

FACTUAL HISTORY

On March 8, 1985 appellant, then a 31-year-old firefighter, injured her right hip during physical training at work. OWCP accepted muscle strain right hip. Appellant stopped work on March 8, 1985 and returned on March 12, 1985. On February 3, 1986 she injured her back while lifting an airpack and placing it in a bracket. OWCP accepted a low back strain. Appellant stopped work February 3, 1986 and returned February 7, 1986. On April 10, 1986 she was injured while running across the yard to assist a person with a gunshot wound. OWCP accepted the claim for lumbar strain. Appellant returned to light-duty work on May 8, 1986 and worked light duty until September 25, 1986 when she was released to her regular duties. On July 6, 1987 she filed a claim alleging she strained the back side of her right leg during physical training. Appellant did not stop work or seek medical treatment. On December 24, 1987 she filed a recurrence claim effective November 9, 1987 claiming her right leg and back have been painful since her March 8, 1985 injury. Appellant stopped work on November 9, 1987 and returned to light duty on November 25, 1987. OWCP accepted the recurrence and expanded her claim to include an aggravation of degenerative disc disease and depressive reaction. Appellant stopped work October 22, 1988 and was placed on the periodic rolls effective February 12, 1989. OWCP paid all appropriate benefits.

By decision dated May 23, 1994, OWCP reduced appellant's compensation benefits based on her employment as a vehicle registration clerk.

On August 2, 2011 appellant advised OWCP that she was electing to receive Office of Personnel Management (OPM) benefits effective August 3, 2011. She requested that it terminate her workers' compensation payments. Appellant retired from the employing establishment on August 3, 2011. She did not, however, transfer over to OPM benefits until July 1, 2013.

In a November 1, 2012 manual adjustment form, OWCP noted that health benefit insurance deductions had not been collected for the period August 4, 2011 through October 20, 2012, which amounted to \$7,444.40. It noted that appellant was paid compensation of \$16,140.43 but was entitled to only \$8,696.03 after health benefit insurance premiums were deducted. Copies of the Federal Employees' Compensation System worksheets provided for the period August 4, 2011 through October 20, 2012 showed appellant was paid without health insurance premium deductions for the period on August 4, 2011 through October 20, 2012.

In a November 15, 2012 preliminary determination, OWCP determined that appellant had been overpaid benefits in the amount of \$7,440.00 because her health benefits had been terminated on August 4, 2011 but were not reinstated until October 20, 2012. It found that she was without fault in creating the overpayment. OWCP informed appellant that she had 30 days to request a telephone conference, a final decision based on the written evidence or a prerecoumpment hearing on the issue of possible waiver of the overpayment. It requested that she complete and return the enclosed financial information questionnaire (Form OWCP-20) within 30 days.

On December 10, 2012 appellant elected civil service retirement benefits effective July 1, 2013.

On December 10, 2012 appellant also requested a prerecoumment hearing on the issues of fault and possible waiver of the overpayment. The hearing was held telephonically before the Branch of Hearings and Review on July 18, 2013. At the hearing, appellant testified that she did not dispute the amount of the overpayment. It was also agreed that OWCP's finding of without fault was appropriate as the underdeduction of health insurance premium benefits was an administrative action taken without appellant's awareness. Appellant's finances, as noted on the December 10, 2012 overpayment recovery questionnaire received by OWCP December 13, 2012, were discussed. She testified that clothing was purchased with a credit card. Appellant also stated that her mortgage payment was \$400.00.

On the December 10, 2012 overpayment recovery questionnaire, appellant listed her income as \$1,000.00 from social security benefits, \$570.00 from FECA benefits and \$11,949.00 from lease of hunting dogs,² for a total monthly income of \$13,519.00. Expenses were listed as \$1,100.00 for mortgage; \$464.00 for food; \$200.00 for clothing; \$388.48 for utilities and \$989.00 for other expenses, for a total monthly expense of \$3,141.48. Appellant listed credit card debt of \$8,000.00 to Chase for which she pays \$200.00 a month and \$5,000.00 to Bank of America, for which she pays \$200.00 per month. She indicated that she had a total of \$3,520.80 other available funds which included \$20.00 to \$30.00 cash on hand; \$2,915.14 checking account balance; and \$575.80 savings account balance. Supporting documentation included a statement from Bragg Mutual Federal Credit Union indicating balance of approximately \$576.00, balances on Cabelo's Club Visa Signature; 2011 Income Tax Return for an S Corporation for appellant's business.

By decision dated September 27, 2103, OWCP's hearing representative finalized the finding of overpayment in the amount of \$7,444.40 for the period August 4, 2011 to October 20, 2012 because health benefit premiums were not deducted and appellant does not contest the overpayment. The hearing representative concurred that appellant was without fault as the computation of health benefits is an administrative action and was untaken without appellant's participation. The hearing representative found that appellant was not entitled to waiver of recovery as she had over \$400.00 to pay the overpayment after monthly expenses were subtracted from monthly income. As appellant testified that the clothing expense was included in the credit card amount, the monthly expenses were reduced by \$200.00. The hearing representative further found that a recoumment of \$300.00 per month would not constitute a financial hardship.

LEGAL PRECEDENT -- ISSUE 1

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.³ When an overpayment has been made to an individual 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 the individual is entitled.

² OWCP's hearing representative noted this business income was \$1,200.00 monthly.

³ 5 C.F.R. § 8102(a).

An employee entitled to disability compensation may continue his or her health benefits under FEHB program. The regulations of OPM, which administers FEHB program, provide guidelines for registration, enrollment and continuation of enrollment for federal employees. In this connection, 5 C.F.R. § 890.502(a)(1) provides that an employee or annuitant is responsible for payment of the employee or annuitant share of the cost of enrollment for every pay period during which the enrollment continues. An employee or annuitant incurs indebtedness to the United States in the amount of the proper employee or annuitant withholding required for each pay period that health benefit withholdings or direct premium payments are not made but during which the enrollment continues.⁴

In addition, 5 C.F.R. § 890.502(c) 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 United States Code, to OPM for deposit in the Employees' Health Benefits Fund.⁵

The Board has recognized that, when an underwithholding 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.⁶

ANALYSIS -- ISSUE 1

The record reflects that OWCP failed to deduct health insurance premiums from appellant's compensation payments for the period August 4, 2011 to October 20, 2012 in the amount of \$7,444.40. It noted that appellant was paid compensation of \$16,140.43 but would have been entitled to only \$8,696.03 after health benefit insurance premiums had been properly deducted. This resulted in an overpayment of compensation of \$7,444.40. No health benefit insurance deductions were made from appellant's compensation during that time period and there was no evidence that she cancelled her health benefits enrollment. OWCP explained how the overpayment occurred and provided this to her with the preliminary notice of overpayment.⁷ Appellant does not dispute that she received the overpayment in question or the amount of the overpayment. The Board finds that an overpayment was created in the amount of \$7,444.40 due to the underwithholding of health insurance premiums.

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.⁸ These statutory guidelines are found in section 8129(b) of FECA which states: Adjustment or recovery of an overpayment

⁴ *Id.* at § 890.502(a)(1).

⁵ *Id.* at § 890.502(c).

⁶ See *James Lloyd Otte*, 48 ECAB 334 (1997); *Marie D. Sinnott*, 40 ECAB 1009 (1989); *John E. Rowland*, 39 ECAB 1377 (1988); 5 C.F.R. § 890.502.

⁷ See *Sandra K. Neil*, 40 ECAB 924 (1989).

⁸ See *Robert Atchison*, 41 ECAB 83, 87 (1989).

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.⁹ When a claimant is found to be without fault in the matter of the 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.

Section 10.436 of the implementing regulations¹⁰ provide that 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.¹¹ An individual is deemed to need substantially all of his or her income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.¹²

Section 10.437 provides that 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.¹³

Section 10.438 of the 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 on an overpayment would defeat the purpose of FECA or be against equity and good conscience. Failure to submit the requested information within 30 days of the request shall result in denial of waiver.¹⁴

ANALYSIS -- ISSUE 2

OWCP found appellant to be without fault in creating the overpayment. The issue is whether recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience. OWCP provided appellant with an OWCP-20 form and requested in the November 15, 2012 preliminary determination that she submit supporting financial

⁹ 5 U.S.C. § 8129(b).

¹⁰ 20 C.F.R. § 10.436.

¹¹ OWCP's procedures provide that the 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) (June 2009).

¹² *Id.*; See also *Sherry A. Hunt*, 49 ECAB 467, 473 (1998).

¹³ 20 C.F.R. § 10.437.

¹⁴ *Id.* at § 10.438.

documentation with respect to her monthly income and expenses. Appellant was notified of the provisions of 20 C.F.R. § 10.438.

Appellant provided an overpayment recovery questionnaire with a few supportive financial documents and further clarified her financial situation at the prerecoupment hearing. Based on her testimony and information from the overpayment recovery questionnaire, OWCP's hearing representative revealed that she had monthly income of \$3,093.00. While appellant listed monthly expenses of \$2,841.48, the hearing representative found the clothing expense was included in the credit card amount, thus reducing the monthly expenses to \$2,641.48. The hearing representative calculated that appellant had over \$400.00 ($\$3,093.00 - \$2,641.48 = \451.52) remaining to pay the overpayment and denied waiver.

The Board finds that OWCP made a proper determination as to waiver. With the limited amount of financial information submitted, OWCP did not abuse its discretion in finding that recovery of the overpayment would not defeat the purpose of FECA or be against equity and good conscience.¹⁵ Appellant has the responsibility to submit the necessary evidence. Pursuant to 20 C.F.R. § 10.438, OWCP may properly deny waiver of the overpayment.¹⁶ For this reason, it properly denied waiver in conformance with the implementing federal regulations.

LEGAL PRECEDENT -- ISSUE 3

Section 8129(a) of FECA provides, in pertinent part, that 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.¹⁷ OWCP's implementing regulations provide that, if an overpayment of compensation has been made to an individual entitled to further payments and no refund is made, it 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.¹⁸

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly directed recovery of the overpayment at the rate of \$300.00 per month from each continuing compensation payment.

Regarding the recovery of the overpayment from appellant's continuing compensation, the Board notes that she provided limited financial information to assist OWCP in determining her financial circumstances to minimize any hardship. OWCP properly set the rate of recovery at \$300.00 from each continuing compensation payment until the benefit was paid in full. The

¹⁵ See also *D.I.*, Docket No. 13-469 (issued July 1, 2013). See *N.R.*, Docket No. 12-1853 (issued June 10, 2013).

¹⁶ *Id.*

¹⁷ 5 U.S.C. § 8129.

¹⁸ 20 C.F.R. § 10.441(a).

Board finds that this was reasonable in the absence of any financial documentation proving otherwise.¹⁹

On appeal, appellant alleges that she does not always have extra money at the end of each month and enclosed copies of some bills. The Board's jurisdiction however is limited to evidence that was before OWCP at the time it issued its final decision.²⁰ Because this evidence was not in the case record at the time OWCP rendered its final September 27, 2013 decision, the Board is precluded from considering such evidence on appeal.

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$7,444.40. OWCP properly denied waiver and required recovery of the overpayment by deducting \$300.00 every 28 days from her continuing compensation payments.

ORDER

IT IS HEREBY ORDERED THAT the September 27, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 6, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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

¹⁹ *Id.*

²⁰ *Id.* at § 501.2(c); *Sandra D. Pruitt*, 57 ECAB 126 (2005).