

FACTUAL HISTORY

The case has previously been before the Board. There have been six traumatic injuries to appellant's back accepted by OWCP: a lumbar strain on December 19, 1981 (File No. xxxxxx669); acute low back strain, cervical strain, and psychogenic pain disorder on December 17, 1985 (File No. xxxxxx047); aggravation of degenerative disc disease C5-6 and C6-7 on May 10, 1988 (File No. xxxxxx048), cervical strain, lumbar strain, and herniated C6-7 disc on November 28, 1988 (File No. xxxxxx412); lumbar strain on June 19, 1999 (File No. xxxxxx644) and aggravation of preexisting cervical spine conditions on November 23, 2005 (File No. xxxxxx891).³

By decision dated November 13, 1985, OWCP found, with respect to the December 19, 1981 employment injury, that appellant was not entitled to continuing compensation for wage-loss or medical benefits after September 9, 1982. It noted that the thermogram was normal and previous tests were within normal limits. By decision dated April 19, 2000, OWCP denied merit review of the claim. In a decision dated April 12, 2002, the Board affirmed the April 19, 2000 decision.⁴ With respect to the November 13, 1985 decision, OWCP had denied a reconsideration request on July 1, 2009. The Board affirmed this decision on June 28, 2010.⁵ Appellant again requested reconsideration of the November 13, 1985 decision, which was denied by OWCP on September 4, 2014. By decision dated July 29, 2015, the Board affirmed the September 4, 2014 decision.⁶

The record indicates that appellant began receiving wage-loss compensation, pursuant to her claims filed from December 17, 1985 through November 28, 1988. As of March 1, 1997, she was working four hours and receiving compensation reduced by actual earnings. OWCP compensation payments indicate that the pay rate date was November 28, 1988, the date of injury for the cervical strain, lumbar strain, and herniated C6-7 disc noted above. The pay rate was reported as \$560.29 per week. The compensation amount was adjusted to reflect actual earnings.

By decision dated November 22, 2006, the Board affirmed OWCP decisions dated May 27 and January 28, 2005, denying a claimed recurrence of disability commencing April 2004 causally related to appellant's cervical condition.⁷

Appellant was paid compensation from December 19, 2010 to May 10, 2013 pursuant to a schedule award. Compensation payments, adjusted for actual earnings, commenced on May 11, 2013. The compensation payment for the period May 11 to June 29, 2013 indicated that

³ The master file for these claims is File No. xxxxxx047.

⁴ Docket No. 00-2528 (issued April 12, 2002).

⁵ Docket No. 09-2258 (issued June 28, 2010).

⁶ Docket No. 15-0825 (issued July 29, 2015).

⁷ Docket No. 06-0263 (issued November 22, 2006).

appellant's current pay rate for the date-of-injury position was \$1,010.12, with her having actual earnings of \$505.06 per week. No deductions were made for life insurance.

The record indicates that appellant worked four hours on July 23, 2014 and then stopped working. OWCP accepted that no work was available and began paying her temporary total disability. The employing establishment advised OWCP by letter dated November 7, 2013, that appellant's salary on July 24, 2013 was \$53,840.00 per year, and her optional life insurance (OLI) code was K0. The employing establishment indicated that it had paid OLI premiums through July 24, 2013. A supplemental payment covering the period July 24 to September 20, 2013 indicated that OLI premiums had been deducted based on a coverage amount of \$53,839.56. Another supplemental payment covering the period September 21 to December 14, 2013 indicated that OLI premiums had been deducted based on coverage of \$52,526.00.

As of December 15, 2013, the compensation payments indicated that deductions of \$62.40 were made for OLI under code K0, with the annual pay rate of \$29,135.08. This represented the November 28, 1988 compensation pay rate of \$560.29 per week. OWCP advised appellant by letter dated December 26, 2014 that she would receive compensation on the periodic rolls. The OLI deduction was reported as \$62.40.

By letter to OWCP dated March 25, 2015, the Office of Personnel Management (OPM) "Retirement Operations Center" indicated that appellant was eligible to continue Federal Employees Group Life Insurance (FEGLI) coverage. It reported that the final base salary was \$55,574.00. The code reported was K0, basic life insurance with 75 percent reduction, and option B, two times salary. OPM indicated that premium deductions by OWCP were to commence as of August 9, 2014. An OWCP memorandum dated March 25, 2015 indicated that OPM had reported that appellant had continued eligibility for postretirement basic life insurance (PRBLI) at 75 percent reduction with Option B. The memorandum states that per OPM, the PRBLI coverage should begin on August 9, 2014.

The record indicates that as of May 3, 2015, OWCP began deducting \$116.48 for OLI from every 28 day payment. The coverage amount was reported as \$55,574.00.

OWCP sent appellant a letter dated August 5, 2015, advising her of a preliminary determination that an overpayment of compensation in the amount of \$515.69 had been created. The preliminary determination notes that information from OPM established the base salary for life insurance purposes as \$55,574.00 annually. According to OWCP, for the period August 9, 2014 to May 2, 2015, \$595.03 had been deducted for OLI premiums, but it should have deducted \$1,110.72.⁸ Therefore, an overpayment of \$515.69 was created. It found that appellant was not at fault in creating the overpayment, and an overpayment recovery questionnaire (OWCP-20) was enclosed.

On September 8, 2015 appellant submitted an August 26, 2015 letter. She indicated that she had not been notified of a salary change, and inquired as to whether her compensation pay

⁸ The preliminary determination states that the amount actually deducted was \$593.03, but a memorandum in the file indicates that \$595.03 was deducted from August 9, 2014 to May 2, 2015.

rate should match her salary for life insurance purposes. Appellant also asserted that she had a previous overpayment and to repay the current overpayment would be a financial hardship.⁹

By decision dated September 9, 2015, OWCP finalized its determination of a \$515.69 overpayment of compensation. It denied waiver of recovery of the overpayment, finding that appellant had not submitted evidence sufficient to warrant waiver.

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.¹⁰ The coverage for basic life is effective unless waived¹¹ and premiums for basic and optional life coverages are withheld from the employee's pay.¹²

FECA and its implementing regulations provide that an employee entitled to disability compensation benefits may continue his or her basic life insurance coverage without cost under certain circumstances¹³ and may also retain the optional life insurance.¹⁴ At separation from the employing establishment, the FEGLI insurance will either terminate or be continued under "compensation" status.¹⁵ If the compensation chooses to continue basic and optional life insurance coverage, the schedule of deductions made while the compensation was an employee will be used to withhold premiums from his or her compensation payments.¹⁶ Thus while receiving disability compensation in lieu of retirement benefits, the former employee is responsible for all insurance premiums.¹⁷ When FEGLI premiums, including postretirement insurance premiums are incorrectly withheld, the entire amount of the unpaid premium is deemed an overpayment of compensation because OWCP must pay the full premium to OPM upon discovery of the error.¹⁸

⁹ The record includes a December 28, 2012 decision finding an overpayment of \$611.25 due to an incorrect pay rate.

¹⁰ 5 C.F.R. § 870.201.

¹¹ *Id.* at § 870.204(a).

¹² *Id.* at § 870.401(a).

¹³ *Id.* at § 870.701, subpart G.

¹⁴ *Id.* at § 871.201, subpart B; 8702.201, subpart B; 873.203, subpart B.

¹⁵ *Id.* at § 870.501.

¹⁶ *Id.* at § 872.410, subpart D.

¹⁷ *Scherri L. Stanley*, 53 ECAB 433 (2002).

¹⁸ *See James Lloyd Otte*, 48 ECAB 334, 337 (1997).

ANALYSIS -- ISSUE 1

In the present case, the record indicates that the employing establishment had paid appellant's OLI premiums through July 24, 2013. When appellant began receiving wage-loss compensation for total disability as of July 24, 2013, OWCP had initially deducted OLI premiums based on her current pay rate for the date-of-injury position. The employing establishment indicated that the annual salary was \$53,849.00 as of July 24, 2013.

The overpayment in this case has been based on the failure to properly deduct OLI premiums from August 9, 2014 to May 2, 2015. There is no indication that appellant disputes that OLI premiums should be deducted from her continuing compensation. She had previously elected OLI coverage, there is no indication that she waived coverage,¹⁹ and there is no dispute that during the period August 9, 2014 to May 2, 2015 the OLI deductions were based on coverage for a salary of \$29,135.08 per year. According to the March 25, 2015 letter from OPM, the proper base salary, as of August 9, 2014, was \$55,574.00 per year. This is consistent with evidence as to appellant's current salary for the date-of-injury position and there is no contrary evidence of record.

The record therefore supports a finding that the OLI premiums were deducted based on an incorrect salary coverage. OWCP calculated that, during the period August 9, 2014 to May 2, 2015, OLI premiums of \$595.03 had been deducted. Using the salary of \$55,574.00, it found that \$1,110.72 should have been deducted. The difference between these amounts represents a \$515.69 overpayment of compensation.

On appeal, appellant notes that her pay rate for compensation purposes was not \$55,574.00, but the date to determine pay rate under FECA is determined by 5 U.S.C. § 8101(4).²⁰ OWCP used a date of November 28, 1988, a date of injury in accord with this section. The OLI premiums are based on a current salary, as the benefit is a multiple of that salary. For the reasons discussed, OWCP properly found an overpayment of compensation in the amount of \$515.69 in this case.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of FECA²¹ provides: "Adjustment or recovery 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 FECA or would be against equity and

¹⁹ Cf. *S.K.*, Docket No. 15-0511 (issued September 9, 2015) (there was no indication that the claimant had elected OLI prior to retirement, and no election form or other documents establishing that she had elected OLI as of the date identified by OPM).

²⁰ Monthly, pay means the monthly pay at the time of injury, or the monthly pay at the time disability begins, or the monthly pay at the time compensable disability recurs, if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater. 5 U.S.C. § 8101(4).

²¹ *Supra* note 2.

good conscience.”²² Since OWCP found that appellant to be without fault in the creation of the overpayment, OWCP may only recover the overpayment if recovery would neither defeat the purpose of FECA nor be against equity and good conscience. The guidelines for determining whether recovery of an overpayment would defeat the purpose of FECA or would be against equity and good conscience are set forth in sections 10.434 to 10.437 of Title 20 of the Code of Federal Regulations.

According to section 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 or her current 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.²³ For waiver of recovery under the “defeat the purpose” of FECA standard, appellant must show that he needs substantially all of his current income to meet current ordinary and necessary living expenses, and that his assets do not exceed the resource base.²⁴

Section 10.437 provides that recovery of an overpayment would be against equity and good conscience if: (a) the overpaid individual would experience severe financial hardship in attempting to repay the debt; and (b) the 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.

With respect to the submission of financial evidence, OWCP’s regulations at 20 C.F.R. § 10.438 provide:

“(a) 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 of an overpayment would defeat the purpose of FECA, or be against equity and good conscience. This information will also be used to determine the repayment schedule, if necessary.

“(b) Failure to submit the requested information within 30 days of the request shall result in denial of waiver, and no further request for waiver shall be considered until the requested information is furnished.”

ANALYSIS -- ISSUE 2

In the present case, OWCP requested that appellant submit financial information relevant to the issue of waiver. It sent her an OWCP-20 form which requests information with respect to

²² 5 U.S.C. § 8129(b).

²³ OWCP 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).

²⁴ See *Robert E. Wenzholz*, 38 ECAB 311 (1986).

income and expenses. As noted above, appellant is responsible for submitting the necessary evidence on which OWCP may properly make an informed determination as to entitlement to waiver under OWCP procedures. She did not submit the requested financial information. Pursuant to 20 C.F.R. § 10.438, OWCP must deny waiver of recovery of the overpayment until the requested information is furnished.

CONCLUSION

The Board finds that OWCP properly found an overpayment of compensation in the amount of \$515.69 was created and that waiver of recovery of the overpayment was properly denied.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 9, 2015 is affirmed.

Issued: March 9, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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