

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

E.G., Appellant

and

**DEPARTMENT OF DEFENSE, COMMISARY
AGENCY, Fort Lee, VA, Employer**

)
)
)
)
)
)
)
)
)
)
)

**Docket No. 13-989
Issued: December 11, 2013**

Appearances:
Kevin R. Stults, Esq., for the appellant
Office of Solicitor, for the Director

Oral Argument Held September 5, 2013

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On March 11, 2013 appellant, through his attorney, filed a timely appeal of the September 11, 2012 decision of the Office of Workers' Compensation Programs (OWCP) which found that appellant received an overpayment of compensation. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.²

¹ 5 U.S.C. §§ 8101-8193.

² Under the Board's *Rules of Procedure* appeal must be filed within 180 days from the date of the last OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Board. One hundred and eighty days from September 11, 2012, the date of OWCP's decision, was March 10, 2013. Since using March 15, 2013, the date the appeal was received by the Clerk of the Board, would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is March 11, 2013. As this was the first business day following Sunday, March 10, 2013, the appeal was timely filed. See 20 C.F.R. § 501.3(f)(1).

ISSUES

The issues are: (1) whether OWCP properly found an overpayment of \$5,151.08 was created from August 31, 2008 to April 9, 2011 due to the failure to deduct health benefit insurance premiums and optional life insurance premiums; (2) whether it properly denied waiver of the overpayment; and (3) whether OWCP properly determined the overpayment would be recovered by deducting \$200.00 from continuing compensation payments.

FACTUAL HISTORY

On November 23, 1993 appellant, then a 33-year-old full time contract specialist, sustained a neck injury after being involved in an automobile accident on October 31, 1993. OWCP accepted his claim for acute cervical and lumbar strain, post-traumatic stress disorder, major depression and postconcussion syndrome. Appellant stopped work on October 31, 1993 and retired in 1997. He elected to receive an annuity through the Civil Service Retirement System under the Office of Personal Management (OPM).

On August 20, 2007 appellant contacted OWCP and advised that he sought to be placed on FECA daily compensation rolls instead of OPM rolls. In an election benefits form dated November 21, 2007, he elected to receive FECA benefits. In a letter dated April 3, 2008, OWCP notified OPM of appellant's election to receive FECA benefits.

On August 7, 2008 OPM confirmed that appellant received retirement annuity benefits from November 22, 1997 to July 31, 2008. It advised that on November 21, 2007 he elected to receive FECA benefits. OPM noted that appellant was enrolled in the Federal Employee's Health Benefit (FEHB) plan under enrollment code 104 and that FEHB enrollment was being transferred to OWCP because he elected to receive its benefits. It noted that premiums should be withheld beginning November 25, 2007. OPM noted that, with regards to the Federal Employees' Group Life Insurance Program (FEGLI), appellant was not covered.

On October 14, 2010 appellant contacted OWCP to inquire about his health benefits. He received a letter from OPM informing him that he was not currently paying for health benefit coverage. On March 30, 2011 OWCP confirmed that health benefits had not been deducted from appellant's compensation benefits since 2008 and that he would have an overpayment of compensation.

In a notice of change in health benefits enrollment form dated March 30, 2011, OWCP advised that appellant was transferred into OWCP effective August 2, 2008. In an OWCP disability benefit payment worksheet dated April 4, 2011, it listed his optional life insurance code as DO.

In disability benefit payment worksheets dated May 12, 2011, OWCP found an overpayment of compensation for the period August 31, 2008 to April 9, 2011 because health benefit premiums and optional life insurance premiums were not deducted from appellant's benefits. In supplemental roll payment worksheets dated May 12, 2011, it calculated that the health benefit premium for the period August 31, 2008 to April 9, 2011 was \$5,089.82 and that optional insurance premiums for this period were \$61.26.

In a preliminary overpayment determination dated January 26, 2012, OWCP advised appellant that he received a \$5,151.08 overpayment as premiums for his health benefits and optional life insurance were not deducted from August 31, 2008 to April 9, 2011. From August 31, 2008 to April 9, 2011, health insurance premiums that should have been deducted was \$5,089.82 and the amount of optional life insurance premiums that should have been deducted was \$61.26. For the period August 31, 2008 to April 9, 2011, appellant was paid compensation of \$126,528.76; however, he was entitled to \$121,377.68 after health benefit and optional life insurance premiums were deducted which resulted in an overpayment of compensation of \$5,151.08. OWCP made a preliminary finding that he was without fault in creating the overpayment. It informed appellant that, if he believed the overpayment should be waived, he should complete a financial recovery questionnaire form and submit documents such as income tax returns, bank statements, bills, canceled checks, pay slips and other records to support his claimed income and expenses.

On February 22 and 23, 2012 appellant requested waiver and a prerecoupment hearing. He noted that the overpayment occurred through no fault of his own. Appellant through counsel asserted that recovery of the overpayment would be against equity and good conscience. Counsel advised OWCP that appellant's only source of income was his FECA benefits of \$3,600.00 a month and that his monthly expenses included support of his sisters. This reduced his net income from \$800.00 to \$900.00 a month. Requiring appellant to repay the overpayment would cause severe financial hardship. He submitted a February 23, 2012 overpayment questionnaire. Appellant listed his income as \$3,600.00 and his expenses as \$2,720.00. The overpayment questionnaire noted a monthly payment of rent or mortgage of \$1,020.00, food of \$250.00, clothing of \$50.00, utilities of \$750.00 and other expenses of \$650.00. Appellant listed cash on hand of zero, a checking account balance of \$3,000.00 and a savings account balance of \$1,000.00 for a total of \$4,000.00.

A prerecoupment hearing was held on June 26, 2012 and appellant appeared with counsel and Narcisa Taguinod, his nursing assistant. Appellant testified that his income was \$3,640.00 a month. He provided support to each of his three sisters, noting that he gave them "between \$100.00 and \$200.00 a month. I have direct deposit going to their accounts of \$100.00 a month...." Appellant also paid a nursing assistant for services provided to him during his dialysis treatments three times a week of "around \$200.00 a week sometimes; between \$100.00 and \$200.00 a week." The hearing representative advised that appellant could submit additional financial documentation within 30 days.

Appellant submitted a Suntrust bank statement dated June 1 to July 16, 2012, bills from Dominion electric, water bills, a Wells Fargo mortgage statement indicating a payment of \$1,020.55 a month and checks to Ms. Taguinod dated June 8, 2012 in the amount of \$60.00, June 13, 2012 in the amount of \$200.00 and June 26, 2012 in the amount of \$800.00. The June 26, 2012 check noted in the memo section that it was for nurse assistance.

In a September 11, 2012 decision, OWCP's hearing representative found that appellant received a \$5,151.08 overpayment of compensation from August 31, 2008 to April 9, 2011 because health benefit and optional life insurance premiums were not deducted. She found that he was without fault in creating the overpayment, but that waiver of recovery was not warranted. The hearing representative noted that appellant testified that his income was \$3,640.00 a month

and that, in addition to the expenses listed on the overpayment questionnaire, he provided each of his three sisters \$100.00 a month and paid a nursing assistant about “\$100.00 to \$200.00 a week” for assistance with his dialysis treatments. She noted that, subsequent to the hearing, he submitted bank statements, utility bills and copies of three checks to the nursing assistant totaling \$1,060.00. The hearing representative determined that appellant’s income was \$3,640.00 and his expenses were \$2,720.00 or a balance of \$920.00. She found that the expense of providing each of his three sisters \$100.00 a month and the nursing assistant \$100.00 a week totaled \$700.00, which left a surplus income of \$220.00 a month. The hearing representative noted that appellant listed \$3,000.00 in his checking account and \$1,000.00 in his savings account. She found that it was not against equity and good conscience nor would it defeat the purpose of FECA to recover the overpayment. The hearing representative directed that \$200.00 be withheld from his continuing compensation payments.

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 his or her 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 FEHB program. The regulations of OPM, which administers 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 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

Under applicable OPM regulations, the employee or annuitant is responsible for payment of the employee’s share of the cost of enrollment.⁶ An employing establishment that withholds less than the proper health benefits contribution must submit an amount equal to the sum of the

³ 5 C.F.R. § 8102(a).

⁴ *Id.* at § 890.502(a)(1).

⁵ *Id.* at § 890.502(c).

⁶ *Id.* at § 890.502(a)(1).

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 FEGLI most civilian employees of the Federal Government are eligible to participate in basic life insurance and one 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, 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 OWCP failed to deduct premiums for appellant's health insurance and optional life insurance from compensation payments for the period August 31, 2008 to April 9, 2011. OWCP found that, from August 31, 2008 to April 9, 2011, the amount of health insurance premiums that should have been deducted was \$5,089.82 and the amount of optional life insurance premiums that should have been deducted was \$61.26. It noted that appellant was paid compensation of \$126,528.76 but was entitled to only \$121,377.68 after health benefit and optional life insurance premiums were deducted. This resulted in an overpayment of compensation of \$5,151.08. No health benefit or optional life insurance deductions were made from appellant's compensation during that time period and there is no evidence that he cancelled his health benefits enrollment or optional life insurance. The Board finds that an overpayment was created in the amount of \$5,151.08 due to the underwithholding of health insurance and optional life insurance premiums. OWCP explained how the overpayment occurred and provided this to appellant and counsel with the preliminary notice of overpayment.¹⁵ Appellant

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 *Id.* at § 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 See *Sandra K. Neil*, 40 ECAB 924 (1989).

does not dispute that he received the overpayment in question or the amount of the overpayment. Thus, the failure to deduct health and optional life insurance premiums caused an overpayment in compensation in the amount of \$5,151.08.

LEGAL PRECEDENT -- ISSUE 2

The waiver or refusal to waive an overpayment of compensation by OWCP is a matter that rests within OWCP's discretion pursuant to statutory guidelines.¹⁶ These statutory guidelines are found in section 8129(b) of FECA which states: "Adjustment or recovery [of an overpayment] by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience."¹⁷ When a claimant is found to be without fault in the matter of the overpayment, then, in accordance with section 8129(b), OWCP may only recover the overpayment if it determined that recovery of the overpayment would neither defeat the purpose of FECA nor be against equity and good conscience.

Section 10.436 of the implementing regulations¹⁸ provide that recovery of an overpayment will defeat the purpose of FECA if such recovery would cause hardship to a currently or formerly entitled beneficiary because: (a) the beneficiary from whom OWCP seeks recovery needs substantially all of his or her current income (including compensation benefits) to meet current or ordinary and necessary living expenses; and (b) the beneficiary's assets do not exceed a specified amount as determined [by OWCP] from data furnished by the Bureau of Labor Statistics.¹⁹ 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 \$50.00.²⁰

Section 10.437 provides that recovery of an overpayment is considered to be against equity and good conscience when an individual who received an overpayment would experience severe financial hardship attempting to repay the debt; and when an individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his or 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 OWCP. This information is needed to determine whether or not recovery on an

¹⁶ See *Robert Atchison*, 41 ECAB 83, 87 (1989).

¹⁷ 5 U.S.C. § 8129(b).

¹⁸ 20 C.F.R. § 10.436.

¹⁹ An individual's assets must exceed a resource base of \$3,000.00 for an individual or \$5,000.00 for an individual with a spouse or one dependent plus \$600.00 for each additional dependent. This base includes all of the individual's assets not exempt from recoupment. See *Robert F. Kenney*, 42 ECAB 297 (1991).

²⁰ See *Sherry A. Hunt*, 49 ECAB 467, 473 (1998).

²¹ 20 C.F.R. § 10.437.

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 denial of waiver.²²

ANALYSIS -- ISSUE 2

OWCP determined that appellant was without fault in creating the overpayment. Because he is without fault in the matter of the overpayment, it may adjust later payments only if adjustment would not defeat the purpose of FECA or be against equity and good conscience.

The Board finds that the case is not in posture as to waiver of overpayment. With its preliminary overpayment finding, OWCP sought financial information to determine whether recovery of the overpayment would defeat the purpose of FECA or would be against equity and good conscience. Appellant provided an overpayment recovery questionnaire and updated financial information at the prerecoupment hearing. OWCP revealed that he had monthly income of \$3,640.00 and monthly expenses which included \$1,020.00 for rent or mortgage, \$250.00 for food, \$50.00 for clothing, \$750.00 for utilities and \$650.00 for other expenses. Appellant testified that he provided each of his three sisters \$100.00 a month and paid a nursing assistant for services related to his dialysis treatments three times a week of “around \$200.00 a week sometimes; between \$100.00 and \$200.00 a week.” After the hearing, he submitted financial information which OWCP found to be reliable and reasonable, specifically, three checks to Ms. Taguinod, appellant’s nursing assistant, dated June 8, 2012 in the amount of \$60.00, June 13, 2012 in the amount of \$200.00 and June 26, 2012 in the amount of \$800.00, for a total of \$1,060.00. Appellant’s reported expenses exceeded income by over \$400.00 and he submitted supporting documents including copies of bank statements, checks to the nursing assistant, mortgage statement and utility bills to support income and expenses as requested by OWCP. The hearing representative calculated his expenses and allocated \$100.00 a week for his nursing assistant for a total of \$400.00 a month. However, she failed to adequately address the financial information submitted in support of the nursing expenses which included three checks to Ms. Taguinod totaling \$1,060.00 for June 2012. The hearing representative further did not address appellant’s allegations that his nursing expenses are “around \$200.00 a week sometimes; between \$100.00 and \$200.00 a week.” The record contains financial records to support the nursing assistant payments of \$1,060.00 in June 2012. The Board finds the hearing representative failed to adequately address the financial evidence submitted as to appellant’s nursing assistant expense of \$100.00 a week in light of the supporting evidence showing a nursing expense of \$1,060.00 in June 2012.

The case will be remanded to OWCP to consider relevant financial evidence and further develop such evidence as it deems necessary, to be followed by a proper determination as to waiver of the overpayment. In view of the Board’s disposition of the waiver issue, it is premature to address repayment of the overpayment.

²² *Id.* at § 10.438.

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation during the period August 31, 2008 to April 9, 2011 in the amount of \$5,151.08 for underwithholding of health insurance and optional life insurance premiums. The case is not in posture for a decision regarding whether waiver of the overpayment is appropriate and recovery of the overpayment from continuing compensation benefits.

ORDER

IT IS HEREBY ORDERED THAT the September 11, 2012 decision of the Office of Workers' Compensation Programs is affirmed in part with regards to fact of overpayment and remanded in part with regards to waiver of overpayment and recovery of overpayment.

Issued: December 11, 2013
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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