

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

K.M., Appellant

and

**DEPARTMENT OF THE AIR FORCE,
WESTOVER AIR FORCE BASE,
Chicopee, MA, Employer**

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**Docket No. 14-2001
Issued: November 6, 2015**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On September 17, 2014 appellant filed a timely appeal from a July 9, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP).¹ Pursuant to the Federal Employees' Compensation Act² (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 a \$5,420.74 overpayment of compensation for the period November 1, 2008 through October 19, 2013, for which he was not at fault; (2) whether the overpayment is subject to waiver of recovery; and (3) whether OWCP properly withheld \$150.00 from appellant's continuing compensation payments.

¹ Appellant filed a prior appeal with the Board on April 28, 2005, docketed as 05-1145. On July 22, 2005 the Board issued an order asking the Director to produce the case record. The Board has not issued a final decision or order under Docket No. 05-1145.

² 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

OWCP accepted that on August 27, 1992 appellant, then a 34-year-old aircraft pneudraulic systems mechanic, sustained a back strain, L3-4 and L4-5 disc herniations and thoracolumbar radiculitis when he fell at work. It later expanded the claim to accept lumbar spina bifida with hydrocephalus, an open vertebral fracture, and herniated C4-5, C5-6, and T8-9 and T9-10 discs.³

Appellant received wage-loss compensation in late 1992, for a recurrence of disability in 1994, from August 15, 1999 to April 3, 2000, and from November 23, 2003 to June 27, 2005. He stopped work again on August 22, 2005 and received wage-loss compensation for total disability from December 25, 2005 onward. OWCP did not deduct health or life insurance premiums from appellant's wage-loss compensation.

Appellant retired from the employing establishment effective March 24, 2008. He initially elected to receive retirement benefits through the Office of Personnel Management (OPM). The notification of personnel action indicated that appellant was "excluded from life insurance coverage by law or reg[ulation]." Appellant then elected to receive compensation benefits under FECA effective October 25, 2008. OWCP did not deduct health or life insurance premiums from his compensation payments.

In a letter dated March 18, 2009, the OPM advised OWCP that appellant had elected Federal Employees' Group Life Insurance (FEGLI) and that there had been no reduction for postretirement life insurance election, which commenced November 1, 2008. Deduction was to be made using code BO, effective November 1, 2008, for basic life insurance and no reduction postretirement life insurance.

In an October 24, 2013 worksheet, OWCP calculated that, for the period November 1, 2008 through October 19, 2013, appellant received gross compensation of \$185,442.24, based on his final salary in his date-of-injury position of \$33,700.00. It found that it should have deducted \$699.69 in basic life insurance and \$4,721.05 in postretirement basic life insurance premiums, a total of \$5,420.74. As OWCP had not deducted the premiums, it found that the \$5,420.74 amount constituted an overpayment of compensation for the period November 1, 2008 to October 19, 2013.

By notice dated February 6, 2014, OWCP advised appellant of its preliminary determination that he had received a \$5,420.74 overpayment of compensation because basic life insurance premiums had not been properly deducted from his compensation payments for that

³ Appellant had L3-4 and L4-5 microdiscectomies on March 1, 1993, a repeat L4-5 microdiscectomy on September 20, 1994, repeat L3-4 and L4-5 microdiscectomies and an L3-5 posterior lumbar fusion on August 17, 1999, exploration of the L3-5 fusion and L2-3 posterior decompression and fusion on May 28, 2004, and repairs of a postsurgical L2-3 pseudomeningocele on September 10, 2004 and October 5, 2005. On August 22, 1996 OWCP issued a schedule award for six percent impairment of the left leg. On December 8, 2005 it issued a schedule award for nine percent impairment of each leg, covering the period February 20, 2005 to February 16, 2006. OWCP issued a January 14, 2009 decision adjusting the period of the 2005 schedule award to avoid overlapping a period of compensation, but vacated this decision on June 4, 2009, finding that no adjustment was necessary. By decision dated December 24, 2009, it denied appellant's request for reconsideration of the June 4, 2009 decision.

period. It provided a calculation of the overpayment, noting that he was not at fault in its creation. OWCP requested that appellant provide financial information within 30 days or indicate if he contested the overpayment.

Appellant requested that OWCP make a decision based on the written evidence. He asserted that he had not previously elected life insurance as the employing establishment's personnel office advised him that he was ineligible as he had not been insured for five continuous years prior to becoming permanently disabled. Appellant completed an overpayment recovery questionnaire with supporting documentation on February 22, 2014, listing monthly income of \$5,000.00 and total monthly expenses of \$3,367.10, including a \$1,100.00 mortgage payment, \$500.00 for food, \$400.00 for utilities, \$200.00 for clothing, \$600.00 for vehicular and miscellaneous expenses, and \$567.10 for debt repayment. He listed assets of \$270.00 in cash and bank accounts.

By decision dated July 9, 2014, OWCP finalized that appellant had received an overpayment of compensation in the amount of \$5,420.74 for the period November 1, 2008 through October 19, 2013 as no basic life and postretirement life insurance premiums had been properly deducted from his compensation payments. It found that he was not at fault in the creation of the overpayment but that the overpayment was not subject to waiver as his income exceeded his monthly expenses by \$1,632.90.⁴ OWCP directed recovery by deducting \$150.00 every 28 days from his continuing compensation payments. It noted that appellant had not submitted any evidence from the employing establishment substantiating his allegation that its personnel office had advised him he was ineligible for life insurance.

LEGAL PRECEDENT -- ISSUE 1

Under the FEGLI program, most civilian employees of the Federal Government are eligible to participate in basic life insurance and one or more of the options.⁵ The coverage for basic life insurance is effective unless waived,⁶ and premiums for basic and optional life coverage are withheld from the employee's pay.⁷ Upon retirement or upon separation from the employing establishment or being placed on the periodic FECA compensation rolls, an employee may choose to continue basic and optional life insurance coverage, in which case the schedule of deductions made will be used to withhold premiums from his or her annuity or compensation payments.⁸ Basic insurance coverage shall be continued without cost to an employee who retired or began receiving compensation on or before December 31, 1989,⁹ however, the employee is

⁴ OWCP accepted all expenses appellant listed, and accepted the \$600.00 vehicular and miscellaneous amount as stated.

⁵ 5 U.S.C. § 8702(a).

⁶ *Id.* at § 8702(b).

⁷ *Id.* at § 8707.

⁸ *Id.* at § 8706.

⁹ *Id.* at § 8707(b)(2).

responsible for payment of premiums for optional life insurance coverage which is accomplished by authorizing withholdings from his compensation.¹⁰

A 1980 amendment of 5 U.S.C. § 8706(b)(2) provided that an employee receiving compensation under FECA could elect continuous withholdings from his compensation, so that his life insurance coverage could be continued without reduction. 5 C.F.R. § 870.701 (December 5, 1980) provided that an eligible employee had the option of choosing no life insurance; Option A -- basic coverage (at no additional cost) subject to continuous withholdings from compensation payments that would be reduced by two percent a month after age 65 with a maximum reduction of 75 percent; Option B -- basic coverage (at an additional premium) subject to continuous withholdings from compensation payments that would be reduced by one percent a month after age 65 with a maximum reduction of 50 percent; or Option C -- basic coverage subject to continuous withholdings from compensation payments with no reductions after age 65 (at a greater premium).¹¹

Each employee must elect or waive Option A, Option B, and Option C coverage, in a manner designated by OPM, within 60 days after becoming eligible unless, during earlier employment, he or she filed an election or waiver that remains in effect.¹² Any employee who does not file a Life Insurance Election with his or her employing office, in a manner designated by OPM, specifically electing any type of optional insurance, is considered to have waived it and does not have that type of optional insurance.¹³ 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.¹⁴

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.¹⁵ 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.¹⁶

¹⁰ *Id.* at 8706(b)(3)(B). See *Edward J. Shea*, 43 ECAB 1022 (1992) (the Board found that the claimant received an overpayment of compensation where he elected postretirement basic life insurance with no reduction and no premiums had been deducted from his compensation from January 3, 1988 to May 6, 1989). See also *Glen B. Cox*, 42 ECAB 703 (1991) (the Board found that an overpayment was created due to no deduction of premiums for optional life insurance for periods July 1983 through November 1989).

¹¹ See *James J. Conway*, Docket No. 04-2047 (issued May 20, 2005).

¹² 5 C.F.R. § 870.504(a)(1).

¹³ *Id.* at 504(b).

¹⁴ 5 U.S.C. § 8707(d); see also *Keith H. Mapes*, 56 ECAB 130 (2004); *James Lloyd Otte*, 48 ECAB 334 (1997).

¹⁵ *Id.* at § 8102(a).

¹⁶ *Id.* at § 8129 (a).

ANALYSIS -- ISSUE 1

The Board finds that the case is not in posture for decision regarding whether appellant received an overpayment of compensation in the amount of \$5,420.74 for the period November 1, 2008 through October 19, 2013

Appellant elected to receive compensation benefits from OWCP instead of retirement benefits from OPM effective October 25, 2008. While in compensation status, appellant remained responsible for all insurance benefits, including the premiums for postretirement basic life insurance at whatever option appellant had selected.¹⁷ He maintained, however, that he did not elect life insurance after he retired as the employing establishment advised him he was not eligible for coverage. The record does not contain any documentation reflecting appellant's election of the optional postretirement basic life insurance. While OPM notified OWCP by letter dated March 18, 2009, that appellant had elected that option, it did not provide documentation of that election. OWCP procedures state that the preliminary notice of overpayment must clearly set forth the reason for the overpayment and contain a clearly written explanation as to how the overpayment was calculated.¹⁸ In this case, OWCP simply relied on a statement from OPM and placed the burden on appellant to disprove the fact of the overpayment. A claimant is entitled to an adequate statement of reasons with respect to any final decision by OWCP.¹⁹

In *N.J.*,²⁰ the Board remanded the case to OWCP for further development because the evidence was unclear as to why postretirement optional life insurance premiums had been deducted as of a certain date. Similarly in this case the evidence fails to establish the basis for the optional postretirement life insurance premiums for the no reduction option as the signed form is not in the record.

Appellant would be responsible for the additional cost associated with his election of the optional postretirement basic life insurance. However, as OWCP has not factually established that appellant elected the optional coverage, there can be no finding of overpayment. The case will be remanded to OWCP.²¹ On remand, OWCP should obtain from OPM the executed election form completed by appellant prior to determining whether appellant received an overpayment of compensation. After such further development as OWCP deems necessary, it should issue a *de novo* decision.

¹⁷ See *supra* note 14.

¹⁸ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.4a (June 2009).

¹⁹ *J.L.*, Docket No. 14-0194 (issued June 25, 2015). See also *L.D.*, Docket No. 12-1408 (issued April 26, 2013) (finding that OWCP did not provide adequate reasons for calculating an overpayment when the record contained no worksheets or other specific documentation confirming the amount of compensation received).

²⁰ Docket No. 13-2164 (issued April 18, 2014).

²¹ See *generally id.* (finding that the information from OPM did not sufficiently establish the date that a claimant's deductions for postretirement basic life began); *D.R.*, Docket No. 13-1531 (issued October 21, 2013) (finding that OWCP improperly found that a claimant received dual benefits from OPM and OWCP when the record did not contain clear documentation establishing that he received benefits from OPM during the period in question).

CONCLUSION

The Board finds that the case is not in posture for decision regarding whether appellant received an overpayment of compensation in the amount of \$5,420.74 for the period November 1, 2008 through October 19, 2013 because it failed to deduct premiums for the optional postretirement basic life insurance.²²

ORDER

IT IS HEREBY ORDERED THAT the July 9, 2014 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: November 6, 2015
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

²² In view of the Board's finding that the case is not in posture for decision regarding whether appellant received an overpayment of compensation, it is premature to address the issues of waiver and recovery.