

<sup>2</sup> The Board notes that following the January 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.*

without fault, because health benefits insurance (HBI) premiums had not been properly deducted from her FECA compensation; and (2) whether OWCP properly denied waiver of recovery of the overpayment.

### **FACTUAL HISTORY**

On January 28, 1985 appellant, then a 31-year-old assistant secretary, filed a traumatic injury claim (Form CA-1) alleging that she slipped and fell on October 29, 1984 while in the performance of duty. OWCP initially accepted the claim for neck sprain, brachial neuritis, thoracic and lumbosacral neuritis, lumbar disc herniation and disc bulge. It subsequently accepted cervical radiculitis, lumbar radiculitis and an aggravation of lumbar disc herniation. OWCP paid appellant wage-loss compensation on the supplemental rolls as of December 18, 2001 and on the periodic rolls as of June 16, 2002.<sup>3</sup>

On November 21, 2018 appellant submitted a Health Benefits Election Form (Standard Form 2809) seeking to change her current health care plan under Care First Blue Choice (2G2) to Blue Cross Blue Shield (113), effective January 6, 2019.<sup>4</sup>

In a May 17, 2019 worksheet for the period April 17, 2012 through January 5, 2019, OWCP explained that health insurance premiums for Care First Blue Choice (2G2) were not properly deducted for the above period and amounted to a total overpayment of \$46,507.36. The following deductions for code 2G2 should have been deducted: for the period April 17, 2012 through January 12, 2013, a total of \$2,881.70; for the period January 13, 2013 through January 11, 2014, a total of \$4,327.44; for the period January 12, 2014 through January 10, 2015, a total of \$5,843.24; for the period January 11, 2015 through January 9, 2016, a total of \$6,433.44; for the period January 10, 2016 through January 7, 2017, a total of \$7,176.00; for the period January 8, 2017 through January 6, 2018, a total of \$9,027.46; and for the period January 7, 2018 through January 5, 2019, a total of \$10,818.08, for a total of \$46,507.36. The overpayment was calculated as the difference between the amount of deductions which were made (\$0.00) and the deductions that should have been made (\$46,507.36).

In a preliminary overpayment determination dated June 24, 2019, OWCP notified appellant that an overpayment of compensation in the amount of \$46,507.36 had been created because health insurance premiums had not been properly deducted from her FECA compensation for the period April 17, 2012 through January 5, 2019. It further advised her of its preliminary determination that she was without fault in the creation of the overpayment. OWCP provided

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<sup>3</sup> By decision dated April 17, 2012, OWCP reduced appellant's wage-loss compensation benefits, effective that date, finding that the constructed position of Customer Service Representative fairly and reasonably represented appellant's wage-earning capacity. By decision dated December 27, 2012, an OWCP hearing representative affirmed the April 17, 2012 loss of wage-earning capacity determination.

<sup>4</sup> In a letter dated February 5, 2019, OWCP informed appellant that the premiums for her selected health insurance plan cost \$341.14 every 28 days. As she was only entitled to wage-loss compensation every 28 days in the amount of \$318.00, her health benefit premium resulted in a negative balance of \$23.14 every 28 days, or \$25.07 a month. Accordingly, appellant was advised that, in order to keep her health insurance under Blue Cross Blue Shield, she had to make monthly payments of \$25.07. She subsequently paid the balance of her health insurance premiums for the year.

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 July 23, 2019 appellant requested a prerecoupment hearing before a representative of OWCP's Branch of Hearings and Review. She indicated that she was requesting waiver of recovery of the overpayment as she was found without fault in the creation of the overpayment. Attached was a July 23, 2019 completed Form OWCP-20 and supporting financial documentation. Appellant listed her total household monthly income as \$2,984.65, which included a breakdown of her spouse's income, which she noted was earned predominately in the first quarter of the year. She indicated that she had no income. Appellant indicated that she had monthly expenses of \$3,618.40 including two mortgages, at \$1,594.80 monthly and at \$139.24 monthly, food at \$685.00 monthly, clothing at \$159.00 monthly and provided itemized expenses on the attached sheet, \$790.45 in utilities, \$250.00 for monthly automobile maintenance. She also indicated that she had \$943.20 in monthly expenses for other debts being paid by monthly installments. Appellant reported over \$15,000.00 in personal funds, which included \$100.00 cash on hand, a checking account balance of over \$11,000.00, and a savings account balance of over \$4,000.00. She also submitted copies of taxes, bank statements, and copies of billing statements for the expenses listed, with the exception of groceries/food and clothing.

During the telephonic hearing held on November 15, 2019, appellant testified regarding the alleged overpayment of compensation and noted that she understood that premiums for her selected health insurance plan were not deducted from her compensation, which resulted in an overpayment for the period April 17, 2012 through January 5, 2019. Her husband testified regarding his income, noting that he was not a salaried employee, so his total income fluctuated. Appellant's husband indicated that as of July 2019, when the Form OWCP-20 was filed, his six-month income was \$12,881.00, which equated to \$2,091.00 monthly. He testified that his current income had not changed significantly. Appellant's husband further testified that from January to April he was self-employed and that income was used to pay bills during the year. He testified that the \$11,000.00 was from his business account. Appellant's husband also noted that evidence submitted showed that the business account gets "drained down to zero by the end of the year or close to it anyway." He testified that they spend approximately \$700.00 monthly for food, \$160.00 monthly for clothing, and \$790.46 for utilities. Appellant's husband further testified that they have two mortgages, approximately \$11,000.00 in a checking account, and \$4,000.00 in a savings account.

By decision dated January 30, 2020, the hearing representative finalized the June 24, 2019 preliminary overpayment determination. The hearing representative found that appellant had received an overpayment of compensation in the amount of \$46,507.36 for the period April 17, 2012 through January 5, 2019, because OWCP failed to properly deduct health insurance premiums from her FECA compensation. The hearing representative further found that appellant was without fault in the creation of the overpayment, but denied waiver of recovery of the overpayment. Based on the documentation provided, the hearing representative calculated appellant's monthly household income as \$2,984.65 and monthly household expenses as

\$4,561.54, noting that her monthly expenses exceeded the monthly income by \$1,576.89.<sup>5</sup> The hearing representative further found, however, that appellant's assets exceeded the allowable resource base of \$10,300.00 for an individual with a spouse as the business bank statements pertaining to appellant's spouse's seasonal tax work show assets of \$13,883.38. Because appellant had not met the second prong of the two-prong test of whether recovery of the overpayment would defeat the purpose of FECA, the hearing representative found it unnecessary to consider the first prong of the test, *i.e.*, whether appellant required substantially all of her income to meet ordinary living expenses. The hearing representative required recovery of the overpayment by monthly payments of \$250.00, noting that appellant did not receive FECA compensation as the cost of her health insurance coverage exceeded her 28-day compensation entitlement resulting in a negative amount.

### **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>6</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>7</sup>

An employee entitled to disability compensation may continue his or her health benefits under the Federal Employees Health Benefits (FEHB) program. The Office of Personnel Management (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:

“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

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<sup>5</sup> The hearing representative noted that the wages were based on appellant's spouse's year-to-date income of \$12,881.01 divided by 6.16 months or \$2,091.07 plus his secondary income for partial year employment during 2018, or \$889.58 monthly. This equates to a total of \$2,980.65. As appellant also included \$4.00 for “other income,” this equates to a total of \$2,984.66. The hearing representative noted that appellant's 2018 taxes listed the spouse's annual income of \$43,146 or \$2,793.73 monthly income after taxes. She found that while appellant's 2019 monthly income was consistent with the 2018 annual income, using appellant's 2018 income was beneficial to the claimant in the consideration of a waiver or repayment calculation. The hearing representative also noted that documentation of record supported appellant's monthly averages for utilities, as well as monthly debts for car payments and minimum monthly payments for credit cards and a loan. She further found that while appellant did not provide specific documentation for food or clothing expenses, the expenses were taken at face value as they were based on national standards and were in line with ordinary living expenses for appellant's area.

<sup>6</sup> 5 U.S.C. § 8102(a).

<sup>7</sup> *Id.* at § 8129(a).

enrolled if the appropriate health benefits withholdings or direct premium payments are not made.”<sup>8</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 Employees Health Benefits Fund.”<sup>9</sup>

Under applicable OPM regulations, the employee or annuitant is responsible for payment of the employee’s share of the cost of enrollment.<sup>10</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>11</sup> The Board has recognized that, when an under withholding of health insurance 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>12</sup>

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

The Board finds that appellant received an overpayment of compensation in the amount of \$46,507.36 for the period April 17, 2012 through January 5, 2019, for which she was without fault, because health insurance premiums had not been properly deducted from her FECA compensation.

The record reveals that appellant changed her Federal Health Benefits plan enrollment from HBI code 2G2 to HBI code 113, effective January 6, 2019. Health insurance premiums from April 17, 2012 through January 5, 2019 were supposed to have been deducted under HBI code 2G2 in the amount of \$46,507.36, but were not deducted. The difference in the underdeduction of appellant’s premium created an overpayment of \$46,507.36. When an underwithholding of premiums is discovered, the amount is deemed an overpayment of compensation to the recipient. OWCP must pay the full amount of the premium to OPM when the error is discovered.<sup>13</sup> Because of the under deduction of health insurance premiums to reflect appellant’s coverage under HBI code 2G2, an overpayment of compensation was created in the amount of \$46,507.36. The Board

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<sup>8</sup> 5 C.F.R. § 890.502(a)(1).

<sup>9</sup> *Id.* at § 890.502(c).

<sup>10</sup> *Id.* at § 890.502(b)(1).

<sup>11</sup> *Id.* at § 890.502(d).

<sup>12</sup> *D.B.*, Docket No. 19-1742 (issued March 22, 2021); *R.M.*, Docket No. 19-0183 (issued November 18, 2019); *J.W.*, Docket No. 14-1531 (issued November 3, 2014); *James Lloyd Otte*, 48 ECAB 334 (1997).

<sup>13</sup> *Id.*, see also *Keith H. Mapes*, 56 ECAB 130 (2004).

thus finds that an overpayment of compensation in the amount of \$46,507.36 was created for the period April 17, 2012 through January 5, 2019 for which appellant was without fault.

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

Section 8129 of FECA<sup>14</sup> provides that an overpayment must be recovered unless incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience. Thus, a finding that appellant was without fault does not automatically result in waiver of the overpayment. OWCP must 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>15</sup>

According to 20 C.F.R. § 10.436, recovery of an overpayment would defeat the purpose of FECA if recovery would cause hardship because the beneficiary needs substantially all of his or her 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>16</sup> An individual's liquid assets include, but are not limited to, cash on hand, the value of stocks, bonds, savings accounts, mutual funds, and certificates of deposits. Nonliquid assets include, but are not limited to, the fair market value of an owner's equity in property such as a camper, boat, second home, furnishings/supplies, vehicle(s) above the two allowed per immediate family, retirement account balances (such as Thrift Savings Plan or 401(k)), jewelry, and artwork.

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 her position for the worse.

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

The Board finds that this case is not in posture for decision regarding waiver of recovery of the overpayment.

In its January 30, 2020 decision, the hearing representative denied waiver of recovery, finding that appellant's assets exceeded the allowable resource base of \$10,300.00 for an individual with a spouse. The hearing representative, however, failed to explain what facts were

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<sup>14</sup> *Supra* note 1.

<sup>15</sup> *G.L.*, Docket No. 19-0297 (issued October 23, 2019).

<sup>16</sup> 20 C.F.R. § 10.436. OWCP's procedures provide that a claimant is deemed to need substantially all of his or her current net income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. Its procedures further provide that 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 6.400.4(a)(2) and (3) (September 2018).

used in determining that appellant's assets exceeded the resource base. OWCP is required to make findings of fact and a statement of reasons regarding the material facts of the case. Due to the lack of clarity in OWCP's findings on waiver of recovery of the overpayment, it is necessary to remand the case for OWCP to make appropriate findings on the issue.<sup>17</sup> On remand, OWCP shall review all of the evidence of record and, following any further development deemed necessary, issue a *de novo* decision regarding waiver of the recovery of the overpayment.

### **CONCLUSION**

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$46,507.36 for the period April 17, 2012 through January 5, 2019, for which she was not at fault, because HBI premiums had not been properly deducted from her FECA compensation. The Board further finds that the case is not in posture for decision with regard to waiver of recovery of the overpayment.

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<sup>17</sup> See *Paula J. Lewis*, Docket No. 04-0506 (issued June 21, 2004).

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 30, 2020 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: January 6, 2022  
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