

On appeal, appellant, through his representative, argued that appellant is 80 years old and has numerous medical problems and his wife is 70 years old with serious health issues. They barely get by financially and should not have to pay for a mistake made over 10 years ago.

FACTUAL HISTORY

On September 18, 1991 appellant, then a 60-year-old aircraft worker, filed a traumatic injury claim alleging a back injury on September 17, 1991 while moving an engine. OWCP accepted his claim for a lumbar strain with herniated nucleus pulposus at L5-S1. Appellant underwent a lumbar disc excision and decompression at the L5-S1 level on September 24, 1991. He was placed on the periodic rolls. Appellant returned to work on April 24, 1994 as a modified aircraft mechanic. In a decision dated June 30, 1994, OWCP found that his actual earnings represented appellant's wage-earning capacity.

Appellant elected health insurance under Enrollment Code Number 105 commencing October 1, 1995. On August 20, 2010 OWCP made a preliminary determination that he was overpaid benefits in the amount of \$9,040.69 because health benefits premiums were not deducted from October 1, 1995 through July 31, 2010. It further determined that appellant was not at fault in the creation of the overpayment. OWCP instructed appellant of his right to disagree with the amount of the overpayment or to request waiver of the overpayment and instructed him of the procedures for doing so. It noted that appellant had 30 days to submit the requested information and notified him that under 20 C.F.R. § 10.438 failure to submit the requested information within 30 days would result in the denial of waiver.

On September 5, 2010 appellant submitted an overpayment action request seeking a telephone conference. He noted that the overpayment occurred through no fault of his own and requested a waiver. Appellant did not realize that insurance was not being deducted.

On September 13, 2010 appellant submitted financial documents. He advised that he was 80 years old and going blind and that his wife was 70 years old and on oxygen. Appellant reiterated that OWCP should waive the overpayment.

In a memorandum of conference dated September 23, 2010, the senior claims examiner noted that there was an overpayment in the amount of \$9,040.69 that was caused because health benefits premiums were not collected from appellant's compensation from October 1, 1995 through July 31, 2010. He discussed appellant's financial documentation and noted that appellant's monthly family income (self and spouse) was \$2,771.12. The senior claims examiner noted that appellant's monthly household expenses were: rent \$700.00; food \$450.00; clothing \$300.00; telephone \$100.00; car \$120.00; insurance \$163.27; maintenance \$291.22; medical expenses \$182.00; church charity \$100.00; cell phone \$36.00; and haircuts \$40.00. The total monthly expenses claimed were \$2,586.03. Other monthly liabilities included: Sears \$10.00; Chase \$10.00; Castle Key \$50.00; and GE Protection \$103.50. The senior claims examiner noted that as appellant's monthly net income was \$2,771.12 and monthly expenses were \$2,586.03, there was a difference of \$185.09. He determined that appellant did not meet the criteria for waiving the overpayment as he had not established that collecting the overpayment would be against equity and good conscience or defeat the purpose of FECA. The senior claims

examiner noted that both parties agreed upon a deduction in the amount of \$25.00 from appellant's continuing compensation payments.

By decision dated October 12, 2010, OWCP finalized the determination that appellant received an overpayment of compensation in the amount of \$9,040.69; that appellant was not at fault in the creation of the overpayment; that waiver was denied; and that the debt would be collected by deducting \$25.00 a month from appellant's 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 duty.² 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.³

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.⁴

Under applicable OPM regulations, the employee or annuitant is responsible for payment of the employee's share of the cost of enrollment.⁵ An agency that withholds less than the proper health benefits contribution must submit an amount equal to the sum of the uncollected deductions.⁶ The Board has recognized that, when an under withholding of health insurance

² *Id.* at § 8102(a).

³ 5 C.F.R. § 890.502(a)(1).

⁴ *Id.* at § 890.502(c).

⁵ *Id.* at § 890.502(a)(1).

⁶ *Id.*

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

While the employee is receiving compensation under FECA, deductions for insurance are withheld from the employee's compensation.⁸ At separation from the employing establishment, 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.⁹ When an under withholding 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.¹⁰

ANALYSIS -- ISSUE 1

The record establishes an overpayment of compensation. Appellant elected health insurance coverage under Enrollment Code 105 on October 1, 1995. However, deductions were not made from his monetary compensation from that date until July 31, 2010. Once OWCP learned that appellant had health insurance and no deductions had been made for the premiums, it advised him that he had been paid an incorrect rate and that an overpayment was created. The overpayment worksheet establishes that proper deduction for his share of the health insurance premiums was \$9,040.69. In the absence of a specific waiver or cancellation of coverage, of which there is none of record, OWCP should have deducted the premiums. 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 \$9,040.69 from October 1, 1995 through July 31, 2010.

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.¹¹ An individual should always be found without fault where the overpayment resulted from OWCP error in the under deduction of health benefits or life insurance premiums.¹²

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

⁷ 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.

⁸ 5 U.S.C. § 8707(b)(1).

⁹ *Id.* at § 8706(b).

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

¹¹ 20 C.F.R. § 10.433(a).

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

FECA; or (2) adjustment or recovery of the overpayment would be against equity and good conscience.¹³

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 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.¹⁴ 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 \$50.00.¹⁵

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.¹⁶ 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.¹⁷

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.¹⁸

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

¹³ 20 C.F.R. § 10.434. *See* 5 U.S.C. § 8129(b).

¹⁴ *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.

¹⁵ *Sherry A. Hunt*, 49 ECAB 467, 473 (1998).

¹⁶ 20 C.F.R. § 10.437(a).

¹⁷ *Id.* at § 10.437(b).

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

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 \$2,771.12 a month and monthly expenses of \$2,586.03 a month, or a difference of \$185.09. 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 \$50.00.¹⁹ The Board finds that, as appellant's monthly income of \$2,771.12 exceeded his documented reasonable monthly expenses of \$2,586.03 by \$185.09, 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 October 1, 1995 through July 31, 2010. 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 \$9,040.69.

Appellant properly contends on appeal that the overpayment was not caused due to any fault of his own. However, after considering his financial status, *i.e.*, income and expenses, the Board finds, for the reasons set forth above, that OWCP properly found 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.²⁰

ANALYSIS -- ISSUE 3

OWCP noted that appellant's monthly income exceeded expenses by \$185.09. It determined that he could repay the debt at the rate of \$25.00 a month without great hardship. The Board finds that OWCP gave due regard to the relevant factors noted above and did not

¹⁹ *Supra* note 12 at Chapter 6.200.6(a)(3) (June 2009).

²⁰ 20 C.F.R. § 10.441(a).

abuse its discretion in setting the rate of recovery. The Board will affirm OWCP's decision on the rate of recovery.²¹ Thus, appellant's contentions on appeal concerning his and his spouse's health concerns and their ability to repay do not formulate a basis for changing the ultimate disposition.

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment in the amount of \$9,040.69 because health benefit premiums were not properly deducted from his compensation payments for the period October 1, 1995 through July 31, 2010. The Board further finds that OWCP properly denied waiver of the overpayments and properly set the rate of recovery of \$25.00 from continuing compensation payments.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 12, 2010 is affirmed.

Issued: November 22, 2011
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

²¹ The Board will review the issue of recovery of an overpayment in those cases where OWCP seeks recovery from continuing compensation benefits. *See Desiderio Martinez*, 55 ECAB 245, 251 (2004).