

without fault; (2) whether OWCP properly denied waiver of recovery of the overpayment; and (3) whether OWCP properly required recovery of the overpayment by deducting \$125.00 every 28 days from appellant's continuing compensation payments.

FACTUAL HISTORY

On April 22, 2011 appellant, then a 44-year-old health technician, was injured while in the performance of duty when a patient punched her in the face when she attempted to assist him. OWCP accepted her traumatic injury claim (Form CA-1) for cervical strain, cervical radiculitis, facial contusion (maxilla), left rotator cuff strain, and post-traumatic stress (PTSD) disorder. Appellant received compensation for periods of temporary total disability and intermittent wage loss. OWCP also granted her a schedule award for nine percent permanent impairment of the left upper extremity, which covered the period January 2 through July 17, 2014. On August 1, 2016 appellant stopped work. OWCP paid her wage-loss compensation on the supplemental rolls beginning August 1, 2016, and on the periodic rolls beginning August 21, 2016.

On May 2, 2017 OWCP received information regarding appellant's health benefit insurance (HBI) enrollment. The evidence established that she was enrolled in the Federal Employees Health Benefit (FEHB) plan effective June 30, 2013 under enrollment code 111 (self-only). A memorandum from the employing establishment dated May 2, 2017 indicated that appellant's proper FEHB enrollment was code 112 (family) and was being transferred because she was receiving OWCP benefits.

In a telephone call dated June 2, 2017, OWCP informed appellant that it had the wrong HBI code and advised her that it had corrected the HBI code from 111 to 112, which resulted in an adjustment in her compensation payments.

By letter dated June 14, 2017, OWCP advised appellant of its preliminary determination that an overpayment in the amount of \$1,912.90 was created because it failed to deduct the correct HBI premiums for the period August 1, 2016 through April 29, 2017.³ It informed her that she was without fault in the creation of the overpayment. OWCP provided appellant with an overpayment recovery questionnaire (Form OWCP-20) to complete and return. It also advised her that she had the option to request a telephone conference, a decision based on the written evidence, or a precoupment hearing with the Branch of Hearings and Review. Lastly, OWCP explained that, if appellant did not reply to the preliminary determination within 30 days, it would issue a final determination based on the current information on file.

In response, appellant submitted a partial copy of her 2016 income tax return, which showed her adjusted gross income as \$21,460.00, a statement indicating a mortgage balance of \$122,872.73, a list of household and utilities expenses totaling \$3,742.00, and a bank statement showing an available balance of \$167.99.

³ An overpayment worksheet dated June 6, 2017 noted that for the period August 1, 2016 through April 29, 2017 the HBI premium for enrollment code 111 was \$1,352.39. A separate June 6, 2017 worksheet indicated that the HBI premium for enrollment code 112 was \$3,265.29 for the same period. The difference between what OWCP deducted and what it should have deducted for HBI premiums represented an overpayment of \$1,912.90.

On June 21, 2017 appellant requested that OWCP make a decision based on the written evidence on the issues of fault and possible waiver of the overpayment. She also submitted a Form OWCP-20. Appellant reported monthly income included \$1,520.00 in Social Security benefits and \$2,344.74 in FECA benefits, for a total monthly income of \$3,864.74. Appellant reiterated on her OWCP-20 that she had \$3,742.00 in monthly expenses. She also reported an available balance of \$167.99 in her checking account. Appellant argued that she was without fault in the creation of the overpayment because the employing establishment did not provide the correct HBI code 112 and she submitted supporting health benefits election forms.

By decision dated August 3, 2017, OWCP finalized its preliminary determination that appellant had received an overpayment of compensation in the amount of \$1,912.90 because HBI premiums were not properly deducted from her compensation payments for the period August 1, 2016 through April 29, 2017. It found that she was without fault in the creation of the overpayment, but that she was not entitled to waiver of recovery because her monthly income exceeded her monthly expenses by more than \$50.00. OWCP directed recovery by deducting \$125.00 every 28 days from appellant's continuing compensation payments.

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.⁴ 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.⁵

The regulations of the Office of Personnel Management (OPM), which administers the FEHB 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 that 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 due to the United States in the amount of the proper employee withholding required for that pay period.⁶

In addition, 5 C.F.R. § 890.502(c)(1) provides that an agency that withholds less than the amount due for 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 agency contributions to OPM for deposit in the Employees Health Benefits Fund.⁷ When OWCP deducts

⁴ 5 U.S.C. § 8102(a).

⁵ *Id.* at § 8129(a).

⁶ 5 C.F.R. § 890.502(a)(1).

⁷ *Id.* at § 890.502(c)(1).

less than the proper health benefit premium for the coverage selected, an overpayment of compensation is created.⁸

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$1,912.90 for the period August 1, 2016 through April 29, 2017, for which she was without fault.

The record reflects that OPM notified OWCP that appellant's correct HBI code was 112 (family), rather than 111 (self-only). For the period August 1, 2016 through April 29, 2017, OWCP calculated that appellant had been overpaid \$1,912.90 because it had not deducted the appropriate HBI premiums (112). It further found that appellant was without fault in the creation of the resulting overpayment. The two separate June 6, 2017 overpayment worksheets, containing calculations as to the amount of overpayment, reflect the above-noted overpayment.⁹ Accordingly, the Board finds that appellant received an overpayment of compensation in the amount of \$1,912.90 for the period August 1, 2016 through April 29, 2017, for which she was without at fault.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA 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."¹⁰ 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.¹¹

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 or her 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.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

⁸ See *John Skarbek*, 53 ECAB 630 (2002). Cf. *C.S.*, Docket No. 11-1274 (issued September 15, 2011).

⁹ See *supra* note 3.

¹⁰ 5 U.S.C. § 8129(a)-(b).

¹¹ See *L.S.*, 59 ECAB 350 (2008).

¹² 20 C.F.R. § 10.436.

¹³ *Id.* at § 10.437.

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

The Board finds that OWCP properly denied waiver of recovery of the overpayment. Appellant reported monthly income of \$3,864.74 and monthly expenses of \$3,742.00, which represents a monthly income surplus of \$122.74. An individual is deemed to need substantially all of her monthly income to meet current and ordinary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.¹⁵ As appellant's current monthly income exceeds her reported monthly expenses by \$122.74, recovery of the overpayment would not defeat the purpose of FECA.¹⁶

Additionally, the evidence of record does not demonstrate that repayment of the overpayment would be against equity and good conscience. Appellant submitted no evidence that she relied upon the incorrect payments to her detriment or that she would experience severe financial hardship attempting to repay the debt.¹⁷ Consequently, OWCP did not abuse its discretion in denying waiver of recovery of the overpayment.

Appellant maintained that she was without fault in the creation of the overpayment and repayment would cause financial hardship. However, the fact that an error by OWCP resulted in an overpayment does not relieve a claimant from liability for repayment.¹⁸

LEGAL PRECEDENT -- ISSUE 3

Section 10.441(a) of OWCP's regulations provide that 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.¹⁹ 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.²⁰

¹⁴ *Id.* at § 10.437(b)(1).

¹⁵ *Desiderio Martinez*, 55 ECAB 336 (2004).

¹⁶ As appellant's income exceeds her ordinary and necessary living expenses by more than \$50.00, it is not necessary for OWCP to consider whether her assets exceed the allowable resource base. *See J.W.*, Docket No. 16-1355 (issued January 10, 2017).

¹⁷ 20 C.F.R. § 10.437.

¹⁸ *Id.* at 10.435(a); *Lawrence J. Dubuque*, 55 ECAB 667 (2004).

¹⁹ *Id.* at § 10.441.

²⁰ *Id.*

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly required recovery of the above overpayment of compensation by deducting \$125.00 every 28 days from appellant's continuing compensation payments. The Board took into account the amount of the compensation and the financial circumstances of appellant to minimize hardship, as well as the factors set forth in section 10.441 of OWCP's regulations. The Board found that this method of recovery would minimize any resulting hardship on her. The Board therefore finds that OWCP properly required recovery of the overpayment of compensation by deducting \$125.00 every 28 days from her continuing compensation payments.²¹

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$1,912.90 for the period August 1, 2016 through April 29, 2017, for which she was without fault. The Board further finds that OWCP properly denied waiver of recovery of the overpayment and properly required recovery of the overpayment by deducting \$125.00 every 28 days from appellant's continuing compensation payments.

ORDER

IT IS HEREBY ORDERED THAT the August 3, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 11, 2019
Washington, DC

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

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

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

²¹ See *C.M. & J.M., (J.M.)*, 58 ECAB 504, 510 (2007).