United States Department of Labor
Employees' Compensation Appeals Board

R.H., Appellant	)	
and	)	**Docket No. 09-1113**
	)	**Issued: February 16, 2010**
U.S. POSTAL SERVICE, POST OFFICE, San Francisco, CA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 19, 2009 appellant, through counsel filed a timely appeal from a February 18, 2009 overpayment decision of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(e), the Board has jurisdiction over the merits of this claim.

ISSUES

The issues are: (1) whether the Office properly determined that appellant received an overpayment of compensation in the amount of $7,981.71 for the period January 31, 2006 through May 10, 2008 because health insurance premiums were not deducted; and (2) whether the Office properly denied waiver of recovery of the overpayment.

FACTUAL HISTORY

On January 20, 1998 appellant, then a 52-year-old mail handler, filed an occupational disease claim alleging a low back condition as a result of his federal employment. His claim was accepted for aggravation degenerative disc disease with related surgery. On June 4, 2003 the Office determined that appellant's modified mail handler position, effective March 11, 2003, in

which he worked four hours per day, represented his wage-earning capacity. It paid appellant compensation for the remaining four hours. Health benefit deductions were made by the employing establishment.

Appellant retired on January 31, 2006 but continued to receive compensation benefits from the Office with no health benefit deductions.[1] His compensation was paid by check with a detailed benefit statement provided every four weeks. On April 30, 2008 the Office received an employing establishment memorandum transferring appellant's health benefit enrollment to the Office, due to appellant's retirement, effective January 31, 2006, due to disability retirement. Accompanying documents indicated that appellant was enrolled in health benefit insurance (HBI) code LB2. On April 30, 2008 the Office determined that no health deductions had been made on behalf of appellant since his retirement. The record reflects that, for the period January 31, 2006 through May 10, 2008, $7,981.71 in health benefits premiums were paid under HBI code LB2.

On May 12, 2008 the Office issued a preliminary determination that appellant was overpaid in the amount of $7,981.71 because no health benefits deductions were made from his compensation for the period January 31, 2006 through May 10, 2008. It determined that appellant was at fault in the creation of the overpayment, as he knew or should have known that health benefit deductions were necessary. The Office noted that appellant received benefit statements which indicated no health benefit deductions were being made on his behalf.

On May 22, 2008 appellant disagreed with the Office's decision and requested a prerecoupment hearing before an Office hearing representative. He advised that, in September 2007, he had questioned the Office and his employer regarding the fact that no deductions were being made for health insurance premiums. The record reflects that appellant contacted the Office on September 19, 2007 to inquire as to why health insurance benefits were not being deducted from his compensation.

At the October 31, 2008 prerecoupment hearing, appellant confirmed that his benefit statements did not reflect deductions for his health benefits and reiterated that he had inquired about this. He stated that the premiums currently being deducted by the Office were higher than the premiums paid while he was employed. Appellant indicated that he would not have kept his wife on the plan had he known how expensive the premiums were. He noted that his wife had 100 percent coverage under her employer and they did not need her to be on his insurance. Appellant also indicated that the Office may have used the wrong health benefit code when calculating the overpayment. He additionally testified about his income, assets and expenses. As part of his expenses, appellant noted that he supported his son in graduate school at the rate of $2,500.00 per month.

In an overpayment recovery questionnaire (Form OWCP-20) dated November 19, 2008, appellant provided information regarding his income, assets and expenses. He indicated a monthly income in the amount of $6,271.00, monthly expenses in the amount of $6,715.00 (which included $5,100.00 for support of son in graduate school) and assets in the amount of

[1] Appellant did not receive benefits from the Office of Personnel Management but did receive benefits from the Department of Veterans Affairs for injuries received in Vietnam.

$888,100.00. The assets listed included: $2,500.00 cash on hand; $600.00 checking account balance; $335,000.00 savings account balance with the notation "wife's retirement," $250,000.00 current value of stocks and bonds; and $300,000.00 value of other personal property and other funds with the notation "house." Appellant also noted that he was a 20 percent owner in a family-owned property which generated about $250.00 in monthly income.

Appellant also provided: a letter from his wife's employer verifying that she had been receiving medical insurance since 1999 and that her premiums were paid 100 percent; a September 20, 2007 memorandum regarding his request for clarification as to who was paying his health insurance; and copies of his 2003 and 2008 benefit statements from the Office.

By decision dated February 18, 2009, an Office hearing representative finalized the preliminary findings of fact and amount of the overpayment but modified the finding of fault to reflect appellant was without fault in creating the overpayment. The hearing representative found there was no lawful basis to retroactively drop appellant's wife from insurance coverage. The hearing representative indicated that the Office had used the correct health benefit code when calculating the overpayment. The hearing representative found that while there was some discrepancy over the amount appellant claimed was paid to his son for support in graduate school from the hearing testimony and that reported on the Form OWCP-20, appellant had adequate resources from his assets to repay the debt. The hearing representative further found that the evidence did not demonstrate detrimental reliance, that appellant gave up a valuable right or that he would suffer a severe financial hardship as a result of recovery of the overpayment. The hearing representative directed recovery of the overpayment in full.

LEGAL PRECEDENT -- ISSUE 1

The Act[2] provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty.[3] When an overpayment has been made to an individual because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which the individual is entitled.

The regulations of the Office of Personnel Management (OPM), which administers the Federal Employees' Health Benefits program, provide guidelines for registration, enrollment and continuation of enrollment of federal employees. In this connection, 5 C.F.R. § 890.502(a)(1) provides:

> "[A]n employee or annuitant is responsible for payment of the employee or annuitant share of the cost of enrollment for every pay period during which the enrollment continues. An employee or annuitant incurs an indebtedness due the United States in the amount of the proper employee or annuitant withholding

[2] 5 U.S.C. §§ 8101-8193.

[3] *Id.* at § 8102(a).

required for each pay period that health benefit withholdings or direct premium payments are not made but during which the enrollment continues."[4]

In addition, 5 C.F.R. § 890.502(c) provides:

"An agency that withholds less than the proper health benefits contributions from an individual's pay, annuity or compensation must submit an amount equal to the sum of the uncollected contributions and applicable agency contributions required under section 8906 of Title 5 United States Code, to OPM for deposit in the Employees Health Benefits Fund."[5]

Under applicable OPM regulations, the employee or annuitant is responsible for payment of the employee's share of the cost of enrollment.[6] An agency that withholds less than the proper health benefits contribution must submit an amount equal to the sum of the uncollected deductions.[7] The Board has recognized that, when an under withholding of health insurance premiums is discovered, the entire amount is deemed an overpayment of compensation because the Office must pay the full premium to OPM when the error is discovered.[8]

ANALYSIS -- ISSUE 1

The record reveals that, when appellant retired from the employing establishment, he was enrolled in health insurance under plan code LB2. When the employing establishment transferred health benefits enrollment to the Office, the record establishes that $7,981.71 in premiums for health benefits were not deducted from compensation for the period January 31, 2006 through May 10, 2008. Thus, an overpayment was created by the underdeduction of premiums for the health benefits appellant elected. Appellant consequently received an overpayment of compensation due to the Office's failure to deduct premiums for health insurance coverage. He elected to continue receiving health insurance after he retired and is responsible for the entire amount of the health benefit premiums not deducted from his compensation benefits.[9] Therefore, the Office properly determined that appellant received a $7,981.71 overpayment during the period January 31, 2006 through May 10, 2008.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Act provides: "Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and

[4] 5 C.F.R. § 890.502(a)(1).

[5] *Id*. at § 890.502(c).

[6] *Supra* note 3.

[7] *Id.*

[8] *See James Lloyd Otte*, 48 ECAB 334 (1997); *Marie D. Sinnett*, 40 ECAB 1009 (1989); *John E. Rowland*, 39 ECAB 1377 (1988); 5 C.F.R § 890.502.

[9] *See supra notes* 4 through 6 and accompanying text.

when adjustment or recovery would defeat the purpose of [the Act] or would be against equity and good conscience."[10] If a claimant is without fault in the creation of an overpayment, the Office may only recover the overpayment if recovery would neither defeat the purpose of the Act nor be against equity and good conscience.

According to section 10.436, the recovery of an overpayment would defeat the purpose of the Act if recovery would cause hardship because the beneficiary needs substantially all of his or her income (including compensation benefits) to meet current, ordinary and necessary living expenses, and, also, if the beneficiary's assets do not exceed a specified amount determined by the Office from data provided by the Bureau of Labor Statistics.[11] For waiver under the defeat the purpose of the Act standard, an appellant must meet the two pronged test and show that he needs substantially all other current income to meet current ordinary and necessary living expenses[12] and that his assets do not exceed the resource base.[13]

An individual's liquid assets include but are not limited to cash, the value of stocks, bonds, savings accounts, mutual funds and certificates of deposit.[14] Nonliquid assets include but are not limited to the fair market value of an owner's equity in property such as a camper, boat, second home and furnishings/supplies including more than two vehicles in the immediate family.[15]

ANALYSIS -- ISSUE 2

The Office determined that appellant was without fault in the creation of the overpayment. The fact that he was without fault does not preclude the Office from recovering all or part of the overpayment.[16] Appellant furnished the Office with information regarding his finances. The Office noted that he indicated a monthly income in the amount of $6,271.00, monthly expenses in the amount of $6,715.00 and assets of $888,100.00. It noted that the monthly expenses included $5,100.00 for monthly help to appellant's son in graduate school, which appellant had earlier testified that the amount was $2,500.00. The Office advised that,

[10] 5 U.S.C. § 8129(b).

[11] Office procedures provide that the assets must not exceed a resource base of $4,800.00 for an individual or $8,000.00 for an individual with a spouse or dependent, plus $960.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a) (October 2004).

[12] An individual is deemed to need substantially all of his or her income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than $50.00. *Desiderio Martinez*, 55 ECAB 245, 250 (2004).

[13] *W.F.*, 57 ECAB 705 (2006).

[14] Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(b) (May 2004).

[15] Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a) (May 2004).

[16] *See George A. Rodriguez*, 57 ECAB 224 (2005).

while it was not clear where the higher expenses for the son's graduate school was coming from, appellant had adequate resources to repay the debt in full.

In evaluating whether recovery of the overpayment from appellant would defeat the purpose of the Act, the Board notes that the financial information listed on the overpayment recovery questionnaire submitted November 26, 2008 is correct, appellant's monthly expenses would exceed his monthly income. Although this evidence supports that appellant needs substantially all of his income to meet current, ordinary and necessary living expenses, he has assets, excluding his house valued at $300,000.00, which far exceed the allowed resource base of $8,000.00 for an individual with a spouse or dependent, plus $960.00 for each additional dependent. For example, appellant lists $250,000.00 in stocks and bonds, $335,000.00 savings account balance/wife's retirement; $2,500.00 cash on hand, $600.00 checking account balance; and $250.00 a month income from family property. As this amount is clearly greater than the resource base, the Office acted properly in refusing appellant's request for waiver under the defeat the purpose of the Act standard as he did not meet both criteria to qualify for waiver of the recovery of the overpayment.[17]

The Board also finds that the Office properly exercised its discretion to find that recovery of the overpayment would not be against equity and good conscience. The evidence does not show that appellant, in reliance on the $7,981.71 overpayment, gave up a valuable right, changed his position for the worse, or would suffer a severe financial hardship as a result of recovery of the overpayment. Appellant argues that he would have changed his health insurance had he been aware of how much his health premiums were. While he argues that he would have dropped his wife from his insurance once he knew the cost of the family premium, the record reflects that it took appellant over six months after finding out what the family premium was before he changed it December 2008. Additionally, the record reflects appellant's wife had full coverage from her employer since 1999, but he continued to carry her on his insurance policy for almost nine years. Thus, his argument that he would have changed his health insurance to single coverage once he knew how much his health premiums were lacks credibility given his actions.

On appeal, appellant argues his assets had dramatically changed since he turned in his list of assets. He notes his stock market investments are practically worthless. The Board has held that the Office must rely on a claimant's current financial situation at the time of the waiver determination.[18] Past circumstances or assumed future conditions are not a proper basis on which to decide a claimant's eligibility for waiver.[19] The remainder of appellant's arguments on appeal are duplicative of arguments previously addressed. Although he was not at fault in creating the overpayment -- it was the Office's mistake -- that does not mean that he gets to keep the overpaid amounts if he does not meet eligibility requirements for waiver as noted.

[17] *See E.M.*, Docket No. 07-785 (issued August 17, 2007); 20 C.F.R. § 10.436.

[18] *L.S.*, 59 ECAB ___ (Docket No. 07-196, issued February 14, 2008).

[19] 20 C.F.R. § 10.433.

CONCLUSION

The Board finds that an overpayment of $7,981.71 occurred because the Office neglected to deduct health insurance premiums from appellant's continuing compensation. The Board further finds that the Office properly denied waiver of the overpayment because appellant does not otherwise qualify.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 18, 2009 is affirmed.

Issued: February 16, 2010
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board