

January 22, 2009, claiming temporary total disability and received wage-loss compensation as limited duty was not available. Appellant continued to receive compensation for total disability on the daily rolls until her benefits were terminated on February 22, 2010.

On March 9, 2010 appellant requested review of the decision terminating her compensation benefits by OWCP Branch of Hearings and Review. Following a series of merit reviews and further development of the case record, on June 5, 2012 OWCP expanded acceptance of the claim to include right reflex sympathetic dystrophy of the lower limb. It found that appellant continued to have residuals from the September 9, 2008 employment injury and she was retroactively returned to the daily compensation rolls for the period February 23, 2010 through July 28, 2012 and was placed on the periodic rolls commencing July 29, 2012.

On June 3, 2014 OWCP issued a preliminary overpayment determination of \$8,318.03 for the period January 22, 2009 to May 3, 2014 as OWCP had failed to deduct postretirement basic life insurance premiums, an incorrect annual salary had been used as the basis for the insurance deductions, and an incorrect code had been used for the optional life insurance premium. It found that appellant was without fault in the creation of the overpayment and requested that she submit financial information pursuant to an enclosed overpayment recovery questionnaire (Form OWCP-20) within 30 days if she was requesting waiver of recovery of the overpayment. OWCP noted that waiver would be denied if she failed to furnish the information requested on the enclosed OWCP-20 form with supporting documentation within 30 days.

On June 30, 2014 appellant requested a precoupment hearing where she disagreed that an overpayment had occurred and also requested waiver of recovery. She disagreed with the amount owed as her benefits had been terminated beginning February 22, 2010 and she would not have been covered by health or life insurance during that period and, therefore, should not be liable for retroactive premiums during that time. Appellant stated that, by letter dated March 21, 2011, Blue Cross/Blue Shield notified her that her health insurance had been terminated on November 14, 2010.

Appellant further noted that on August 3, 2012 she was notified by OWCP that she would receive retroactive compensation from February 23, 2010 to May 27, 2012 in the amount of \$118,890.93, but that she only received \$111,987.90 during this time period. She believed that the discrepancy was due to the fact that deductions had been made for health benefits and life insurance premiums during the time her benefits had been terminated and under appeal.

A hearing was held on December 18, 2014 where appellant testified disputing the fact and amount of the overpayment and requested waiver of recovery. She also submitted numerous documents contesting the overpayment amount and financial information pertaining to waiver of recovery with OWCP-20 form.

By decision dated February 5, 2015, a Branch of Hearings and Review hearing representative reversed the June 3, 2014 preliminary overpayment determination. It explained that OWCP had deducted health insurance and life insurance premiums for the period January 22, 2009 through May 3, 2014, but appellant's insurance had been terminated on November 14, 2010 and she did not have coverage until her benefits were later reinstated on July 29, 2012. The hearing representative found that OWCP had incorrectly included deductions

for premiums for the period November 14, 2010 to July 28, 2012. Upon further calculation, it found that appellant had been underpaid \$771.51 for the period January 22, 2009 to May 3, 2014 and returned the case file to OWCP for appropriate payment of compensation.

By letter dated February 9, 2015, OWCP informed appellant that, pursuant to the February 5, 2015 decision of the hearing representative, it was processing a payment in the amount of \$771.51.

In a separate letter dated February 27, 2015, OWCP requested that appellant disregard the February 9, 2015 letter as the payment had not issued and the overpayment was still under review.

By decision dated March 18, 2015, the Chief of the Branch of Hearings and Review (hereinafter Branch Chief) vacated the February 5, 2015 hearing representative's decision. He issued a new final overpayment decision finding that appellant had received an overpayment of compensation in the amount of \$3,285.32 for the period January 22, 2009 to May 3, 2014, that she was without fault in creating the overpayment, and that she was not entitled to waiver of recovery. The Branch Chief explained that OWCP had properly not deducted health insurance premiums from the retroactive payment, but that it had learned that OWCP was required to retroactively deduct the life insurance premiums for that period. The Branch Chief accordingly vacated the February 5, 2015 hearing representative's decision and affirmed, as modified, the June 3, 2014 preliminary overpayment determination to reflect an overpayment in the amount of \$3,285.32 for which she was not at fault.

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.² 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.³

Under Federal Employees' Group Life Insurance, most civilian employees of the Federal Government are eligible to participate in basic life insurance and one or more of the options. When an under withholding of life insurance premiums occurs, the entire amount is deemed an overpayment because OWCP must pay the full premium to the Office of Personal Management (OPM) upon discovery of the error.⁴

² *Id.* at § 8102(a).

³ *Id.* at § 8129(a).

⁴ *See J.H.*, Docket No. 15-1385 (issued October 27, 2015).

The Board has similarly 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.⁵

Section 10.431 of the implementing regulations provides that, before seeking to recover an overpayment or adjust benefits, OWCP will advise the individual in writing that the overpayment exists and the amount of the overpayment.⁶ The written notification must also include a preliminary finding regarding whether the individual was at fault in the creation of the overpayment.⁷ Additionally, OWCP is obliged to advise the individual of his or her right to inspect and copy the government records relating to the overpayment.⁸ Lastly, the preliminary notice 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.⁹ The recipient of the alleged overpayment may present evidence in response to OWCP's preliminary notice either in writing or at a prerecoupment hearing.¹⁰ The evidence must be presented or the hearing requested within 30 days of the date of the written notice of overpayment.¹¹ Failure to request the hearing within this 30-day time period shall constitute waiver of that right.¹²

OWCP procedures provide that, once an overpayment is identified and calculated, it is responsible for determining whether the claimant was with fault or without fault, issuing a preliminary finding, and unless a hearing is requested, OWCP is responsible for issuing a final decision.¹³ These procedures note that, if the claimant is determined to be with fault, Form CA-2201 (preliminary finding notice) must be released within 30 days of the date the overpayment is identified. Both the reason that the overpayment occurred and the reason for the finding of fault must be clearly stated. Form CA-2201 informs the claimant of the right to submit evidence and the right to a prerecoupment hearing on the issues of (a) fact and amount of overpayment; (b) fault; and (c) waiver. Along with Form CA-2201, OWCP should provide a clearly written statement explaining how the overpayment was calculated.¹⁴

⁵ *James Lloyd Otte*, 48 ECAB 334 (1997).

⁶ 20 C.F.R. § 10.431(a).

⁷ *Id.* at § 10.431(b).

⁸ *Id.* at § 10.431(c).

⁹ *Id.* at § 10.431(d).

¹⁰ *Id.* at § 10.432

¹¹ *Id.*

¹² *Id.*

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

¹⁴ *Id.* at Chapter 2.600.4(a)(1) (May 2004).

ANALYSIS -- ISSUE 1

On June 3, 2014 OWCP made preliminary findings that appellant had received an overpayment of compensation in the amount of \$8,318.03 for the period January 22, 2009 to May 3, 2014. On June 30, 2014 appellant requested a precoupment hearing disagreeing with the preliminary overpayment determination. By decision dated February 5, 2015, an OWCP hearing representative reversed the June 3, 2014 preliminary determination finding no overpayment for the period January 22, 2009 to May 3, 2014. Upon further calculation, however, the hearing representative determined that appellant had been underpaid in the amount of \$771.51 for the period January 22, 2009 to May 3, 2014. By decision dated March 18, 2015, the Branch Chief vacated that decision and issued a new, revised final overpayment decision finding that she had received an overpayment of compensation in the amount \$3,285.32 for the period January 22, 2009 to May 3, 2014, that she was without fault in the creation of the overpayment, and that she was not entitled to waiver of recovery.

The Board finds that OWCP denied appellant due process in issuing the March 18, 2015 overpayment decision. OWCP 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 overpayment.¹⁵ It must inform the individual of 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, and the right to request a waiver of recovery of the overpayment.¹⁶ OWCP's procedures further provide 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.¹⁷

The preliminary notice of findings is essential in overpayment cases because OWCP regulations limit further review of a final decision concerning overpayment to the Board. A claimant is prohibited from requesting a hearing, or reconsideration, following a final overpayment decision.¹⁸ The claimant is, therefore, precluded from introducing new evidence to rebut findings made in a final overpayment decision.

The Board notes that OWCP routinely issues a new preliminary determination after an OWCP hearing representative reviews a preliminary overpayment decision and remands the case to OWCP for further findings.¹⁹

In this case, OWCP did not issue a new preliminary determination advising appellant of its findings following the February 5, 2015 decision of OWCP's hearing representative. Rather,

¹⁵ 20 C.F.R. § 10.431(a).

¹⁶ *Id.* at § 10.431(d).

¹⁷ *Id.*

¹⁸ *See* 20 C.F.R. § 10.440 (b).

¹⁹ *See N.N.*, Docket No. 14-0603 (issued July 22, 2014); *J.J.*, Docket No. 13-1905 (issued April 8, 2014); *L.B.*, Docket No. 12-1202 (issued February 6, 2013).

it simply amended the final amount of overpayment to the amount of \$3,285.32. OWCP has not provided appellant with the right to challenge the new amount of overpayment or inform her whether she was entitled to waiver of recovery, thereby infringing upon her due process procedural rights.²⁰ The Board finds that OWCP did not provide her due process and improperly issued the March 18, 2015 overpayment decision.

In *B.T.*,²¹ the Board remanded a January 2, 2013 decision finding an overpayment of compensation in the amount of \$2,934.53 for OWCP to properly calculate the amount of the overpayment and to consider waiver of the entire amount of the overpayment. On remand OWCP recalculated the amount of overpayment as directed by the Board and, by final decision dated April 11, 2014, determined that the claimant had received an overpayment of compensation in the amount of \$3,031.23. On subsequent appeal the Board set aside the April 11, 2014 decision finding that OWCP had failed to follow its procedures by failing to issue a revised preliminary determination advising the claimant of its new findings, prior to finalizing the overpayment. The Board concluded that as OWCP had failed to provide the claimant with the right to challenge the amount of the overpayment or to request waiver, it had infringed upon procedural rights. The case was remanded for OWCP to issue a preliminary determination regarding any overpayment in accordance with its procedures, prior to making any final overpayment decision.²²

As in *B.T.*, in the current March 18, 2015 decision, the Branch Chief modified the fact and amount of overpayment from the initial June 3, 2014 preliminary determination, and also from the February 5, 2015 final decision. Yet, appellant was not afforded another process by which to present evidence to challenge the amount.

In *K.G.*,²³ the Board set aside an OWCP August 20, 2007 decision finding that an overpayment of compensation had been created in the amount of \$7,183.80, and that the claimant was at fault in the creation of the overpayment, thereby precluding waiver of recovery.²⁴ It had remanded the case for further development regarding fact of overpayment, after which OWCP issued a final June 3, 2008 overpayment decision without issuing a new preliminary determination. The fact and amount of overpayment and findings of fault had not changed from the initial January 16, 2007 preliminary determination and final August 20, 2007 overpayment decision. However, when the case returned to the Board for the second time on appeal, the Board found that OWCP had erred in not issuing a new preliminary determination. The Board found that the claimant had been denied due process because it had failed to issue a new preliminary determination from which she could request a hearing or review of the

²⁰ 20 C.F.R. §§ 10.431, 10.432.

²¹ Docket No. 13-1619 (issued February 24, 2014).

²² *B.T.*, Docket No. 14-1909 (issued May 19, 2015).

²³ *K.G.*, Docket No. 08-2135 (issued April 16, 2009).

²⁴ On January 16, 2007 OWCP made a preliminary determination that appellant was overpaid in the amount of \$7,183.80 for the period April 10 to July 7, 2007. It found that she was at fault in the creation of the overpayment as she accepted a payment which she knew or should have known to be incorrect.

evidence. Similarly, in the case currently before the Board, OWCP has failed to afford appellant due process as she was not issued a new preliminary determination of overpayment according to its procedures.

Likewise in *M.V.*,²⁵ a preliminary determination had been issued on April 3, 2012 and finalized on October 10, 2012 finding an overpayment of compensation in the amount \$20,227.46. On appeal the Board remanded the case for further development of the medical evidence for its schedule award determination and further determined that it was premature to address the overpayment issue as the case was not in posture for determination.²⁶ Per the Board's instructions on remand, OWCP further developed the medical evidence for its schedule award determination and issued a new, final overpayment decision dated December 19, 2013 finding the same \$20,227.46 overpayment amount. On a subsequent appeal, the Board remanded the December 19, 2013 overpayment decision for failing to properly issue a new preliminary determination notifying the claimant of its findings, providing the right to challenge the fact or amount of overpayment, or to submit new information regarding waiver of recovery of the overpayment.²⁷ The Board notes that the fact and amount of overpayment had not changed from the initial April 3, 2012 preliminary determination and October 10, 2012 final overpayment decision. Yet, the Board nonetheless found that the claimant had not been afforded his procedural rights as OWCP had failed to issue a new preliminary determination.

The Board notes that, in the current case, as the fact and amount of overpayment differed in two subsequent decisions following the initial June 3, 2014 preliminary determination, appellant was not afforded her procedural rights to challenge the fact and new amount of overpayment and to request a waiver of recovery of the overpayment.²⁸ In both *M.V.* and *K.G.*, the fact and amount of the overpayment did not change from the preliminary to the final overpayment decision issued on remand.²⁹ However, the Board still determined that procedural rights had been denied without a new preliminary determination prior to its final overpayment decision. As in this case, OWCP failed to issue a new preliminary determination notifying appellant of its new findings, providing her with the right to challenge the fact and new amount of overpayment, or to submit new information regarding waiver of recovery of the overpayment. Consequently, it did not comply with the procedural rights under its regulations.³⁰

²⁵ *M.V.*, Docket No. 13-798 (issued August 14, 2013).

²⁶ The Board set aside an October 20, 2012 schedule determination finding that the claimant was not entitled to more than 20 percent impairment of the right upper extremity and instructed OWCP to refer him for a new impartial medical specialist for an impairment evaluation. The Board further set aside an October 10, 2012 decision finding that appellant received an overpayment of compensation because he received excess compensation for a schedule award in the amount of \$20,227.46. It determined that it was premature to address the overpayment issue as the case was not in posture for determination regarding the extent of permanent impairment. *Id.*

²⁷ *M.V.*, Docket No.14-1131 (issued November 14, 2014).

²⁸ 20 C.F.R. § 10.431(d).

²⁹ *Supra* note 24 and 26.

³⁰ 20 C.F.R. §§ 10.431, 10.432; *see also K.H.*, Docket No. 11-603 (issued September 27, 2011); and *K.G. supra* note 24.

Accordingly, the case will be remanded for OWCP to issue a preliminary determination regarding overpayment consistent with its own procedures.

CONCLUSION

The Board finds that OWCP improperly issued its March 18, 2015 overpayment decision.

ORDER

IT IS HEREBY ORDERED THAT the March 18, 2015 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: July 19, 2016
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board