

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

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<b>T.M., Appellant</b>	)	
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<b>and</b>	)	<b>Docket No. 20-1085</b>
	)	<b>Issued: December 31, 2020</b>
<b>U.S. POSTAL SERVICE, BLUE LAGOON</b>	)	
<b>POST OFFICE, Miami, FL, Employer</b>	)	
_____	)	

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
CHRISTOPHER J. GODFREY, Deputy Chief Judge  
JANICE B. ASKIN, Judge  
PATRICIA H. FITZGERALD, Alternate Judge

**JURISDICTION**

On March 11, 2020 appellant filed a timely appeal from an October 1, 2019 merit decision and a December 16, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>2</sup>

**ISSUE**

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$1,666.09 for which she was without fault because health insurance premiums had not been deducted from her FECA compensation for the period

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> The Board notes that, following the issuance of the October 1, 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*

November 21, 2017 through November 10, 2018; (2) whether it properly denied waiver of recovery of the overpayment; and (3) whether OWCP properly denied appellant's request for a prerecoupment hearing under 5 USC § 8124.

### **FACTUAL HISTORY**

On October 13, 2017 appellant, then a 31-year-old carrier technician, filed a traumatic injury claim (Form CA-1) alleging that on October 6, 2017 she strained her low back when bending over to pick up a package while in the performance of duty. She stopped work on October 7, 2017. OWCP accepted her claim for low back strain. It paid appellant wage-loss compensation beginning November 21, 2017 and placed her on the periodic rolls, effective December 10, 2017.

In a January 10, 2018 letter, S.L., a health and resource management specialist for the employing establishment, informed OWCP that health benefit insurance (HBI) was not identified at the time that appellant submitted the wage-loss compensation form (Form CA-7) dated December 20, 2017. She noted that appellant was enrolled in the Federal Employees Health Benefit (FEHB) plan under "Code LVI."

Beginning November 11, 2018, OWCP deducted \$145.40 for HBI premiums from appellant's continuing wage-loss compensation payments.

In a memorandum of telephone call (Form CA-110) dated December 3, 2018, OWCP informed appellant that it was recalculating her wage-loss compensation to deduct for HBI premiums for the period November 21, 2017 through November 10, 2018.

On December 4, 2018 appellant returned to full-time, modified-duty work.

A compensation payment worksheet, dated December 4, 2018, outlined the deduction of HBI premiums for the period November 21, 2017 through November 10, 2018. It noted that for FEHB code LVI appellant should have paid \$1,666.09 during the claimed period.

OWCP received a Notice of Change in Health Benefits Enrollment form dated December 10, 2018, signed by a payroll official, which indicated that appellant had been enrolled in FEHB code LVI, effective November 21, 2017.

In a preliminary overpayment determination dated January 17, 2019, OWCP notified appellant that an overpayment of compensation in the amount of \$1,666.09 had been created because HBI premiums had not been deducted from her FECA compensation for the period November 21, 2017 through November 10, 2018. It further advised her of its preliminary determination that she was not at fault in the creation of the overpayment. OWCP provided appellant an overpayment action request form and an overpayment recovery questionnaire (Form OWCP-20). Additionally, it notified her that within 30 days of the date of the letter, she could request a telephone conference, a final decision based on the written evidence, or a prerecoupment hearing.

On February 15, 2019 appellant returned the overpayment action request. She did not indicate whether she requested a review of the written evidence or a pre-recoupment hearing before a representative of OWCP's Branch of Hearings and Review. Appellant explained that she was

not sure which option to select because the overpayment was not her fault. She also alleged that the employing establishment had taken money from her paycheck.

In a February 7, 2019 letter, appellant indicated that the employing establishment had taken \$330.75 out of her paycheck due to OWCP not paying her health benefits. She argued that OWCP had provided notice that they would pay back the employing establishment the amount that was owed by her, but OWCP had not yet done so.

Appellant provided an Employee Earnings Statement for the period January 19 through February 1, 2019 and a December 20, 2018 statement from the employing establishment's disbursing office for the amount of \$330.75.

On July 30, 2019, OWCP's Branch of Hearings and Review advised appellant that it would finalize the January 17, 2019 preliminary overpayment determination *via* a review of the written record.

By decision dated October 1, 2019, an OWCP hearing representative affirmed the January 17, 2019 preliminary overpayment determination.

OWCP subsequently received a statement from appellant asserting that she was unable to repay the overpayment amount.

By appeal request form postmarked October 31, 2019, appellant requested a hearing before a representative of OWCP's Branch of Hearings and Review.

OWCP, by letter dated November 13, 2019, acknowledged appellant's hearing request and informed her of its related procedures.

By decision dated December 16, 2019, OWCP denied appellant's request for a hearing, finding that, since she had already received a review of the written record, she was not entitled to a second hearing as a matter of right whether an oral hearing or a review of the written record on the same issue.

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

Section 8102(a) of 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.<sup>3</sup> Section 8129(a) of FECA provides, in pertinent part, 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>

An employee entitled to disability compensation may continue his or her health benefits under the FEHB program. The Office of Personnel Management (OPM), which administers the

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<sup>3</sup> 5 U.S.C. § 8102(a).

<sup>4</sup> *Id.* at § 8129(a).

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:

“Employees and annuitants are responsible for paying the enrollee share of the cost of enrollment for every pay period during which they are enrolled. An employee or annuitant incurs a debt to the United States in the amount of the proper employee or annuitant withholding required for each pay period during which they are enrolled if the appropriate health benefits withholdings or direct premium payments are not made.”<sup>5</sup>

In addition, 5 C.F.R. § 890.502(c)(1) provides:

“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 uncollected employee contributions and any applicable agency contributions required to OPM for deposit in the Employee’s Health Benefits Fund.”<sup>6</sup>

Under applicable OPM regulations, the employee or annuitant is responsible for payment of the employee’s share of the cost of enrollment.<sup>7</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>8</sup> The Board has recognized that, when an under withholding 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>9</sup>

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

The Board finds that appellant received an overpayment of compensation in the amount of \$1,666.09 for which she was without fault because HBI premiums had not been deducted from her FECA compensation for the period November 21, 2017 through November 10, 2018,

The record reflects that appellant received wage-loss compensation for total disability beginning November 21, 2017, but OWCP did not deduct HBI premiums from appellant’s wage-loss compensation payments until November 11, 2018. The record reflects that on January 10, 2018 OWCP was informed that appellant was enrolled in a FEHB plan under “Code LVI”. OWCP also received a Notice of Change in Health Benefits Enrollment form dated December 10, 2018, which indicated that appellant had been enrolled in a FEHB “Code LVI”, effective

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<sup>5</sup> *Id.* at § 890.502(a)(1).

<sup>6</sup> *Id.* at § 890.502(c).

<sup>7</sup> *Id.* at § 890.502(b)(1).

<sup>8</sup> *Id.* at § 890.502(d).

<sup>9</sup> *R.M.*, Docket No. 19-0183 (issued November 18, 2019); *James Lloyd Otte*, 48 ECAB 334 (1997).

November 21, 2017. For the period November 21, 2017 through November 10, 2018, OWCP calculated that appellant had been overpaid \$1,666.09 because it had not deducted the appropriate HBI premiums.<sup>10</sup> The Board has reviewed the December 4, 2018 overpayment worksheet that reflects the above-noted overpayment and therefore finds that an overpayment of compensation in the amount of \$1,666.09 was created for the period November 21, 2017 through November 10, 2018 for which she was without fault.

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

Section 8129 of FECA provides that an individual who is without fault in creating or accepting an overpayment is still subject to recovery of the overpayment unless adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.<sup>11</sup> 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.<sup>12</sup>

Section 10.436 of OWCP's implementing regulations provides that recovery of an overpayment would defeat the purpose of FECA if such recovery would cause hardship 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, 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.<sup>13</sup> An individual is deemed to need substantially all of his or her current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.<sup>14</sup>

Section 10.437 of OWCP's implementing regulations 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>15</sup> OWCP's procedures provide that, to establish that a valuable right has been relinquished, an individual must demonstrate that the right was, in fact, valuable, that he or she was unable to get the right back,

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<sup>10</sup> See *M.R.*, Docket No. 18-0271 (issued June 11, 2019).

<sup>11</sup> 5 U.S.C. § 8129(a) – (b).

<sup>12</sup> *L.S.*, 59 ECAB 350 (2008).

<sup>13</sup> 20 C.F.R. § 10.436. OWCP's procedures provide that the 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. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Final Overpayment Determinations*, Chapter 6.400.4a(3) (September 2018).

<sup>14</sup> Federal (FECA) Procedure Manual at Chapter 6.400.4(a)(3) (September 2018).

<sup>15</sup> 20 C.F.R. § 10.437; see *E.H.*, Docket No. 18-1009 (issued January 29, 2019).

and that his or her action was based primarily or solely on reliance on the payment(s) or on the notice of payment.<sup>16</sup>

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

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

As OWCP found appellant without fault in the creation of the overpayment, waiver must be considered, and repayment is still required unless adjustment or recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.<sup>17</sup>

In its preliminary determination dated January 17, 2019, OWCP clearly explained the importance of providing the completed Form OWCP-20 recovery questionnaire and supporting financial documentation. It advised appellant that it would deny waiver of recovery if she failed to furnish the requested financial information within 30 days. Appellant, however, did not submit a completed Form OWCP-20 recovery questionnaire or otherwise submit financial information necessary for OWCP to determine if recovery of the overpayment would defeat the purpose of FECA or if recovery would be against equity and good conscience.<sup>18</sup>

Consequently, as appellant did not submit the information required under 20 C.F.R. §10.438, which was necessary to determine her eligibility of waiver, the Board finds that OWCP properly denied waiver of recovery of the overpayment of compensation in the amount of \$1,666.09.<sup>19</sup>

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

OWCP's regulations provide that before collecting an overpayment, it must provide the claimant with written notice of the fact and amount of the overpayment, the finding of fault, the right to submit evidence challenging the fact, amount or finding of fault and the right to request waiver of the overpayment.<sup>20</sup> The regulations further provide that a claimant may request a prerecoupment hearing with respect to an overpayment.<sup>21</sup> However, once the overpayment decision has been finalized the only right to review of a final overpayment decision is to the

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<sup>16</sup> FECA Procedure Manual, *supra* note 13 at Chapter 6.400.4c(3) (September 2018).

<sup>17</sup> 20 C.F.R. § 10.436.

<sup>18</sup> *See S.W.*, Docket No. 20-0544 (issued September 21, 2020); *see also S.M.*, Docket No. 17-1802 (issued August 20, 2018).

<sup>19</sup> *See J.A.*, Docket No. 19-1946 (issued July 13, 2020); *see also T.E.*, Docket No. 19-0348 (issued December 11, 2019).

<sup>20</sup> 20 C.F.R. § 10.431.

<sup>21</sup> *Id.* at § 10.432.

Board.<sup>22</sup> The hearing provisions of 5 USC § 8124(b) do not apply to a final overpayment decision.<sup>23</sup>

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

OWCP notified appellant of its preliminary determination that he received an overpayment of compensation in a letter dated March 3, 2010. By letter dated March 11, 2010, appellant requested a precoupment hearing.

A telephonic hearing was scheduled on June 17, 2010, and appellant received notification of the hearing 30 days in advance of the hearing. However, appellant failed to appear.

In the July 19, 2010 decision, OWCP found that appellant had abandoned his request for a precoupment hearing and issued a final decision affirming the preliminary overpayment finding. Appellant requested a second precoupment hearing on April 15, 2011, citing hardship as the reason for this request.

The Board finds that OWCP properly determined that appellant was not entitled to a second hearing under section 8124 as a matter of right.

OWCP's regulations and Board case law are clear that the only right to review of a final overpayment decision is an appeal to the Board.<sup>24</sup> The hearing provisions of section 8124(b) (5 USC § 8124(b)) do not apply to final overpayment decisions. The Branch of Hearings and Review has no discretion to grant a hearing after an overpayment decision has been finalized. Accordingly, the Board finds that OWCP properly denied appellant's request for a second hearing, after his overpayment was finalized.

### **CONCLUSION**

The Board finds that appellant received an overpayment of compensation in the amount of \$1,666.09 for which she was without fault, because HBI premiums had not been deducted from her FECA compensation for the period November 21, 2017 through November 10, 2018. The Board also finds that OWCP properly denied waiver of recovery of the overpayment. The Board further finds that OWCP properly denied appellant's request for hearing under 5 U.S.C. § 8124.

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<sup>22</sup> *Id.* at § 10.440(b).

<sup>23</sup> *Id.*; *see also G.G.*, Docket No. 12-159 (issued May 24, 2012); *R.H.*, Docket No. 11-1790 (issued April 2, 2012); *Philip G. Feland*, 48 ECAB 485 (1997).

<sup>24</sup> *Id.*

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 16 and October 1, 2019 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: December 31, 2020  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge  
Employees' Compensation Appeals Board