

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

L.D., Appellant)	
)	
and)	Docket No. 20-1344
)	Issued: March 9, 2023
DEPARTMENT OF THE AIR FORCE,)	
PETERSON AIR FORCE BASE,)	
Colorado Springs, CO, 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 June 11, 2020 appellant filed a timely appeal from an April 6, 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

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that following the April 6, 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.*

ISSUE

The issue is whether OWCP properly determined the amount of appellant's overpayment of compensation due to improper life insurance deductions for the period April 14, 2003 through December 18, 2010, for which he was without fault.

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances as set forth in the Board's prior decisions and orders are incorporated herein by reference. The relevant facts are set forth below.

On January 17, 2003 appellant, then a 53-year-old contracting officer, filed an occupational disease claim (Form CA-2) alleging that he sustained injuries due to factors of his federal employment. On the reverse side of the claim form, appellant's supervisor indicated that he worked 32 hours per week. Appellant stopped work on April 14, 2003. OWCP accepted the claim for bilateral carpal tunnel syndrome and bilateral reflex sympathetic dystrophy of the upper extremities. OWCP paid him wage-loss compensation on the supplemental rolls as of April 14, 2003 and on the periodic rolls as of May 18, 2003.

A June 27, 2003 Notification of Personnel Action (Standard Form (SF) 50) indicated appellant's participation in the Federal Employees' Group Life Insurance (FEGLI) program with optional life insurance under code Z5. Appellant's coverage was noted as Option A, Option B (5x) and Option C (5x). The adjusted basic pay was listed as \$87,289.00.

In a March 17, 2006 Form RI 76-13, the Office of Personnel Management (OPM) indicated that the final salary rate on which appellant's group life insurance was based was \$87,289.00 due to incontestability. It indicated that postretirement basic life insurance (PRBLI) of no reduction withholding should begin on June 26, 2003 and appellant had Optional Life insurance, Option A standard, Option B (5x) no reduction, and Option C (5x) no reduction.

Appellant's FECA wage-loss compensation payments were not adjusted for PRBLI deductions until after the December 7, 2010 payment which covered the period November 21 through December 18, 2010.

In a preliminary overpayment determination dated February 14, 2011, OWCP advised that two overpayments of compensation had been identified. It found that appellant received an overpayment in the amount of \$170,917.82 for the period April 14, 2003 through December 18, 2010 because compensation had been paid at an incorrect pay rate. OWCP also found an overpayment in the amount of \$15,064.27 for the period May 1, 2003 through December 13, 2010 due to failure to deduct PRBLI premiums.

³ *Order Remanding Case*, Docket No. 18-1347 (issued September 17, 2019); Docket No. 15-1102 (issued January 20, 2016); Docket No. 12-1408 (issued April 26, 2013), *Order Granting Petition for Reconsideration and Modifying its Prior Decision*, Docket No. 12-1408 (issued July 21, 2014).

On February 25, 2011 appellant was issued a \$9,712.10 refund, consisting of a basic life insurance (BLI) overpayment of \$2,349.00 and optional life insurance (OLI) overpayment \$7,363.10.

On March 12, 2011 appellant requested a prerecoumpment hearing before a representative of OWCP's Branch of Hearings and Review.

On September 2, 2011 OPM corrected appellant's final salary from \$87,289.00 to \$69,831.00. It noted that appellant carried OLI Option B with 3 multiples, no reduction.

By decision dated January 26, 2012, the hearing representative finalized the preliminary overpayment determination that appellant had received an overpayment of compensation in the amount of \$185,982.09. The hearing representative also found that appellant was without fault in the creation of the overpayment, but denied waiver of recovery of the overpayment. The hearing representative required recovery of the overpayment by deducting \$1,500.00 every 28 days from appellant's continuing compensation payments.

Appellant appealed to the Board. By decision dated April 26, 2013, the Board found that the correct pay rate under 5 U.S.C. § 8114 was for 32 hours per week at a fixed rate of pay.⁴ The Board further found that an overpayment of compensation was created from the failure to deduct PRBLI premiums. The Board remanded the case to OWCP for further determination as to the amount of both overpayments. The Board further affirmed the denial of waiver of recovery of the overpayment and the method of recovery. In a July 21, 2014 order granting petition for reconsideration and modifying its previous decision, the Board affirmed its April 26, 2013 decision as to the fact of both overpayments and that appellant was without fault in the creation of the overpayments. The Board modified the decision to find that the case was not in posture for decision as to the amount of the overpayments, the denial of waiver of recovery, and the rate of recovery of the overpayments.⁵

By decision dated November 4, 2014, OWCP modified the amount of the overpayment to \$125,034.50. It explained that the initial overpayment calculation was incorrect because FEGLI premiums were calculated based on an \$87,289.00 full-time salary, but should have been based on the \$69,831.00 part-time salary.

On November 7, 2014 OPM advised OWCP to base their calculations for FEGLI premiums on a final salary of \$87,289.00. It instructed OWCP to deduct for Code Z5 (basic, Option A Standard, Option B (5x) no reduction, Option C (5x)), with no reduction for the postretirement election, effective June 26, 2003.

On November 17, 2014 OWCP indicated, based on OPM's final salary rate of \$87,289.00 but prorated to a 32-hour weekly rate of \$1,343.06, that for the period April 14, 2003 through December 18, 2010, it deducted \$2,349.00 for BLI premiums, \$29,269.10 for OLI premiums, and \$178.20 for PRBLI premiums. However, it should have deducted \$0 for BLI premiums,

⁴ Docket No. 12-1408 (issued April 26, 2013).

⁵ Docket No. 12-1408 (issued July 21, 2014).

\$29,484.95 for OLI, and \$17,427.75 for PRBLI. As appellant had been refunded \$7,363.10 for OLI premiums, OWCP found that an overpayment of \$7,147.25 was created for OLI premiums and \$17,249.55 for PRBLI premiums (\$17,427.75 minus \$178.20). OWCP, therefore, concluded that the overpayment totaled \$133,678.84. A November 17, 2014 worksheet was provided along with pay rate calculations based on OPM's letters of different salary rates.

On April 17, 2015 appellant appealed to the Board. By decision dated January 20, 2016, the Board found that an overpayment of \$109,282.04 had been established based on an incorrect pay rate for the period April 14, 2003 through December 18, 2010, that OWCP properly denied waiver of recovery of the overpayment and had properly determined the recovery of that overpayment from continuing compensation. The Board remanded the case for a proper explanation as to the amount of the overpayment based on deductions for PRBLI and OLI.⁶ The Board noted that OWCP had reported for the period from April 14, 2003 through December 18, 2010, it should have deducted PRBLI premiums of \$17,427.75 and \$29,484.95 in OLI premiums. The prior calculations indicated that \$15,064.27 should have been deducted for PRBLI premiums and \$21,906.00 in OLI premiums. The Board requested that OWCP clearly explain why a final salary of \$87,289.00 was the appropriate pay rate on which to base deductions for PRBLI and OLI, as it previously found that pay rate was the incorrect pay rate for compensation purposes.⁷

On April 14, 2017 OWCP notified appellant of its preliminary overpayment determination that he received an overpayment of compensation in the amount of \$24,828.50 for the period April 14, 2003 through December 18, 2010 as OWCP had not correctly deducted PRBLI and OLI insurance premiums. It found that, based on information received from OPM and the evidence of file, appellant was allowed coverage under the higher salary of \$87,289.00 (the earnings of a full-time employee) due to the incontestability clause under Public Law 105-311, the Federal Employees Life Insurance Improvement Act and the Benefits Administration Letter (BAL) 95-203. OWCP contended that the incontestability clause allowed appellant's coverage to be based on the annual salary of \$87,289.00 because coverage was in effect for at least two years before the error was discovered and appellant paid the applicable premiums for the erroneous coverage while it was in effect. It noted that during the period in question, it deducted BLI \$2,349.00, OLI \$29,269.10 and PRBLI \$178.20, but should have only deducted BLI \$0.00, OLI \$29,484.95 and PRBLI \$17,427.75. OWCP further noted that on March 4, 2011, appellant was incorrectly issued a \$9,712.10 refund, BLI \$2,349.00 and OLI \$7,363.10. Thus, it found that appellant was overpaid OLI \$7,578.95⁸ and \$17,249.55 PRBLI for a total overpayment of \$24,828.50. OWCP further advised him of its preliminary overpayment determination that he was without fault in the creation of the overpayment. It requested that appellant complete the enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documentation. Additionally, OWCP notified him that, within 30 days of the date of the letter, he

⁶ Docket No. 15-1102 (issued January 20, 2016).

⁷ *Order Denying Petition for Reconsideration*, Docket No. 15-1102 (issued August 17, 2016).

⁸ OWCP explained that OLI premiums should total \$7,578.95 (\$215.85 and \$7,263.10) as it was previously miscalculated.

could request a telephone conference, a final decision based on the written evidence, or a prerecoupment hearing.

On April 21, 2017 appellant requested a prerecoupment hearing before a representative of OWCP's Branch of Hearing and Review on the issues of fault and a possible waiver of recovery of the overpayment.

A telephonic hearing was held on October 16, 2017. By decision dated January 2, 2018, an OWCP hearing representative finalized its preliminary overpayment determination that appellant had received an overpayment of compensation in the amount of \$24,828.50 for the period April 14, 2003 to December 18, 2010 due to an underdeduction of premiums in the amount of \$7,578.95 for OLI and \$17,249.55 for PRBLI, for which he was without fault. The hearing representative denied waiver of recovery of the overpayment as appellant failed to provide financial information or documentation regarding his income and expenses. The hearing representative required recovery of the overpayment by deducting \$276.92 from appellant's continuing compensation payments.

On June 28, 2018 appellant appealed to the Board. On September 17, 2019 the Board set aside OWCP's January 2, 2018 decision, finding that OWCP had not explained its findings with regard to how the fact and amount of the overpayment were determined. On remand, OWCP was instructed to issue an appropriate decision with regard to the relevant overpayment issues.

By decision dated December 9, 2019, the hearing representative found that further development of the claim was warranted. The hearing representative found that the evidence of record supported that an overpayment occurred due to an underdeduction of OLI based on appellant's signed life insurance election on March 2, 2001, which established that he elected Option A, Option B (5x); and Option C (5x). However, the record was devoid of an election form to establish that he elected no reduction in PRBLI. As the fact and amount of the overpayment related to PRBLI could not be determined, the hearing representative returned the case record to OWCP to obtain from OPM the signed election form from appellant regarding PRBLI coverage, to be followed by a *de novo* decision regarding the overpayment as it related to his OLI and PRBLI.

In a February 4, 2020 letter, OPM provided OWCP with appellant's signed February 3, 2003 FEGLI election form, which had an "x" through it and a handwritten note "Not Valid." Regarding Option C, a box had been checked "no." It indicated that it relied on incontestability and provided copies of its May 26, 2004, January 20, 2006, and March 17, 2006 letters wherein it noted that it began withholding premiums on June 26, 2003 based on FEGLI final salary rates of \$87,289.00, \$69,831.00, and \$87,289.00, respectively. OPM further noted that it had provided appellant with information showing no reduction status multiple times over the years with no contest.

On March 6, 2020 OWCP indicated that OPM did not have appellant's signed election form for a zero percent reduction in PRBLI. Appellant indicated that he wanted PRBLI to continue at 0 percent reduction and did not want the default 75 percent reduction.

In a March 18, 2020 letter, OWCP informed appellant that OPM did not have a copy of his PRBLI election and that it had relied on incontestability. Appellant was advised that he had been

paying for 0 percent reduction with a cost. OWCP noted appellant's telephone conversation of March 6, 2020 and his preference to continue PRBLI at 0 percent reduction. It requested that appellant sign its letter by March 31, 2020 to verify that he wanted to keep his PRBLI reduction at 0 percent reduction with a cost. OWCP advised, if no response was received, the PRBLI would be changed to 75 percent reduction.

In a March 27, 2019 letter, appellant discussed his concerns with OWCP's March 18, 2020 letter. He stated that OPM's March 17, 2006 letter confirmed his election options. An attached FEGLI election form, electronically signed by appellant on March 2, 2001, noted Option A at 0 percent reduction, Option B (5x) and Option C (5x). March 17, 2006 letters from OPM were also attached.⁹ An OPM FEGLI coverage form dated March 17, 2006 noted that appellant had elected "no reduction" of BLI and OLI. An undated OPM letter indicated that Option A and Option C would begin to reduce by two percent beginning the second month after age 65 or retirement, if later; and Option B would not be reduced and premiums would continue.

In an April 6, 2020 letter, OWCP advised that a final decision was made to leave his PRBLI at 0 percent reduction.

By decision dated April 6, 2020, OWCP finalized its preliminary overpayment determination that appellant had received an overpayment of compensation in the amount of \$24,828.50, for which he was without fault, because OWCP improperly deducted life insurance premiums for the period April 14, 2003 through December 18, 2010. Based on appellant's March 27, 2008 statements and March 6, 2020 telephone conversation, OWCP found that he had elected for his PRBLI deduction to remain at 0 percent reduction.

LEGAL PRECEDENT

Section 8129(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.¹⁰ When an overpayment of compensation 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.¹¹

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.¹² The coverage for basic life insurance is effective unless waived,¹³ and premiums for basic and optional life coverage are

⁹ In a March 17, 2006 letter, OPM indicated that appellant was entitled to all life insurance coverage he was enrolled in for over two years due to incontestability. In another letter of even date, OPM discussed appellant's disability retirement annuity under the Federal Employees Retirement System (FERS).

¹⁰ 5 U.S.C. § 8129.

¹¹ 20 C.F.R. §§ 10.434-10.437; *J.L.*, Docket No. 18-0212 (issued June 8, 2018).

¹² 5 U.S.C. § 8702(a).

¹³ *Id.* at § 8702(b).

withheld from the employee's pay.¹⁴ 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.¹⁵ Basic insurance coverage shall be continued without cost to an employee who retired or began receiving compensation on or before December 31, 1989.¹⁶ However, the employee is responsible for payment of premiums for optional life insurance coverage which is accomplished by authorizing withholdings from his or her compensation.¹⁷

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).¹⁸

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.¹⁹ An 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.²⁰ When an underwithholding of life insurance premiums

¹⁴ *Id.* at § 8707.

¹⁵ *Id.* at § 8706.

¹⁶ *Id.* at § 8706(b)(2).

¹⁷ *Id.* at § 8706(b)(3)(B). See *V.H.*, Docket No. 18-1124 (issued January 16, 2019); see also *S.P.*, Docket No. 17-1888 (issued July 18, 2018); *Edward J. Shea*, 43 ECAB 1022 (1992) (the Board found that the claimant received an overpayment of compensation where he elected PRBLI 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 of compensation was created due to no deduction of premiums for OLI for the period July 1983 through November 1989).

¹⁸ *V.H.*, *id.*; see also *S.P.*, *id.*; *James J. Conway*, Docket No. 04-2047 (issued May 20, 2005).

¹⁹ 5 C.F.R. § 870.504(a)(1).

²⁰ *Id.* at § 870.504(b).

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

ANALYSIS

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

The Board previously found that fact of overpayment had been established for the period April 14, 2003 through December 18, 2010.²² Findings made in prior Board decisions are *res judicata* absent further merit review by OWCP under section 8128 of FECA.²³

In its prior decisions and orders, the Board remanded the case for OWCP to explain its calculation of the amount of the overpayment and why a final salary of \$87,289.00 was the appropriate pay rate on which to base appellant's life insurance deductions when it had previously found that that pay rate was the incorrect pay rate for compensation purposes.²⁴

OWCP's April 6, 2020 decision, however, does not contain a statement of reasons regarding the calculation of the overpayment as it relates to appellant's life insurance premium deductions. Furthermore, while OWCP indicated that it used a base salary of \$87,289.00 (the earnings of a full-time employee), OWCP has not explained why the provisions of the incontestability clause²⁵ mandate that the overpayment be calculated on a full-time salary that appellant never received. As the case record remains unclear as to how OWCP calculated the amount of the overpayment, the Board is unable to adequately review this aspect of the case to determine the amount of overpayment of compensation.

Section 8124(a) of FECA provides: "OWCP shall determine and make a finding of fact and make an award for or against payment of compensation."²⁶ Its regulation at section 10.126 of Title 20 of the Code of Federal Regulations provides: "The decision of the Director of OWCP shall contain findings of fact and a statement of reasons."²⁷ Moreover, OWCP's procedures

²¹ 5 U.S.C. § 8707(d); *see V.H., supra* note 17; *see also Keith H. Mapes*, 56 ECAB 130 (2004); *James Lloyd Ote*, 48 ECAB 334 (1997).

²² *Supra* note 3.

²³ *M.J.*, Docket No. 20-1565 (issued January 24, 2023); *B.D.*, Docket No. 20-1365 (issued December 21, 2022); *M.D.*, Docket No. 19-0510 (issued August 6, 2019); *Clinton E. Anthony, Jr.*, 49 ECAB 476, 479 (1998).

²⁴ *Supra* note 3.

²⁵ Public Law 105-311, the Federal Employees Life Insurance Improvement Act and the Benefits Administration Letter (BAL) 95-203.

²⁶ 5 U.S.C. § 8124(a); *see R.C.*, Docket No. 16-0563 (issued May 4, 2016); *Hubert Jones, Jr.*, 57 ECAB 467 (2006); *Paul M. Colosi*, 56 ECAB 294 (2005).

²⁷ *See* 20 C.F.R. § 10.126.

provide: “The reasoning behind OWCP’s evaluation should be clear enough for the reader to understand the precise defect of the claim and the kind of evidence which would overcome it.”²⁸

As the April 6, 2020 decision did not sufficiently explain how the amount of the overpayment was calculated or why the incontestability clause mandates use of a full-time base salary for the deduction of appellant’s life insurance premiums, the decision will be set aside and the case remanded to OWCP. On remand, following any further development, OWCP shall issue a *de novo* decision which fully explains its calculations supporting the amount of the overpayment, as previously ordered by the Board.²⁹

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the April 6, 2020 decision of the Office of Workers’ Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: March 9, 2023
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

²⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.5 (February 2013).

²⁹ *See B.W.*, Docket No. 19-0126 (issued December 9, 2019).