

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

B.P., widow of R.P., Appellant,

and

**DEPARTMENT OF THE AIR FORCE,
TYNDALL AIR FORCE BASE, FL, Employer**

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**Docket No. 14-2017
Issued: March 19, 2015**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On September 19, 2014 appellant filed a timely appeal of an August 29, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$9,636.53 for the period February 17, 2009 through August 24, 2013 for which she was not at fault; (2) whether OWCP properly denied waiver of recovery of the overpayment; (3) whether the overpayment should be recovered by deducting \$500.00 from appellant's ongoing compensation benefits every 28 days; and (4) whether OWCP properly found that she abandoned her request for a prerecoupment hearing.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On June 3, 1978 the employee, then a 39-year-old sheet metal mechanic, filed an occupational disease claim alleging that he developed asthmatic bronchitis due to inhalation of fumes in the performance of duty. He had retired on disability effective June 2, 1978. OWCP accepted the employee's claim for chronic airways obstruction and found that he was totally disabled on October 8, 1982. It entered him on the periodic rolls on December 21, 1982. The employee received a schedule award for 18 percent impairment of his lungs on July 29, 1983. He died on February 16, 2009 and appellant filed a claim for compensation by widow, Form CA-5.

On February 24, 2009 the employing establishment directed OWCP to transfer the employee's health benefits to the Office of Personnel Management (OPM). On February 25, 2009 OWCP directed appellant to contact OPM regarding life insurance, health insurance, or any retirement benefits. By letter dated March 3, 2009, it stated that it had transferred health benefits to OPM effective February 16, 2009. In a letter dated June 4, 2009, OPM stated that health insurance enrollment should be transferred to OPM and stated that the enrollment should be terminated as the claimant's survivor was not eligible for a survivor annuity under OPM.

OWCP accepted appellant's claim for survivor benefits on August 5, 2009. On August 26, 2009 appellant requested whether she was entitled to health benefits. In a letter dated June 10, 2013, OWCP informed her that no health benefit deductions had been made since the March 3, 2009 transfer to OPM. It stated that when appellant's claim for death benefits was accepted the health benefits should have been transferred back to OWCP from OPM. OWCP stated, "health benefits should have then been deducted from the benefits you were receiving as a widow. Due to a regrettable administrative error, for which we sincerely apologize, this [was not] done." OWCP stated that appellant was entitled to health benefits under FECA and asked if she wished to have retroactive coverage back to the acceptance of her claim. It advised her that a large overpayment would be created for nondeduction of premiums if she elected retroactive coverage. OWCP reiterated appellant's options on June 21, 2013.

On July 1, 2013 appellant elected to receive retroactive health benefits coverage. OWCP determined that she had received compensation in the amount of \$118,764.88 for the period February 17, 2009 through August 24, 2013 and that she was entitled to receive compensation in the amount of \$109,128.35 resulting in an overpayment of compensation in the amount of \$9,636.53.

In a preliminary determination of overpayment dated November 20, 2013, OWCP found that appellant received an overpayment of compensation in the amount of \$9,636.53 because health benefits had not been deducted for the period February 17, 2009 through August 24, 2013. It found that she was without fault in the creation of the overpayment. OWCP directed appellant to complete an overpayment recovery questionnaire in order to determine waiver or amount of recovery.

Appellant requested waiver of recovery of the overpayment on November 25, 2013. She submitted the overpayment recovery questionnaire and indicated that she received social security benefits of \$961.60, compensation benefits of \$1,953.10 and earnings of \$1,678.00 a month for a

total monthly income of \$4,592.70. Appellant stated that she supported her 48-year-old son who required a heart transplant. She listed her expenses as \$450.00 for food, \$200.00 for clothing, utilities of \$900.00, and student loans of \$1,000.00 a month. Appellant also indicated that she had credit card debt and loans totaling \$6,777.60 with total monthly payments of \$525.81. She listed her assets as \$63.00.

In a letter dated April 25, 2014, addressed to the employee at appellant's address of record, OWCP's Branch of Hearings and Review scheduled an oral hearing for June 9, 2014 at 1:00 pm. Appellant telephoned OWCP on June 10, 2014 and stated that she was scheduled for an oral hearing on that date. She stated that she never received the April 25, 2014 letter.

By decision dated August 29, 2014, an OWCP hearing representative stated that appellant failed to call at the appropriate time for the scheduled telephonic hearing. He found that as, appellant's income exceeded her expenses by \$2,042.70 a month, waiver of recovery of the overpayment was not warranted. Additionally, the hearing representative found that a reasonable repayment plan was \$500.00 every 28 days until the overpayment of \$9,636.53 was recovered.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of FECA² 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.³ Section 8129(a) of FECA provides, in pertinent part, that when an overpayment has been made to an individual under this subchapter 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 an individual is entitled.⁴

The regulations of OPM, which administers the Federal Employees Health Benefit 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.”⁵

² *Id.* at §§ 8101-8193.

³ *Id.* at § 8102(a).

⁴ *Id.* at § 8129(a).

⁵ 5 C.F.R. § 890.502(a)(1).

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 applicable agency contributions required under section 8906 of Title 5 United States Code, to OPM for deposit in the Employees’ Health Benefits Fund.”⁶

The Board has recognized that, when an under withholding 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.⁷

ANALYSIS -- ISSUE 1

The record establishes that appellant requested health benefits in August 2009. OWCP informed her in 2013 that reenrollment in health benefits would result in an overpayment. Appellant opted to reenroll. OWCP explained in preliminary notice of overpayment the amount and period of the overpayment. Appellant does not dispute the fact or amount of the overpayment. The Board finds that an overpayment in the amount of \$9,636.53 for the period February 17, 2009 through August 24, 2013 occurred due to the failure to withhold health insurance premiums.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of FECA provides that when an overpayment of compensation occurs “because of an error of fact or law,” adjustment or recovery shall be made by decreasing later payment to which the individual is entitled.⁸ The only exception to this requirement that an overpayment must be recovered is set forth 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 fault and when adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.”

Thus, a finding that appellant was without fault is not sufficient, in and of itself, for OWCP to waive the overpayment. OWCP must exercise its discretion to determine whether recovery of the overpayment would “defeat the purpose of FECA or would be against equity and good conscience,” pursuant to the guidelines provided in the implementing federal regulations.

⁶ *Id.* at § 890.502(c).

⁷ *T.S.*, Docket No. 08-1604 (issued March 13, 2009); 5 C.F.R. § 890.502.

⁸ 5 U.S.C. § 8129(a).

Section 10.436 of the implementing regulations⁹ provide that recovery of an overpayment will defeat the purpose of FECA if recovery would cause hardship by depriving a presently or formerly entitled beneficiary of income and resources needed for ordinary and necessary living expenses and outlines the specific financial circumstances under which recovery may be considered to defeat the purpose of FECA.

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.¹⁰

Section 10.438(a) provides that the individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by OWCP, as 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.¹¹ This information would also be used to determine the repayment schedule, if necessary. Section 10.438(b) provides that failure to submit the requested information within 30 days of the request shall result in denial of waiver.¹²

ANALYSIS -- ISSUE 2

OWCP determined that appellant was without fault in creating the overpayment. Because she is without fault in the matter of the overpayment, it must adjust later payments only if adjustment would not defeat the purpose of FECA or be against equity and good conscience. Appellant provided an overpayment recovery questionnaire which indicated that her monthly income of \$4,592.70 exceeded all of her listed monthly expenses of \$3,075.81 by more than \$1,516.00. The Board thus finds that, as her monthly income exceeds her documented reasonable monthly expenses by \$1,516.00, she is not entitled to waiver of recovery of the overpayment as she does not need substantially all of her income to meet current ordinary and necessary expenses.¹³ 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 \$50.00.¹⁴

⁹ 20 C.F.R. § 10.436.

¹⁰ *Id.* at § 10.437.

¹¹ *Id.* at § 10.438(a).

¹² *Id.* at § 10.438(b).

¹³ *P.G.*, Docket No. 14-227 (issued January 9, 2015).

¹⁴ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6a(1)(a) (June 2009).

Additionally, the evidence does not demonstrate that repayment of the overpayment would be against equity and good conscience. Consequently, OWCP properly denied waiver of recovery of the overpayment.

LEGAL PRECEDENT -- ISSUE 3

Section 10.321(a)¹⁵ provides that if an overpayment of compensation has been made to one entitled to future payments, proper adjustment shall be made by decreasing subsequent payments of compensation, “having due regard to 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 resulting hardship upon such individual.”

ANALYSIS -- ISSUE 3

The record reflects that appellant continues to receive benefits from OWCP. The hearing representative reduced her future compensation benefits by \$500.00 every 28 days. He noted that appellant had monthly gross income of \$4,592.70 every month. The record reflects expenses of \$3,075.81 a month as reported by her on the overpayment recovery questionnaire. Appellant’s income exceeds her expenses by \$1,516.89 a month. The hearing representative found she was capable of repaying the debt with deductions of \$500.00 every 28 days from her continuing compensation benefits. The Board finds that OWCP properly required repayment of the overpayment by deducting \$500.00 from appellant’s ongoing compensation payments every four weeks.

LEGAL PRECEDENT -- ISSUE 4

With respect to abandonment of hearing requests, section 10.622(f) of OWCP’s regulations and Chapter 2.1601.6(g) of OWCP’s procedures provide that failure of the claimant to appear at the scheduled hearing, failure to request a postponement, and failure to request a new hearing in writing within 10 days after the date of the scheduled hearing shall constitute abandonment of the request for a hearing.¹⁶ Under these circumstances, the Branch of Hearings and Review will issue a formal decision finding that the claimant has abandoned his or her request for a hearing and return the case to the district office. In cases involving prerecoupment hearings, the Branch of Hearings and Review will also issue a final decision on the overpayment, based on the available evidence, before returning the case to the district office.¹⁷

ANALYSIS -- ISSUE 4

In a letter dated April 25, 2014, pursuant to appellant’s request, OWCP advised appellant of a scheduled telephonic prerecoupment hearing with the hearing representative at a specific

¹⁵ 20 C.F.R. § 10.321(a).

¹⁶ *Id.* at § 10.622(f); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Review of the Written Record*, Chapter 2.1601.6(g) (October 2011).

¹⁷ *See* Federal (FECA) Procedure Manual, *id.*

time on June 9, 2014. The evidence establishes that OWCP mailed appropriate notice to appellant at her last known address. The record also reveals that appellant did not request postponement, failed to appear for the scheduled hearing, and failed to provide any written notification for such failure within 10 days of the scheduled date of the hearing. As this meets the conditions for abandonment of a hearing as specified by OWCP's regulations and procedure manual, the Board finds that OWCP properly found that she abandoned her request for a prerecoupment hearing before the hearing representative and properly issued a final decision on the overpayment of compensation. The Board finds that it properly found that appellant abandoned her request for a prerecoupment hearing.

Appellant alleges that she never received the April 25, 2014 letter. The Board has found that a notice properly addressed and duly mailed to an individual in the ordinary course of business is presumed to have been received by that individual.¹⁸ Thus, the Board finds that absent any evidence to the contrary appellant received proper notice of the scheduled telephonic hearing.

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$9,636.53 during the period February 17, 2009 through August 24, 2013 for which she was not at fault. Appellant is not entitled to waiver of recovery of the overpayment and it should be recovered by withholding \$500.00 every 28 days from her continuing compensation benefits. The Board further finds that she abandoned her request for a prerecoupment hearing.

¹⁸ *M.G.*, Docket No. 14-1917 (issued January 22, 2015).

ORDER

IT IS HEREBY ORDERED THAT the August 29, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 19, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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