

On appeal, appellant contends that he was not at fault in creating the overpayment because he informed OWCP, the employing establishment and the Office of Personnel Management (OPM) that deductions were not being made from his compensation benefits. He further contends that he is unable to repay the overpayment due to financial hardship.

FACTUAL HISTORY

OWCP accepted that on November 22, 1993 appellant, then a 51-year-old surveying technician, sustained a lumbar strain, medical meniscus tear of the right knee and an old disruption of a medial collateral ligament of the left knee as a result of a fall at work.

On October 27, 2010 OWCP issued a preliminary determination finding that appellant received an overpayment of compensation in the amount of \$18,585.20 from June 27, 1994 through May 8, 2010 because premiums for health benefits, basic life insurance and postretirement basic life insurance were not deducted from his compensation for this period. Appellant was found not at fault in the creation of the overpayment. OWCP requested that he complete an enclosed overpayment recovery questionnaire and submit supporting financial documents. It notified appellant that, within 30 days of the date of the letter, he could request a telephone conference, a final decision based on the written evidence or a precoupment hearing.

An overpayment computation worksheet indicates that deductions for appellant's health insurance for code 105 from August 2, 2005 through May 8, 2010, basic life insurance from June 27, 1994 through April 7, 1996 and postretirement basic life insurance from January 25, 2005 through April 11, 2009 were not made for the stated periods.

On November 22, 2010 appellant disagreed with the proposed action. He requested a precoupment hearing, but indicated that he was open to having a precoupment telephone conference if deemed suitable by OWCP. Appellant contended that he was not at fault because he advised the employing establishment, OPM, the Department of Agriculture's finance office and OWCP's finance office on numerous occasions that medical premiums were not being deducted from his compensation. OWCP's finance office responded that it did not know anything about his situation and that it was OPM's problem. Also, on November 22, 2010 appellant completed the overpayment questionnaire. He reported monthly income of \$1,878.00 in Social Security benefits, \$812.00 and \$712.13 in Supplemental Security Income and \$160.00 in dividends and interest, totaling \$3,562.13. Appellant also reported monthly expenses which included \$820.00 in mortgage or rent, \$400.00 for food, \$100.00 for clothing, \$395.00 for utilities, \$800.00 for other expenses, \$150.00 for a Visa credit card and \$240.00 for a MasterCard credit card, totaling \$2,905.00. He had \$150.00 cash on hand, \$30.00 in a checking account, \$16,000.00 in a savings account, totaling \$16,180.00.

In an April 12, 2010 memorandum, the employing establishment indicated that appellant retired in August 2005. It was advised by him that his health insurance had been cancelled as of January 7, 2010. Appellant received a statement from OWCP four years ago which did not reflect his payment for health benefits. When he contacted OWCP about the status of his health benefits, he was advised to contact the employing establishment or OPM.

Following the April 12, 2011 telephone hearing, appellant submitted financial documents, including a credit union statement which indicated that \$15,692.04 was in a certificate of deposit account. He stated that he did not have access to this account because it belonged to his wife.

In a June 28, 2011 decision, an OWCP hearing representative finalized the preliminary overpayment determination. The hearing representative found that appellant received an overpayment of \$18,585.20 from June 27, 1994 through May 8, 2010 and, while he was not at fault, he was not entitled to waiver of the overpayment because the evidence of record did not establish that repayment of the overpayment would cause him financial hardship. She found that although he stated that he did not have access to the certificate of deposit savings account the account was a marital asset. The hearing representative determined that the debt would be recovered by deducting \$250.00 from continuing compensation payments every 28 days effective July 31, 2011.

In a July 12, 2011 decision, OWCP set forth the overpayment recovery schedule. Based on its calculation, the overpayment would be fully repaid on April 2, 2017.

LEGAL PRECEDENT -- ISSUE 1

Section 8102 of 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

OPM, rather than OWCP, has jurisdiction over the matter of health insurance deductions from compensation and over enrollment under the Federal Employees' Health Benefits (FEHB).³ OPM regulations provide guidelines for the registration, enrollment and continuation of enrollment for federal employees. In this connection, section 890.502(a)(1) provides that 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 due to the United States in the amount of the proper employee withholding required for that pay period.⁴ In addition, section 890.502(c)(1) 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 of the United States Code, to OPM for deposit in the Employees' Health Benefits Fund.⁵ When OWCP deducts less than the proper health benefit premium for the coverage selected, an overpayment in compensation is created.⁶

² *Id.* at § 8102(a).

³ *Raymond C. Beyer*, 50 ECAB 164 (1998).

⁴ 5 C.F.R. § 890.502(a)(1).

⁵ 5 U.S.C. § 8906; *Id.* at § 890.502(c)(1).

⁶ *See John Skarbek*, 53 ECAB 630 (2002).

The Board has recognized that, when an under withholding of health insurance premiums is discovered, the entire amount is deemed an overpayment in compensation because OWCP must pay the full premium to OPM when the error is discovered.⁷

Under the Federal Employees' Group Life Insurance Program (FEGLI), most civilian employees of the Federal Government are eligible to participate in basic life insurance and one or more of the options.⁸ The coverage for basic life insurance is effective unless waived⁹ and the premiums for basic and optional life coverage are withheld from the employee's pay.¹⁰ At separation from the employing establishment, the FEGLI insurance will either terminate or be continued under compensation status. If the compensationner 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.¹¹ When an underwithholding 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.¹² OWCP's procedures provide that in order to be eligible for optional life insurance, a claimant must also be enrolled in basic life insurance coverage.¹³

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$18,585.20 from June 27, 1994 through May 8, 2010. A computation worksheet noted that OWCP did not make deductions for his enrollment in FEHB code 105, basic life insurance and postretirement basic life insurance premiums for the stated period which totaled \$18,585.20. Appellant has not disputed this amount. Further, there is no evidence that he waived coverage. When an under withholding of these premiums 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.¹⁴ The Board finds that OWCP properly determined that an overpayment of compensation in the amount of \$18,585.20 was created for the period June 27, 1994 through May 8, 2010.

⁷ *James Lloyd Otte*, 48 ECAB 334 (1997).

⁸ 5 U.S.C. § 8702(a); 5 C.F.R. § 870.201.

⁹ *Id.* at § 8702(b); *Id.* at § 870.204(a).

¹⁰ *Id.* at § 8707.

¹¹ *Id.* at § 8706(b); 20 C.F.R. § 870.401.

¹² *Id.* at § 8707(d); *Keith H. Mapes*, 56 ECAB 130 (2004).

¹³ Federal (FECA) Procedure Manual, Part 5 -- Benefit Payments, *Life Insurance*, Chapter 5.401.4(a) (August 2004).

¹⁴ *James Lloyd Otte*, *supra* note 7; *Keith H. Mapes*, *supra* note 12.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA provides that an overpayment in compensation shall be recovered by OWCP 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.¹⁵ Section 10.438 of OWCP 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.¹⁶ Failure to submit the requested information within 30 days of the request shall result in denial of waiver.¹⁷

ANALYSIS -- ISSUE 2

As OWCP found appellant without fault in the creation of the overpayment of compensation, waiver must be considered and repayment is still required unless adjustment or recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.¹⁸

Appellant furnished OWCP with an overpayment questionnaire on November 22, 2010 and submitted supporting financial information following the telephone conference held on April 12, 2011. He initially reported monthly income of \$3,562.00, monthly expenses of \$2,905.00 and assets of \$16,180.00. Subsequently, appellant argued that he did not have access to his wife's certificate of deposit which had decreased from \$16,000.00 to \$15,692.04. However, he did not submit any evidence in support of his contention. Appellant listed the certificate of deposit as an asset on his overpayment questionnaire. As the record establishes that his monthly income exceeds his monthly expenses by \$657.00, he is not entitled to waiver as he does not need substantially all of his income to meet current ordinary and necessary expenses. Because appellant has income which exceeds his monthly expenses by more than \$50.00, as set

¹⁵ 5 U.S.C. § 8129.

¹⁶ Recovery of an overpayment will defeat the purpose of FECA if such recovery would cause hardship to a currently or formerly entitled beneficiary because: (a) the beneficiary from whom OWCP seeks recovery needs substantially all of his or her current income (including compensation benefits) to meet current or ordinary and necessary living expenses; and (b) the beneficiary's assets do not exceed a specified amount as determined by OWCP from data furnished by the Bureau of Labor Statistics. 20 C.F.R. § 10.436. 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. *Id.* at § 10.437.

¹⁷ 20 C.F.R. § 10.438.

¹⁸ *Id.* at §§ 10.436, 10.437.

forth by OWCP in its procedure manual, the Board concludes that he has failed to demonstrate that recovery of the overpayment would defeat the purposes of FECA.¹⁹

Additionally, the evidence does not demonstrate that recovery of the overpayment would be against equity and good conscience. Contrary to appellant's contention that recovery of the overpayment would cause a severe financial hardship for him, the availability of assets indicates that he would not experience financial hardship attempting to repay the debt. The factors considered regarding financial hardship are substantially the same as those factors to determine whether repayment would defeat the purpose of FECA and, as noted above, appellant has sufficient available assets.²⁰ Moreover, appellant has not presented evidence that he gave up a valuable right or changed his position for the worse in reliance on the overpayment. The Board finds that recovery of the overpayment would not be against equity and good conscience since there is no evidence of record from which to conclude that he relied on his incorrectly calculated compensation payments to relinquish a valuable right or change his position for the worse.

As the evidence fails to support that, recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience, OWCP did not abuse its discretion by denying waiver of recovery.

On appeal, appellant contended that he was without fault with regard to the overpayment. However, as OWCP had already found that he was without fault, this argument is not relevant to the issues in this case.

LEGAL PRECEDENT -- ISSUE 3

The individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by OWCP. This information will be used to determine the repayment schedule, if necessary.²¹

When an overpayment has been made to an individual who is entitled to further payments and 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.²²

ANALYSIS -- ISSUE 3

With respect to the recovery of an overpayment, the Board notes that its jurisdiction is limited to reviewing those cases where OWCP seeks recovery from continuing compensation

¹⁹ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a)(1) (October 2004).

²⁰ *Id.* at Chapter 6.200.6(b)(1) (June 2009); see *Jan K. Fitzgerald*, 51 ECAB 659 (2000).

²¹ 20 C.F.R. § 10.438(a).

²² *Id.* at § 10.441(a).

benefits under FECA.²³ Regarding the recovery of the \$18,585.20 overpayment from appellant's continuing compensation, OWCP found it reasonable to deduct \$250.00 from his periodic continuing compensation payments to recover the debt.

With respect to the \$250.00 withheld from appellant's continuing compensation payments to recover the overpayment, OWCP's regulations list factors to be considered in determining repayment.²⁴ The implementing regulations provide that OWCP must take 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.²⁵

OWCP found that recovery of the overpayment would be made by an adjustment against continuing compensation at the rate of \$250.00 every 28 days.²⁶ The financial evidence of record reveals that appellant's monthly income exceeded his expenses by \$657.00 and he has assets totaling approximately \$15,872.04. Based on the evidence of record, OWCP took into consideration relevant factors so as to minimize any hardship and properly directed recovery of the overpayment by deducting \$250.00 from continuing compensation payments every 28 days.²⁷

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment in the amount of \$18,585.20 from June 27, 1994 through May 8, 2010. The Board further finds that OWCP properly denied waiver of recovery of the overpayment. Lastly, the Board finds that OWCP properly directed recovery of the overpayment at the rate of \$250.00 every 28 days from appellant's continuing compensation payments.

²³ *Terry A. Keister*, 56 ECAB 559 (2005); *see also Cheryl Thomas*, 55 ECAB 610 (2004).

²⁴ 20 C.F.R. § 10.441; *see Fred A. Cooper, Jr.*, 44 ECAB 498 (1994).

²⁵ *Id.*

²⁶ *Supra* note 22.

²⁷ Federal (FECA) Procedure Manual, *supra* note 19 at Chapter 6.200.4(c)(2) and 6.200.4.d(1)(b) (May 2004).

ORDER

IT IS HEREBY ORDERED THAT the July 12 and June 28, 2011 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 9, 2012
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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