

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

ALEXANDER HALPERIN, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 11-3269  
 )  
 DEPARTMENT OF MANAGEMENT )  
 SERVICES, DIVISION OF STATE )  
 GROUP INSURANCE, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER

A formal hearing was conducted in this case on April 2, 2012, in Tallahassee, Florida, before E. Gary Early, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Karen Halperin Cyphers  
Qualified Representative  
1537 Woodgate Way  
Tallahassee, Florida 32308

For Respondent: Sonja P. Mathews, Esquire  
Department of Management Services  
4050 Esplanade Way, Suite 160  
Tallahassee, Florida 32399-0950

STATEMENT OF THE ISSUE

The issue is whether Respondent is entitled to recovery of overpayments of disability benefits resulting from the alleged

failure to reduce such payments by offsetting social security benefits.

PRELIMINARY STATEMENT

On or about February 21, 2011, Respondent, Department of Management Services, Division of State Group Insurance (Respondent or DSGI), notified Petitioner, Alexander Halperin (Petitioner), that it had overpaid him \$13,925.82, in state Group Disability Income benefits. The basis for the overpayment was the failure to offset Social Security Disability Income payments received by Petitioner.

On or about April 19, 2011, Petitioner received a second notice of Respondent's intent to recover the overpayment of State Group Disability Income benefits. Petitioner responded to the notice with an e-mail questioning the notice, which Respondent treated as a Level II Appeal.

By letter dated May 3, 2011, Respondent advised Petitioner that it intended to deny the Level II Appeal, and seek recovery of alleged overpayments.

On May 19, 2011, Petitioner signed a Petition for Formal Hearing. The record is silent as to when the Petition was filed with Respondent, but there has been no suggestion that it was not timely filed. On June 27, 2011, Respondent referred the petition to the Division of Administrative Hearings.

The proceeding was, at the request of the parties, almost immediately placed in abeyance. Efforts to resolve the matter having proven unproductive, and at the request of the parties, a Notice of Hearing was entered on November 28, 2011, that scheduled the final hearing for February 21, 2012. On January 13, 2012, a Motion for Continuance was filed. The Motion was granted, and the final hearing was rescheduled for April 2, 2012.

Leading up to hearing, a number of motions were filed and disposed of by separately-issued orders. Those motions, and their disposition, may be determined by reference to the docket of this case.

On March 26, 2012, the parties filed a Stipulation of Facts which they stipulated to facts numbered 1 through 14. Those facts have been accepted in the preparation of this Recommended Order.

On March 27, 2012, Respondent filed a Motion to Take Official Recognition requesting that the undersigned officially recognize a number of federal rules, and Florida Administrative Code Chapter 60P-9. The motion was granted at the hearing.

The hearing was held as scheduled on April 2, 2012. At the final hearing, Petitioner testified on his own behalf, and presented the testimony of Gail Halperin, his wife. Petitioner's Exhibits 2, 3, 5(b), 6, and 7 were received into evidence.

Respondent presented the testimony of Sandie Wade, DSGI's Benefits Administrator for Insurance and Eligibility; Celeste Pullen, Bureau Chief for DSGI's Bureau of Financial and Fiscal Management; James West, Operations Manager-Benefits for NorthGate Arinso, DSGI's contracted administrator for state employee benefits; Tabitha Williams, Senior Human Resources representative for NorthGate Arinso; and Valeria Jefferson, Human Resources and Benefits Manager for the Florida Department of Health. Respondent's Exhibits 1-2, 4, and 6-14 were received into evidence.

The final hearing was not transcribed. The parties timely filed their Proposed Recommended Orders, which have been considered in the preparation of this Recommended Order.

#### FINDINGS OF FACT

1. From March 1, 2007, until February 26, 2010, Petitioner was employed by the Department of Health as a Dental Consultant for the Prosecution Services Unit. During the period of his employment, Petitioner was a Select Exempt Service employee.

2. Respondent is responsible for the administration of the state group insurance program. As authorized by law, Respondent has contracted with NorthGate Arinso to provide human resources management services, including the administration of employee health insurance benefits. The electronic portal for state

employees to access personnel information is the "People First" system.

3. During his employment with the Department of Health, Petitioner participated in the Florida state group insurance program, and was enrolled as a member of the State Employees PPO Plan.

4. At the time of his enrollment in the state group insurance program, Respondent was provided with the Senior Management and Select Exempt Service Employees' State Group Disability Insurance Program benefits booklet. The booklet provides, under the heading "Benefit Reduction Provisions," that:

Benefits payable under this insurance will be reduced by the amount of:

Any disability or retirement Social Security Benefits for which the employee is eligible, and benefits for which the employee's spouse or children are eligible as a result of the employee's eligibility for Social Security benefits. DSGI reserves the right to estimate the amounts of any Social Security benefits until the employee has applied for such benefits and the Social Security Administration has made a final determination, and to reduce the plan benefits as if these Social Security benefits were paid. Benefit payments made by DSGI will be adjusted when a determination is made by the Social Security Administration. If such a determination reveals an overpayment by the Plan, DSGI has the right to recover any such overpayment.

5. Petitioner has a supplemental disability life insurance policy with the Cigna insurance company. The supplemental policy is not administered by Respondent, and did not affect the state disability insurance benefits.

6. While employed at the Department of Health, Petitioner began to experience debilitating health problems. By October, 2009, his condition had advanced to the degree that he could no longer work.

7. Petitioner began to contemplate going on disability. He was uncertain as to whether he would be allowed to resign from state employment and still qualify for disability benefits. Petitioner's daughter, Karen Halperin Cyphers, researched the issue and discovered that it had been resolved by judicial decision in a manner that would allow Petitioner to retire from state employment, but maintain his disability benefits for the full term allowed by law. Ms. Cyphers sought confirmation from Respondent that Petitioner would qualify for disability benefits if he resigned his position. On January 29, 2010, Respondent e-mailed a letter to Ms. Cyphers confirming that "benefits will not terminate solely because an insured terminates employment with the state. To be eligible for these benefits, all other requirements must be satisfied."

8. On February 17, 2010, Petitioner filed his claim for benefits under the state disability plan, and the required

Attending Physician's Statement. The Attending Physician's Statement confirmed that Petitioner was not able to work. Petitioner thereafter went on leave-without-pay status on February 18, 2010. His last day of employment with the Department of Health was February 27, 2010. Petitioner was eligible for state disability benefits for 364 days, or into February, 2011.

9. At all times pertinent to this proceeding, Petitioner's wife, Dr. Gail Halperin,<sup>1/</sup> was responsible for handling the family's finances. Petitioner consulted with Mrs. Halperin when he was able. However, the severity of Petitioner's medical condition, which necessitated a stay of almost five weeks at the Mayo Clinic, often made communications regarding finances impractical.

10. Mrs. Halperin used electronic banking services, and frequently checked the family account to ensure that the bi-weekly state disability benefit payments had been deposited.

11. On March 12, 2010, Mrs. Halperin wrote to Respondent to object to an underpayment in one of the first disability benefit payments to Petitioner. The underpayment amount resulted from an issue regarding four days of available leave, which would have made Petitioner ineligible for benefits for the period of March 1 through March 4, 2010. In her e-mail, Mrs. Halperin acknowledged having read the "Benefit Reduction

Provisions" of the benefits booklet regarding reduction of state benefits by Social Security benefits, but as to any such reductions of Petitioner's state benefits, noted that Petitioner "did apply of [sic] social security, but he does not expect to hear from them for quite some time." The underpayment issue was resolved, and Petitioner was ultimately paid for the disputed four days.

12. By a Notice of Award from the Social Security Administration dated September 3, 2010, Petitioner was notified that he had been determined to be entitled to Social Security Disability benefits in the amount of \$1,818.00 per month. He received his regular monthly payment for September, 2010, and a lump-sum payment of \$5,454.00, for the months of June-August, 2010.

13. As was her practice regarding state disability payments, Mrs. Halperin regularly checked her bank accounts to ensure that the payments were deposited, and knew that Social Security Disability Income benefits were being paid to Petitioner.

14. Petitioner did not inform Respondent when he became eligible for Social Security Disability Income benefits, or when he began receiving those payments.

15. During his period of disability, Petitioner had a dispute with Cigna regarding its denial of a waiver of his



supplemental disability policy premium. On November 14, 2010, Mrs. Halperin sent an appeal of the denial to Rhonda Whethers, an employee of Cigna. The appeal, sent by e-mail, consisted of roughly nine pages of printed text and eight exhibits.

Mrs. Halperin described Petitioner's medical condition in detail, and requested that Cigna waive the premium to keep the policy in effect. Mrs. Halperin sent copies of the appeal to Cigna's manager of Specialty Lines Administration, to the Director of Cabinet Affairs for the Florida Attorney General, to the Insurance Consumer Advocate for the Department of Financial Services, and to Michele Robletto, the DSGI Division Director.

16. In the description of Petitioner's medical condition, Mrs. Halperin stated that "[i]ndeed, Minnesota Life, the State of Florida through the State Group Health Plan, and the U.S. Social Security Disability Insurance (SSDI) program have fully approved [Petitioner's] claim of total disability from ANY and ALL work." That statement is the only time in which mention of Petitioner's Social Security benefits was made to Respondent. The reference, which was not directed to Respondent, is too indirect to constitute notice to Respondent of Petitioner's Social Security benefits.

17. On February 1, 2011, Respondent sent Petitioner a notice that his Attending Physician's Statement had not been updated.

18. On February 6, 2011, in response to the previous notice, Mrs. Halperin sent a copy of the September 3, 2010, Notice of Award from the Social Security Administration to Respondent. That letter was the first disclosure to Respondent of Petitioner's eligibility for, and receipt of, payments of Social Security disability benefits.

19. Based on the September 3, 2010 letter, Respondent determined that Petitioner had been receiving state disability benefits without the reduction of Social Security benefits as provided for by rule. Thereafter, Respondent calculated that Petitioner was overpaid in the amount of \$13,925.82. On February 21, 2011, Respondent notified Petitioner that it had overpaid him \$13,925.82, in State Group Disability Income benefits. That figure is found to accurately reflect the amount of state benefits that were not reduced by corresponding payments of Social Security benefits.

20. Petitioner argues that neither rule 60P-9.005 nor the the Senior Management and Select Exempt Service Employees' State Group Disability Insurance Program benefits booklet contains a requirement that a recipient of state disability benefits notify Respondent of eligibility for or receipt of Social Security disability benefits, and that as a result, Respondent should be estopped from recovering any overpayments.

21. Rule 60P-9.005 and the Senior Management and Select Exempt Service Employees' State Group Disability Insurance Program benefits booklet are both clear and unequivocal that state disability benefits are to be reduced by Social Security disability benefits. Respondent receives no information directly from the federal government regarding disability benefits. Thus, it is the responsibility of recipients of state disability income to understand and comply with the law.

22. Petitioner testified that neither he nor his family had any intent to mislead the state. The undersigned accepts that as true. Nonetheless, Petitioner received state disability benefits after he became eligible for and began receiving Social Security benefits, without the reduction required by law. Thus, Respondent is entitled to recovery of the overpayments.

#### CONCLUSIONS OF LAW

23. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes (2011).

24. Respondent is the agency charged by the legislature with the duty to oversee the administration of the State Group Insurance Program, including the group disability insurance program.

25. Respondent, as the party asserting the right to recovery of paid disability benefits, has the burden of proving by a preponderance of the evidence that it is entitled to recovery of overpayments resulting from the failure to reduce state disability benefits by offsetting social security benefits. See Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981); cf., Southpointe Pharmacy v. Dep't of HRS, 596 So. 2d 106,109 (Fla. 1st DCA 1992) (the agency seeking to establish a Medicaid overpayment, and recovery of that overpayment, has the burden of proving the allegations by a preponderance of the evidence.).

26. Section 110.123, entitled State Group Insurance Plan, describes the powers and duties conferred on Respondent, in pertinent part, as follows:

(5) DEPARTMENT POWERS AND DUTIES. — The department is responsible for the administration of the state group insurance program. The department shall initiate and supervise the program as established by this section and shall adopt such rules as are necessary to perform its responsibilities. To implement this program, the department shall, with prior approval by the Legislature:

(a) Determine the benefits to be provided and the contributions to be required for the state group insurance program . . . . However, in the determination of the design of the program, the department shall consider existing and complementary benefits provided by the Florida Retirement System and the Social Security System.

27. Regarding entitlement to benefit payments, Florida Administrative Code Rule 60P-9.005 provides, in pertinent part:

60P-9.005 Benefits.

If an employee, while insured under the Plan and as a result of sickness or injury, becomes totally disabled, the Plan will pay biweekly benefits to the employee for the period of such disability. Such benefits are payable in an amount of sixty-five (65) percent of the employee's basic daily earnings at the date of disability. Benefits are payable from the first benefit day of any one continuous period of disability up to a maximum of one year (364 days) subject to the following:

\* \* \*

(2) Benefits paid under the Plan will be reduced by any benefits paid or payable:

\* \* \*

(b) As primary and family benefits under the Social Security Act; . . . .

28. The requirement that state disability benefit payments be offset by Social Security benefits is reiterated in the Senior Management and Select Exempt Service Employees' State Group Disability Insurance Program benefits booklet which both Petitioner and Mrs. Halperin read.

29. The evidence demonstrates that Petitioner received benefits under the state disability insurance plan, while simultaneously receiving benefits under the Social Security Act. The evidence further demonstrates that benefits paid under the

state disability insurance plan were not reduced by benefits under the Social Security Act received by Petitioner.

### Estoppel

30. Petitioner has asserted that, despite rules to the contrary, he is entitled to the application of estoppel against Respondent to preclude it from recovering the state disability benefits that were not reduced by Social Security disability benefits. Petitioner, as the party asserting the issue of estoppel as a defense, has the burden of proving by a preponderance of the evidence that the elements of estoppel apply in this case. See Dep't of Transp. v. J.W.C. Co., Inc., supra; Mercede v. Mercede Park Italian Rest., 392 So. 2d 997, 998 (Fla. 4th DCA 1981).

31. It is well established that "[e]quitable estoppel will apply against a governmental entity 'only in rare instances and under exceptional circumstances.'" Council Bros., Inc. v. City of Tallahassee, 634 So. 2d 264, 266 (Fla. 1st DCA 1994), citing North American Co. v. Green, 120 So. 2d 603, 610 (Fla. 1959), and Dep't of Rev. v. Anderson, 403 So. 2d 397, 400 (Fla. 1981). The First District Court of Appeal in Council Brothers established the elements that must be established for the doctrine of equitable estoppel to apply against a governmental agency as follows:

The elements which must be present for application of estoppel are: "(1) a representation as to a material fact that is contrary to a later-asserted position; (2) reliance on that representation; and (3) a change in position detrimental to the party claiming estoppel, caused by the representation and reliance thereon." State Department of Revenue v. Anderson, 403 So. 2d 397, 400 (Fla. 1981). See also Dolphin Outdoor Advertising v. Department of Transportation, 582 So. 2d 709, 710 (Fla. 1st DCA 1991); Harris v. State, Department of Administration, Division of Employees' Insurance, 577 So. 2d 1363, 1366 (Fla. 1st DCA 1991); Warren v. Department of Administration, 554 So. 2d 568 (Fla. 5th DCA 1990). As a general rule, estoppel will not apply to mistaken statements of the law, see Anderson, 403 So. 2d at 400, but may be applied to erroneous representations of fact. Dolphin Outdoor Advertising, 582 So. 2d at 711; Harris, 577 So. 2d at 1366; Warren, 554 So. 2d at 571; City of Coral Springs v. Broward County, 387 So. 2d 389, 390 (Fla. 4th DCA 1980).

\* \* \*

One seeking to invoke the doctrine of estoppel against the government first must establish the usual elements of estoppel, and then must demonstrate the existence of affirmative conduct by the government which goes beyond mere negligence, must show that the governmental conduct will cause serious injustice, and must show that the application of estoppel will not unduly harm the public interest. Alachua County v. Cheshire, 603 So. 2d 1334, 1337 (Fla. 1st DCA 1992).

32. Petitioner has demonstrated no exceptional circumstances that would estop Respondent from recovering the overpayments of state disability benefits that should have been

reduced by Social Security disability benefits received by Petitioner. Respondent never suggested, in any way, that Petitioner would be able to draw full state and federal disability benefits simultaneously and never gave any intimation that it would not seek to recover any benefit overpayments. Rather, Respondent began the process of seeking recovery within two weeks after having been provided with evidence of Petitioner's eligibility for and receipt of Social Security benefits. Thus, Respondent is not estopped from seeking such recovery of benefits as authorized by law.

#### Waiver

33. Petitioner has asserted that Respondent, by its affirmative acts or its forbearance from taking acts, has waived the right to recover the state disability benefits that were not reduced by Social Security disability benefits. Petitioner, as the party asserting the issue of waiver as a defense, has the burden of proving by a preponderance of the evidence that the elements of waiver apply in this case. See Dep't of Transp. v. J.W.C. Co., Inc., supra; Mercede v. Mercede Park Italian Rest., supra.

34. The First District Court of Appeal has established the elements that must be established for the doctrine of waiver as follows:



Waiver is the intentional or voluntary relinquishment of a known right, or conduct which infers the relinquishment of a known right. Thomas N. Carlton Estate v. Keller, 52 So. 2d 131 (Fla. 1951); Enfinger v. Order of United Commercial Travelers, 156 So. 2d 38 (Fla. 1st DCA 1963); Fireman's Fund Insurance Company v. Vogel, 195 So. 2d 20 (Fla. 2d DCA 1967). The essential elements of waiver are (1) the existence at the time of the waiver of a right, privilege, advantage, or benefit which may be waived; (2) the actual or constructive knowledge of the right; and (3) the intention to relinquish the right. Gulf Life Insurance Company v. Green, 80 So. 2d 321 (Fla. 1955); Gilman v. Butzloff, 155 Fla. 888, 22 So. 2d 263 (1945); Wilds v. Permenter, 228 So. 2d 408 (Fla. 4th DCA 1969). Waiver may be express, or implied from conduct or acts that lead a party to believe a right has been waived. Thomas N. Carlton Estate, *supra*; Davis v. Davis, 123 So. 2d 377 (Fla. 1st DCA 1960). However, when waiver is to be implied from conduct, "the acts, conduct, or circumstances relied upon to show waiver must make out a clear case." Fireman's Fund Insurance Co., *supra*, at 24, citing Gilman v. Butzloff, *supra*.

Taylor v. Kenco Chemical & Mfg. Corp., 465 So. 2d 581, 587 (Fla. 1st DCA 1985).

35. Petitioner has shown no statements, conduct, or acts on the part of Respondent that would indicate that Respondent intentionally or voluntarily relinquished its right to recover the overpayments of state disability benefits that should have been reduced by Social Security disability benefits received by Petitioner. Rather, the evidence demonstrates that Respondent was unaware of Petitioner's eligibility for and receipt of

Social Security benefits until February 6, 2011. When it was provided with information regarding the federal benefits, Respondent immediately took action to recover benefit payments that were not reduced as provided by rule. Thus, Respondent has not waived the recovery of benefits as authorized by law.

Ultimate Conclusion

36. Respondent has demonstrated by a preponderance of the evidence that it is entitled to recovery of overpayments of disability benefits to Petitioner resulting from the alleged failure to reduce such payments by offsetting social security benefits. Respondent has further demonstrated by a preponderance of the evidence that the amount subject to recovery is \$13,925.82.

37. Petitioner failed to demonstrate that Respondent is precluded from recovery of overpayments of disability benefits by application of the doctrines of estoppel or waiver.

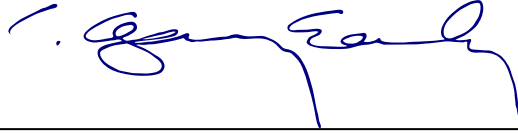
RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED:

That the Department of Management Services enter a final order finding that Respondent is entitled to recovery of overpayments of disability benefits in the amount of \$13,925.82.

DONE AND ENTERED this 19th day of April, 2012, in  
Tallahassee, Leon County, Florida.



---

E. GARY EARLY  
Administrative Law Judge  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-3060  
(850) 488-9675  
Fax Filing (850) 921-6847  
www.doah.state.fl.us

Filed with the Clerk of the  
Division of Administrative Hearings  
this 19th day of April, 2012.

ENDNOTE

<sup>1/</sup> Petitioner and his wife are both doctors. To avoid confusion, but with full acknowledgement that she is entitled to the title of Dr. Halperin, Petitioner's wife will be referred to in this Recommended Order as "Mrs. Halperin."

COPIES FURNISHED:

Sonja P. Mathews, Esquire  
Department of Management Services  
Office of the General Counsel  
4050 Esplanade Way, Suite 260  
Tallahassee, Florida 32399

Karen Halperin Cyphers  
Qualified Representative  
1537 Woodgate Way  
Tallahassee, Florida 32308

Jason Dimitris, General Counsel  
Department of Management Services  
4050 Esplanade Way, Suite 160  
Tallahassee, Florida 32399-0950

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.