

FACTUAL HISTORY

On December 30, 1996 appellant, then a 30-year-old medical clerk, filed a traumatic injury claim alleging that on that date she injured her neck and shoulders when she slipped on stairs. OWCP accepted the claim for cervical strain, left shoulder strain, aggravation of other affections of the left shoulder, aggravation of interstitial myositis, muscle spasm, aggravation of cervicgia, aggravation of cervical neuritis or radiculitis, aggravation of cervical spondylosis without myelopathy and chronic pain syndrome. Appellant worked with restrictions until February 15, 2007, when she stopped work to undergo an anterior cervical discectomy and fusion at C4-5 and C5-6. OWCP paid her compensation for total disability.

On January 8, 2009 appellant returned to work for two hours a day with the employing establishment. OWCP paid her compensation beginning January 19, 2009 for intermittent disability. It did not deduct premiums for health benefits. Appellant subsequently increased to three hours a day in August 2009 and to four hours a day in September 2009. OWCP continued to pay her compensation for lost wages without deducting premiums for health benefits.

On April 20, 2011 OWCP advised appellant that it would begin deducting health premiums from her compensation. The employing establishment informed OWCP that it had not deducted her health benefit premiums from January 18, 2009 through April 9, 2011.²

On January 3, 2012 OWCP notified appellant of its preliminary determination that she received an overpayment of compensation, for which she was without fault, because it did not deduct premiums for health benefits from January 18, 2009 through April 9, 2011. It calculated the overpayment by determining the amount of premiums that it should have deducted for Code 105 health benefits during the period, \$10,320.46. OWCP further advised appellant of its preliminary determination that she was not at fault in the creation of the overpayment. It requested that she complete the enclosed overpayment recovery questionnaire and submit supporting financial documents. Additionally, OWCP notified appellant that, within 30 days of the date of the letter, she could request a telephone conference, a final decision based on the written evidence or a prerecoupment hearing.

On January 12, 2012 appellant informed the Branch of Hearings and Review that she was not at fault in creating the overpayment and requested waiver of recovery of the overpayment. At a telephone hearing, held on May 4, 2012, she asserted that she had not received an overpayment recovery questionnaire. Appellant provided the hearing representative with estimated income and expenses for herself and her husband. She also related that she had no cash, savings, stocks, bonds or other personal property. OWCP's hearing representative informed counsel that he would send appellant an overpayment recovery questionnaire for completion.

There is no evidence in the record that OWCP provided appellant with an overpayment recovery questionnaire. On June 6, 2012 appellant submitted financial documentation and a list of expenses. She submitted two earnings statements from her husband's job. A statement dated

² On January 5, 2012 OWCP transferred appellant's health benefit enrollment back to the employing establishment.

May 18, 2012 showed that he worked 80 hours that pay period earning \$23.29 an hour. A statement dated April 28, 2012 provided that he worked 40 hours earning \$23.29 an hour. The earning statements also indicated that deductions were being taken for a 401K retirement plan.

By decision dated August 2, 2012,³ OWCP's hearing representative found that appellant received an overpayment of \$10,320.46, for which she was without fault, because OWCP failed to deduct health benefit premiums from January 18, 2009 to April 9, 2011 after she returned to work part time.⁴ Appellant considered the financial documentation submitted and denied waiver of recovery of the overpayment as her monthly income exceeded her monthly expenses by more than \$50.00. The hearing representative found that the overpayment would be recovered by deducting \$200.00 from continuing compensation payments. OWCP issued another decision dated August 2, 2012 setting forth his findings and providing a repayment schedule.

On appeal, appellant argues that OWCP's hearing representative incorrectly calculated her husband's monthly income. She asserts that her husband is currently not working.

LEGAL PRECEDENT -- ISSUE 1

An employee entitled to disability compensation may continue his or her health benefits under the Federal Employee Health Benefits program. The regulation of the Office of Personnel Management (OPM), which administers the Federal Employee Health Benefits Program, provides guidelines for the registration, enrollment and continuation of enrollment for federal employees. In this connection, 5 C.F.R. § 890.502(a)(1) provides:

“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 to the United States in the amount of the proper employee withholding required for that pay period.”⁵

In addition, 5 C.F.R. § 890.502(c) provides:

“An agency that withholds less than or none of the proper health benefits contributions for an individual's pay, annuity or compensation must submit an amount equal to the sum of the uncollected deductions and any applicable agency

³ This decision superseded a decision dated June 24, 2012. On June 24, 2012 OWCP's hearing representative found that appellant received an overpayment of compensation for which she was without fault. Appellant denied waiver, however, after finding that she did not submit documentation regarding her income and expenses.

⁴ OWCP's hearing representative indicated that the overpayment occurred because OWCP did not deduct health or life insurance premiums; however, the employing establishment indicated that it had deducted life insurance premiums. OWCP calculated the overpayment based solely on its failure to deduct premiums for health insurance.

⁵ 5 C.F.R. § 890.502(a)(1).

contributions required under section 8906 of the 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 employing establishment 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 under withholding of health insurance 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.⁹

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received a \$10,320.46 overpayment of compensation for the period January 8, 2009 through April 9, 2011. The overpayment occurred because it failed to deduct health benefit premiums from her compensation during this period. OWCP calculated the amount that it should have deducted for premiums using the applicable health benefits Code 105 to find an overpayment of \$10,320.46. Based on this determination, it found that appellant received an overpayment of compensation in the amount of \$10,320.47 based on its failure to deduct health insurance benefits of \$10,320.46. Appellant has not challenged fact or amount of the overpayment.

LEGAL PRECEDENT -- ISSUE 2

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 the overpayment.¹⁰ The written notification must also include a preliminary finding regarding whether the individual was at fault in the creation of the overpayment.¹¹ OWCP 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.¹² Its 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.¹³

⁶ *Id.* at § 890.502(c).

⁷ *Id.* at § 890.502(b)(1).

⁸ *Id.* at § 890.502(d).

⁹ *James Lloyd Otte*, 48 ECAB 334 (1997).

¹⁰ 20 C.F.R. § 10.431(a).

¹¹ *Id.* at § 10.431(b).

¹² *Id.* at § 10.431(d).

¹³ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.4(a)(1) (May 2004).

OWCP's procedure manual further states, "*If the claimant is determined to be without fault*, Form CA-2202 must be released (along with an OWCP-20) within 30 days of the date the overpayment is identified." (Emphasis in original).

ANALYSIS -- ISSUE 2

OWCP determined that appellant was without fault in creating the overpayment. It may only collect the overpayment if such collection would not defeat the purpose of FECA or be against equity and good conscience. At the hearing, appellant asserted that she had not received an overpayment recovery questionnaire. OWCP's hearing representative informed her that she would send her a Form OWCP-20 for completion. However, there is no evidence in the case record that the form was sent.¹⁴ OWCP's procedures provide that an OWCP-20 must be provided to appellant.¹⁵ As it does not appear that OWCP complied with its procedures, the case will be remanded for OWCP to provide appellant with a Form OWCP-20 prior to determining whether she is entitled to waiver of recovery of the overpayment.¹⁶

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$10,320.46 because OWCP failed to deduct premiums for health benefits from January 8, 2009 through April 9, 2011. The Board further finds that the case is not in posture for decision regarding whether OWCP properly denied waiver of recovery of the overpayment.¹⁷

¹⁴ At the hearing, appellant provided estimates of some income and expenses and submitted some financial documentation after the hearing. The information submitted, however, is insufficient to show her spouse's income as it contains only two pay stubs. It further does not include the amount of any assets in a retirement fund.

¹⁵ See *supra* note 13.

¹⁶ See *S.G.*, Docket No. 12-779 (issued September 17, 2012).

¹⁷ In view of the Board's determination regarding waiver of the recovery of the overpayment, it is premature to address whether OWCP properly determined that the overpayment should be repaid by withholding \$200.00 a month from continuing compensation.

ORDER

IT IS HEREBY ORDERED THAT the August 2, 2012 merit decisions of the Office of Workers' Compensation Programs are affirmed in part and set aside in part and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: March 18, 2013
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