

FACTUAL HISTORY

On September 26, 1998 appellant, then a 46-year-old city carrier, filed a traumatic injury claim alleging that he injured the arch of his left foot on that date in the performance of duty. OWCP accepted the claim for left foot sprain and plantar fascial fibromatosis of the left foot.

By decision dated April 15, 2003, OWCP reduced appellant's compensation to zero based on its finding that his actual earnings as a rehabilitation city carrier fairly and reasonably represented his wage-earning capacity.³

OWCP paid appellant compensation for total disability beginning May 27, 2010 because there was no longer work available for him at the employing establishment. It did not deduct premiums for health insurance.

On May 31, 2010 the employing establishment advised that it had transferred appellant's health benefit plan enrollment, code 312, to OWCP on May 31, 2010. On July 19, 2011 it completed a Federal Employees Health Benefits form transferring his health benefits effective May 31, 2010 to OWCP. By letter dated July 19, 2010, OWCP advised appellant that it was placing him on the periodic rolls. It noted deductions for life insurance but omitted any reference to his health benefits on the form. Beginning July 3, 2011, OWCP began deducting premiums for health insurance from his compensation.

On August 2, 2011 OWCP notified appellant of its preliminary determination that he received an overpayment of compensation in the amount of \$4,030.50 because it failed to deduct premiums for health benefits from May 31, 2010 to July 2, 2011. It further advised him of its finding that he was without fault in the creation of the overpayment and requested that he submit financial information in support of any request for waiver of recovery of the overpayment.

On August 16, 2011 appellant submitted a completed overpayment recovery questionnaire and requested a prerecoupment hearing before an OWCP hearing representative. Following a telephone conference, in a decision dated September 9, 2011, OWCP found that appellant received a \$4,030.50 overpayment of compensation and that he was at fault in its creation. Appellant appealed to the Board.

On May 9, 2012 the Board set aside the September 9, 2011 decision.⁴ It found that appellant had timely requested a prerecoupment hearing but that OWCP had issued its September 9, 2011 decision without providing him with a hearing. The Board remanded the case to schedule a hearing before an OWCP hearing representative.

³ In decisions dated April 8 and November 30, 2003, OWCP found that appellant received a \$12,781.97 overpayment of compensation because he returned to work on August 24, 2000 but received compensation for total disability until January 27, 2001.

⁴ *Order Remanding Case*, Docket No. 12-48 (issued May 9, 2012).

A telephone hearing was held on July 6, 2012.⁵ At the hearing, appellant contended that he was not at fault and provided financial information.

By decision dated September 24, 2012, an OWCP hearing representative determined that appellant received an overpayment from May 31, 2010 to July 2, 2011 of \$4,030.50 because OWCP failed to deduct premiums for health benefits from his compensation. She determined that he was not without fault in creating the overpayment because health benefit statements he received in 2000 indicated that premiums were being deducted from his compensation. The hearing representative found that the benefit statement appellant received beginning May 27, 2010 would have shown no premiums were deducted and he reasonably should have known that he was overpaid. She advised that he could submit the full amount to repay the overpayment.

On appeal appellant, through his representative, noted that on August 2, 2011 OWCP notified him that he was not at fault but in September 9, 2011 found that subsequently he was at fault. He noted that he did not remember the contents of benefit statements from 10 years prior. Appellant maintained that he was not at fault in creating the overpayment.

LEGAL PRECEDENT -- ISSUE 1

An employee entitled to disability compensation may continue his or her health benefits under the Federal Employee Health Benefits Program. The regulation of the Office of Personnel Management (OPM), which administers the Federal Employee Health Benefits Program, provides guidelines for the registration, enrollment and continuation of enrollment for federal employees. In this connection, 5 C.F.R. § 890.502(b)(1) provides:

“An employee or annuitant is responsible for payment of the employee’s share of the cost of enrollment for every pay period during which the enrollment continues. In each pay period for which health benefits withholdings or direct premium payments are not made but during which the enrollment of an employee or annuitant continues, he or she incurs an indebtedness to the United States in the amount of the proper employee withholding required for that pay period.”⁶

In addition, 5 C.F.R. § 890.502(c)(1) provides:

“An agency that withholds less than or none of the proper health benefits contributions for 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 the title, 5 United States Code, to OPM for deposit in the Employees’ Health Benefits Fund.”⁷

⁵ OWCP issued a decision dated May 22, 2010 on the overpayment without providing a precoupment hearing. It subsequently provided the telephone hearing and issued a September 24, 2012 decision which supersedes the May 22, 2010 decision.

⁶ 5 C.F.R. § 890.502(b)(1).

⁷ *Id.* at § 890.502(d).

Under applicable OPM regulations, the employee or annuitant is responsible for payment of the employee's share of the cost of enrollment.⁸ An agency that withholds less than the proper health benefits contribution must submit an amount equal to the sum of the uncollected deductions.⁹ 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.¹⁰

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$4,030.50 from May 31, 2010 to July 2, 2011. The record supports that, for the stated period, OWCP did not make deductions from his FECA benefits for his enrollment in FEHB code 312. OWCP established that the premium for health insurance code 312 during this period was \$4,030.50. There is no evidence that appellant waived coverage. When an underwithholding of this premium is discovered, the entire amount is deemed an overpayment in compensation because OWCP must pay the full amount of the premium to OPM when the error is discovered.¹¹ The Board finds, therefore, that OWCP should have deducted health benefit premiums as appellant had selected enrollment and premiums were not deducted. This omission created an overpayment in compensation of \$4,030.50. Appellant has not challenged fact or amount of overpayment.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of FECA¹² provides that “[a]djustment or recovery 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.” Section 10.433 of OWCP’s implementing regulations¹³ provides that in determining whether a claimant is at fault, OWCP will consider all pertinent circumstances. An individual is with fault in the creation of an overpayment who:

“(1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or

“(2) Failed to provide information which he or she knew or should have known to be material; or

⁸ *Id.* at § 890.502(b)(1).

⁹ *Id.* at § 890.502(d).

¹⁰ *James Lloyd Otte*, 48 ECAB 334 (1997).

¹¹ *Id.*; see also *Keith H. Mapes*, 56 ECAB 130 (2004).

¹² 5 U.S.C. § 8129(b).

¹³ 20 C.F.R. § 10.433.

“(3) Accepted a payment which he or she knew or should have known to be incorrect.”

Section 10.433(b) of OWCP’s regulations provide in relevant part:

“Whether or not [OWCP] determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual’s capacity to realize that he or she is being overpaid.”¹⁴

ANALYSIS -- ISSUE 2

OWCP applied the third standard in determining that appellant was at fault in the creation of the overpayment. It must establish that, at the time he received the compensation in question, he knew or should have known that the payment was incorrect.¹⁵ The Board finds that OWCP has not established that appellant accepted a payment that he knew or should have known was incorrect. In concluding that he was at fault, the hearing representative noted that he had received benefit statements in 2000 showing a deduction for health benefits. She determined that any benefit statements received from May 27, 2010 onward would fail to show a deduction for health premiums, which she found was sufficient to put appellant on notice that his compensation payment was incorrect. However, the record does not contain any health benefit statements covering the period of the overpayment. Further, OWCP’s procedures state that a claimant is always without fault if an overpayment results from the underdeduction of health or life insurance premiums.¹⁶ The Board thus finds that, under the circumstances, the evidence is insufficient to establish that appellant knew or should have known that he received an overpayment for the period May 31, 2010 through July 2, 2011.¹⁷ Consequently, the case will be remanded to OWCP to consider waiver of recovery of the overpayment of compensation.

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$4,030.50 because OWCP did not deduct premiums for health benefits from May 31, 2010 to July 2, 2011. The Board further finds that appellant is not at fault in creating the overpayment and that the case must be remanded to OWCP to consider waiver of recovery of the overpayment.

¹⁴ *Id.* at § 10.433(b).

¹⁵ *See A.L.*, Docket No. 09-1529 (issued January 13, 2010); *Tammy Craven*, 57 ECAB 689 (2006).

¹⁶ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.5(b)(1)(c) (June 2009).

¹⁷ *See J.B.*, Docket No. 11-2005 (issued July 23, 2012); *R.B.*, Docket No. 10-747 (issued December 3, 2010).

ORDER

IT IS HEREBY ORDERED THAT the September 24, 2012 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: June 6, 2013
Washington, DC

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

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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