



## **ISSUES**

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$5,763.42 for the period December 25, 2016 through March 31, 2018, because OWCP failed to deduct health benefit premiums, for which appellant was not at fault; (2) whether OWCP properly denied waiver of recovery of the overpayment; and (3) whether it properly required recovery of the overpayment by deducting \$400.00 every 28 days from appellant's continuing compensation.

## **FACTUAL HISTORY**

On November 8, 2016 appellant, then a 52-year-old customer service representative, filed a traumatic injury claim (Form CA-1) alleging that on November 1, 2016, he struck two elk while driving a government vehicle while in the performance of duty. He indicated that he suffered a concussion and neck and back injuries from whiplash as a result of this collision. Appellant stopped work on November 1, 2016. OWCP accepted the claim for concussion with loss of consciousness of unspecified duration; contusion of left eyelid and periocular area; right shoulder derangement; and low back strain. It paid appellant wage-loss compensation on the supplemental rolls as of December 25, 2016, and on the periodic rolls as of April 2, 2017.

On January 11, 2017 appellant completed a claim for compensation (Form CA-7). On the reverse side of the form, the employing establishment checked the box marked "no" in answer to a question as to whether appellant was enrolled in a federal employee health plan (FEHP).

A February 1, 2017 telephone memorandum (Form CA-110) relates that OWCP contacted the employing establishment to verify appellant's pay rate information. The employing establishment indicated that he received an annual salary of \$34,472.00, and that his only benefit was basic life insurance.

A Form CA-1049 dated April 6, 2017, issued by OWCP outlined appellant's entitlement to compensation benefits beginning March 19, 2017. It indicated that his wage-loss compensation payments included deductions for basic life insurance; however, no deductions were being made for health benefits. OWCP advised appellant to notify it immediately if he had optional life insurance or health benefits coverage as no deduction was shown for these benefits and he would be responsible for these premiums.

On April 11, 2018 the employing establishment provided OWCP with a FEHB notice of change in health benefits enrollment (Form 2810), indicating that enrollment code 112, should be transferred from the employing establishment to OWCP effective December 25, 2016.

In an April 20, 2018 telephone memorandum (Form CA-110), appellant informed OWCP that his health insurance premiums had not been paid. OWCP explained that they had just received his health benefits enrollment form and that appellant had been advised of his entitlement to benefits in the April 6, 2017 Form CA-1049. Appellant indicated that he did not believe he should be held responsible and he indicated that he had not read the form because of his medical condition.

In a June 4, 2018 fiscal file memorandum, OWCP calculated that, from December 25, 2016 through March 31, 2018, it had failed to deduct health benefit premiums, totaling \$5,763.42.

In a preliminary notice of overpayment dated June 4, 2018, OWCP advised appellant of its determination that he had received an overpayment of compensation in the amount of \$5,763.42, because it failed to deduct health benefit premiums from his FECA benefits for the period December 25, 2016 through March 31, 2018, for a total of 462 days. It provided a calculation of the overpayment and indicated that appellant was at fault in its creation. OWCP requested that appellant provide information regarding his income, assets, and expenses on an enclosed overpayment recovery questionnaire (Form OWCP-20) within 30 days, if he contested that an overpayment occurred.

On June 20, 2018 counsel requested a telephonic prerecoupment hearing before a representative of OWCP's Branch of Hearings and Review. He contended that OWCP should waive recovery of the overpayment because appellant was hospitalized and treated for serious injuries, including a traumatic brain injury, and "could not have been reasonably aware of the alleged overpayment."

In an August 6, 2018 telephone memorandum (Form CA-110), OWCP advised counsel that the Form OWCP-20 must be completed prior to the telephonic prerecoupment hearing. Appellant submitted an incomplete Form OWCP-20 on September 21, 2018. Appellant listed total monthly income of \$2,011.00 and total monthly expenses of \$3,596.00 (\$676.00, rent or mortgage; \$1,100.00, food; \$200.00, clothing; \$725.00, utilities; \$695.00, other expenses to include car, insurance and personal necessities; and \$200.00, credit cards).

During the September 24, 2018 telephonic prerecoupment hearing, OWCP's representative indicated that the finding of fault should be changed to a finding of not at fault. She requested that appellant provide documentation to support his expenses, his final divorce decree, and the award letter from the Department of Veterans Affairs for post-traumatic stress disorder. OWCP received a copy of a September 2018 credit report, but no other documentation of income or expenses.

By decision dated October 19, 2018, OWCP finalized the preliminary determination, finding that appellant received a \$5,763.42 overpayment of compensation for the period December 25, 2016 through March 31, 2018, as OWCP failed to deduct health benefit premiums. OWCP changed the preliminary at fault finding and found that appellant was not at fault as he was not aware, nor could he have been reasonably aware that the health benefits were not being deducted. However, it further found that the circumstances of his case did not warrant a waiver of the recovery of the overpayment. OWCP explained that appellant had not provided the documentation requested at the telephonic prerecoupment hearing and that it was unable to verify the court ordered spousal support and the value of appellant's assets. It found that, as appellant received \$1,658.94 in compensation payments every 28 days, he was able to repay the overpayment at the rate of \$400.00 a month, and that this rate of recovery would not defeat the purpose of FECA or be against equity and good conscience.

### **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.<sup>4</sup> When an overpayment has been made to an individual because of an error of fact or law,

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<sup>4</sup> 5 U.S.C. § 8102(a); *see T.G.*, Docket No. 17-1989 (issued June 5, 2018).

adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which the individual is entitled.<sup>5</sup>

An employee entitled to disability compensation may continue his or her health benefits under the FEHB program. OPM, which administers the FEHB program, by regulation 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.”<sup>6</sup>

In addition, 5 C.F.R. § 890.502(c) provides:

“An establishment 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 establishment contributions required under section 8906 of the title, 5 United States Code, to OPM for deposit in the Employee’s Health Benefits Fund.”<sup>7</sup>

Under applicable OPM regulations, the employee or annuitant is responsible for payment of the employee’s share of the cost of enrollment.<sup>8</sup> An establishment that withholds less than the proper health benefits contribution must submit an amount equal to the sum of the uncollected deductions.<sup>9</sup> The Board has recognized that, when an underwithholding of health benefit 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>10</sup>

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

The Board finds that OWCP properly found that appellant received an overpayment of compensation in the amount of \$5,763.42 for the period December 25, 2016 through March 31, 2018, because OWCP failed to deduct health benefit premiums, for which appellant was not at fault.

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<sup>5</sup> *Id.* at § 8129(a).

<sup>6</sup> *Id.* at § 890.502(a)(1).

<sup>7</sup> *Id.* at § 890.502(c).

<sup>8</sup> *Id.* at § 890.502(b)(1).

<sup>9</sup> *Id.* at § 890.502(d).

<sup>10</sup> *T.G.*, Docket No. 17-1989 (issued June 5 2018); *James Lloyd Otte*, 48 ECAB 334 (1997).

As previously noted, an overpayment of compensation is made when an underwithholding of health benefits occurs. A fiscal worksheet demonstrated that, from December 25, 2016 through March 31, 2018, OWCP failed to deduct a total of \$5,763.42 from appellant's compensation payments for health benefit premiums.

The Board has reviewed OWCP's calculations and finds that it properly determined that appellant received an overpayment of compensation in the amount of \$5,763.42 for the time period at issue.<sup>11</sup>

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

The waiver or refusal to waive an overpayment of compensation by OWCP is a matter that rests within OWCP's discretion pursuant to statutory guidelines.<sup>12</sup> These statutory guidelines are found in section 8129(b) of FECA which provides:

“Adjustment or recovery of an overpayment 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 this subchapter or would be against equity and good conscience.”<sup>13</sup>

Section 10.436 of the implementing regulations<sup>14</sup> provides that recovery of an overpayment will defeat the purpose of FECA if such recovery would cause hardship to a currently or formerly entitled beneficiary because: (a) the beneficiary from whom OWCP seeks recovery needs substantially all of his or her current income (including compensation benefits) to meet current or ordinary and necessary living expenses; and (b) the beneficiary's assets do not exceed a specified amount as determined by OWCP from data furnished by the Bureau of Labor Statistics.<sup>15</sup>

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<sup>11</sup> An overpayment finding made in a final decision issued prior to September 2018 was subject to reversal if the preliminary notice of overpayment was not issued within 30 days after the overpayment was identified. *See P.H.*, Docket No. 18-1539 (issued August 2, 2019); *P.H.*, Docket No. 18-1806 (issued October 10, 2019) (the Board reversed the finding of overpayment as the preliminary overpayment determination was not issued within 30 days after the overpayment was identified). The overpayment in this case was identified by OWCP on April 11, 2018, OWCP did not issue a preliminary determination until June 4, 2018; however, the final decision did not issue until October 19, 2018. While OWCP's procedures previously required that a preliminary determination must be issued within 30 days after an overpayment was identified, by the time the final decision issued in this case on October 19, 2018, OWCP had modified its procedures such that this provision was no longer mandatory, but rather the 30-day period for issuance of a preliminary determination was advisory. *See* Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Debt Liquidation*, Chapter 6.300.5 (September 2018).

<sup>12</sup> *See Robert Atchison*, 41 ECAB 83, 87 (1989).

<sup>13</sup> 5 U.S.C. § 8129(b).

<sup>14</sup> 20 C.F.R. § 10.436.

<sup>15</sup> 20 C.F.R. § 10.436. 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. Assets must not exceed a resource base of \$6,200.00 for an individual or \$10,300.00 for an individual with a spouse or dependent plus \$1,200.00 for each additional dependent. *See* Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Final Overpayment Determinations*, Chapter 6.400(2), (3) (September 2018).

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.<sup>16</sup>

Section 10.438 provides that 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 on an overpayment would defeat the purpose of FECA or be against equity and good conscience. Failure to submit the requested information within 30 days of the request shall result in denial of waiver.<sup>17</sup>

### **ANALYSIS -- ISSUE 2**

The Board finds that OWCP properly denied waiver of recovery of the overpayment.

OWCP found appellant not at fault in the creation of the overpayment. However, the issue is whether recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience. In the June 4, 2018 preliminary determination of overpayment, it requested that he submit information regarding his assets, income, and expenses on an enclosed Form OWCP-20 and notified him of the provisions of 20 C.F.R. § 10.438.

Appellant submitted an incomplete Form OWCP-20 on September 21, 2018. He listed total monthly income and noted expenses, however, he did not provide requested information regarding his income, assets, and expenses. Following the telephonic prerecoupment hearing, OWCP received a credit report, but appellant still did not provide documentation of all his expenses, including the amount paid for spousal support and the value of his assets.

The Board finds that OWCP properly determined that recovery of the overpayment would not defeat the purpose of FECA or be against equity and good conscience.<sup>18</sup> Appellant has the responsibility to submit the necessary evidence.<sup>19</sup> Pursuant to 20 C.F.R. § 10.438, OWCP must deny waiver of the overpayment if financial information is not received.<sup>20</sup> For this reason, it properly denied waiver in conformance with the implementing federal regulations.

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<sup>16</sup> 20 C.F.R. § 10.437.

<sup>17</sup> *Id.* at § 10.438.

<sup>18</sup> *See D.I.*, Docket No. 13-0469 (issued July 1, 2013); *N.R.*, Docket No. 12-1853 (issued June 10, 2013).

<sup>19</sup> *See supra* note 17.

<sup>20</sup> *Id.*

### **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.<sup>21</sup> Section 10.441(a) of the regulations provides:

“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>22</sup>

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

The Board finds that OWCP properly required recovery of the overpayment through deduction of \$400.00 from appellant's continuing compensation payments.

OWCP found that appellant received FECA compensation benefits on the periodic rolls in the amount of \$1,658.94 every 28 days. While appellant had responded to the preliminary overpayment determination and had submitted a summary of income and expenses, OWCP asked him to provide documentation of his expenses and assets during the telephonic prerecoupment hearing; however, he failed to provide the requested documentation. Therefore, OWCP's hearing representative found that appellant could repay the overpayment at a rate of \$400.00 per month.

OWCP's current procedures provide that if no response to the preliminary overpayment determination is received, OWCP should set the rate of repayment at 25 percent of the 28-day net compensation amount until the balance of the overpayment is paid in full. If a completed response to the preliminary determination is received within one year, the financial information should be thoroughly examined and if adjustment of the 25 percent is warranted, OWCP should set a reasonable rate of repayment with intent to recover the overpayment within three years.<sup>23</sup>

Based on the evidence of record, OWCP gave due regard to the relevant factors noted above and therefore did not abuse its discretion in setting the rate of recovery.<sup>24</sup> The Board finds that OWCP properly required recovery of the overpayment by deducting \$400.00 from appellant's continuing compensation payments.

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<sup>21</sup> *Lorenzo Rodriguez*, 51 ECAB 295 (2000).

<sup>22</sup> 20 C.F.R. § 10.441(a).

<sup>23</sup> Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.500.8(c)(1) (September 2018).

<sup>24</sup> *See M.D.*, Docket No. 11-1751 (issued May 7, 2012).

**CONCLUSION**

The Board finds that appellant received an overpayment of compensation in the amount of \$5,763.42 and that he was not at fault in the creation of the overpayment. The Board further finds that OWCP properly denied waiver of recovery of the overpayment and it properly required recovery of the overpayment by deducting \$400.00 every 28 days from appellant's continuing compensation.

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 19, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 18, 2019  
Washington, DC

Christopher J. Godfrey, 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