

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

M.S., Appellant)

and)

DEPARTMENT OF ENERGY, SOUTHEASTERN)
POWER ADMINISTRATION, Elberton, GA,)
Employer)

**Docket No. 11-96
Issued: August 17, 2011**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On October 13, 2010 appellant filed a timely appeal of an April 16, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act (FECA)¹ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the overpayment case.

ISSUES

The issues are: (1) whether appellant received overpayment compensation in the amount of \$5,371.50 for the period March 30, 2008 through August 1, 2009; (2) whether OWCP properly denied waiver of the recovery; and (3) whether OWCP properly requested recovery through payment of the entire amount of the overpayment.

On appeal appellant stated that she was submitting additional information which she inadvertently failed to submit to the hearing representative.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On June 15, 2006 appellant, then a 52-year-old supply technician, filed a traumatic injury claim alleging that she injured her head and neck in the performance of duty. She completed a claim for compensation and indicated that she was enrolled in health benefits code 105. On September 15, 2006 OWCP accepted appellant's claim for sprain of the neck. Appellant returned to light-duty work on February 27, 2007. OWCP accepted that she sustained a recurrence of disability on February 28, 2007. Appellant returned to work four hours a day on March 8, 2007. By decision dated February 15, 2008, OWCP terminated her compensation benefits effective that date finding that she was no longer disabled due to her accepted employment injury. Appellant requested an oral hearing and, by decision dated April 17, 2008, the Branch of Hearings and Review reversed OWCP's February 15, 2008 decision and reinstated her compensation benefits retroactively to February 15, 2008.

On April 22, 2008 OWCP reinstated appellant's compensation benefits for period February 17 through April 12, 2008 and did not provide any deduction for health insurance or life insurance. It accepted her claim for the additional conditions of chronic pain syndrome and fibromyalgia on August 1, 2008.

On June 10, 2009 the employing establishment informed OWCP that appellant had elected health benefits code 105 and that premiums were not deducted from March 12, 2007 through June 6, 2009. On August 4, 2009 OWCP determined that the employing establishment paid her health insurance premiums through March 29, 2008. It calculated that appellant's health insurance benefits from March 30, 2008 through August 1, 2009 resulted in an overpayment of \$5,371.50.

In a letter dated August 10, 2009, OWCP informed appellant of a preliminary determination that she had received an overpayment of compensation in the amount of \$5,371.50 because no health benefit premiums were deducted from her compensation during the period March 30, 2008 through August 1, 2009. It noted that from March 30 through January 3, 2009 her biweekly health insurance premiums were \$145.14 and multiplied this amount by 20 two-week pay periods to reach \$2,902.80 and from January 4 through August 1, 2009 her biweekly health insurance premium was \$164.58 and multiplied this amount by 15 two-week pay periods to reach \$2,468.70 for a total overpayment of \$5,371.50. OWCP found that appellant was not at fault in the creation of the overpayment. It provided her with an overpayment recovery questionnaire (OPRQ).

Appellant requested a prerecoupment hearing on September 1, 2009 and submitted the completed OPRQ on August 31, 2009 indicating that her monthly household income was \$3,055.00. She included \$1,800.00 from her husband, \$1,115.00 from social security and \$469.00 from OWCP benefits which total \$3,375.00. Appellant indicated that housing expenses were \$890.70, food was \$600.00 and utilities were \$600.00 with miscellaneous expenses of \$275.00 and incidentals of \$207.05. She listed her monthly debts as an additional \$282.25 for total expenses of \$3,055.00. Appellant stated that she had \$36.75 in her checking account and no savings account or other funds and property. She stated that repaying the premiums would create a serious hardship and make it impossible to survive financially. Appellant noted that she and her husband planned to separate and possibly divorce.

Appellant's attorney appeared at the prerecoument hearing on February 22, 2010 and stated that appellant would submit additional financial information. The hearing representative requested additional financial information clarifying the household income and members of the household, noting that appellant indicated that a separation from her husband was contemplated. She also requested documentation in support of the household expenses claimed. The hearing representative allowed 30 days for a response.

By decision dated April 16, 2010, the Branch of Hearings and Review found that there was an overpayment in the amount of \$5,371.50 for the period March 30, 2008 through August 1, 2009 as OWCP did not deduct health insurance premiums. The hearing representative noted that OWCP found appellant without fault in the creation of the overpayment. Appellant failed to provide the additional financial information requested by the hearing representative. The hearing representative found that appellant's household composition, income, expenses and assets could not be determined from the evidence in the record. The hearing representative found that due to the absence of requested financial information the record did not establish that recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience and concluded that the entire amount of the overpayment was due and payable.

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 the Office of Personnel Management (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 5 U.S.C. §§ 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

Under applicable OPM regulations, the employee or annuitant is responsible for payment of the employee’s share of the cost of enrollment.⁷ An agency that withholds less than the proper health benefits contribution must submit an amount equal to the sum of the uncollected deductions.⁸ The Board has recognized that, when an underwithholding of health insurance premiums is discovered, the entire amount is deemed an overpayment of compensation because the Office must pay the full premium to OPM when the error is discovered.⁹

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$5,371.50 for the period March 30, 2008 through August 1, 2009. The record reveals that, when the hearing representative reinstated appellant’s compensation benefits following an improper termination of benefits, OWCP did not begin deducting health benefits. The employing establishment paid health benefits through March 30, 2008 and no health insurance premiums were paid from March 30, 2008 through August 1, 2009. Thus, an overpayment was created by the underdeduction of premiums for the health benefits appellant elected. The Board finds, therefore, that OWCP properly determined that appellant received a \$5,371.50 overpayment for the stated period.

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.¹⁰ 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 the Act or would be against equity and good conscience.”

⁶ *Id.* at § 890.502(c).

⁷ *Id.* at § 890.502(a)(1).

⁸ *Id.*

⁹ *T.S.*, Docket No. 08-1604 (issued March 13, 2009); 5 C.F.R. § 890.502.

¹⁰ 5 U.S.C. § 8129(a).

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.

Section 10.436 of the implementing regulations¹¹ 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.¹²

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.¹³ 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.¹⁴

ANALYSIS -- ISSUE 2

Appellant submitted a completed overpayment recovery questionnaire with financial information outlining her income, expenses and assets. However, at the February 22, 2010 hearing, the hearing representative requested additional information related to her monthly income and expenses. Appellant did not submit the requested information.

As appellant did not submit complete financial information, there was insufficient evidence before OWCP establishing that recovery of the overpayment would defeat the purpose of FECA or would be against equity and good conscience.¹⁵ As she failed to submit the requested information, as required by section 10.438 of its regulations, she was not entitled to a

¹¹ 20 C.F.R. § 10.436.

¹² 20 C.F.R. § 10.437.

¹³ *Id.* at § 10.438(a).

¹⁴ *Id.* at § 10.438(b).

¹⁵ *See id.* at § 10.438(a) (in requesting waiver, the overpaid individual has the responsibility for providing financial information).

waiver.¹⁶ The Board finds that OWCP properly denied waiver of recovery of the \$5,371.50 overpayment of compensation.

LEGAL PRECEDENT -- ISSUE 3

Section 10.441 of Title 20 of the Code of Federal Regulations provide in pertinent part:

“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 the 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.”¹⁷

ANALYSIS -- ISSUE 3

The record reflects that appellant continues to receive wage-loss compensation under FECA. As noted, appellant failed to timely submit supporting documentation or properly represent her income on the overpayment questionnaire form. In cases where the appropriate financial documentation or overpayment questionnaire as required by 20 C.F.R. § 10.441 is not submitted, OWCP is unable to consider financial circumstances. The Board finds that OWCP did not abuse its discretion in following its regulations and finding that the overpayment was due in full.¹⁸

On appeal, appellant submitted additional new financial information. As OWCP did not consider this evidence in reaching a final decision, the Board may not review the evidence for the first time on appeal.¹⁹

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$5,371.50 for the period March 30, 2008 through August 1, 2009 for which she was not at fault. The Board further finds that appellant failed to submit the necessary financial information for OWCP to determine waiver and an appropriate repayment schedule. Therefore the Board finds that OWCP properly determined that appellant should repay the amount in full.

¹⁶ *Id.*

¹⁷ 20 C.F.R. § 10.441(a); *see Donald R. Schueler*, 39 ECAB 1056, 1062 (1988).

¹⁸ *C.H.*, Docket No. 09-26 (issued November 17, 2009).

¹⁹ 20 C.F.R. § 501.2(c)(1).

ORDER

IT IS HEREBY ORDERED THAT the April 16, 2010 decision of Office of Workers' Compensation Programs is affirmed.

Issued: August 17, 2011
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board