

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

K.H., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Oakland, CA, Employer**

)
)
)
)
)
)
)
)
)
)
)
)

**Docket No. 11-603
Issued: September 27, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 13, 2011 appellant filed a timely appeal from a November 2, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) finding that he received an overpayment of compensation in the amount of \$7,615.23 during the period October 3, 2004 through December 20, 2008 and that he was at fault in the creation of the overpayment. Pursuant to the Federal Employees' Compensation Act (FECA)¹ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the overpayment issue.

ISSUE

The issue is whether OWCP properly issued the November 2, 2010 overpayment decision.

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

This case was previously before the Board. By decision dated June 11, 2010, the Board affirmed OWCP's March 16, 2009 determination that an overpayment for optional life insurance premiums in the amount of \$1,309.00 was created during the period October 3, 2004 through December 20, 2008. It set aside OWCP's determination that appellant received an overpayment of compensation during that period based on an underwithholding of health insurance premiums.² Appellant asserted that his carrier cancelled his health benefit coverage on November 1, 2005 and that he was covered by this wife's health insurance plan as of that date. The Board found there was insufficient evidence to determine whether the employer transferred coverage as requested by OWCP or that appellant properly followed Office of Personnel Management (OPM) procedures to cancel his health insurance enrollment before December 20, 2008. The Board directed OWCP to obtain relevant evidence from the employing establishment and OPM documenting when appellant was covered by health insurance and whether he ever elected to cancel his enrollment through OPM.³ The facts of the case as set forth in the Board's prior decision are incorporated herein by reference.

Following the Board's June 11, 2010 decision, OWCP sent letters dated September 16, 2010 to the employing establishment and OPM. It requested that the employer and OPM provide documentation regarding whether appellant had health insurance coverage from October 3, 2004 through December 20, 2008 and whether he elected to cancel his enrollment at anytime during that period. In a September 17, 2010 telephone call, OWCP asked OPM to provide information regarding whether appellant requested a waiver of health benefits coverage. On September 23, 2010 it asked appellant to document any coverage that he had under his wife's health insurance plan from October 3, 2004 through December 20, 2008.

In an October 4, 2010 letter, appellant stated that he enclosed documentation for coverage under his wife's plan during the period November 1, 2002 through April 1, 2009. In an attached October 4, 2010 letter, Ron Dardis, a senior health plan representative, Kaiser Health Plan, indicated that appellant was a member of the Kaiser Health Plan from November 1, 2002 through April 1, 2009. Appellant was covered under Napa County group number 32813 from November 1, 2002 through January 1, 2006 and under PERS group number 3 from January 1, 2006 through April 1, 2009. He also provided correspondence from himself to OPM and from OPM regarding his inquiries regarding retirement and annuities from March 26, 2007 through February 18, 2009. The documents provided did not indicate whether appellant attempted to or had canceled his enrollment with OPM under the Federal Employees' Health Benefits (FEHB) Plan.

By decision dated November 2, 2010, OWCP found that appellant received a \$7,615.23 overpayment of compensation because premiums for health and optional life insurance were not deducted from his compensation from October 3, 2004 through December 21, 2008. It reissued its previous decision of March 16, 2009 and also noted the new evidence provided by appellant.

² Docket No. 09-1554 (issued June 11, 2010).

³ In light of its disposition on the amount of overpayment, the Board found the issues regarding fault and recovery were premature.

OWCP found that the evidence from appellant was insufficient to show that he had no health insurance coverage during the period at issue.⁴ It incorporated its preliminary determination that appellant was at fault in creating the overpayment as he accepted payments he knew or reasonably should have known were for incorrect amounts. OWCP directed recovery of the overpayment in the manner described on an attached EN2223 enclosure. No EN2223 accompanied the decision.

LEGAL PRECEDENT

Under section 8129 of FECA and the implementing regulations, an overpayment must be recovered unless 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.⁵

Section 10.431 of the implementing regulations provide that, before seeking to recover an overpayment or adjust benefits, OWCP will advise the individual in writing that the overpayment exists and the amount of the overpayment.⁶ The written notification must also include a preliminary finding regarding whether the individual was at fault in the creation of the overpayment.⁷ Additionally, OWCP is obliged to advise the individual of his or her right to inspect and copy the government records relating to the overpayment.⁸ Lastly, the preliminary notice must inform the individual of his or her right to challenge the fact or amount of the overpayment, the right to contest the preliminary finding of fault in the creation of the overpayment, if applicable, and the right to request a waiver of recovery of the overpayment.⁹ The recipient of the alleged overpayment may present evidence in response to OWCP's preliminary notice either in writing or at a precoupment hearing.¹⁰ The evidence must be presented or the hearing requested within 30 days of the date of the written notice of overpayment.¹¹ Failure to request the hearing within this 30-day time period shall constitute waiver of that right.¹²

⁴ OWCP stated that, in response to its September 16, 2010 letter and September 17, 2010 telephone call, OPM provided several documents dated from March 26, 2007 to February 18, 2009 which did not indicate whether appellant canceled his health benefits enrollment. The Board notes that these documents appear to have been provided by appellant.

⁵ 5 U.S.C. § 8129(b); 20 C.F.R. §§ 10.433, 10.434, 10.436, 10.437.

⁶ 20 C.F.R. § 10.431(a).

⁷ *Id.* at § 10.431(b).

⁸ *Id.* at § 10.431(c).

⁹ *Id.* at § 10.431(d).

¹⁰ *Id.* at § 10.432.

¹¹ *Id.*

¹² *Id.*

OWCP procedures provide that, once an overpayment is identified and calculated, OWCP is responsible for determining whether the claimant was with fault or without fault, issuing a preliminary finding, and unless a hearing is requested, OWCP is responsible for issuing a final decision.¹³ These procedures note that, if the claimant is determined to be with fault, Form CA-2201 (preliminary finding notice) must be released within 30 days of the date the overpayment is identified. Both the reason that the overpayment occurred and the reason for the finding of fault must be clearly stated. Form CA-2201 informs the claimant of the right to submit evidence and the right to a precoupment hearing on the issues of (a) fact and amount of overpayment; (b) fault and (c) waiver. Along with Form CA-2201, OWCP should provide a clearly written statement explaining how the overpayment was calculated.¹⁴

ANALYSIS

The Board previously affirmed that appellant received a \$1,209.00 overpayment for life insurance premiums during the period October 3, 2004 through December 20, 2008. However, it otherwise set aside OWCP's overpayment, fault and recovery findings noting that further evidentiary development was needed with regard to whether appellant received an overpayment regarding healthy insurance premiums. The Board directed OWCP to obtain relevant evidence from the employer and OPM documenting whether appellant canceled his health insurance enrollment through OPM. Although OWCP requested such documentation from OPM and the employing establishment, it received no responsive evidence from the employing establishment or OPM before it issued its November 2, 2010 final overpayment decision. As such the Board is unable to determine if OWCP's calculations were correct.¹⁵ OWCP's decision offered no explanation regarding why it did not obtain the documentation directed in the Board's June 11, 2010 decision. The Board has held that it has final authority to determine questions of law and its determinations are binding upon OWCP.¹⁶ The Board finds that OWCP did not take the action directed by the Board or offer any explanation regarding why it was unable to further develop the evidence as directed by the Board.¹⁷

The Board also finds that OWCP failed to follow its procedures in issuing the November 2, 2010 overpayment decision. OWCP's regulations provide that before seeking to recover an overpayment or adjust benefits, it will advise the individual in writing that the overpayment exists and the amount of overpayment.¹⁸ It must inform the individual of his or her right to challenge the fact or amount of the overpayment, the right to contest the preliminary finding of fault in the creation of the overpayment and the right to request a waiver of recovery

¹³ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.4 (May 2004).

¹⁴ *Id.* at Chapter 2.600.4(a)(1) (May 2004).

¹⁵ *G.K.*, Docket No. 08-1620 (issued July 2, 2009).

¹⁶ *See Paul Raymond Kuyoth*, 27 ECAB 498, 503-04 (1976); *Anthony Greco*, 3 ECAB 84, 85 (1949).

¹⁷ *See Frank W. White*, 42 ECAB 693 (1991) (Board's order in a prior appeal imposed an obligation on the Director to take particular actions as directed).

¹⁸ 20 C.F.R. § 10.431(a).

of the overpayment.¹⁹ OWCP's procedure manual further provides that a preliminary finding of overpayment must be provided within 30 days and must clearly identify the reason that the overpayment occurred and the basis for any fault finding.²⁰ In this case, OWCP never mailed a new preliminary decision to appellant advising him of its findings following the Board's prior decision remanding the case and it did not provide him with the right to challenge the amount of overpayment or its finding of fault in the creation of the overpayment, thereby infringing upon his procedural rights under its own regulations.²¹ The Board has previously determined that failure to inform him in writing of his or her rights is reversible error.²² Therefore OWCP did not provide appellant due process and improperly issued the November 2, 2010 overpayment decision.²³

Consequently, the Board must set aside the November 2, 2010 decision and remand the case to OWCP for it to conduct appropriate further development of the evidence as contemplated in the Board's June 11, 2010 decision. Following this and such other development as deemed appropriate, OWCP shall issue a preliminary determination regarding any overpayment, pursuant to its procedures, prior to making any final overpayment determination.

CONCLUSION

The Board finds that OWCP improperly issued its November 2, 2010 decision. The case is remanded for further action consistent with this decision.

¹⁹ *Id.* at § 10.431(d).

²⁰ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.4(a)(1) (May 2004).

²¹ *Id.* at §§ 10.431, 10.432.

²² *F.C.*, 59 ECAB 666 (2008).

²³ *See K.G.*, Docket No. 08-2135 (issued April 16, 2009) (the Board, in a prior appeal, set aside an overpayment decision and remanded the case for further development regarding whether the overpayment occurred, after which OWCP issued a final overpayment decision without issuing a new preliminary finding; the Board found that OWCP erred in not issuing a new preliminary finding and that the final overpayment decision was improperly issued).

ORDER

IT IS HEREBY ORDERED THAT the November 2, 2010 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision.

Issued: September 27, 2011
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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