

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

D.I., Appellant

and

**DEPARTMENT OF THE NAVY, NORFOLK
NAVAL SHIPYARD, Portsmouth, VA, Employer**

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**Docket No. 13-469
Issued: July 1, 2013**

Appearances:
Appellant, pro se
No Appearance, for the Director

Oral Argument April 25, 2013

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 31, 2012 appellant timely appealed the December 5, 2012 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 the case.

ISSUES

The issues are: (1) whether appellant received an overpayment of \$7,157.77 for the period of June 6 to August 27, 2011; and (2) whether OWCP properly declined to waive recovery of the overpayment.

FACTUAL HISTORY

Appellant, a 48-year-old physical science technician, has an accepted claim for lumbar sprain and left ankle sprain which arose on November 20, 2010. He stopped work on May 9, 2011 to undergo left ankle arthroscopic surgery. OWCP authorized the May 9, 2011 surgery and

¹5 U.S.C. §§ 8101-8193 (2006).

paid appellant appropriate wage-loss compensation for temporary total disability (TTD). Effective June 5, 2011, it placed him on the periodic compensation rolls. On June 6, 2011 appellant returned to work in a full-time, limited-duty capacity. The employing establishment informed OWCP of his return to work as early as June 8, 2011, but OWCP continued to pay him wage-loss compensation for an additional four months.

Beginning July 2, 2011, OWCP disbursed four 28-day periodic rollspayments, which covered the following periods: June 5 to July 2, 2011; July 3 to 30, 2011; July 31 to August 27, 2011; and August 28 to September 24, 2011. Each 28-day payment was in the amount of \$2,418.37. Appellant returned the latest 28-day payment covering the period of August 28 to September 24, 2011. For the period of June 5 to August 27, 2011, he received net wage-loss compensation totaling \$7,255.11.

On May 14, 2012 OWCP issued a preliminary finding of overpayment in the amount of \$7,157.77 for the period of June 6 to August 27, 2011.² The preliminary determination also indicated that appellant was at fault in creating the overpayment because he accepted payments he knew or should have known to be incorrect.

Appellant requested a prerecoupment hearing. He challenged the preliminary finding of fault and requested waiver of recovery of the overpayment. Appellant also submitted an overpayment recovery questionnaire (Form OWCP-20). He reported total monthly income (net) of \$2,820.44 and monthly expenses/debts of \$2,949.96. Appellant also reported various unpaid medical expenses totaling \$2,668.16. Some of the charges pertained to recent OWCP-approved lumbar surgery.³ Additionally, appellant reported total liquid assets of \$1,376.73.

At the October 2, 2012 prerecoupment hearing, OWCP's hearing representative acknowledged receipt of appellant's Form OWCP-20 and advised him to submit financial documentation to support the figures he provided regarding necessary expenses such as utilities. The hearing representative initially afforded his 30 days to submit the requested financial documentation. She subsequently extended the deadline until November 15, 2012.

By decision dated December 5, 2012, the hearing representative found that appellant received an overpayment of \$7,157.77 for the period of June 6 to August 27, 2011. She also found that he was not at fault in creating the overpayment. As to the issue of waiver, the hearing representative found that the "did not submit any financial documentation to support [his] claimed expenses." And absent the required financial documentation, appellant was not entitled to a waiver of recovery of the overpayment.

Appellant subsequently filed the instant appeal and requested oral argument before the Board. In his application for review (AB-1) and during oral argument, he adamantly disagreed with the hearing representative's finding that he had not submitted the requested financial

² Appellant was entitled to compensation for June 5, 2011.

³ In April 18, 2012, appellant underwent a left-sided L5-S1 microdiscectomy. He returned to work on May 1, 2012 and within a few weeks he was released to resume his regular duties without restrictions.

documentation.⁴ He also challenged the amount of overpayment arguing that OWCP had incorrectly paid him at the lower, basic compensation rate ($\frac{2}{3}$) rather than the augmented rate ($\frac{3}{4}$). Appellant claimed his adult daughter, as a dependent.⁵

LEGAL PRECEDENT -- ISSUE 1

If an employee returns to work and has earnings, he or she is not entitled to receive TTD benefits and actual earnings for the same time period.⁶ Where there are actual earnings and the continued receipt of wage-loss compensation for TTD for the same period, an overpayment of benefits exists.⁷

ANALYSIS -- ISSUE 1

Appellant returned to work in a full-time capacity on June 6, 2011. However, OWCP continued to pay him wage-loss compensation for approximately four months while he also earned wages from the employing establishment. Following his June 6, 2011 return to work, appellant received four 28-day periodic rolls disability payments covering the period of June 5 to September 24, 2011. He returned one check which covered the period of August 28 to September 24, 2011. With respect to the three remaining checks covering the period of June 5 to August 27, 2011, OWCP paid appellant total net compensation of \$7,255.11, but appellant was only entitled to disability compensation for one of those days; June 5, 2011.

OWCP calculated that appellant was entitled to receive \$98.94 in net compensation for June 5, 2011. Subtracting this amount from the previous payments resulted in an overpayment of \$7,156.17.⁸ OWCP calculated a slightly higher overpayment (\$7,157.77) due to a minor computation error (\$1.60) regarding amounts previously withheld for health insurance premiums (HBI).⁹

Wage-loss compensation for total disability is computed based on the employee's effective pay rate and whether he has any eligible dependents.¹⁰ Depending on whether the employee has at least one eligible dependent, wage-loss compensation will be paid at either $\frac{2}{3}$ or $\frac{3}{4}$ of the effective pay rate. As noted, appellant claimed his adult daughter, as a dependent. At

⁴ Appellant reportedly submitted a package containing 49 pages of information regarding his personal finances.

⁵ On a May 17, 2011 claim for compensation (Form CA-7), appellant listed his daughter's date of birth as April 27, 1991. He also noted that she lived with him at the time. On his June 12, 2012 Form OWCP-20, appellant again listed his then 21-year-old daughter, as a dependent.

⁶ *Daniel Renard*, 51 ECAB 466, 469 (2000).

⁷ *L.S.*, 59 ECAB 350, 352-53 (2008).

⁸ \$7,255.11 - \$98.94 = \$7,156.17.

⁹ The overpayment worksheet indicated that OWCP had withheld \$1,592.00 for HBI premiums. However, the actual payment reports indicated that OWCP withheld \$1,593.60 in HBI premiums for the period of June 5 to September 24, 2011.

¹⁰ See 5 U.S.C. §§ 8105(a), 8110, 8112 and 8114; 20 C.F.R. §§ 10.5(s) and 10.401(b) (2011).

oral argument, he offered a copy of his income tax return as proof that he was entitled to claim his adult daughter as a dependent.¹¹ The Board advised appellant that it was not at liberty to accept new evidence on appeal.¹²

The record reflects that OWCP paid appellant at the basic compensation rate ($\frac{2}{3}$) for the period of May 9 to June 4, 2011. Appellant essentially argued that, because OWCP underpaid him for an earlier period, this should offset at least part of the subsequent overpayment. Perhaps he was entitled to additional compensation for the period of May 9 to June 4, 2011; however, that particular period of compensation is not before the Board. The issue currently before the Board is whether appellant received an overpayment of benefits for the period of June 6 to August 27, 2011.¹³

Although the record is unclear as to whether appellant's adult daughter qualifies as a dependent under FECA, OWCP nonetheless gave him the benefit of the doubt when it recalculated the amount of benefits he was entitled to receive for June 5, 2011. Applying the $\frac{3}{4}$ compensation rate to his weekly pay rate of \$1,056.29, OWCP determined that he was entitled to gross compensation of \$113.17 for June 5, 2011.¹⁴ It then reduced that amount by the pro rata share of appellant's 28-day HBI premium (\$14.23).¹⁵ Thus, OWCP determined that he was entitled to net compensation of \$98.94 for June 5, 2011. This figure was then subtracted from the total net compensation paid during the period of June 5 to August 27, 2011. As noted, OWCP made a slight miscalculation regarding previously withheld HBI premiums.

The record establishes that appellant received an overpayment of \$7,156.17 for the period of June 6 to August 27, 2011. He was not entitled to receive disability compensation following his June 6, 2011 return to full-time work. The hearing representative's December 5, 2012 decision shall be modified to reflect an overpayment of \$7,156.17. The Board also finds that appellant was without fault in either creating or accepting the overpayment.

LEGAL PRECEDENT -- ISSUE 2

An individual who is without fault in creating or accepting an overpayment is nonetheless subject to recovery of the overpayment unless adjustment or recovery would defeat the purpose

¹¹ Dependency status under FECA is not determined based on whether the claimed individual qualifies as a dependent for Federal and/or State income tax purposes. Dependents under FECA include: a wife or husband; an unmarried child under 18 years of age, an unmarried child over 18 who is incapable of self-support; a student, until he or she reaches 23 years of age or completes four years of school beyond the high school level; or a wholly dependent parent. 20 C.F.R. § 10.405(a).

¹² See 20 C.F.R. § 501.2(c)(1).

¹³ Had OWCP applied the higher augmented rate ($\frac{3}{4}$) for the period of June 6 to August 27, 2011, this would have resulted in an even greater overpayment.

¹⁴ Based on the weekly pay rate in effect as of May 9, 2011, OWCP had previously paid compensation at the $\frac{2}{3}$ rate which yielded a 28-day gross compensation of \$2,816.77 or \$100.60 per day.

¹⁵ $\$398.40 \div 28 = \14.23

of FECA or would be against equity and good conscience.¹⁶ Recovery of an overpayment will defeat the purpose of FECA if such recovery would cause hardship to a current or former beneficiary because the beneficiary from whom OWCP seeks recovery needs substantially all of his 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, relinquished a valuable right or changed his position for the worse.¹⁸

The individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by OWCP.¹⁹ This information is necessary for determining whether a waiver of recovery of the overpayment is warranted.²⁰ The information is also used to determine an appropriate repayment schedule, if necessary.²¹ Failure to submit the requested information within 30 days of the request shall result in denial of waiver.²²

ANALYSIS - ISSUE 2

The hearing representative denied waiver of recovery of the overpayment because there was insufficient evidence to support the income, expenses and assets appellant reported in his June 12, 2012 overpayment recovery questionnaire. The hearing representative advised appellant of the need for supporting financial documentation and provided him ample opportunity post-hearing to submit the required information. Appellant claimed to have timely submitted 49 pages of financial information. However, there is no indication from the record that the previously requested documentation was timely received and properly associated with the current claim file.

The requested financial documentation is not part of the record on appeal. Because this information was unavailable at the time of the December 5, 2012 final overpayment decision, the hearing representative properly denied appellant's request for waiver of recovery.²³ Section

¹⁶5 U.S.C. § 8129(b); 20 C.F.R. §§ 10.433, 10.434, 10.436, 10.437.

¹⁷20 C.F.R. § 10.436(a), (b). For an individual with no eligible dependents the asset base is \$4,800.00. The base increases to \$8,000.00 for an individual with a spouse or one dependent, plus \$960.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6a(1)(b) (June 2009).

¹⁸*Id.* at § 10.437(a), (b).

¹⁹*Id.* at § 10.438(a).

²⁰*Id.*

²¹*Id.*

²²20 C.F.R. § 10.438(b).

²³*Id.*

10.438, which describes the overpayment recipient's responsibility to submit financial information, does not preclude further consideration of waiver based on subsequently submitted evidence.²⁴ Accordingly, appellant is free to submit an updated Form OWCP-20 along with current financial documentation and request further review from OWCP regarding the possibility of waiver of recovery.

CONCLUSION

Appellant received an overpayment of \$7,156.17 for the period of June 6 through August 27, 2011. Although he was deemed without fault in creating or accepting the overpayment, he is not entitled to waiver of recovery. The hearing representative's decision shall be modified to reflect the above-noted overpayment amount.

ORDER

IT IS HEREBY ORDERED THAT the December 5, 2012 decision of the Office of Workers' Compensation Programs is affirmed as modified.

Issued: July 1, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

²⁴*Id.*