

FACTUAL HISTORY

OWCP accepted that on July 6, 2000 appellant, then a 51-year-old heavy equipment operator, sustained a tear of the medial meniscus of the right knee, sprain of the right knee cruciate ligament, hypersomnia with sleep apnea, morbid obesity, right lower leg joint derangement, postsurgical nonabsorption and ventral hernia without obstruction or gangrene in the performance of duty. He stopped work in May 2006 and received wage-loss benefits for which he was placed on periodic rolls.

On appellant's claim for compensation (Form CA-7) dated June 8, 2006, the employing establishment indicated that his optional life insurance was a base salary of \$47,521.24. By letter dated February 5, 2008, the Office of Personnel Management (OPM) advised OWCP that appellant's optional life insurance base salary was \$48,668.00. OPM further noted that he had elected postretirement basic life insurance (PRBLI) with no reduction effective May 25, 2007.

On June 28, 2012 OWCP made preliminary findings that appellant received an overpayment of \$5,094.80 for the period of May 25, 2007 to June 2, 2012 because an incorrect optional life insurance (OLI) code was used and deductions were not made for basic life insurance. It found that he was without fault in the creation of the overpayment. OWCP noted that the first overpayment occurred when appellant's optional life insurance was improperly deducted using code W0 with a base salary of \$47,521.24 instead of the correct base salary of \$48,668.00. For the period May 25, 2007 to June 2, 2012, appellant's OLI deductions totaled \$8,680.80. Using the correct S0 code, his OLI deductions should have totaled \$7,089.32. It further noted that appellant's basic life insurance for that period totaled \$983.57 whereas it should have totaled \$1,003.24 based on the corrected \$48,668.00 base salary. Explaining that no deductions were made for basic life insurance from May 25, 2007 to June 2, 2012, it calculated a total of \$6,666.61 in PRBLI deductions. Taking the difference of the life insurance deductions appellant paid from what he should have paid, OWCP found a \$5,094.80 overpayment of compensation for the period May 25, 2007 through June 2, 2012.

As OWCP determined that appellant was without fault in the creation of the overpayment. It requested that he submit financial information pursuant to an enclosed overpayment recovery questionnaire (Form OWCP-20) within 30 days if he sought waiver of the overpayment. OWCP noted that waiver would be denied if he failed to furnish the information requested on the enclosed OWCP-20 form with supporting documentation within 30 days. It further informed appellant that he could submit additional evidence in writing or at a prerecoupment hearing, but that a prerecoupment hearing must be requested within 30 days of the date of the written notice of overpayment.

On July 6, 2012 appellant requested a prerecoupment hearing. He noted that the overpayment occurred through no fault of his own and requested a waiver of repayment due to financial hardship. Appellant did not submit the overpayment recovery questionnaire.

At the January 8, 2013 prerecoupment hearing, appellant testified that he did not take issue with the overpayment decision, but that he was not at fault for the mistakes made by OWCP. Further, paying back the overpayment would cause him extreme financial hardship. Appellant stated that the only income he received was from his OWCP compensation benefits.

He testified that his wife earned \$492.00 every two weeks working at Walmart and that they received approximately \$500.00 in 2012 from a rental property they owned in California. Appellant stated that he had approximately \$600.00 to \$800.00 in his checking account, nothing in his savings account, a \$90,000.00 thrift savings plan (TSP), which remained untouched. He also had property in North Carolina where he lived, a rental property in California, two vehicles which were 12 years old and a boat which was 15 years old. Appellant provided a list of his expenses, which included \$800.00 a year in property taxes for his North Carolina home, \$650.00 a year in property taxes for his California property, \$1,700.00 a year for homeowners insurance, \$1,000.00 a year for car maintenance, \$800.00 a month for his mortgage, \$175.00 a month for the electric bill, \$165.00 a month for cable/phone/internet, \$200.00 a month for minimum credit card payments on \$5,000.00 balance, \$75.00 a month for hospital bills, \$10.00 a month for prescription copays, \$80.00 a month for physicians' copays, \$145.00 a month for car insurance, \$200.00 a month for cellphone bills, \$400.00 a month for gas and \$400.00 a month for food. He testified that there were other hospital bills and items that were part of his monthly expenses. The hearing examiner instructed him that if he recalled or found any other bills, to submit additional financial information on the expenses before a decision was made on the overpayment determination. She informed appellant that the record would be held open for 30 days. No other financial information was submitted.

By decision dated March 2, 2012, the hearing representative finalized the overpayment in the amount of \$5,094.80 for the period May 25, 2007 to June 2, 2012 because an incorrect optional life insurance code was used and deductions were not made for basic life insurance. The hearing representative found that appellant was without fault in the creation of the overpayment but denied waiver of recovery, finding that he had excess income over expenses and exceeded the asset limit. Based on the evidence of record, the hearing representative found that he could repay the overpayment by deducting \$400.00 from continuing compensation every 28 days.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) 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 his or her duty.² Section 8129(a) of FECA provides, in pertinent part:

When an overpayment has been made to an individual under this subchapter 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 an individual is entitled.³

Section 8116(a) of FECA provides that, while an employee is receiving compensation or if he or she has been paid a lump sum in commutation of installment payments until the expiration of the period during which the installment payments would have continued, the

²5 U.S.C. § 8102(a).

³*Id.* at § 8129(a).

employee may not receive salary, pay or remuneration of any type from the United States, except in limited specified instances.⁴

Under the Federal Employees Group Life Insurance (FEGLI) program, most civilian employees of the Federal Government are eligible to participate in BLI and one or more of the options.⁵ The coverage for basic life is effective unless waived⁶ and premiums for basic and optional life coverages are withheld from the employee's pay.⁷

FECA and its implementing regulations provide that an employee entitled to disability compensation benefits may continue BLI coverage without cost under certain circumstances⁸ and may also retain the OLI.⁹ At separation from the employing establishment, the FEGLI insurance will either terminate or be continued under compensation status.¹⁰ If the compensationner chooses to continue BLI and OLI insurance coverage, the schedule of deductions made while the compensationner was an employee will be used to withhold premiums from his or her compensation payments.¹¹ Thus while receiving disability compensation in lieu of retirement benefits, the former employee is responsible for all insurance premiums.¹²

ANALYSIS-- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$5,094.80 for the period May 25, 2007 to June 2, 2012.

The record shows that an overpayment occurred because an incorrect base salary and OLI code was used and deductions were not made for basic life insurance from May 25, 2007 to June 2, 2012. On a June 8, 2006 Form CA-7, the employing establishment incorrectly indicated that appellant's base salary of \$47,521.24. By letter dated February 5, 2008, OPM advised OWCP that appellant's life insurance was based on a salary \$48,668.00. It further noted that appellant had elected PRBLI effective May 25, 2007. Because OWCP failed to make proper adjustments to his compensation benefits until June 3, 2012, incorrect withholdings occurred.

The June 28, 2012 OWCP noted that the first overpayment occurred when appellant's OLI was improperly deducted from a base salary of \$47,521.24 instead of the correct base salary

⁴*Id.* at § 8116(a).

⁵5 C.F.R. § 870.201.

⁶*Id.* at § 870.204(a).

⁷*Id.* at § 870.401(a).

⁸*Id.* at § 870.701, subpart G.

⁹*Id.* at § 871.201, subpart B; 8702.201, subpart B; 873.203, subpart B.

¹⁰*Id.* at § 870.501.

¹¹*Id.* at § 872.410, subpart D.

¹²*Scherri L. Stanley*, 53 ECAB 433 (2002).

of \$48,668.00. It found that, for the period May 25, 2007 to June 2, 2012, his OLI deductions totaled \$8,680.80. Using the correct base salary of \$48,668.00, appellant's OLI deductions should have totaled \$7,089.32. Subtracting the \$7,089.32 OLI deductions he should have paid from the \$8,680.80 in OLI deductions he actually paid, he overpaid \$1,591.48 for OLI.

An OWCP memorandum further noted that appellant's basic life insurance for the period May 25, 2007 to June 2, 2012 totaled \$983.57 whereas it should have totaled \$1,003.24 using the correct \$48,668.00 base salary. After subtracting \$983.57 from \$1,003.24, appellant should have paid an extra \$19.67 for BLI.¹³

Finding that no deductions were made for PRBLI from May 25, 2007 to June 2, 2012, OWCP provided an explanation as to its calculations and found a total of \$6,666.61 in PRBLI deductions which were not made. Taking the \$6,666.61 in PRBLI deductions, which appellant should have paid and adding it to the \$19.67 owed for BLI deductions resulted in an overpayment of \$6,686.28. As OWCP properly determined that he overpaid for his OLI benefits in the amount of \$1,591.48, this amount was subtracted from the \$6,686.28 owed for PRBLI and BLI benefits (\$6,686.28 - \$1,591.48) for a total overpayment of \$5,094.80. It properly found a \$5,094.80 overpayment of compensation for the period May 25, 2007 through June 2, 2012.¹⁴

LEGAL PRECEDENT -- ISSUE 2

The waiver or refusal to waive an overpayment of compensation by OWCP is a matter that rests within OWCP's discretion pursuant to statutory guidelines.¹⁵ These statutory guidelines are found in section 8129(b) of FECA which states: Adjustment or recovery [of an overpayment] by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience.¹⁶ If OWCP finds that a claimant to be without fault in the matter of an overpayment, then, in accordance with section 8129(b), OWCP may only recover the overpayment if it determined that recovery of the overpayment would neither defeat the purpose of FECA nor be against equity and good conscience.

According to 20 C.F.R. § 10.436, recovery of an overpayment would defeat the purpose of FECA if recovery would cause hardship because the beneficiary needs substantially all of his income (including compensation benefits) to meet current ordinary and necessary living expenses and also, if the beneficiary's assets do not exceed a specified amount as determined by

¹³ Coverage for basic life is effective unless waived and premiums for basic and optional life coverages are withheld from the employee's pay. 5 C.F.R. at § 870.204(a) and § 870.401(a). Thus, appellant is responsible for payment of the premiums and the premiums must be deducted from his compensation payments. *W.J.*, Docket No. 12-672 (issued August 24, 2012).

¹⁴ *S.W.*, Docket No. 11-895 (issued December 5, 2011).

¹⁵ See *Robert Atchison*, 41 ECAB 83, 87 (1989).

¹⁶ 5 U.S.C. § 8129(b).

OWCP from data provided by the Bureau of Labor Statistics.¹⁷ According to 20 C.F.R. § 10.437, 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 position for the worse.¹⁸ To establish that a valuable right has been relinquished, it must be shown that the right was in fact valuable, that it cannot be regained and that the action was based chiefly or solely in reliance on the payments or on the notice of payment.¹⁹

ANALYSIS -- ISSUE 2

In the present case, appellant failed to submit a completed overpayment recovery questionnaire with financial information. He did, however, provide testimony at the January 8, 2013 hearing outlining his income, expenses and assets.

Using the information provided at the hearing, the hearing representative determined that appellant received compensation from OWCP in the amount of \$2,372.57 every 28 days (\$2,513.79 per month) and that his wife had net pay of \$492.00 every two weeks from her job at Walmart for a monthly income of \$1,066.00. She further noted that in 2012, appellant received approximately \$500.00 in rent for his California property. The hearing representative concluded that appellant's net monthly income totaled \$3,621.46. Taking a monthly average of appellant's yearly expenses for property taxes, homeowners insurance and car maintenance, the hearing representative added the monthly cost for these items to appellant's other expenses including his monthly mortgage payments, electric bill, cable/phone/internet bill, credit card payments, prescription copays, hospital bill, car insurance payments and monthly food payments. She totaled his current monthly expenses at \$2,515.85 and noted that \$200.00 per month spent on cellphone bills did not qualify as an ordinary and necessary living expense. Taking appellant's monthly income of \$3,621.46 and deducting his monthly expenses of \$2,315.85, the hearing representative found that appellant had \$1,305.61 in disposable income each month. Appellant's income exceeded his monthly expenses by more than \$50.00. Factoring his \$1,305.61 monthly income surplus and \$90,000.00 TSP plan balance the hearing representative properly determined that waiver could not be granted.

When an employee's assets exceed \$8,000.00 for an individual with a spouse, recovery of the overpayment will not defeat the purpose of FECA. The evidence submitted establishes that

¹⁷20 C.F.R. § 10.436. An individual is deemed to need substantially all of his monthly income to meet current and ordinary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. *Desiderio Martinez*, 55 ECAB 245 (2004). OWCP's procedures provide that assets must not exceed a resource base of \$4,800.00 for an individual or \$8,000.00 for an individual with a spouse or dependent plus \$960.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a) (October 2004). The procedure manual states that assets do not include the value of household furnishings (primary residence), wearing apparel, one or two vehicles, family burial plot or prepaid burial contract, a home which the person maintains as the principal family domicile or income-producing property, if the income from such property has been included in comparing income and expenses.

¹⁸*Id.* at § 10.437(a), (b).

¹⁹*Id.* at § 10.437(b)(1).

appellant had more than \$8,000.00 in assets. With respect to whether recovery would be against equity and good conscience, there was no evidence that he would experience severe financial hardship in repaying the debt.²⁰ The evidence reflects that appellant had, excess monthly income over expenses with other significant assets. In addition, there was no evidence presented that he had given up a valuable right in reliance on the overpayment or changed his position for the worse. The Board finds that the evidence of record does not establish that recovery of an overpayment would defeat the purpose of FECA or be against equity and good conscience.²¹ OWCP properly denied waiver of recovery of the \$5,094.80 overpayment of compensation.²²

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.²³

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 the 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 factors, so as to minimize any hardship.²⁴

ANALYSIS-- ISSUE 3

Appellant receives \$2,372.57 in continuing compensation benefits every 28 days and a total combined monthly income of \$3,621.46. The hearing representative determined the overpayment could be recovered by deducting \$400.00 from his continuing compensation payments every 28 days. The Board notes that a claimant is responsible for submitting necessary information with respect to income, expenses and assets as required by OWCP.²⁵ In this case, appellant submitted limited information regarding his financial circumstances and his income and expenses were not sufficiently documented.

OWCP considered the amount of appellant's assets and the extent that his monthly income exceeded his monthly expenses. As noted, the hearing representative determined that

²⁰*Id.* at 10.438(a) (in requesting waiver, the overpaid individual has the responsibility for providing financial information).

²¹*L.D.*, Docket No. 12-1408 (issued April 26, 2013).

²²*M.S.*, Docket No. 11-96 (issued August 17, 2011).

²³20 C.F.R. § 10.438.

²⁴*Id.* at § 10.441(a).

²⁵*Id.* at § 10.438.

his monthly expenses totaled \$2,315.85.²⁶ Subtracting this amount from appellant's monthly income of \$3,621.46, it determined that he had a surplus of \$1,305.61 monthly in excess income. Appellant's income exceeded his monthly expenses by more than \$50.00. The evidence reflects that the hearing representative considered the financial circumstances of appellant and other factors to minimize the hardship in accord with 20 C.F.R. § 10.441.²⁷ Therefore, OWCP properly required repayment of the overpayment by deducting \$400.00 from appellant's continuing compensation payments every 28 days.²⁸

On appeal, appellant argued that he cannot pay his bills and that deducting \$400.00 per month from his continuing compensation payments would cause a severe hardship. In support of his claim, he provided a list of his yearly and monthly expenses. As the Board's review is limited to evidence in the case record at the time OWCP made its decision over which the Board has jurisdiction, the Board cannot review this evidence submitted for the first time on appeal.²⁹ The Board finds that OWCP determined his monthly surplus and excess income based on the information he provided during the January 8, 2013 prerecoumpment hearing. As noted, appellant provided limited information but the hearing representative did consider the evidence of record and supported her findings.³⁰ The payment schedule was reasonable in the absence of any financial documentation proving otherwise.³¹ The Board finds that OWCP properly determined the overpayment should be recovered by deducting \$400.00 from continuing compensation.

CONCLUSION

The Board finds that OWCP properly determined that appellant received a \$5,094.80 overpayment of compensation for the period May 25, 2007 through June 2, 2012. The Board further finds that he was not at fault for the overpayment that occurred and that OWCP properly denied waiver of the overpayment based on the evidence of record. The Board also finds that OWCP properly determined the overpayment should be recovered by deducting \$400.00 from continuing compensation every 28 days.

²⁶ The Board notes that, when calculating appellant's monthly expenses, the hearing representative failed to mention \$400.00 monthly spent on gas and approximately \$80.00 monthly spent on copays for medical visits, as evidenced from appellant's testimony. The Board finds that the failure of the hearing representative to include these two expenses was harmless error. Even if \$480.00 was added to appellant's monthly expenses, he would still have \$825.61 in disposable income per month. Thus, the omission of these two expenses would not change appellant's \$400.00 repayment amount.

²⁷ *W.M.*, Docket No. 13-291 (issued June 12, 2013).

²⁸ *M.G.*, Docket No. 07-2317 (issued April 11, 2008).

²⁹ *D.E.*, Docket No. 07-27 (issued April 6, 2007); 20 C.F.R. § 501.2(c).

³⁰ *See S.C.*, Docket No. 12-1871 (issued February 26, 2013).

³¹ *Supra* note 29.

ORDER

IT IS HEREBY ORDERED THAT the March 21, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 29, 2013
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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