

**United States Department of Labor
Employees' Compensation Appeals Board**

G.G., Appellant)

and)

DEPARTMENT OF THE NAVY, PUGET)
SOUND NAVAL SHIPYARD, Bremerton, WA,)
Employer)

**Docket No. 10-7
Issued: September 22, 2010**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 30, 2009 appellant filed a timely appeal from a June 16, 2009 merit decision of the Office of Workers' Compensation Programs regarding an overpayment of compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the overpayment issue.

ISSUES

The issues are: (1) whether the Office properly determined that appellant received an overpayment of compensation in the amount of \$34,680.98 from November 13, 2003 through February 16, 2008; (2) whether the Office abused its discretion in denying waiver of recovery; and (3) whether the Office properly required repayment of the overpayment by deducting \$821.95 from his continuing compensation payments.

FACTUAL HISTORY

This case was previously before the Board. By decision dated April 1, 2004, the Board affirmed Office decisions dated June 24, 2002 and April 18, 2003 which denied appellant's claim

for compensation for intermittent periods of disability between June 21, 2000 and July 25, 2001 and denied his request for reconsideration. The facts of the case as set forth in the decision are incorporated herein by reference.

Appellant was separated from the employing establishment effective May 19, 2003 as it was no longer able to accommodate him. He received compensation for wage loss commencing November 13, 2003.¹ Deductions for health and life insurance were not taken out of compensation payments. The record reflects that appellant was enrolled in health insurance, code 452, with basic and optional life insurance.

In a December 17, 2007 decision, the Office reduced appellant's compensation effective that date finding that the selected position of gate guard represented his wage-earning capacity. However, on February 22, 2008 it rescinded the December 17, 2007 decision and retroactively reinstated his compensation benefits for total disability. The Office confirmed that appellant had health and life insurance and that no deductions had been taken for the premiums. Effective February 17, 2008, it adjusted his compensation to include deductions for health insurance and life insurance premiums.

On November 14, 2008 the Office issued a preliminary determination finding an overpayment in the amount of \$34,680.98 for the period November 12, 2003 to February 16, 2008 because health, basic life and optional life insurance premiums were not withheld from his compensation. It determined that health benefit premiums were \$29,804.97, life insurance premiums were \$884.16 and optional life insurance premiums were \$3,991.85, or a total overpayment of \$34,680.98. The Office found appellant to be without fault in the matter. Appellant was advised of the procedures for contesting the preliminary determination and asked to submit financial information if he sought waiver of the overpayment.

On December 9, 2008 appellant contested the overpayment and requested waiver as it occurred through no fault of his own. He advised that financial documentation was not readily available as he was in the midst of a divorce and his house was in foreclosure.

In a January 7, 2009 letter, the Office advised appellant that he needed to complete a Form OWCP-20 overpayment recovery questionnaire for waiver to be considered. On January 11, 2009 appellant completed the form. He indicated that he supported his wife and son, age 15, who did not live with him. Appellant had a child support payment of \$450.00 a month but was unsure about what he owed for his car or house. He listed his monthly household expenses as: \$500.00 rent, \$400.00 food, \$180.00 clothing; \$600.00 utilities; and \$250.00 for other expenses. Appellant noted monthly installments to Sears for \$140.00 and Capitol One for \$200.00. He had other bills not listed due to the divorce process. Appellant denied owning any valuable property or real estate and stated he had \$75.00 cash and \$275.00 in a checking account. He did not disclose his total monthly income or provide supporting documents.

By decision dated February 6, 2009, the Office finalized the \$34,680.98 overpayment and that appellant was not at fault in its creation. It determined that he received net compensation of

¹ From October 21, 2001 to November 12, 2003, appellant received schedule award compensation for permanent impairment to his arms.

\$2,973.96 every 28 days or \$3,221.79 a month and his current monthly expenses totaled \$2,370.00. Appellant was found capable of repaying the overpayment and he did not provide justification for waiver. The Office determined that \$500.00 a month would be deducted from future compensation payments until the overpayment was recovered.

In an April 23, 2009 letter, appellant contended that he was unable to repay the overpayment by paying \$500.00 a month. He provided a list of his monthly bills, which totaled \$1,965.00. On May 15, 2009 a conference call was conducted. Appellant indicated that his monthly expenses were: \$93.00 cable, \$25.00 garbage, \$100.00 propane; \$205.00 electricity, \$124.00 telephone, \$300.00 food; \$500.00 rent effective June 1, 2009; \$450.00 child support; \$160.00 Les Schwab and \$75.00 Sears. He indicated that child support was court ordered and deducted from his checking account each month. Appellant indicated that his son was currently staying with him, but no permanent plans had been reached for the summer. The Office asked him to provide copies of receipts and supporting documentation, including: a copy of the court-ordered child support payment and receipt of the automatic deduction; copies of all monthly billing statements and any miscellaneous payments; the amount per month he paid on his bills, the minimum amount and how often he was billed. A memorandum of the conference was sent to appellant on May 18, 2009. In a May 18, 2009 letter to appellant's congressman, the Office noted that the withholding of \$500.00 from appellant's compensation had been deleted and a new withholding determination would be made after he submitted the requested documentation.

On May 25, 2009 appellant submitted a statement indicating that as of May 15, 2009 his monthly expenses were: \$500.00 rent, \$426.00 child support, \$110.98 Verizon, \$89.85 Direct TV; \$75.00 Les Schwab; \$23.32 Sears; \$125.65 heat; \$166.44 Peninsula Light; \$192.00 truck insurance; \$300.00 food. Copies of his rent check, propane invoice, billing statements from Direct TV, Les Schwab, car insurance, Verizon Wireless, Sears Credit Card, and Peninsula Light Company were included along with a "notice regarding electronic funds transfer" showing the Division of Child Support would deduct \$426.00 from appellant's bank account and apply it towards his child support responsibility each month.

By decision dated June 16, 2009, the Office advised that the February 6, 2009 decision has been rescinded as, in considering his income, it had used an incorrect net amount for his compensation payments. It stopped withholding \$500.00 from his continuing compensation benefits. The Office finalized its finding of a \$34,680.98 overpayment from November 12, 2003 through February 16, 2008 for which appellant was without fault. It denied waiver of the overpayment finding that the circumstances of his case did not support a finding that the adjustment or recovery would defeat the purpose of the Federal Employees' Compensation Act or be against equity and good conscience. From the documentation appellant provided, the Office determined his total monthly expenses were \$2,293.44. It found that he received \$2,938.98 disability compensation every 28 days which equaled \$3,183.89 monthly. The Office subtracted the monthly expenses from appellant's monthly disability compensation and found \$890.45 monthly or \$821.95 every 28 days available for overpayment. It determined that the overpayment would be recovered by deducting \$821.95 from his future compensation payments.

LEGAL PRECEDENT -- ISSUE 1

The Federal Employees' Compensation Act² 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.

An employee entitled to disability compensation may continue his or her health benefits under the Federal Employee Health Benefits (FEHB) program. The regulations of the Office of Personnel Management (OPM), which administers the FEHB program, provide guidelines for registration, enrollment and continuation of enrollment for federal employees. In this connection, 5 C.F.R. § 890.502(a)(1) provides that an employee or annuitant is responsible for payment of his or her 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 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 that an agency that withholds less than or none of the proper health benefits contributions from an individual's pay, annuity or compensation must submit an amount equal to the sum of the uncollected deductions and any applicable agency contributions required under section 8906 of Title 5 United States Code, to OPM for deposit in the Employees Health Benefits Fund.⁵

Thus, 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

Under the Federal Employees' Group Life Insurance Program (FEGLI), most civilian employees of the Federal Government are eligible to participate in basic life insurance and one

² 5 U.S.C. §§ 8101-8193.

³ *Id.* at § 8102(a).

⁴ 5 C.F.R. § 890.502(a)(1).

⁵ *Id.* at § 890.502(c).

⁶ *Id.* at § 890.502(a)(1).

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.

or more of the options.⁹ The coverage for basic life insurance is effective unless waived¹⁰ and the premiums for basic and optional life coverage are withheld from the employee's pay.¹¹ While the employee is receiving compensation under the Act, deductions for insurance are withheld from the employee's compensation.¹² At separation from the employing establishment, the FEGLI insurance will either terminate or be continued under compensation status. If the compensation chooses to continue basic and optional life insurance coverage, the schedule of deductions made will be used to withhold premiums from his or her compensation payments.¹³ When an underwithholding of life insurance premiums occurs, the entire amount is deemed an overpayment of compensation because the Office must pay the full premium to OPM upon discovery of the error.¹⁴

ANALYSIS -- ISSUE 1

The record establishes that an overpayment occurred because appellant was placed on the periodic rolls in November 2003 when his schedule award ended but premiums for health insurance, basic and life insurance were not deducted for the period November 13, 2003 through February 16, 2008. Once the Office learned that appellant had health and life insurance and that no deductions had been taken for the premiums, it advised him that he had been paid an incorrect rate and that an overpayment had been created. The evidence shows that in 2003 appellant was enrolled in health insurance, code 452, and basic life insurance and optional life insurance. Office worksheets further show that for the period November 13, 2003 to February 16, 2008 deductions for health benefit premiums totaled \$29,804.97, deductions for basic life insurance premiums totaled \$884.16, and deductions for optional life insurance premiums totaled \$3,991.85, for a total of \$34,680.98, but were not taken from appellant's compensation. In the absence of a specific waiver or cancellation of coverage, of which there is none in this case, the Office should have deducted the premiums. Appellant has not provided any evidence supporting that these calculated amounts are incorrect. The Board finds that the Office properly determined that an overpayment in compensation in the amount of \$34,680.98 had been created for the period November 13, 2003 to February 16, 2008.

LEGAL PRECEDENT -- ISSUE 2

The Office may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment.¹⁵ An individual should always

⁹ 5 U.S.C. § 8702(a).

¹⁰ *Id.* at § 8702(b).

¹¹ *Id.* at § 8707.

¹² *Id.* at § 8707(b)(1).

¹³ *Id.* at § 8706(b).

¹⁴ *Id.* at § 8707(d); see *Keith H. Mapes*, 56 ECAB 130 (2004); *James Lloyd Otte*, 48 ECAB 334 (1997).

¹⁵ 20 C.F.R. § 10.433(a).

be found without fault where the overpayment resulted from Office error in the underdeduction of health benefits or life insurance premiums.¹⁶

If the Office finds that the recipient of an overpayment was not at fault, repayment will still be required unless: (1) adjustment or recovery of the overpayment would defeat the purpose of the Act; or (2) adjustment or recovery of the overpayment would be against equity and good conscience.¹⁷

Recovery will defeat the purpose of the Act if both: (a) the individual from whom recovery is sought needs substantially all of his current income (including periodic benefits under the Act) to meet current ordinary and necessary living expenses; and (b) the individual's assets do not exceed the resource base (including but not limited to cash, the value of stocks, bonds, savings accounts, mutual funds) of \$4,800.00 for an individual or \$8,000.00 for an individual with a spouse or one dependent, plus \$960.00 for each additional dependent. The first \$4,800.00 or more, depending on the number of claimant's dependents, is also exempted from recoupment as a necessary emergency resource. If an individual has current income or assets in excess of the allowable amount, a reasonable repayment schedule can be established over a reasonable, specified period of time. It is the individual's burden to submit evidence to show that recovery of the overpayment would cause the degree of financial hardship sufficient to justify waiver.¹⁸ 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 \$50.00.¹⁹

Recovery of an overpayment is considered to be against equity and good conscience when any individual who received an overpayment would experience severe financial hardship in attempting to repay the debt.²⁰ Recovery of an overpayment is also considered to be against equity and good conscience when any individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes her position for the worse.²¹

Section 10.438 of the regulations provide that the individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by the Office. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of the Act or be against equity and good conscience. Failure to submit the requested information within 30 days of the request shall result in the denial

¹⁶ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.5.b (May 2004).

¹⁷ 20 C.F.R. § 10.434. See 5 U.S.C. § 8129(b).

¹⁸ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a) (October 2004). See *Miguel A. Muniz*, 54 ECAB 217 (2002); 20 C.F.R. §§ 10.436, 10.437.

¹⁹ See Federal (FECA) Procedure Manual, *id.*; *Sherry A. Hunt*, 49 ECAB 467, 473 (1998).

²⁰ 20 C.F.R. § 10.437(a).

²¹ *Id.* at § 10.437(b).

of waiver and no further request for waiver shall be considered until the requested information is furnished.²²

ANALYSIS -- ISSUE 2

The fact that appellant is without fault in creating the overpayment does not mean that the Office cannot collect the overpayment. Appellant is still required to repay the debt unless: (1) recovery of the overpayment would defeat the purpose of the Act; or (2) recovery of the overpayment would be against equity and good conscience.

In determining that he was not entitled to a waiver of the recovery of the overpayment, the Office reviewed appellant's income, expenses and assets as listed in his May 25, 2009 statement, May 15, 2009 conference, January 11, 2009 overpayment recovery questionnaire, appellant's testimony and financial documents received into the record. Based on the figures and financial documentation supplied by appellant on May 25, 2009, the Office found appellant's monthly household income was \$2,938.98 disability compensation every 28 days (\$3,183.89 monthly) with no tangible assets. It allowed the full amount of claimed necessary monthly expenses, as verified by the financial documentation received, in the amount of \$2,293.44 for rent, child support, Verizon, Direct TV, Les Schwab, Sears, gas and electricity, truck insurance, food, garbage collection and miscellaneous expenses of \$250.00. Office procedures provide that an individual is deemed to need substantially all of his or her current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.²³ The Board finds that, as appellant's monthly income of \$3,183.89 exceeds his documented reasonable monthly expenses of \$2,293.44 by \$890.46, he is not entitled to waiver as he does not need substantially all of his income to meet current ordinary and necessary expenses. While appellant reported an additional \$500.00 monthly repayment expense to the Office, the Office had rescinded its previous repayment amount that it had deducted that amount from appellant's continuing compensation payments.

Further, there is no evidence in this case, and appellant did not allege, that he relinquished a valuable right or changed his position for the worse in reliance on the excess compensation he received for the period November 13, 2003 to February 16, 2008. Pursuant to its regulations, the Office, therefore, properly found that recovery of the overpayment would not be against equity or good conscience.

As the evidence in this case fails to support that recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience, the Board finds that the Office did not abuse its discretion in denying a waiver of recovery of the overpayment of \$34,680.98.

²² *Id.* at § 10.438; *Linda Hilton*, 52 ECAB 476 (2001).

²³ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a)(3) (October 2004).

LEGAL PRECEDENT -- ISSUE 3

When an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to the Office the amount of the overpayment as soon as the error is discovered or his or her attention is called to same. If no refund is made, the Office shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize any hardship.²⁴

ANALYSIS -- ISSUE 3

The Board finds that the Office improperly required repayment by withholding the overpayment amount of \$821.95 from appellant's compensation checks until the overpayment was recouped.

Appellant contends that, due to his debts and expenses, he was unable to afford a withholding of \$500.00 or more from his compensation checks. The Office rescinded its earlier determination that \$500.00 would be withheld from appellant's compensation checks and provided him an opportunity to submit information regarding his current financial circumstances, which he provided in his May 25, 2009 statement. It determined appellant's monthly income of \$3,183.89 exceeded his documented reasonable monthly expenses of \$2,293.44 by \$890.45 a month or \$821.95 every 28 days. As noted, the Office found that eligibility for waiver was not established. However, in setting the recovery rate at \$821.95, the same amount as appellant's discretionary income, it did not address how recovery in this amount would minimize any hardship. The Office is suppose to take into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize any hardship.²⁵ The June 16, 2009 decision explained why eligibility for waiver was not established but it did not address how it considered the factors set forth at 20 C.F.R. § 10.441(a) in setting the amount of repayment from continuing compensation benefits. The Office provided no reasoning to explain why this amount of recovery of \$821.95 was consistent with its regulations governing recovery of overpayments from continuing compensation payments. The Board finds that the Office improperly imposed repayment from continuing compensation at the rate of \$821.95 every 28 days. The case will be remanded for the Office to further develop the issue of recovery. After appropriate further development, the Office shall issue a final decision on an appropriate rate of recovery from continuing compensation.

On appeal, appellant submitted a listing of his current expenses and bills. As the Board's review is limited to evidence in the case record at the time the Office made its decision, the Board cannot review this evidence submitted for the first time on appeal.²⁶

²⁴ 20 C.F.R. § 10.441(a).

²⁵ *Id.* at § 10.441(a).

²⁶ *D.E.*, 58 ECAB 448 (2007); 20 C.F.R. § 501.2(c).

CONCLUSION

The Board finds that appellant received an overpayment of \$34,680.98 during the period November 13, 2003 to February 16, 2008 and the Office properly denied waiver of the overpayment. The case is remanded for further development on the issue of recovery of the overpayment from continuing compensation.

ORDER

IT IS HEREBY ORDERED THAT the June 16, 2009 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part and remanded for further action consistent with this decision.

Issued: September 22, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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