

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case was previously before the Board. By decision dated February 14, 2007, the Board affirmed a June 20, 2006 OWCP decision which denied appellant's request for modification of a July 11, 2003 wage-earning capacity decision.² The facts of the case as set forth in the prior decision are incorporated herein by reference.³

Appellant was removed from his position with the employing establishment effective October 14, 2005 as he was discharged from the Army National Guard for medical reasons and his position required maintaining membership. Deductions for health and life insurance were not taken out of compensation payments based on the July 11, 2003 loss of wage-earning capacity decision. In a March 23, 2010 worksheet, appellant was enrolled in health insurance, code 105, with basic and optional life insurance.

On March 30, 2010 OWCP issued a preliminary overpayment determination in the amount of \$17,404.55 for the period October 15, 2005 through March 13, 2010 because health, basic life and optional life insurance premiums were not withheld from appellant's compensation. It determined that health benefit premiums were \$16,695.71, basic life insurance premiums were \$665.91 and optional life insurance premiums were \$52.93 or a total overpayment of \$17,404.55. OWCP found appellant to be without fault in the matter. Appellant was advised of the procedures for contesting the preliminary determination and to submit financial information if he sought waiver or contested the overpayment.

On April 21, 2010 appellant contested the overpayment and requested waiver as it occurred through no fault of his own. He submitted a completed Form OWCP-20 overpayment recovery questionnaire and supporting financial documentation. Appellant advised that he supported his wife and five children. He listed monthly income as \$5,243.50 for actual earnings; \$923.00 for his wife's income and \$262.56 from FECA benefits, for a total monthly income of \$6,429.06. Appellant listed his monthly household expenses as \$671.40 for mortgage including insurance; \$1,006.00 for food; \$113.00 for clothing; \$852.00 for utilities and \$1,500.00 for other expenses. He noted monthly installment payments of \$180.14 to USAA for a home equity loan; \$277.69 to USAA for an automobile loan; \$192.87 to Community Bank; \$128.00 to GE credit orthodontist; \$173.00 for Cabela's credit card and \$231.00 for a USAA credit card. Appellant's total monthly expenses amounted to \$5,325.10. He stated that he had \$108.37 and \$96.75 in checking accounts; \$1.15 and \$1,679.81 in savings accounts for total assets of \$1,886.08. In addition to owning a house, appellant owned a 1986 Lowe Lunger III boat and motor worth \$1,015.00; a 1997 Chevy Suburban worth \$3,470.00; a 1991 E350 Ford van worth \$1,620.00; a 2001 Chevy Impala worth \$2,650.00; and a 1994 Cadillac DeVille worth \$1,285.00. Supporting financial documentation revealed assets of \$4,910.77 in a Vanguard retirement plan for his wife; \$3,525.59 in a Fidelity investment account at First State Bank and \$88,901.41 in New York Life Essentials Variable Annuity.

² Docket No. 06-2071 (issued February 14, 2007).

³ On January 29, 1998 appellant, then a 32-year-old electronics mechanic, filed a traumatic injury claim alleging that on that day he injured his lower back in the performance of duty. OWCP accepted the claim for an L4-5 disc herniation and authorized a lumbar laminectomy and discectomy, which was performed on August 6, 1998.

By decision dated June 21, 2010, OWCP finalized the \$17,404.55 overpayment and that appellant was not at fault in its creation. It determined that his total monthly income was \$6,528.06 and his current monthly expenses totaled \$5,152.10. OWCP did not include the \$173.00 monthly expenses for the Cabela credit card as it found it was not necessary for his daily living expenses. Appellant was found capable of repaying the overpayment and he did not provide justification for waiver. OWCP determined that \$150.00 a month would be deducted from future compensation payments until the overpayment was recovered.

LEGAL PRECEDENT -- ISSUE 1

The regulations of the Office of Personnel Management, which administers the FEHB 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 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 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

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 underwithholding of health insurance premiums is discovered, the entire amount is deemed an overpayment of compensation because OWCP 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

⁴ See 5 C.F.R. § 890.502(a)(1); *see also John Skarbek*, 53 ECAB 630 (2002).

⁵ *Id.* at § 890.502(c).

⁶ *Id.* at § 890.502(a)(1).

⁷ *Id.*

⁸ See *Keith H. Mapes*, 56 ECAB 130 (2004); *James Lloyd Otte*, 48 ECAB 334 (1997); *Marie D. Sinnott*, 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 FECA, 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 OWCP must pay the full premium to OPM upon discovery of the error.¹⁴

ANALYSIS -- ISSUE 1

The record reflects that deductions for health, basic life and optional life insurance premiums were not made from appellant's compensation payments from October 15, 2005 through March 13, 2010. OWCP determined that health benefit premiums of \$16,695.71, basic life insurance premiums of \$665.91 and optional life insurance premiums of \$52.93 should have been deducted from his compensation for this period as he had elected enrollment and premiums were not deducted. Appellant does not dispute that he had elected enrollment for health, basic life and optional life insurance benefits. In a worksheet dated March 23, 2010, OWCP calculated his share of the premiums, which were not withheld from his compensation payment and determined an overpayment in the amount of \$17,404.55.

As no health, basic life and optional life benefit deductions were made from his compensation during this time period and there is no evidence that he cancelled his health, basic life and optional life benefits enrollment, the Board finds that the record establishes that an overpayment was created in the amount of \$17,404.55 from October 15, 2005 through March 13, 2010, due to the nonwithholding of health, basic life and optional life insurance premiums.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of FECA provides that, where an overpayment of compensation has been made because of an error of fact or law, adjustment shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): "Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without

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*, *supra* note 8; *James Lloyd Otte*, *supra* note 8.

fault and when adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.”¹⁵

Office regulations, at 20 C.F.R. § 10.438, state:

“(a) The individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by [OWCP]. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of FECA or be against equity and good conscience. This information will also be used to determine the repayment schedule, if necessary.

“(b) Failure to submit the requested information within 30 days of the request shall result in denial of waiver and no further request for waiver shall be considered until the requested information is furnished.”¹⁶

ANALYSIS -- ISSUE 2

The fact that appellant is without fault in creating the overpayment does not mean that OWCP cannot collect the overpayment. Appellant is still required to repay the debt unless: (1) recovery of the overpayment would defeat the purpose of FECA; 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, OWCP reviewed appellant’s income, expenses and assets as listed in his April 21, 2010 statement, overpayment recovery questionnaire and financial documents received into the record. Based on the figures and financial documentation supplied by appellant on April 21, 2010, it found his monthly household income was \$6,528.60 with assets of \$1,886.08, Mutual Funds/Annuities of \$97,337.77 and valuable property of \$10,040.00. OWCP allowed the full amount of claimed necessary monthly expense, as verified by the financial documentation received, in the amount of \$5,152.10 for food, clothing, utilities, mortgage, property tax, insurance, equity loan, auto loan, community loan, USAA credit card and miscellaneous expenses of \$1,500.00. It disallowed monthly expenses of \$173.00 for Cabela’s credit card as being unnecessary for daily living expenses. OWCP 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 \$50.00.¹⁷

¹⁵ 5 U.S.C. § 8129

¹⁶ 20 C.F.R. § 10.438.

¹⁷ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a)(3) (October 2004).

The Board finds that, as appellant's monthly income of \$6,528.60 exceeds his documented reasonable monthly expenses of \$5,152.10 by \$1,375.96¹⁸ he is not entitled to waiver as he does not need substantially all of his income to meet current ordinary and necessary expenses.

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 October 15, 2005 to March 13, 2010. Pursuant to its regulations, OWCP, 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 FECA or be against equity and good conscience, the Board finds that OWCP did not abuse its discretion in denying a waiver of recovery of the overpayment of \$17,404.55.

LEGAL PRECEDENT -- ISSUE 3

The Board's jurisdiction over recovery of an overpayment is limited to reviewing those cases where OWCP seeks recovery from continuing compensation under FECA. Section 10.441(a) of the regulations provide:

"When an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to OWCP 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, OWCP 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."¹⁹

ANALYSIS -- ISSUE 3

With respect to the \$150.00 withheld from appellant's continuing compensation payments to recoup the amount of the outstanding payment, OWCP's regulations note the factors to be considered in determining repayment from continuing compensation.²⁰ The implementing regulations provide that OWCP must 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.²¹

¹⁸ The Board notes that appellant's income exceeds his expenses even when the monthly expense of \$173.00 for the Cabela's credit card is included. With this expense included, appellant's income exceeds his expenses by \$1,202.96.

¹⁹ 20 C.F.R. § 10.441.

²⁰ *Id.*; see *Fred A. Cooper, Jr.*, 44 ECAB 498 (1994).

²¹ *Id.*

OWCP found that recovery of the overpayment would be made by an adjustment against continuing compensation at the rate of \$150.00 per payment. It is appellant's responsibility to provide information about income, expenses and assets.²² The financial evidence indicated that his monthly income exceeded his expenses by \$1,375.06 and he has assets \$1,886.08, mutual funds/annuities with a value of approximately \$97,337.77 and valuable property worth approximately \$10,040.00. Based on the evidence, OWCP did take relevant evidence into account so as to minimize hardship in recovering the overpayment. The Board finds that it properly followed its regulations in this case and in determining that the \$17,404.55 overpayment could be recovered by deducting \$150.00 from appellant's continuing compensation payments.²³

CONCLUSION

The Board finds that appellant received an overpayment of \$17,404.55 during the period October 15, 2005 through March 13, 2010 and OWCP properly denied waiver of the recovery of the overpayment. The Board further finds that OWCP also properly directed recovery of the overpayment by deducting \$150.00 every 28 days from continuing compensation.

²² 20 C.F.R. § 10.441(a).

²³ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.4(c)(3) and 6.200.4.d(1)(b) (May 2004).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 21, 2010 is affirmed.

Issued: October 26, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

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

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