

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

M.W., Appellant)	
)	
and)	Docket No. 20-1107
)	Issued: March 17, 2021
U.S. POSTAL SERVICE, WORLDWAY)	
POSTAL CENTER, POST OFFICE,)	
Los Angeles, CA, Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On May 5, 2020 appellant filed a timely appeal from an April 30, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$4,576.61 for the period January 9, 2019 through February 1, 2020 because OWCP

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the April 30, 2020 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.*

failed to deduct health benefit premiums, for which she was 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 \$773.85 every 28 days from appellant's continuing compensation.

FACTUAL HISTORY

On April 24, 2002 appellant, then a 35-year-old mail handler, filed an occupational disease claim (Form CA-2) alleging that the loading/unloading and pushing of heavy equipment on a constant daily basis caused or aggravated her diagnosed upper extremity conditions. OWCP accepted the claim for bilateral medial epicondylitis, bilateral common flexor tendinitis, bilateral cubital tunnel syndrome, bilateral lesion of ulnar nerve; bilateral brachial neuritis or radiculitis, bilateral synovitis and tenosynovitis, and brachial flexus lesions. It paid appellant wage-loss compensation intermittently on the supplemental and periodic rolls as of June 15, 2003.

Appellant stopped work on January 9, 2019 and has not returned. OWCP expanded acceptance of the claim to include additional conditions of strain of unspecified muscle, fascia and tendon at shoulder and upper arm level of the right arm.³

A copy of appellant's November 13, 2018 Health Benefits Election Form (Standard Form 2809) indicated that she transferred from enrollment code 112 to code 113, effective November 13, 2018.

In a February 4, 2020 letter, the employing establishment indicated that appellant's Federal Employee Health Benefit (FEHB) enrollment code 113 was transferred to OWCP on January 13, 2019.⁴

Effective February 2, 2020, OWCP started deducting FEHB code 113 from appellant's wage-loss compensation.

In a February 19, 2020 ACPS Manual/Fiscal Payment Worksheet, OWCP calculated that, from January 9, 2019 through February 1, 2020, it had failed to deduct health benefit premiums for health code 113, totaling \$4,576.61.

In a preliminary overpayment determination dated March 5, 2020, OWCP advised appellant that she had received an overpayment of compensation in the amount of \$4,576.61, because it failed to deduct health benefit premiums from her FECA benefits for the period January 9, 2019 through February 1, 2020, for a total of 389 days. It noted that, during each 28-day cycle it should have deducted \$352.05, therefore, during the 13 28-day cycles during the period in question a total of \$4,576.61 should have been deducted. OWCP provided a calculation of the overpayment and indicated that appellant was without fault in its creation. It requested that she provide information regarding her income, assets, and expenses on an enclosed overpayment

³ The record reflects that appellant underwent right shoulder surgery on February 25, 2019 and left wrist surgery on February 17, 2020.

⁴ A January 29, 2020 Personnel Action Request from the employing establishment indicated that appellant's FEHB Code 113 was transferred to OWCP effective January 14, 2019.

action request form, and an overpayment recovery questionnaire (Form OWCP-20) within 30 days, if she contested that an overpayment occurred.

On March 17, 2020 appellant submitted the overpayment action request form. She requested that OWCP waive the overpayment as she was unaware of any overpayment and was found to be without fault in the creation of the overpayment. No financial documentation was received.

By decision dated April 30, 2020, OWCP finalized the preliminary determination, finding that appellant received a \$4,576.61 overpayment of compensation for the period January 9, 2019 through February 1, 2020, as OWCP failed to deduct health benefit premiums from her compensation benefits. It found that she was not at fault as she was not aware, nor could she have been reasonably aware that the health benefits were not being deducted. However, OWCP further found that the circumstances of appellant's case did not warrant a waiver of the recovery of the overpayment as no concrete evidence exists to substantiate that adjustment or recovery would defeat the purpose of FECA or be against equity and good conscience. It found that, as she received \$3,095.38 in compensation payments every 28 days, she was able to repay the overpayment at the rate of \$773.85 from each payment.

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.⁵ 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.⁶

An employee entitled to disability compensation may continue his or her health benefits under the FEHB program. OPM, which administers the FEHB program, by regulations 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.”⁷

⁵ 5 U.S.C. § 8102(a); *see R.M.*, Docket No. 19-0183 (issued November 18, 2019); *T.G.*, Docket No. 17-1989 (issued June 5, 2018).

⁶ *Id.* at § 8129(a).

⁷ 5 C.F.R. § 890.502(a)(1).

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.”⁸

Under applicable OPM regulations, the employee or annuitant is responsible for payment of the employee’s share of the cost of enrollment.⁹ An establishment that withholds less than the proper health benefits contribution must submit an amount equal to the sum of the uncollected deductions.¹⁰ 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.¹¹

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly found that appellant received an overpayment of compensation in the amount of \$4,576.61 for the period January 9, 2019 through February 1, 2020, because it failed to deduct FEHB premiums, specifically code 113, for which she was not at fault.

As previously noted, an overpayment of compensation is created during each pay period in which an under withholding of health benefit premiums occurs.¹² While the employing establishment noted that it had transferred FEHB coverage to OWCP on January 13 or 14, 2019, since appellant was in receipt of OWCP wage-loss benefits during the pay period beginning January 9, 2019, OWCP was responsible for deducting FEHB premiums during this pay period.¹³ A fiscal worksheet demonstrated that, from January 9, 2019 through February 1, 2020, OWCP failed to deduct a total of \$4,576.61 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 \$4,576.61 for the time period at issue.¹⁴

⁸ *Id.* at § 890.502(c).

⁹ *Id.* at § 890.502(b)(1).

¹⁰ *Id.* at § 890.502(d).

¹¹ *See R.M., supra* note 5; *T.G., supra* note 5; *James Lloyd Otte*, 48 ECAB 334 (1997).

¹² *Id.*

¹³ *See R.B.*, Docket No. 10-0747 (issued December 3, 2010).

¹⁴ *R.M., supra* note 5.

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.¹⁵ 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.¹⁶

Recovery of an overpayment will defeat the purpose of FECA if such recovery would cause hardship to a currently or formerly entitled beneficiary 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 the beneficiary's assets do not exceed a specified amount as determined by OWCP.¹⁷ Additionally, 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 in attempting to repay the debt or when an individual, in reliance on such payment or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.¹⁸

OWCP's regulations provide 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 of an overpayment would defeat the purpose of FECA or be against equity and good conscience. The information is also used to determine the repayment schedule, if necessary.¹⁹ Failure to submit the requested information within 30 days of the request will result in a denial of waiver of recovery, and no further request for waiver shall be considered until the requested information is furnished.²⁰

ANALYSIS -- ISSUE 2

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

OWCP found that appellant was without fault in the creation of the overpayment of compensation. The fact that a claimant is without fault in the creation of an overpayment does not

¹⁵ 5 U.S.C. § 8129; 20 C.F.R. §§ 10.433, 10.434, 10.436, and 10.437; *see A.F.*, Docket No. 19-0054 (issued June 12, 2019).

¹⁶ *A.C.*, Docket No. 18-1550 (issued February 21, 2019); *see Robert Atchison*, 41 ECAB 83, 87 (1989).

¹⁷ 20 C.F.R. § 10.436(a)(b). For an individual with no eligible dependents the asset base is \$6,200.00. The base increases to \$10,300.00 for an individual with a spouse or one dependent, plus \$1,200.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Final Overpayment Determinations*, Chapter 6.400.4(a)(2) (September 2018).

¹⁸ *Id.* at § 10.437(a)(b).

¹⁹ *Id.* at § 10.438(a); *M.S.*, Docket No. 18-0740 (issued February 4, 2019).

²⁰ *Id.* at § 10.438(b).

preclude OWCP from recovering the overpayment.²¹ Waiver is only possible if recovery would defeat the purpose of FECA or be against equity and good conscience.²² Appellant, however, did not provide the requisite financial documentation to OWCP.²³

In its preliminary determination dated March 5, 2020, OWCP explained the importance of providing the completed Form OWCP-20 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. On March 17, 2020 appellant submitted the overpayment action request form. No additional evidence was received prior to OWCP's April 30, 2020 final overpayment determination. OWCP therefore did not have the necessary financial information to determine whether waiver of recovery of the overpayment would defeat the purpose of FECA or would be against equity and good conscience within 30 days of the preliminary decision.²⁴ It was therefore required to deny waiver of recovery of the overpayment.²⁵

For the foregoing reasons, the Board finds that OWCP properly denied waiver of recovery of the overpayment.

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.²⁶ 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.”²⁷

²¹ See *L.M.*, Docket No. 19-1197 (issued January 8, 2020); *M.D.*, Docket No. 19-1500 (issued February 24, 2020); *L.D.*, Docket No. 19-0606 (issued November 21, 2019); *R.B.*, Docket No. 15-0808 (issued October 26, 2015).

²² 20 C.F.R § 10.436; *J.C.*, Docket No. 19-0122 (issued June 11, 2019).

²³ *Id.* at § 10.438(b); *T.J.*, Docket No. 19-1242 (issued January 13, 2020).

²⁴ See *E.M.*, Docket No. 19-0857 (issued December 31, 2019).

²⁵ *Supra* note 22.

²⁶ *Lorenzo Rodriguez*, 51 ECAB 295 (2000).

²⁷ 20 C.F.R. § 10.441(a).

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly required recovery of the overpayment through deduction of \$773.85 from appellant's continuing compensation payments.

OWCP found that appellant received FECA compensation benefits on the periodic rolls in the amount of \$3,095.38 every 28 days. While appellant requested waiver, she did not complete the Form OWCP-20 or provide any financial information to support that she was financially unable to repay the debt. In its preliminary determination, OWCP asked her to provide documentation of her expenses and assets; however, she failed to provide the requested financial documentation. Therefore, it properly found that appellant could repay the overpayment at a rate of \$773.85 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.²⁸

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.²⁹ The Board finds that OWCP properly required recovery of the overpayment by deducting \$773.85 from appellant's continuing compensation payments.

On appeal appellant asserts that she will suffer severe financial hardship in trying to repay the debt as she would be unable to cover the cost of her living expenses and would be living on the street. She advised that she was not given any warning of the matter and had no way to adjust her livelihood, especially during the pandemic, by May 22, 2020 when the first deduction of \$773.85 from her monthly compensation would begin. Appellant noted that she had contacted her claims examiner and it was her understanding that, since she was not at fault in the creation of the overpayment, she was not required to submit payment. She advised that this was a misunderstanding on her part and that she had no problem submitting OWCP form to confirm her situation. As explained above, however, appellant neither completed a Form OWCP-20 nor did she submit supporting financial documentation as of the issuance of OWCP's April 30, 2020 final overpayment determination. Furthermore, as also explained above, the fact that she was not at fault does not relieve her from liability for repayment of the overpayment of compensation.

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$4,576.61 and that she 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

²⁸ *Supra* note 17 at Chapter 6.500.8(c)(1) (September 2018).

²⁹ *See R.M., supra* note 5; *M.D.*, Docket No. 11-1751 (issued May 7, 2012).

recovery of the overpayment by deducting \$773.85 every 28 days from her continuing compensation.

ORDER

IT IS HEREBY ORDERED THAT the April 30, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 17, 2021
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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