

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

_____)	
G.C., Appellant)	
)	
and)	Docket No. 18-1451
)	Issued: May 5, 2020
U.S. POSTAL SERVICE, POST OFFICE,)	
Milwaukee, WI, Employer)	
_____)	

Appearances: *Case Submitted on the Record*
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

DECISION AND ORDER

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

JURISDICTION

On July 24, 2018 appellant, through counsel, filed a timely appeal from a May 22, 2018 merit decision of the Office of Workers’ Compensation Programs (OWCP). 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 In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative’s collection of a fee without the Board’s approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that following the May 22, 2018 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 appellant received an overpayment of compensation in the amount of \$3,418.52 for the period October 1, 2016 to September 1, 2017 for which she was without fault because health and life insurance premiums had not been deducted from her FECA compensation; (2) whether OWCP properly denied waiver of recovery of the overpayment; and (3) whether OWCP properly required recovery of the overpayment by deducting \$300.00 from appellant's continuing compensation payments.

FACTUAL HISTORY

On August 20, 2010 appellant, then a 44-year-old mail processing clerk, filed an occupational disease claim (Form CA-2) alleging that she injured her right shoulder while processing mail. OWCP accepted the claim for other affections of the right shoulder, not otherwise classified. Appellant stopped work on February 28, 2011 when Dr. Dean W. Ziegler, a Board-certified orthopedist, performed right shoulder arthroscopic surgery. OWCP paid appellant wage-loss compensation on the supplemental rolls from February 28 to April 8, 2011 and initially placed appellant on the periodic rolls commencing April 10, 2011.

In correspondence dated December 28, 2011, the employing establishment notified OWCP that appellant's Federal Employees Health Benefits (FEHB) program enrollment was being transferred to OWCP effective February 28, 2011. It attached health benefits elections forms, including one signed by appellant on December 11, 2009. This indicated that she had switched her health benefits enrollment to plan 104.⁴

In a letter dated June 26, 2013, the Office of Personnel Management (OPM) indicated that, as a compensation, appellant was eligible to continue Federal Employees' Group Life Insurance (FEGLI) coverage. The final base salary on which FEGLI was based is \$53,102.00. OPM instructed OWCP to deduct for Code H0: Basic, Option A Standard, and Option B x 1 full reduction. Post-retirement election was 75 percent reduction, and it commenced on February 25, 2012.

In notices of change in health benefits enrollment forms dated May 13, 2015 and June 2, 2016 FEHB indicated that OWCP accepted transfer of FEHB plan 104, effective May 3, 2015. The employing establishment again forwarded the election form appellant had signed on December 11, 2009, electing FEHB plan 104.

OWCP records indicate that no deductions were made for health benefits insurance (HBI), basic life insurance (BLI), optional life insurance (OLI), or post-retirement basic life insurance (PRBLI) for the period October 1, 2016 through September 1, 2017.

On September 20, 2017 appellant telephoned OWCP because she was concerned that her health benefits could terminate. OWCP indicated that upon review of her record, deductions for health benefits and life insurance had ceased in October 2016. It advised appellant that the missed

⁴ OPM also included a form appellant signed on January 4, 1998 in which she elected plan X12, and a second form she signed on December 10, 2000, in which she elected plan 105.

deductions would result in an overpayment of compensation benefits, and that deductions would resume on current and future payments.

In a letter dated September 26, 2017, OWCP informed appellant that her health insurance enrollment had been transferred effective May 9, 2015 and health insurance premiums would be withheld from her compensation benefits. It attached a change in health benefits enrollment form dated September 29, 2017, in which it accepted transfer of appellant's enrollment, effective May 9, 2015.

A compensation payment worksheet dated September 29, 2017, outlined the undersubscription of FEHB, BLI, and OLI premiums for the period October 1, 2016 to September 1, 2017. It indicated that the under deduction for HBI code 104 was \$2,502.68, for BLI was \$201.60, and for OLI code H0, was \$714.24, which totaled \$3,418.52. It found that appellant received total compensation of \$18,150.55 whereas, after deductions for HBI, BLI, and OLI of \$3,418.52 were made, she should have received compensation of \$14,732.03. A payment record indicated that all deductions were reinstated effective September 2, 2017.

A compensation payment history form dated October 27, 2017 confirmed that no premiums for HBI, BLI, or OLI were deducted for the period October 1, 2016 to August 18, 2017.

On October 30, 2017 OWCP advised appellant of its preliminary determination that she had received an overpayment of compensation in the amount of \$3,418.52 because HBI, BLI, and OLI premiums had not been deducted from her FECA compensation for the period October 1, 2016 to September 1, 2017. It found her at fault in the creation of the overpayment because she should have been aware after viewing her earnings statements that her benefits were not being deducted from her FECA compensation. OWCP explained how the overpayment was calculated.

OWCP forwarded an overpayment action request and an overpayment recovery questionnaire (Form CA-20) and allotted appellant 30 days to respond.

An overpayment worksheet dated October 30, 2017, outlined the undersubscription of premiums for the period October 1, 2016 to September 1, 2017, noting that the premium for HBI plan 104 was \$2,502.68; for BLI the premium was \$201.60; and for OLI code H0, the premium was \$714.24.

By decision dated November 30, 2017, OWCP finalized the October 30, 2017 preliminary overpayment determination.

On November 27, 2017 appellant contested the preliminary overpayment determination. She maintained that the overpayment occurred through no fault of her own and requested waiver of the recovery of the overpayment.⁵

On March 9, 2018 OWCP informed appellant that a prerecoupment hearing was scheduled for April 17, 2018. It advised her that in order to consider waiver or determine a reasonable

⁵ On January 16, 2018 OWCP began payment of total disability compensation, based on a December 12, 2017 report from Dr. Eric Gaenslen, a Board-certified orthopedic surgeon who provided an impartial evaluation. OWCP placed appellant on the periodic compensation rolls effective February 4, 2018.

method of collection of the overpayment, she must complete and submit the enclosed overpayment recovery questionnaire.

During the hearing appellant testified that OWCP had been deducting health benefit premiums then stopped making deductions. In October 2017, she received a letter from her health insurance carrier advising that it had not received payment of her premiums. Appellant contacted OWCP and initially was advised that there was no mistake. She later was advised that OWCP had made a mistake and would resume making deductions. Appellant further testified that she received her benefits by direct deposit and did not review her benefit statements. Counsel maintained that appellant was not at fault.

Appellant submitted a signed overpayment recovery questionnaire dated April 28, 2018. She reported total monthly income of \$1,201.00 in Social Security Administration (SSA) disability benefits and total expenses of approximately \$2,665.00. Appellant also submitted a Thrift Savings Plan (TSP) statement that indicated that, as of December 31, 2017, she had \$23,512.69 in her account.

By decision dated May 22, 2018, an OWCP hearing representative affirmed with modification the decision dated November 30, 2017. She found that the evidence was sufficient to establish that an overpayment of compensation in the amount of \$3,418.52 had been created for the period October 1, 2016 to September 1, 2017 because premiums for HBI, BLI, and OLI were not deducted from appellant's FECA compensation. The hearing representative modified the fault determination and found appellant without fault in the creation of the overpayment. She set recovery at \$300.00 every 28 days from appellant's continuing FECA compensation.

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.⁶ 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.⁷

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

⁶ 5 U.S.C. § 8102(a); *see I.J.*, Docket No. 19-1672 (issued March 10, 2020).

⁷ *Id.* at § 8129(a).

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.”⁸

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.”⁹

Under applicable OPM regulations, the employee or annuitant is responsible for payment of the employee’s share of the cost of enrollment.¹⁰ An establishment that withholds less than the proper health benefits contribution must submit an amount equal to the sum of the uncollected deductions.¹¹ 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.¹²

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.¹³ The coverage for basic life insurance is effective unless waived,¹⁴ and premiums for basic and optional life coverage are withheld from the employee’s pay.¹⁵ 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.¹⁶ Basic insurance coverage shall be continued without cost to an employee who retired or began receiving compensation on or before December 31, 1989;¹⁷ however, the employee is responsible

⁸ *Id.* at § 890.502(a)1).

⁹ *Id.* at § 890.502(c).

¹⁰ *Id.* at § 890.502(b)(1).

¹¹ *Id.* at § 890.502(d).

¹² *R.M.*, Docket No. 19-0183 (issued November 18, 2019); *James Lloyd Otte*, 48 ECAB 334 (1997).

¹³ 5 U.S.C. § 8702(a).

¹⁴ *Id.* at § 8702(b).

¹⁵ *Id.* at § 8707.

¹⁶ *Id.* at § 8706.

¹⁷ *Id.* at § 8707(b)(2).

for payment of premiums for optional life insurance coverage, which is accomplished by authorizing withholdings from his compensation.¹⁸

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 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 2 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 1 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).¹⁹

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.²⁰ 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 does not have that type of optional insurance.²¹ 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.²²

ANALYSIS -- ISSUE 1

The Board finds that this case is not in posture for decision.

The record contains a signed election form in which appellant chose plan 104 for health insurance. However, regarding BLI and OLI, the record only contains the OPM letter dated June 26, 2013 described above. The record in this case does not contain evidence that appellant signed a document electing the life insurance coverage described. It does not contain a signed election form showing which life insurance coverage appellant actually selected or if she actually selected coverage. The Board has previously found that OWCP must document whether and when

¹⁸ *Id.* at § 8706(b)(3)(B). *See Edward J. Shea*, 43 ECAB 1022 (1992) (the Board found that the claimant received an overpayment of compensation where he elected postretirement basic life insurance with no reduction and no premiums had been deducted from his compensation from January 3, 1988 to May 6, 1989). *See also Glen B. Cox*, 42 ECAB 703 (1991) (the Board found that an overpayment was created due to no deduction of premiums for optional life insurance for the periods July 1983 through November 1989).

¹⁹ *See F.F.*, Docket No. 19-1630 (issued April 7, 2020); *James J. Conway*, Docket No. 04-2047 (issued May 20, 2005).

²⁰ 5 C.F.R. § 870.504(a)(1)

²¹ *Id.* at § 504(b).

²² 5 U.S.C. § 8707(d); *see also Keith H. Mapes*, 56 ECAB 130 (2004); *James Lloyd Otte*, 48 ECAB 334 (1997).

a claimant elected life insurance coverage after separation from federal service or retirement.²³ As OWCP has not factually established appellant's life insurance election, effective February 25, 2012, it has not met its burden of proof to establish that she received an overpayment of compensation from October 1, 2016 through September 1, 2017 regarding under deductions of life insurance premiums.²⁴

As the fact and amount of the overpayment are not clearly established by the record, the case will be remanded to OWCP. On remand OWCP shall obtain an executed election form regarding appellant's life insurance selections, if any, completed and signed prior to determining whether she received an overpayment of compensation due to the failure to deduct health and life insurance premiums. After this and other such further development as OWCP deems necessary, it shall issue a *de novo* decision.²⁵

CONCLUSION

The Board finds that this case is not in posture for decision.

²³ *P.K.*, Docket No. 18-0913 (issued March 5, 2020); *C.P.*, Docket No. 19-0317 (issued July 1, 2019).

²⁴ *Id.*

²⁵ In light of the Board's disposition of fact and amount of overpayment, the issues of whether OWCP properly denied waiver of recovery of the overpayment and whether it properly set the amount of recovery are rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the May 22, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: May 5, 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