

overpayment; and (3) whether it properly found that it would recover the overpayment by deducting \$230.00 from appellant's continuing compensation payments.

FACTUAL HISTORY

OWCP accepted that on November 26, 1984 the employee, then a 34-year-old boiler plant operator, sustained a herniated disc at L5-S1 and thoracolumbar sprain in the performance of duty. It paid him compensation for total disability beginning January 3, 1986. OWCP deducted premiums for health benefits for the Federal Employee's Health Benefit (FEHB) plan using enrollment code 105.

The employee died on October 22, 1999 of an oxycodone overdose. On February 20, 2001 appellant filed a claim for survivor's benefits. On July 12, 2001 OWCP accepted that the employee's death resulted from his employment injury. In its acceptance letter, it informed appellant that if the employee was covered by a health benefits plan with the employing establishment, she was eligible for coverage and the benefits would be deducted automatically from the survivor benefits. OWCP advised that it was issuing an initial payment of \$54,114.67 covering the period October 23, 1999 to May 19, 2001 and placing her on the periodic rolls for continuing payments. Computer worksheets validate, however, that it did not deduct premiums for health benefits.

On March 30, 2005 OWCP completed a notice of change in health benefits enrollment (Standard Form 2810) changing appellant's enrollment code from 105 to 104 as her daughter had turned 22. In another health benefit enrollment form dated March 30, 2005, it advised that the name of the enrollee should be changed effective October 23, 1999 from the employee to appellant.

On April 5, 2005 OWCP noted that it should have deducted health benefits premiums from appellant's survivor benefits using code 105 from November 17, 1999 to July 10, 2003 and using code 104 from July 11, 2003 to March 19, 2005. On December 16, 2005 it began deducting health benefits from appellant's continuing compensation.

In a telephone call dated September 15, 2011, appellant advised that her health insurance provider informed her that her premiums were not being paid and that it was cancelling her insurance. OWCP noted that it had stopped her premiums in error.

On October 14, 2011 OWCP calculated that appellant received an overpayment of compensation in the amount of \$12,056.92 because it had failed to deduct health benefits premiums using code 105 from November 17, 1999 to July 10, 2003 for family coverage and failed to deduct premiums using code 104 from July 11, 2003 to March 19, 2005 and October 24, 2010 to September 24, 2011 for single coverage.

On October 24, 2011 OWCP advised appellant of its preliminary determination that she received an overpayment of compensation in the amount of \$12,056.92 because it failed to deduct appropriate premiums for health benefits. It further informed her of its preliminary determination that she was without fault in the creation of the overpayment.

In a November 17, 2011 response, appellant related that her daughter was not covered under the employee's health insurance policy, but instead received health coverage through her biological father's policy.

On January 3, 2012 OWCP issued a preliminary determination of overpayment that superseded its October 24, 2011 preliminary determination. It found that appellant had received an overpayment of compensation only in the amount of \$4,165.46 because it had failed to deduct health benefit premiums using code 104 for the period July 11, 2003 to March 19, 2005 and October 24, 2010 to September 24, 2011. It removed the period November 17, 1999 to July 10, 2003. OWCP additionally determined that appellant was not at fault in the creation of the overpayment.

In a January 31, 2012 internal memorandum, OWCP noted that the employee claimed the stepdaughter as a dependent, but had not submitted a health benefits enrollment form adding appellant and her daughter to his health insurance plan after his marriage to appellant on March 13, 1993. It indicated that the record contained a form changing the name on the policy from the employee to appellant effective October 23, 1999. OWCP further advised that the health care insurer, Blue Cross Blue Shield, did not have any records regarding the employee's insurance policy except for his initial selection of the insurance.

By decision dated April 2, 2012, OWCP finalized its preliminary determination that appellant received an overpayment of compensation from July 11, 2003 to March 19, 2005 and October 24, 2010 to September 24, 2011 in the amount of \$4,165.46 because it failed to deduct health benefits premiums from her compensation. It further found that she was not entitled to waiver of recovery of the overpayment and that it would and did recover the overpayment by deducting \$522.15 from further compensation payments until the overpayment for this period was located, November 17, 1999 to July 10, 2003.

On November 4, 2013 OWCP recalculated the overpayment amount for the period in the amount of \$3,433.81 because it had failed to deduct premiums for health benefits using code 104. In an attached worksheet, it determined that the health premiums for the period November 17, 1999 to July 10, 2003 totaled \$3,433.81.

On November 5, 2013 OWCP notified appellant of its preliminary determination that she received an overpayment of compensation in the amount of \$3,433.81 for the period November 17, 1999 to July 10, 2003 because it failed to deduct health insurance premiums. It further advised her of its preliminary determination that she was without fault in the creation of the overpayment. OWCP requested that appellant complete the enclosed overpayment recovery questionnaire and submit supporting financial documents. Additionally, it notified her 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 prerecoyment hearing.

On November 19, 2013 appellant requested a prerecoyment hearing before an OWCP hearing representative. She advised that OWCP previously found that she received an overpayment of compensation from November 17, 1999 to September 24, 2011 which she had repaid. Appellant requested waiver of recovery of the overpayment.

At the telephone hearing, held on July 16, 2014, appellant confirmed that she was covered by the Blue Cross Blue Shield single plan for the period November 17, 1999 through July 10, 2003. She asserted that she did not know if premiums were deducted because she moved frequently and did not always receive her mail. OWCP hearing representative asked appellant to complete an overpayment recovery questionnaire. Appellant advised that she believed that she could pay around \$250.00 per month for recovery of the overpayment if necessary.

On August 7, 2014 appellant submitted a completed overpayment recovery questionnaire dated November 19, 2013. She listed monthly income of \$4,854.00 and expenses of \$4,565.00.

In a decision dated September 30, 2014, OWCP hearing representative found that appellant received an overpayment of compensation in the amount of \$3,433.81 for the period November 17, 1999 through July 10, 2003 because health benefit premiums were not deducted from her compensation. He found that she was without fault in creating the overpayment but denied waiver of recovery of the overpayment as her monthly income exceeded her monthly expenses by more than the allotted amount. The hearing representative determined that OWCP should recover the overpayment by deducting \$230.00 from appellant's continuing compensation.

On appeal appellant argues that she did not receive compensation from OWCP for the period November 17, 1999 to July 10, 2003 as she did not receive survivor benefits until April 4, 2005. She contends that she is both physically and mentally disabled and that repaying the overpayment would result in a financial hardship.

LEGAL PRECEDENT -- ISSUE 1

An employee entitled to disability compensation may continue his or her health benefits under the Federal Employees' Health Benefits program. The regulation of the Office of Personnel Management (OPM), which administers the Federal Employees' 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.”³

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 *Id.* at § 890.502(a)(1).

contributions required under section 8906 of the title, 5 United States Code, to OPM for deposit in the Employee's Health Benefits Fund."⁴

Under applicable OPM regulations, the employee or annuitant is responsible for payment of the employee's share of the cost of enrollment.⁵ An agency that withholds less than the proper health benefits contribution must submit an amount equal to the sum of the uncollected deductions.⁶ 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.⁷

ANALYSIS -- ISSUE 1

OWCP accepted that the employee sustained thoracolumbar sprain and a herniated disc at L5-S1 on November 26, 1984. The employee received compensation for total disability as of January 1986 with deductions for health benefits using code 105.

OWCP accepted appellant's claim for survivor benefits and paid her compensation effective October 23, 1999. It informed her that she would be eligible for health coverage if the employee was covered by a health benefits plan and that benefits would be automatically deducted. OWCP, however, did not deduct premiums for health benefits from November 17, 1999 to July 10, 2003. It calculated that she was entitled to single coverage using code 104 and that the premiums owed during the period totaled \$3,433.81.⁸ OWCP explained how it calculated the overpayment for this time period. When OWCP discovers an under withholding of health benefit premiums, the entire amount is deemed an overpayment of compensation because OWCP must pay the full amount of the premium to OPM when the error is discovered.⁹

At the hearing appellant maintained that she had already repaid an overpayment for the period November 17, 1999 to July 10, 2003. However, OWCP's prior final overpayment decision dated April 2, 2012 concerned the periods of July 11, 2003 to March 19, 2005 and October 24, 2010 to September 24, 2011.

On appeal appellant contends that she did not receive survivor's benefits from OWCP for the period November 17, 1999 to July 10, 2003. However, on June 15, 2001 she received a retroactive payment from OWCP of \$54,114.87 covering the period October 23, 1999 to May 19, 2001. The Board finds that appellant received an overpayment of compensation in the

⁴ *Id.* at § 890.502(c).

⁵ *Id.* at § 890.502(b)(1).

⁶ *Id.* at § 890.502(d).

⁷ *James Lloyd Otte*, 48 ECAB 334 (1997).

⁸ OWCP calculated the overpayment as the daily premium of \$2.577 times 1,332 days to equal \$3,433.81. In fact, the amount would be \$3,432.56.

⁹ *See D.D.*, Docket No. 14-572 (issued June 9, 2014); *Keith H. Mapes*, 56 ECAB 130 (2004).

amount of \$3,432.56 for the period November 17, 1999 to July 10, 2003 because OWCP failed to withhold health insurance premiums.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA⁵ provides that an overpayment must be recovered unless “incorrect payment has been made to an individual who is without fault *and* when adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.” (Emphasis added.) Thus, a finding that appellant was without fault does not automatically result in waiver of the overpayment. OWCP must then exercise its discretion to determine whether recovery of the overpayment would defeat the purpose of FECA or would be against equity and good conscience.⁶

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 OWCP from data provided by the Bureau of Labor Statistics.¹⁰ An individual’s liquid assets include but are not limited to cash, the value of stocks, bonds, savings accounts, mutual funds and certificates of deposits.¹¹ Nonliquid assets include but are not limited to the fair market value of an owner’s equity in property such as a camper, boat, second home, and furnishings and supplies.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 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.¹⁴

ANALYSIS -- ISSUE 2

OWCP determined that appellant was without fault in creating the overpayment. As appellant is without fault in the matter of the overpayment, it must adjust later payments only if

¹⁰ 20 C.F.R. § 10.436. OWCP 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).

¹¹ *Id.*

¹² *Id.*

¹³ 20 C.F.R. § 10.436.

¹⁴ *Id.* at § 10.437(b)(1).

adjustment would not defeat the purpose of FECA or be against equity and good conscience. Appellant provided an overpayment recovery questionnaire which indicated that her monthly income of \$4,854.00 exceeded her monthly expenses of \$4,565.00 by \$289.00. An individual is deemed to need substantially all of her current income to meet ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.¹⁵ The Board thus finds that as appellant's monthly income exceeds her monthly expenses by \$289.00, she is not entitled to waiver of recovery of the overpayment as she does not need substantially all of her income to meet current ordinary and necessary expenses.¹⁶

Additionally, the evidence does not demonstrate that repayment of the overpayment would be against equity and good conscience because appellant has not shown that she would experience severe financial hardship in attempting to repay the debt or that she relinquished a valuable right or changed her position for the worse in reliance on the payment which created the overpayment.¹⁷ Consequently, OWCP properly denied waiver of recovery of the overpayment.

On appeal appellant asserts that she is physically and mentally disabled and would experience hardship repaying the overpayment. As discussed, however, she has not submitted evidence establishing that she would experience severe financial hardship in attempting to repay the debt or that she relinquished a valuable right or changed her position for the worse in reliance on the payments that created the overpayment.¹⁸

LEGAL PRECEDENT -- ISSUE 3

Section 10.321(a)¹⁹ of OWCP's implementing regulations provide that, if an overpayment of compensation has been made to one entitled to future payments, proper adjustment shall be made by decreasing subsequent payments of compensation, having due regard to 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 resulting hardship upon such individual.

ANALYSIS -- ISSUE 3

The record reflects that appellant continues to receive benefits from OWCP. OWCP hearing representative reduced her future compensation benefits by \$230.00 every 28 days. He noted that her monthly income exceeded her monthly expenses by \$289.00. The hearing representative found appellant was capable of repaying the debt with deductions of \$230.00 every 28 days from her continuing compensation benefits. The Board finds that OWCP gave due

¹⁵ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6a(1)(a) (June 2009).

¹⁶ See *B.P. (R.P)*, Docket No. 14-2017 (issued March 19, 2015); *P.G.*, Docket No. 14-227 (issued January 9, 2015).

¹⁷ See *E.C.*, Docket No. 14-1467 (issued July 2, 2015).

¹⁸ See *William J. Murphy*, 41 ECAB 569 (1989).

¹⁹ 20 C.F.R. § 10.321(a).

regard to the relevant factors noted above in setting a rate of recovery of \$230.00 per compensation period.²⁰ It thus properly required repayment of the overpayment by deducting \$230.00 from appellant's ongoing compensation payments every four weeks.

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$3,432.56 for the period November 17, 1999 through July 10, 2003 because OWCP failed to deduct premiums for health benefits. The Board further finds that OWCP properly denied waiver of recovery of the overpayment and properly found that it would recover the overpayment by deducting \$230.00 from appellant's continuing compensation.

ORDER

IT IS HEREBY ORDERED THAT the September 30, 2014 decision of the Office of Workers' Compensation Programs is affirmed, as amended as to amount.

Issued: September 10, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

²⁰ *Id.*; see also *C.M. & J.M. (J.M.)*, 58 ECAB 504 (2007).