



## **FACTUAL HISTORY**

On December 20, 2003 appellant, then a 33-year-old mail processor, filed a claim for occupational disease, alleging that he developed a bilateral knee condition due to his federal duties. His claim was accepted for bilateral chondromalacia, bilateral internal knee derangement, bilateral medial meniscus dislocation and bilateral patella dislocation. Appellant underwent approved surgeries on August 24, 2004, May 2 and July 18, 2006, following which he stopped work and returned to work intermittently.

As of January 17, 2010, appellant stopped work and received wage-loss compensation on the periodic rolls each 28 days based on temporary total disability.

On March 22, 2011 OWCP notified appellant that it had made a preliminary finding that he was overpaid compensation in the amount of \$1,244.54 for the period January 17, 2010 through March 12, 2011. It explained that it had underdeducted health benefits premiums from appellant's compensation based on an incorrect health benefits code of 455, rather than the correct code of 105. The calculations provided by OWCP explained how the overpayment was determined. Appellant was found "without fault" in the creation of the overpayment because he did not know, or reasonably should have known, that OWCP had incorrectly deducted health benefits premiums.

Appellant requested a prerecoupment hearing before the Branch of Hearings and Review on the issues of fault and waiver of the overpayment. A hearing was scheduled for July 12, 2011 to be held by telephone. Appellant failed to appear for the hearing and OWCP conducted a review of the written record.

On April 8, 2011 OWCP received an Overpayment Recovery Questionnaire completed by appellant who noted that he was unaware when OWCP changed his insurance deductions. Appellant only received a statement once per month, and it did not explain the insurance deductions in detail. When he called OWCP to inquire the reason for the fluctuation in his compensation, it was unable to provide an answer. Appellant requested a waiver of the overpayment, as it occurred due to an error on the part of OWCP, and through no fault of his own. He provided a list of his income, assets and expenses. Appellant listed \$4.00 in a checking account in assets, and he listed a total monthly income of \$3,600.00. He listed three dependents, and reported his total monthly expenses to be \$3,100.00.

In a September 28, 2011 decision, OWCP finalized its finding that appellant received an overpayment of compensation in the amount of \$1,244.54 for the period January 17, 2010 through March 12, 2011 because it had underdeducted health benefits premiums from his compensation. It found him to be without fault, but that he did not qualify for a waiver. The decision found that appellant was capable of repaying \$250.00 per month toward the debt, which would be deducted from ongoing FECA compensation and applied toward the outstanding payment.

## LEGAL PRECEDENT -- ISSUE 1

FECA 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 duty.<sup>2</sup> 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, provides 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 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.<sup>3</sup>

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.<sup>4</sup>

Under applicable OPM regulations, the employee or annuitant is responsible for payment of the employee's share of the cost of enrollment.<sup>5</sup> An agency that withholds less than the proper health benefits contribution must submit an amount equal to the sum of the uncollected deductions.<sup>6</sup> 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.<sup>7</sup>

While the employee is receiving compensation under FECA, deductions for insurance are withheld from the employee's compensation.<sup>8</sup> At separation from the employing establishment,

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<sup>2</sup> 5 U.S.C. § 8102(a).

<sup>3</sup> *Id.* at § 890.502(a)(1).

<sup>4</sup> *Id.* at § 890.502(c).

<sup>5</sup> *Id.* at § 890.502(a)(1).

<sup>6</sup> *Id.*

<sup>7</sup> See *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.

<sup>8</sup> 5 U.S.C. § 8707(b)(1).

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.<sup>9</sup> 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.<sup>10</sup>

### **ANALYSIS -- ISSUE 1**

The record establishes an overpayment of compensation. Appellant elected health insurance coverage under Enrollment Code 105; however, deductions for his insurance premiums were calculated according to Enrollment Code 455. Once OWCP learned that his deduction calculations had been incorrectly made, it advised him that he had been paid wage-loss benefits an incorrect rate and that an overpayment was created. The overpayment worksheet establishes that proper deduction for appellant's share of the health insurance premiums under Enrollment Code 105 was \$5,608.36, whereas the deducted amount under Enrollment Code 455 was \$4,363.82, which created an overpayment in the amount of \$1,244.54. In the absence of a specific waiver or cancellation of coverage, of which there is none of record, he is responsible for payment of his share of the cost of enrollment. Appellant has not submitted any evidence to establish that he cancelled the insurance or that the calculated amounts were incorrect. Accordingly, the Board finds that OWCP properly determined an overpayment of compensation in the amount of \$1,244.54 from January 17, 2010 through March 12, 2011.

### **LEGAL PRECEDENT -- ISSUE 2**

OWCP may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment.<sup>11</sup> An individual should always be found without fault where the overpayment resulted from OWCP error in the underdeduction of health benefits or life insurance premiums.<sup>12</sup>

If OWCP 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 FECA; or (2) adjustment or recovery of the overpayment would be against equity and good conscience.<sup>13</sup>

Recovery will defeat the purpose of FECA if both: (a) the individual from whom recovery is sought needs substantially all of his current income (including periodic benefits

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<sup>9</sup> *Id.* at § 8706(b).

<sup>10</sup> *Id.* at § 8707(d); see *Keith H. Mapes*, 56 ECAB 130 (2004); *James Lloyd Otte*, *supra* note 7.

<sup>11</sup> 20 C.F.R. § 10.433(a).

<sup>12</sup> Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.5(b) (June 2009).

<sup>13</sup> 20 C.F.R. § 10.434. See 5 U.S.C. § 8129(b).

under FECA) 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.<sup>14</sup> 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.<sup>15</sup>

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.<sup>16</sup> 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.<sup>17</sup>

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 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. Failure to submit the requested information within 30 days of the request shall result in the denial of waiver and no further request for waiver shall be considered until the requested information is furnished.<sup>18</sup>

### **ANALYSIS -- ISSUE 2**

The fact that appellant was found without fault in creating the overpayment does not mean that OWCP cannot collect the overpayment. He is still required to repay the debt unless recovery of the overpayment would defeat the purpose of FECA, or 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. Based on the financial documentation supplied by appellant, OWCP found that he had a household income of \$3,600.00 a month and

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<sup>14</sup> *Supra* note 12 at Chapter 6.200.6(a) (June 2009). See *Miguel A. Muniz*, 54 ECAB 217 (2002); 20 C.F.R. §§ 10.436, 10.437.

<sup>15</sup> *Sherry A. Hunt*, 49 ECAB 467, 473 (1998).

<sup>16</sup> 20 C.F.R. § 10.437(a).

<sup>17</sup> *Id.* at § 10.437(b).

<sup>18</sup> *Id.* at § 10.438; *Linda Hilton*, 52 ECAB 476 (2001).

monthly expenses of \$3,100.00 a month, or a difference of \$500.00. Its 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.<sup>19</sup> The Board finds that, as appellant's monthly income of \$3,600.00 exceeded his documented reasonable monthly expenses of \$3,100.00 by \$500.00, he is not entitled to waiver as he does not need substantially all of his income to meet current ordinary and necessary expenses.

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 from January 17, 2010 through March 12, 2011. Pursuant to its regulations, OWCP 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 \$1,244.54.

Appellant contends on appeal that the overpayment was not due to any fault of his own. For the reasons set forth, the Board finds that OWCP properly determined that waiver of the recovery of the overpayment was not warranted.

### **LEGAL PRECEDENT -- ISSUE 3**

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 facts, so as to minimize any hardship.<sup>20</sup>

### **ANALYSIS -- ISSUE 3**

OWCP found that appellant's monthly income exceeded expenses by \$500.00. It determined that he could repay the debt at the rate of \$250.00 a month without hardship. The Board finds that OWCP gave due regard to the relevant factors noted above and did not abuse its discretion in setting a rate of recovery, that allowed for repayment within five months. The Board will affirm OWCP's decision on the rate of recovery.<sup>21</sup>

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<sup>19</sup> *Supra* note 12 at Chapter 6.200.6(a)(3) (June 2009).

<sup>20</sup> 20 C.F.R. § 10.441(a).

<sup>21</sup> *See B.S.*, Docket No. 11-487 (issued November 22, 2011) (OWCP did not abuse its discretion in determining a repayment rate of \$25.00 a month when appellant's monthly income exceeded expenses by \$185.09).

**CONCLUSION**

The Board finds that OWCP properly determined that appellant received an overpayment in the amount of \$1,244.54 because health benefit premiums were not properly deducted from his compensation payments for the period January 17, 2010 through March 12, 2011. The Board further finds that OWCP properly denied waiver of the overpayments and properly set the rate of recovery of \$250.00 from continuing compensation payments.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated September 28, 2011 is affirmed.

Issued: June 14, 2012  
Washington, DC

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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