

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

K.W., Appellant

and

U.S. POSTAL SERVICE, POST OFFICE,
Houston, TX, Employer

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**Docket No. 23-1166
Issued: February 14, 2024**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On September 13, 2023 appellant filed a timely appeal from an August 31, 2023 merit decision of the Office of Workers' Compensation Programs (OWCP).¹ Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$4,939.47 for the period August 19, 2021 through November 5, 2022, for which he was without fault, because health benefits insurance (HBI) premiums were not deducted from his

¹ The Board notes that, following the August 31, 2023 decision, OWCP received additional evidence. 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.*

² 5 U.S.C. § 8101 *et seq.*

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 \$100.00 from appellant's continuing compensation payments every 28 days.

FACTUAL HISTORY

On July 26, 2021 appellant, then a 48-year-old tractor trailer operator, filed a traumatic injury claim (Form CA-1) alleging that on July 3, 2021 he injured his head, back, knees, feet, and shoulders when a car struck the rear passenger side of the employment vehicle he was operating, spinning his vehicle several times, while in the performance of duty. He noted that he briefly lost consciousness on impact. Appellant stopped work on July 4, 2021. OWCP accepted the claim for lumbar spine sprain, lumbar disc displacement, lumbar radiculopathy, bilateral knee chondromalacia, and tear of the left medial meniscus. It paid him wage-loss compensation on the supplemental rolls commencing August 19, 2021, and subsequently on the periodic rolls.

In October 2022, OWCP received a copy of a signed Health Benefits Election Form (Standard Form 2809) dated March 31, 2021, which recorded appellant's election of self plus one coverage, effective April 10, 2021.

As of November 6, 2022, OWCP began deducting premiums for self plus one coverage from appellant's wage-loss compensation in the amount of \$322.96 every 28 days.

In a December 7, 2022 overpayment referral memorandum, OWCP found that appellant had received an overpayment of compensation for the period August 19, 2021 through November 5, 2022 as health benefit premiums for self plus one coverage were not deducted. It noted that he had received wage-loss compensation in the amount of \$46,084.82 for the period August 19, 2021 through November 5, 2022, when he should have received only \$41,145.35, resulting in an overpayment of \$4,939.47 due to the under withholding of HBI premiums.

In a preliminary overpayment determination dated December 12, 2022, OWCP notified appellant of its preliminary finding that he had received an overpayment of compensation in the amount of \$4,939.47 for the period August 19, 2021 through November 5, 2022, for which he was without fault, because HBI premiums were not properly deducted from his FECA compensation payments. It advised him that he could submit evidence challenging the fact or amount of the overpayment. OWCP instructed appellant to complete an overpayment recovery questionnaire (Form OWCP-20) to determine whether waiver should be granted, and if not, a reasonable repayment schedule would be formulated. It informed him that he should provide supporting financial documentation, including copies of income tax returns, bank account statements, bills, pay slips, and any other records to support income and expenses. OWCP provided an overpayment action request form and notified appellant that, within 30 days of the date of the letter, he could request a final decision based on the written evidence or a prerecoument hearing.

On December 29, 2022 appellant requested a prerecoument hearing before a representative of OWCP's Branch of Hearings and Review. He indicated that he was requesting waiver of recovery of the overpayment as he was found without fault in the creation of the overpayment. Attached was a completed Form OWCP-20 dated December 29, 2022. Appellant

reported total household monthly income of \$7,600.00; total monthly expenses of \$5,210.00; and total assets of \$2,182.00. No supporting financial documentation was received.

A prerecoupment hearing was held on June 16, 2023. Appellant testified that his monthly income was reduced to \$3,900.00. He offered to repay the overpayment at the rate of \$100.00 every 28 days. OWCP's hearing representative afforded appellant 30 days to submit financial documentation to support his reported income, assets, and expenses. No response was received.

By decision dated August 31, 2023, OWCP's hearing representative finalized the December 12, 2022 preliminary overpayment determination. She found that appellant had received an overpayment of compensation in the amount \$4,939.47 for the period August 19, 2021 through November 5, 2022, for which he was without fault, because OWCP failed to properly deduct HBI premiums from his FECA wage-loss compensation. The hearing representative denied waiver of recovery of the overpayment and required recovery by deducting \$100.00 from appellant's continuing compensation payments every 28 days.

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.³ 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.⁴

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 enrolled if the appropriate health benefits withholdings or direct premium payments are not made.”⁵

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

³ *Id.* at § 8102(a).

⁴ *Id.* at § 8129(a).

⁵ 5 C.F.R. § 890.502(a)(1).

amount equal to the uncollected employee contributions and any applicable agency contributions required to OPM for deposit in the Employees' Health Benefits Fund.”⁶

Under applicable OPM regulations, the employee or annuitant is responsible for payment of the employee's share of the cost of enrollment.⁷ An establishment that withholds less than the proper health benefits contribution must submit an amount equal to the sum of the uncollected deductions.⁸ 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.⁹

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$4,939.47 for the period August 19, 2021 through November 5, 2022, for which he was without fault, because HBI premiums were not deducted from his FECA compensation.

The case record contains a signed health benefits election form (Standard Form 2809), which recorded appellant's election of self plus one coverage, effective April 10, 2021. OWCP subsequently accepted his traumatic injury claim, and it paid him wage-loss compensation on the supplemental rolls beginning August 19, 2021. The case record, however, establishes that OWCP did not begin to deduct the HBI premiums until November 6, 2022.

As noted, when an under withholding of HBI 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.¹⁰

Because of the under deduction of HBI premiums for appellant's elected self plus one coverage, the Board finds that an overpayment of compensation in the amount of \$4,939.47 for the period August 19, 2021 through November 6, 2022 was created.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA¹¹ provides that an overpayment must be recovered unless incorrect payment has been made to an individual who is without fault and when adjustment or

⁶ *Id.* at § 890.502(c).

⁷ *Id.* at § 890.502(b)(1).

⁸ *Id.* at § 890.502(d).

⁹ *E.D.*, Docket No. 20-0963 (issued January 6, 2022); *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).

¹⁰ *Id.*

¹¹ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Final Overpayment Determinations*, Chapter 6.400.4a(3) (September 2018).

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.¹²

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.¹³ 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 his or her position for the worse.

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.¹⁴

In order for appellant to establish that, recovery of the overpayment would defeat the purpose of FECA, he must show that he requires substantially all of his income to meet current ordinary and necessary living expenses and that his assets do not exceed the established limit as determined by OWCP's procedures.¹⁵ He had the responsibility to provide the appropriate financial information to OWCP.¹⁶

¹² *Id.* at Chapter 6.400.4a(2).

¹³ *Id.* at Chapter 6.400.4b(3)(a), (b).

¹⁴ *Supra* note 10.

¹⁵ 20 C.F.R. §§ 10.436, 10.437.

¹⁶ *Id.* at 10.438.

In its preliminary overpayment determination dated December 12, 2022, OWCP requested that appellant provide a completed Form OWCP-20 and supporting financial documentation, including copies of income tax returns, bank account statements, bills and canceled checks, pay slips, and any other records to support his reported income and expenses.

Appellant submitted a completed Form OWCP-20, wherein he reported total household monthly income of \$7,600.00; total monthly expenses of \$5,210.00; and total assets of \$2,182.00. However, no supporting financial documentation was received. A prerecoupment hearing was held on June 16, 2023. Appellant testified that his monthly income was reduced to \$3,900.00. OWCP's hearing representative afforded appellant 30 days to submit financial documentation to support his reported income, assets, and expenses. No response was received. As a result, OWCP did not have the necessary financial information to properly determine whether recovery of the overpayment would defeat the purpose of FECA or if recovery would be against equity and good conscience. Consequently, as appellant did not submit the financial information required under section 10.438 of OWCP's regulations, which was necessary to determine his eligibility for waiver, the Board finds that OWCP properly denied waiver of recovery of the overpayment of compensation.¹⁷

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.¹⁸ 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.”¹⁹

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly required recovery of the overpayment by deducting whether OWCP properly required recovery of the overpayment by deducting \$100.00 from appellant's continuing compensation payments every 28 days.

In its preliminary determination, OWCP asked appellant to provide financial documentation to support his reported income, expenses, and assets; however, appellant failed to

¹⁷ *Id.* at § 10.438.

¹⁸ *Lorenzo Rodriguez*, 51 ECAB 295 (2000).

¹⁹ 20 C.F.R. § 10.441(a).

provide the requested financial documentation. During the prerecoupment hearing held on June 16, 2023, appellant offered to repay the overpayment at the rate of \$100.00 every 28 days.

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.²⁰ The Board finds that OWCP properly required recovery of the overpayment by deducting \$100.00 from appellant's continuing compensation payments every 28 days.

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$4,939.47 for the period August 19, 2021 through November 5, 2022, for which he was without fault, because HBI premiums were not deducted from his FECA compensation. The Board further finds that OWCP properly denied waiver of recovery of the overpayment and properly required recovery of the overpayment by deducting \$100.00 from his continuing compensation payments every 28 days.

ORDER

IT IS HEREBY ORDERED THAT August 31, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 14, 2024
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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

²⁰ See *R.M.*, *supra* note 9; *M.D.*, Docket No. 11-1751 (issued May 7, 2012).