

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

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**J.B., Appellant** )

**and** )

**DEPARTMENT OF AGRICULTURE,** )  
**U.S. NATIONAL ABORETUM, Washington, DC,** )  
**Employer** )

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**Docket No. 11-2005  
Issued: July 23, 2012**

*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, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On September 9, 2011 appellant filed a timely appeal of the April 26, 2011 overpayment decision of the Office of Workers' Compensation Programs. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUES**

The issues are: (1) whether appellant received an overpayment of \$17,285.42 because OWCP did not deduct premiums for health benefits for the period June 16, 2002 through January 19, 2008; (2) whether he was at fault in the creation of the \$17,285.42 overpayment and, therefore, ineligible for waiver of the recovery; and (3) whether OWCP properly ordered him to repay the overpayment in full.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

This case has previously been on appeal before the Board. On January 13, 2009 the Board issued an order remanding case.<sup>2</sup> The Board set aside an OWCP decision dated April 1, 2008 in which OWCP exercised its discretion in finding that as appellant's accepted February 10, 1958 employment injury occurred before enactment of the July 4, 1966 amendments, he was not entitled to a hearing or review of the written record as a matter of right. The Board found that appellant timely and properly requested a prerecoupment hearing under section 8129 of FECA following a February 12, 2008 preliminary finding of an overpayment and OWCP's Branch of Hearings and Review improperly treated this request as a request for an oral hearing under section 8124 of FECA. On remand, the Branch of Hearings and Review was instructed to schedule and conduct a prerecoupment hearing regarding the preliminary overpayment determination and issue an appropriate decision. In an order remanding case dated September 24, 2010, the Board set aside a June 30, 2009 OWCP decision finding that appellant had abandoned a hearing.<sup>3</sup> The Board found that the record did not establish that he was properly notified of the scheduled hearing regarding the February 12, 2008 preliminary determination of overpayment. The Board remanded the case for OWCP to schedule a hearing before an OWCP hearing representative with proper notice provided to appellant. The facts and history relevant to the present appeal are hereafter set forth.

OWCP accepted that on February 10, 1958 appellant, then a 30-year-old janitor, sustained a contusion of the first sacral nerve root while in the performance of duty.

On February 12, 2008 OWCP issued a preliminary determination, finding that appellant received an overpayment of compensation in the amount of \$17,285.42 from June 16, 2002 through January 19, 2008 because premiums for health benefits were not deducted from his compensation for this period. He was found at fault in the creation of the overpayment because he should have known that he was covered by health insurance, but was not paying for such coverage. OWCP requested that appellant complete an enclosed overpayment recovery questionnaire and submit supporting financial documents. It notified him 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 prerecoupment hearing.

Federal Employees' Health Benefits (FEHB) forms showed that appellant was enrolled under code number 105. An overpayment worksheet indicates that deductions for his health insurance for code 105 from June 16, 2002 through January 19, 2008 were not made for the stated period.

On February 25, 2008 and September 10, 2009 appellant contended that he was not at fault in creating the overpayment and requested waiver. He contended that OWCP was at fault in creating the overpayment. Appellant attributed his worsening pain and undue financial hardship to his accepted employment injury.

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<sup>2</sup> Docket No. 08-1429 (issued January 13, 2009).

<sup>3</sup> Docket No. 10-167 (issued September 24, 2010).

Following the issuance of the Board's September 24, 2010 order remanding case, OWCP, in an October 4, 2010 letter, informed appellant that a prerecoupment hearing was scheduled at 3:15 p.m. on November 15, 2010.

On November 24, 2010 appellant completed the overpayment questionnaire. He reported monthly income of \$862.88 which included \$368.88 in OWCP compensation. Appellant also reported monthly expenses in the amount of \$3,268.60. He owed an additional \$20,063.66 in medical expenses. Appellant had \$100.00 in a checking account.

The November 15, 2010 hearing was not held. Instead, a telephone hearing was held on December 20, 2010. During the hearing, appellant stated that OWCP was deducting \$300.00 from his compensation benefits in repayment of the outstanding \$17,285.42 overpayment.<sup>4</sup>

In an April 26, 2011 decision, an OWCP hearing representative finalized the preliminary overpayment determination. He found that appellant received an overpayment of \$17,285.42 for the period June 16, 2002 through January 19, 2008 and he was with fault in creation of the overpayment, thus precluding waiver of recovery of the overpayment. The hearing representative found that the factual evidence established that appellant was advised by statements that his health benefits comprised a portion of his monthly deductions. He noted that such deductions were not reflected on appellant's statements during the period in question and that he certainly would have seen a change in his monthly compensation received during this period. The hearing representative ordered OWCP to cease deducting \$300.00 from appellant's compensation for repayment of the overpayment. He determined that since appellant's monthly expenses exceeded his monthly income by \$1,353.64 which included cessation of the \$300.00 deduction made by OWCP, a reasonable repayment plan could not be established. Thus, the hearing representative ordered appellant to repay the overpayment in full.

### **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.<sup>5</sup>

The Office of Personnel Management (OPM), rather than OWCP, has jurisdiction over the matter of health insurance deductions from compensation, and over enrollment under the FEHB.<sup>6</sup> 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

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<sup>4</sup> The Board notes that OWCP, by letter dated August 28, 2009, advised appellant that it would deduct \$300.00 from his continuing compensation since he had not submitted a payment or indicated that he intended to repay the \$17,285.42 overpayment as finalized in its April 24, 2008 decision.

<sup>5</sup> 5 U.S.C. § 8102(a).

<sup>6</sup> *Raymond C. Beyer*, 50 ECAB 164 (1998).

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.<sup>7</sup> 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.<sup>8</sup> When OWCP deducts less than the proper health benefit premium for the coverage selected, an overpayment in compensation is created.<sup>9</sup> The Board has recognized that, when an underwithholding 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.

### **ANALYSIS -- ISSUE 1**

The Board finds that appellant received an overpayment of compensation in the amount of \$17,285.42 from June 16, 2002 to January 19, 2008. The record supports that, for the stated period, OWCP did not make deductions from appellant's FECA benefits for his enrollment in FEHB code 105. OWCP established that the premium for health insurance code 105 for this period was \$17,285.42. There is no evidence that appellant waived coverage. When an underwithholding of this premium 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.<sup>10</sup> The Board finds, therefore, that OWCP should have deducted health benefit premiums as he had elected enrollment and premiums were not deducted. This omission created an overpayment in compensation in the amount of \$17,285.42. The Board finds, therefore, that OWCP properly determined that appellant received a \$17,285.42 overpayment for the stated period.

### **LEGAL PRECEDENT -- ISSUE 2**

An individual who is found at fault in either accepting or creating an overpayment is not eligible for a waiver of recovery of overpayment.<sup>11</sup> A benefits recipient will be at fault if the individual: (1) made an incorrect statement as to a material fact which he knew or should have known to be incorrect; (2) failed to provide information which he knew or should have known to be material; or (3) accepted a payment which he knew or should have known to be incorrect.<sup>12</sup>

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<sup>7</sup> 5 C.F.R. § 890.502(a)(1).

<sup>8</sup> 5 U.S.C. § 8906; 5 C.F.R. § 890.502(c)(1).

<sup>9</sup> See *John Skarbek*, 53 ECAB 630 (2002).

<sup>10</sup> *Id.*; *Keith H. Mapes*, 56 ECAB 130 (2004).

<sup>11</sup> 5 U.S.C. § 8129(b); 20 C.F.R. §§ 10.433(a) and 10.434.

<sup>12</sup> 20 C.F.R. § 10.433(a).

## **ANALYSIS -- ISSUE 2**

OWCP applied the third standard in determining that appellant was at fault in the creation of the overpayment. It must thus establish that, at the time he received the compensation in question, he knew or should have known that the payment was incorrect.<sup>13</sup> The Board finds that OWCP has not established that appellant accepted a payment that he knew or should have known was incorrect during the period June 16, 2002 through January 19, 2008. In finding that he was at fault, OWCP mentioned his receipt of benefit statements that advised him that his health benefits comprised a portion of his monthly deductions, but noted that such deductions were not reflected on his statements during the stated period and that he would have seen a change in his monthly compensation received during this period. OWCP has not sufficiently explained what evidence put appellant on notice that he was accepting an incorrect payment of compensation from June 16, 2002 through January 19, 2008. The Board finds that, under the circumstances, the evidence is insufficient to establish that he knew or should have known that he received an incorrect payment for the period June 16, 2002 through January 19, 2008. Consequently, the case will be remanded to OWCP to consider whether the overpayment created for this period should be waived.

## **CONCLUSION**

The Board finds that OWCP properly determined that appellant received a \$17,285.42 overpayment of compensation because it did not deduct health benefit premiums from his compensation for the period June 16, 2002 through January 19, 2008. The Board further finds that he was not at fault for the overpayment that occurred from June 16, 2002 through January 19, 2008 and that, consequently, the case must be remanded to OWCP to consider waiver of the overpayment.<sup>14</sup>

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<sup>13</sup> See *A.L.*, Docket No. 09-1529 (issued January 13, 2010); *Tammy Craven*, 57 ECAB 689 (2006); *Robin O. Porter*, 40 ECAB 421 (1989).

<sup>14</sup> In view of the Board's finding that the case must be remanded for OWCP to consider waiver of the overpayment, it is premature to address recovery of the overpayment.

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 26, 2011 decision of the Office of Workers' Compensation Programs is affirmed in part with regard to fact and amount of overpayment and reversed in part with regard to the finding of fault. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: July 23, 2012  
Washington, DC

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

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

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