

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

C.G., Appellant)	
)	
and)	Docket No. 19-0760
)	Issued: October 1, 2019
U.S. POSTAL SERVICE, POST OFFICE,)	
Amarillo, TX, Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On February 22, 2019 appellant filed a timely appeal from a January 28, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP).¹ Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.³

¹ Appellant submitted a timely request for oral argument before the Board pursuant to 20 C.F.R. § 501.5(b) and submitted authorization for his sister to serve as his representative. In an April 9, 2019 letter to the Clerk of the Appellate Boards, appellant withdrew his oral argument request and advised that his sister would no longer serve as his representative.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the January 28, 2019 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received a \$13,382.57 overpayment of compensation for the period February 12, 2007 to April 1, 2017; (2) whether OWCP properly determined that appellant was at fault in the creation of the overpayment of compensation, thereby precluding waiver of recovery of the overpayment; and (3) whether OWCP properly required recovery of the overpayment by deducting \$250.00 from appellant's compensation payments every 28 days.

FACTUAL HISTORY

On March 8, 2005 appellant, then a 42-year-old mail handler, filed an occupational disease claim (Form CA-2) alleging that he sustained upper extremity injuries due to handling mail while in the performance of duty. He indicated that he first became aware of his claimed condition on January 6, 2005 and first realized its relation to his federal employment on February 10, 2005.⁴

OWCP accepted the present claim for left carpal tunnel syndrome, left ulnar nerve lesion, and left lateral epicondylitis. Appellant stopped work on February 13, 2006 and OWCP paid wage-loss compensation on the daily rolls effective February 13, 2006 and on the periodic rolls effective March 19, 2006.⁵

In an October 6, 2016 letter, the Office of Personnel Management (OPM) advised appellant that OWCP had not been withholding premiums for postretirement basic life insurance (PRBLI) (no reduction) coverage. It informed him that in order to continue PRBLI (no reduction) coverage he needed to pay back the coverage underpayment and the monthly premium amount. OWCP requested that appellant complete and return an attached form to indicate whether he wished to continue such coverage. Appellant completed the form on October 18, 2016, indicating that he would like to continue PRBLI (no reduction) coverage.

In an October 26, 2016 letter, OPM informed OWCP that, as a compensation, appellant was eligible to continue to receive PRBLI (no reduction) coverage under the Federal Employees' Group Life Insurance (FGLI) program. It noted that he had elected to have PRBLI (no reduction) coverage commencing February 12, 2007.

Upon review of the fiscal records, OWCP produced a worksheet on November 29, 2018 which showed differing rates of PRBLI (no reduction) premiums for the following periods that it did not withhold such premiums from appellant's FECA compensation: February 12, 2007 to December 31, 2011, January 1, 2012 to August 23, 2014, August 24, 2014 to December 31, 2015,

⁴ OWCP created a case file for the present claim under OWCP File No. xxxxxx392. Under OWCP File No. xxxxxx225, appellant filed an occupational disease claim (Form CA-2) in June 2003 which was accepted for right ulnar neuropathy and mild right carpal tunnel syndrome. OWCP authorized right elbow release surgery which was performed in December 2003. It has administratively combined OWCP File Nos. xxxxxx392 and xxxxxx225, with the latter designated as the master file.

⁵ OWCP authorized left upper extremity procedures, including left lateral epicondylitis orthotripsy performed in February 2006 and left carpal release performed in September 2008. Appellant retired from the employing establishment in early 2007 under the Federal Employees Retirement System.

and January 1, 2016 to April 1, 2017. It calculated the amounts of nonwithheld premiums for each of these periods and added these figures to equal the sum of \$13,382.57.⁶ OWCP started deducting PRBLI (no reduction) premiums from appellant's FECA compensation effective April 2, 2017.

In a November 29, 2018 notice, OWCP advised appellant of its preliminary determination that he received a \$13,382.57 overpayment of compensation for the period February 12, 2007 to April 1, 2017 because PRBLI (no reduction) premiums were not deducted from his FECA compensation for this period. It also made a preliminary determination that he was at fault in the creation of the overpayment because he accepted a payment that he knew, or reasonably should have known, to be incorrect. OWCP advised appellant that he could submit evidence challenging the fact, amount, or finding of fault, and request waiver of recovery of the overpayment. It informed him that he could submit additional evidence in writing or at precoupment hearing, but that a precoupment hearing must be requested within 30 days of the date of the written notice of overpayment. OWCP requested that appellant complete and return an enclosed financial information questionnaire (Form OWCP-20) within 30 days even if he was not requesting waiver of recovery of the overpayment.⁷

Appellant submitted an overpayment action request form in which he challenged the fact and amount of the \$13,382.57 overpayment and the finding of fault in its creation. He requested that OWCP's district office make a decision on these matters and he submitted an updated Form OWCP-20, completed on December 22, 2018, which showed that he had monthly income of \$3,441.50, monthly expenses of \$3,187.00, and assets of \$9,700.00.

By decision dated January 28, 2019, OWCP finalized its preliminary determination that appellant received a \$13,382.57 overpayment of compensation for the period February 12, 2007 to April 1, 2017. It also finalized its preliminary determination that he was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment. OWCP noted, "You are found with fault in the creation of the overpayment because you elected postretirement life insurance benefits and they were not deducted from your compensation payments from [February 12, 2007] through [April 1, 2017]. OPM notified you and made you aware of this [on October 6, 2016]."⁸

⁶ The record also contains OWCP payment records showing that PRBLI (no reduction) premiums were not withheld for the period February 12, 2007 to April 1, 2017.

⁷ OWCP had previously issued a preliminary overpayment determination on May 17, 2017 noting that appellant received a \$13,257.12 overpayment, and that he was at fault in the creation of the overpayment. Appellant requested a precoupment hearing with a representative of OWCP's Branch of Hearings and Review in connection with that preliminary determination. By decision dated October 5, 2017, OWCP's hearing representative found that OWCP had not adequately delineated the precise period of the overpayment and she remanded the case to OWCP for further development.

⁸ OWCP had inadvertently indicated that the premium deductions were not made through April 29, 2007, rather than through April 1, 2017.

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.⁹ The coverage for basic life insurance is effective unless waived,¹⁰ and premiums for basic and optional life coverage are withheld from the employee's pay.¹¹ Upon retirement or upon separation from the employing establishment or being placed on the periodic FECA compensation rolls, an employee may choose to continue basic and optional life insurance coverage, in which case the schedule of deductions made will be used to withhold premiums from his or her annuity or compensation payments.¹² Basic insurance coverage shall be continued without cost to an employee who retired or began receiving compensation on or before December 31, 1989,¹³ however, the employee is responsible for payment of premiums for optional life insurance coverage which is accomplished by authorizing withholdings from his compensation.¹⁴

A 1980 amendment of 5 U.S.C. § 8706(b)(2) provided that an employee receiving compensation under FECA could elect continuous withholdings from his or her compensation, so that his or her life insurance coverage could be continued without reduction. 5 C.F.R. § 870.701 (December 5, 1980) provided that an eligible employee had the option of choosing no life insurance; Option A -- basic coverage (at no additional cost) subject to continuous withholdings from compensation payments that would be reduced by two percent a month after age 65 with a maximum reduction of 75 percent; Option B -- basic coverage (at an additional premium) subject to continuous withholdings from compensation payments that would be reduced by one percent a month after age 65 with a maximum reduction of 50 percent; or Option C -- basic coverage subject to continuous withholdings from compensation payments with no reductions after age 65 (at a greater premium).¹⁵

Each employee must elect or waive Option A, Option B, and Option C coverage, in a manner designated by OPM, within 60 days after becoming eligible unless, during earlier employment, he or she filed an election or waiver that remains in effect.¹⁶ Any employee who does not file a Life Insurance Election with his or her employing office, in a manner designated by OPM, specifically electing any type of Optional insurance, is considered to have waived it and

⁹ 5 U.S.C. § 8702(a).

¹⁰ *Id.* at § 8702(b).

¹¹ *Id.* at § 8707.

¹² *Id.* at § 8706.

¹³ *Id.* at § 8707(b)(2).

¹⁴ *Id.* at § 8706(b)(3)(B). *See B.B.*, Docket No. 17-1733 (issued March 26, 2018); *S.B.*, Docket No. 16-1795 (issued March 2, 2017).

¹⁵ *See C.A.*, Docket No. 18-1284 (issued April 15, 2019); *James J. Conway*, Docket No. 04-2047 (issued May 20, 2005).

¹⁶ 5 C.F.R. § 870.504(a)(1).

does not have that type of Optional insurance.¹⁷ When an underwithholding 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.¹⁸

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 duty.¹⁹ 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.²⁰

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received a \$13,382.57 overpayment of compensation for the period February 12, 2007 to April 1, 2017.

OPM notified OWCP that appellant had elected PRBLI (no reduction) coverage effective February 12, 2007. OWCP, however, did not deduct the proper amount of premiums for PRBLI from appellant's wage-loss compensation until later on April 2, 2017. It calculated the amount of the resulting overpayment as \$13,382.57. The record contains overpayment worksheets explaining the overpayment calculation and how the overpayment occurred. As noted, when an underwithholding 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.²¹

The Board finds that OWCP properly calculated the amount of the overpayment and provided a clear and detailed explanation of the fact and amount of the overpayment. As OWCP failed to properly deduct PRBLI (no reduction) premiums from February 12, 2007 to April 1, 2017, appellant received an overpayment of compensation of \$13,382.57 during this period.²²

LEGAL PRECEDENT -- ISSUE 2

A waiver of recovery of an overpayment is not possible if the claimant is at fault in the creation of the overpayment.²³ A claimant who has done any of the following will be found to be at fault with respect to creating an overpayment: (1) made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; (2) failed to provide information

¹⁷ *Id.* at § 870.504(b).

¹⁸ *Supra* note 9 at § 8707(d); *see also* *B.B.*, *supra* note 14; *S.B.*, *supra* note 14.

¹⁹ *Id.* at § 8102(a).

²⁰ *Id.* at § 8129(a).

²¹ *See supra* note 18.

²² *See J.C.*, Docket No. 17-1791 (issued February 23, 2018); *E.H.*, Docket No. 15-0848 (issued July 6, 2016); *V.B.*, Docket No. 15-0157 (issued March 16, 2015).

²³ *V.H.*, Docket No. 18-1124 (issued January 16, 2019); *P.H.*, Docket No. 13-0642 (issued August 12, 2013).

which he or she knew or should have known to be material; or (3) accepted a payment which he or she knew or should have known to be incorrect. Whether or not an individual was at fault depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid.²⁴

ANALYSIS -- ISSUE 2

The Board finds that OWCP improperly determined that appellant was at fault in the creation of the \$13,382.57 overpayment for the period February 12, 2007 to April 1, 2017.

OWCP procedures provide that it is unrealistic to expect a claimant to know the specific insurance premium deduction made during an OWCP payment cycle (or benefit coding that corresponds to their type and level of coverage). As such, resulting overpayments are generally without fault unless extenuating circumstances apply.²⁵

Under the circumstances of this case, the Board notes that there is no clear and unambiguous evidence to establish that appellant knew or should have known that he received improper payments due to nonwithholding of PRBLI premiums for the period February 12, 2007 to April 1, 2017. OWCP justified its fault finding by noting that, in an October 6, 2016 letter, OPM advised him that OWCP had not been withholding PRBLI premiums from his FECA compensation. There is no evidence in the case record that appellant received any communication advising him, prior to his receipt of the October 6, 2016 letter, that PRBLI (no reduction) premiums had not been withheld. The Board notes that the October 6, 2016 letter only generally indicated that PRBLI (no reduction) premiums had not been withheld in the past without identifying any specific period of nonwithholding and the letter did not provide any clear indication to him that such premiums would not be withheld in the future.

As noted, OWCP's procedures provide that claimants receiving overpayments created by the nonwithholding of insurance premiums are generally found to be without fault in the creation of overpayments unless extenuating circumstances apply.²⁶ It has not adequately identified such extenuating circumstances and the Board finds that OWCP improperly determined that appellant was at fault in the creation of the \$13,382.57 overpayment for the period February 12, 2007 to April 1, 2017. Consequently, the case will be remanded so that OWCP can consider whether he is entitled to waiver of recovery of the overpayment.²⁷

²⁴ *Id.*

²⁵ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Determinations in an Overpayment*, Chapter 6.300.4g(8) (September 2018).

²⁶ *See id.*

²⁷ *See generally V.H., supra* note 23. In light of the Board's disposition of the second issue of the case regarding fault in the creation of the overpayment, it is not appropriate at this time for it to consider the third issue regarding the method of recovery of the overpayment.

CONCLUSION

The Board finds that OWCP properly determined that appellant received a \$13,382.57 overpayment of compensation for the period February 12, 2007 to April 1, 2017. The Board further finds that OWCP improperly determined that he was at fault in the creation of the \$13,382.57 overpayment for the period February 12, 2007 to April 1, 2017.

ORDER

IT IS HEREBY ORDERED THAT the January 28, 2019 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part. The case is remanded to OWCP for further action consistent with this decision of the Board.

Issued: October 1, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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