

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

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J.L., Appellant )  
and ) Docket No. 16-0778  
DEPARTMENT OF HOMELAND SECURITY, ) Issued: November 2, 2016  
CUSTOMS & BORDER PROTECTION, )  
El Paso, TX, Employer )  
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)

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

CHRISTOPHER J. GODFREY, Chief Judge  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On March 8, 2016 appellant filed a timely appeal from a February 19, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP).<sup>1</sup> Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (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 an overpayment of compensation in the amount of \$5,860.80, because deductions for life and health insurance premiums were not made during the period March 23, 2014 through March 7, 2015; (2) whether OWCP properly denied waiver of recovery of the overpayment; and (3) whether OWCP properly determined that the

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<sup>1</sup> On March 7, 2016 the Board issued an order dismissing appeal as appellant appealed a March 20, 2015 preliminary overpayment notice, which was not a final adverse decision. Docket No. 16-0197 (issued March 7, 2016).

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

overpayment should be recovered by withholding \$200.00 from appellant's continuing compensation payments.

### **FACTUAL HISTORY**

OWCP accepted that on December 15, 2010 appellant, then a 44-year-old customs and border patrol officer, was assisting in restraining a subject who kicked him in the chest, ribs, left ring finger, and knee. The incident caused internal derangement of the left knee; medial meniscus tear, left knee; chondromalacia patellae, left knee; and sprain of the lateral collateral ligament, right knee. OWCP paid benefits including left knee surgeries on June 29 and November 30, 2011. It also paid appellant compensation for temporary total disability as of June 30, 2011 on the periodic rolls.

By decision dated February 18, 2014, appellant received a schedule award for three percent permanent impairment of the left lower extremity. By decision dated February 25, 2014, OWCP reduced his wage-loss compensation based on his actual earnings as a clerk with the employing establishment, effective August 26, 2013.

On March 11, 2015 OWCP determined that, from March 23, 2014 through March 7, 2015, health and life insurance premiums had not been deducted from appellant's compensation. For health insurance premiums, it showed calculations that for the period March 23 to April 5, 2014 deductions should have been made as follows: (code 312)  $\$15.93 \times 14 \text{ days} = \$223.02$ . For the period April 6, 2014 to January 10, 2015: (code 312)  $\$445.94 \times 10 \text{ (28-day OWCP pay cycles)} = \$4,459.40$ . For the period January 11 to March 7, 2015: (code 312)  $\$450.46 \times 2 \text{ (28-day OWCP pay cycles)} = \$900.92$ . The total overpayment for health insurance amounted to  $\$5,583.34 (\$223.02 + \$4,459.40 + \$900.92)$ . For basic life insurance premiums, it calculated that for the period March 23 to April 5, 2014 the following deductions should have been made:  $\$0.79 \times 14 \text{ days} = \$11.06$ . For the period April 6, 2014 to March 7, 2015:  $\$22.20 \times 12 \text{ (28-day OWCP pay cycles)} = \$266.40$ . The total overpayment for basic life insurance premiums amounted to  $\$277.46 (\$11.06 + \$266.40)$ . The total overpayment for both health insurance and basic life insurance amounted to  $\$5,860.80 (\$5,583.34 + \$277.46)$ .

On March 20, 2015 OWCP made a preliminary finding that appellant received an overpayment of compensation in the amount of \$5,860.80 because health and life insurance premium deductions were not made during the period March 23, 2014 to March 7, 2015. It found that he was without fault in creating the overpayment because he was not aware, nor could he have reasonably been expected to be aware, that OWCP had paid compensation incorrectly. OWCP informed appellant of his right to challenge the amount of the overpayment or request a waiver of the overpayment by one of three methods including a request for a telephone conference, a request for a written review of the record, or a request for a prerecougment hearing. If appellant wished a waiver of recovery of the overpayment, he was specifically directed to submit financial information by completing an overpayment recovery questionnaire. He was afforded 30 days to submit the requested information.

By letter postmarked April 20, 2015, appellant requested a prerecougment hearing before an OWCP hearing representative. He contended that he should be granted a waiver as he did not know if the Office of Personal Management (OPM) or OWCP was paying the insurance

premiums as his compensation benefits were directly deposited into his bank account. Appellant submitted an overpayment recovery questionnaire (Form OWCP-20) that was completed on April 20, 2015, along with a detailed list of debts being paid by monthly installments and financial documents to verify the amounts. He indicated that he had total monthly income of \$7,529.00, which was comprised of \$4,666.00 from his wife's income, \$2,600.00 from his OWCP compensation benefits, and \$263.00 from his Department of Veterans Affairs (VA) benefits. Appellant also indicated that he had total monthly expenses of \$6,300.00, which was comprised of \$939.00 rent or mortgage, \$3,200.00 in food, \$500.00 in clothing, \$400.00 in utilities, and \$1,800.00 in miscellaneous household expenses.<sup>3</sup> He reported \$60.00 in available funds.

On December 8, 2015 the requested prerecoupment hearing was held telephonically. Appellant confirmed that he understood OWCP's finding regarding the overpayment, that they did not deduct for his health and optional life insurance benefits, and indicated that he did not disagree that an overpayment existed. He testified that his household financial situation had worsened since he completed the overpayment recovery questionnaire on April 20, 2015. Appellant confirmed that the income amounts had remained the same, and that his adult son was in college and was not working or contributing to the household. It was noted that his breakdown of monthly expenses submitted did not equal the amount listed on the form, and he indicated that he believed his monthly expenses had increased. Appellant was advised that the record would remain open for 30 days so he could submit more current and more correct financial information concerning his household monthly expenses. He was also requested to provide any asset information regarding any retirement or investment accounts for the household. No additional financial information was received post-hearing.

By decision dated February 19, 2016, an OWCP hearing representative finalized its preliminary determination that appellant had received an overpayment of compensation in the amount of \$5,860.80, for which he was without fault, but that he was not entitled to waiver of recovery of the overpayment. It directed that recovery would be made from appellant's continuing compensation in the amount of \$200.00 every 28 days until such time as the overpayment is collected in full.

#### **LEGAL PRECEDENT -- ISSUE 1**

Section 8129(a) of FECA provides 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.<sup>4</sup>

OPM, rather than OWCP, has jurisdiction over the matter of health insurance deductions from compensation and enrollment under the Federal Employees Health Benefits (FEHB) Program.<sup>5</sup> OPM regulations regarding the FEHB Program provide that an employee or annuitant

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<sup>3</sup> Based on appellant's reported expenses, his monthly expenses should total \$6,839.00.

<sup>4</sup> 5 U.S.C. § 8129.

<sup>5</sup> See *Raymond C. Beyer*, 50 ECAB 164 (1998).

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 due the United States in the amount of the proper employee withholding required for that pay period.<sup>6</sup> The regulations further provide that an employing establishment 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 employing establishment contributions required under 5 U.S.C. § 8906 to OPM for deposit in the Employees Health Benefits Fund.<sup>7</sup> 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.<sup>8</sup>

Under the Federal Employees Group Life Insurance Program, most civilian employees of the Federal Government are eligible to participate in basic life insurance and one or more of the options.<sup>9</sup> The coverage for basic life insurance is effective unless waived<sup>10</sup> and the premiums for basic and optional life coverage are withheld from the employee's pay.<sup>11</sup> While the employee is receiving compensation under FECA, deductions for insurance are withheld from the employee's compensation.<sup>12</sup> When an under withholding 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.<sup>13</sup>

#### **ANALYSIS -- ISSUE 1**

Fact of overpayment is established and is not contested. The record reflects that OWCP noted it had failed to deduct the amount for health insurance and life insurance premiums for the period March 23, 2014 through March 7, 2015. Worksheets were provided of OWCP's calculations, which indicated that for the period March 23, 2014 through March 7, 2015, it had failed to deduct \$5,583.34 in health insurance and \$277.46 in basic life insurance for a total of \$5,860.80. The Board finds that OWCP properly determined the fact and the amount of overpayment as no other probative evidence has been presented.<sup>14</sup>

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<sup>6</sup> 5 C.F.R. § 890.502(b)(1).

<sup>7</sup> *Id.* at § 890.502(d); see *John Skarbek*, 53 ECAB 630 (2002); *Jennifer Burch*, 48 ECAB 633 (1997).

<sup>8</sup> D.D., Docket No. 14-572 (issued June 9, 2014).

<sup>9</sup> 5 U.S.C. § 8702(a).

<sup>10</sup> *Id.* at § 8702(b).

<sup>11</sup> *Id.* at § 8707.

<sup>12</sup> *Id.* at § 8707(b)(1).

<sup>13</sup> *Id.* at § 8707(d); see *Keith H. Mapes*, 56 ECAB 130 (2004); *James Lloyd Otte*, 48 ECAB 334 (1997).

<sup>14</sup> See *M.N.*, Docket No. 16-0360 (issued July 5, 2016).

## **LEGAL PRECEDENT -- ISSUE 2**

Section 8129 of FECA provides that an overpayment in compensation shall be recovered by OWCP 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.<sup>15</sup> Waiver of an overpayment is not permitted unless the claimant is without fault in creating the overpayment.<sup>16</sup>

Section 10.433(a) of OWCP regulations provide that OWCP may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment.<sup>17</sup> According to 20 C.F.R. § 10.436, recovery of an overpayment will defeat the purpose of FECA if such recovery would cause hardship to a currently or formerly entitled beneficiary because the beneficiary from whom OWCP seeks recovery needs substantially all of his or her current income (including compensation benefits) to meet current ordinary and necessary living expenses; and the beneficiary's assets do not exceed a specified amount as determined by OWCP from data furnished by the Bureau of Labor Statistics.<sup>18</sup> Recovery of an overpayment is considered to be against equity and good conscience under section § 10.437 of OWCP regulations when any individual who received an overpayment would experience severe financial hardship in attempting to repay the debt.<sup>19</sup> Recovery of an overpayment is also considered to be against equity and good conscience when any 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.<sup>20</sup>

OWCP procedures provide that recovery of an overpayment will defeat the purpose of FECA if recovery would cause hardship by depriving a presently or formerly entitled beneficiary of income and resources needed for ordinary and necessary living expenses under the criteria set out in this section. Recovery would defeat the purpose of FECA if both the individual from whom recovery is sought needed substantially all of his or her current income (including FECA periodic benefits) to meet current ordinary and necessary living expense, and if the individual's assets did not exceed the resource base of \$4,800.00 for an individual or \$8,000.00 for an individual with a spouse or one dependent, plus \$960.00 for each additional dependent. An individual is deemed to need substantially all of his or her current income to meet current

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<sup>15</sup> 5 U.S.C. § 8129.

<sup>16</sup> *Steven R. Cofrancesco*, 57 ECAB 662 (2006).

<sup>17</sup> 20 C.F.R. § 10.433(a).

<sup>18</sup> *Id.* at § 10.436. An individual is deemed to need substantially all of his or her monthly income to meet current and ordinary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. 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. See Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a) (October 2004); *B.F.*, Docket No. 13-785 (issued September 20, 2013).

<sup>19</sup> *Id.* at § 10.437(a).

<sup>20</sup> *Id.* at § 10.437(b).

ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. In other words, the amount of monthly funds available for debt repayment is the difference between current income and adjusted living expenses (*i.e.*, ordinary and necessary living expenses plus \$50.00). If an individual has disposable current income or assets in excess of the allowable amount, a reasonable repayment schedule can be established over a reasonable, specified period of time. It is the individual's burden to submit evidence to show that recovery of the overpayment would cause the degree of financial hardship sufficient to justify waiver.<sup>21</sup>

Recovery of an overpayment is considered to be against equity and good conscience when any individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his position for the worse.<sup>22</sup> Conversion of the overpayment into a different form, such as food, consumer goods, real estate, *etc.*, from which the claimant derived some benefit, is not to be considered a loss.<sup>23</sup>

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.<sup>24</sup>

## **ANALYSIS -- ISSUE 2**

OWCP found that appellant was not at fault in creating the overpayment of compensation and thus considered whether he was entitled to waiver of recovery of the overpayment. Waiver is only possible if recovery would defeat the purpose of FECA or would be against equity and good conscience. In order to establish that repayment of the overpayment would defeat the purpose of FECA, appellant must show that he requires substantially all of his income to meet current ordinary and necessary living expenses and that his assets do not exceed the established limit as determined by OWCP's procedures.<sup>25</sup>

During the prerecouptment hearing, appellant testified that his household financial situation had worsened since he completed the overpayment recovery questionnaire form on April 20, 2015, but he did not provide any additional updated financial information to support his claim. He confirmed that his household income amounts had remained the same. Based on the April 20, 2015 overpayment recovery questionnaire and appellant's testimony, OWCP's hearing representative found that his total monthly income totaled \$7,249.44, which included \$4,666.00

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<sup>21</sup> *B.R.*, Docket No. 15-1247 (issued October 26, 2015).

<sup>22</sup> *Supra* note 20.

<sup>23</sup> *Supra* note 18 at Chapter 6.200.6.b(3) (October 2004).

<sup>24</sup> 20 C.F.R. § 10.438(a); *Ralph P. Beachum, Sr.*, 55 ECAB 442 (2004).

<sup>25</sup> *Id.* at § 10.436.

from his wife's income, \$263.00 VA benefits, and \$2,320.44 OWCP benefits.<sup>26</sup> The hearing representative noted that on April 20, 2015 overpayment recovery questionnaire, his household total monthly expenses were incorrectly reported as \$6,300.00 as the proper calculation equaled \$6,839.00.<sup>27</sup> The hearing representative found the monthly household income of \$7,249.44 minus the monthly expenses of \$6,839.00 exceeded the monthly expenses by more than \$410.00.<sup>28</sup> The hearing representative noted that no assets were reported on the overpayment recovery questionnaire, but while appellant had testified that his wife may have a retirement account, he did not provide that information post hearing. Based on his reported expenses and income, his household income exceeded his expenses by more than \$50.00 per month. As appellant's income exceeds expenses by more than \$50.00, the Board finds that OWCP properly found that recovery of the overpayment would not defeat the purpose of FECA.

The evidence also does not demonstrate that repayment of the overpayment would be against equity and good conscience. Appellant submitted no evidence that he had relied upon the incorrect payments to his detriment or that he would experience severe financial hardship attempting to repay the debt. Consequently, OWCP properly denied waiver of recovery of the overpayment.

Because appellant has failed to establish that recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience, the Board finds that he has failed to show that OWCP abused its discretion by refusing to waive the \$5,860.80 overpayment.

### **LEGAL PRECEDENT -- ISSUE 3**

The Board's jurisdiction over recovery of an overpayment is limited to reviewing those cases where OWCP seeks recovery from continuing compensation under FECA. Section 10.441(a) of the regulations provide:

“When an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to OWCP the amount of the overpayment as soon as the error is discovered or his or her attention is called to same. If no refund is made, OWCP 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.”<sup>29</sup>

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<sup>26</sup> The hearing representative noted that as appellant currently receives \$2,141.94 every 28 days, or 13 payments a year, \$2,141.94 x 13 payments a year equaled \$27,845.22, which when divided by 12 months, converted to a monthly amount of \$2,320.44.

<sup>27</sup> See *infra* note 4.

<sup>28</sup> The Board notes the accurate figure is \$410.44.

<sup>29</sup> 20 C.F.R. § 10.441.

### **ANALYSIS -- ISSUE 3**

OWCP found that the overpayment should be repaid in the amount of \$200.00 per month. On appeal appellant contends that his compensation benefits are insufficient and he cannot provide for his son in college and his two other children, who are in high school.

OWCP's procedures provide that, if a claimant is being paid compensation or is due accrued benefits, the debt should be recovered as quickly as possible.<sup>30</sup> The Board finds that OWCP did not abuse its discretion in this matter. OWCP took into consideration the financial information submitted by appellant resulting in a monthly surplus of over \$410.00 as well as the factors set forth in section 10.441(a) of its regulations and found that this method of recovery would minimize any resulting hardship on him. Therefore, it properly required repayment of the overpayment by deducting \$200.00 from his compensation payments every four weeks.<sup>31</sup>

### **CONCLUSION**

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$5,860.80 for the period March 23, 2014 through March 7, 2015 for which he was without fault, that he was not entitled to waiver of recovery of the overpayment, and that the overpayment should be recovered by withholding \$200.00 per month from his continuing compensation benefits.

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<sup>30</sup> See *Frederick Arters*, 53 ECAB 397 (2002), citing *supra* note 18 at Chapter 6.200.4(c)(2) (September 2009).

<sup>31</sup> See P.B., Docket No. 15-1462 (issued February 5, 2016).

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 19, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 2, 2016  
Washington, DC

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

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

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