United States Department of Labor
Employees' Compensation Appeals Board

B.T., Appellant	)	
and	)	**Docket No. 13-1619**
	)	**Issued: February 24, 2014**
DEPARTMENT OF THE NAVY, BANGOR NAVAL SUBMARINE BASE, Silverdale, WA, Employer	)	

Appearances:
John Eiler Goodwin, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On June 28, 2013 appellant, through his attorney, filed a timely appeal from a January 2, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP).[1] Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[3]

[1] Under the Board's *Rules of Procedure,* an appeal must be filed in 180 days from the most recent OWCP decision. One hundred and eighty days from January 2, 2013 was July 1, 2013. Since using July 3, 2013, the date the appeal was received by the Clerk of the Board, would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The appeal was postmarked on June 28, 2013, which renders the appeal timely filed. *See* 20 C.F.R. § 501.3(f)(1).

[2] 5 U.S.C. § 8101 *et seq.*

[3] The Board notes that appellant, through his attorney, is only appealing from OWCP's January 2, 2013 decision. Although the Board has jurisdiction over OWCP's June 7, 2013 merit decision, appellant has not appealed this decision, which denied his claim for compensation for leave without pay from April 25 to May 3, 2013. Therefore, the Board has not addressed it on this appeal. *See* 20 C.F.R. § 501.3(a), (c).

ISSUES

The issues are: (1) whether appellant received a $2,934.53 overpayment of compensation; and (2) whether OWCP abused its discretion in denying waiver of the overpayment.

On appeal, counsel contends that OWCP improperly offset the amount of the overpayment by withholding money owed to appellant which denied administrative due process. He further contends that appellant's wife did not work outside the home after appellant returned to work at the employing establishment. Counsel requested that the Board set aside the overpayment decision and return the case record to OWCP for additional development and issuance of a *de novo* decision.

FUAL HISTORY

OWCP accepted that on February 27, 2007 appellant, then a 24-year-old shipfitter, sustained a lumbar strain and temporary and permanent aggravation of a herniated nucleus pulposus while moving a steel plate. He stopped work on June 24, 2009 as no work was available within his physical limitations. OWCP placed appellant on the periodic compensation rolls and paid wage-loss compensation for his total disability.

On June 6, 2012 the employing establishment advised OWCP that appellant had returned to full-time modified-duty work as a transportation assistant on that date.[4] OWCP stopped his automatic compensation payment, but he continued to receive total disability compensation from June 3 to 30, 2012.

On June 7, 2012 appellant filed a claim (Form CA-7) for wage-loss compensation for a medical appointment on June 8, 2012.

By letter dated June 27, 2012, OWCP made a preliminary determination that appellant received an overpayment of compensation in the amount of $2,934.53 from June 3 to 30, 2012 because he continued to receive disability compensation after his return to work. It explained the calculation of the overpayment and found that he was without fault in its creation because he was not aware nor could he reasonably have been expected to know that it had paid compensation incorrectly as a result of an inability to stop the payment prior to its issuance. OWCP requested that appellant complete an enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documents to determine the issue of waiver. Additionally, it notified him that, within 30 days of the date of the letter, he could request a telephone conference, a final decision based on the written evidence or a prerecoupment hearing.

The completed overpayment worksheet indicated that appellant received net compensation of $3,445.66 for the stated period when he should have received $414.43. OWCP credited deductions it made for $96.70 in compensation for the June 8, 2012 medical

[4] In an August 7, 2012 decision, OWCP found that appellant's actual wages as a transportation assistant as of June 6, 2012 fairly and reasonably represented his wage-earning capacity.

appointment, $18.30 for basic life insurance premiums and $7.08 for optional life insurance premiums, which yielded an overpayment of compensation of $2,909.15.

On July 27, 2012 OWCP reissued the preliminary overpayment determination because the previous notice had been returned to OWCP as undeliverable. It determined that appellant received net compensation in the amount of $3,868.00 when he should have received $414.43. OWCP retroactively deducted $396.96 for health benefits, $18.30 for basic life insurance premiums, $7.08 for optional life insurance premiums and $96.70 in compensation he should have been paid for the June 8, 2012 medical appointment, resulting in an overpayment of compensation of $2,934.53.

On August 1, 2012 appellant requested a telephone prerecoupment hearing. He noted that the overpayment occurred through no fault of his own and requested a waiver of repayment.

At the October 25, 2012 prerecoupment hearing, appellant's attorney did not dispute the fact of overpayment, but disagreed with the calculation of the overpayment amount. Citing Board cases, he contended that OWCP improperly offset the overpayment with amounts owed to appellant and it denied him administrative due process. Counsel requested that OWCP issue a *de novo* decision to correct the amount of the overpayment. He noted that if an OWCP hearing representative determined that the amount of the overpayment was significantly larger than what was calculated, the claim should be remanded for recalculation. Counsel contended that the $1,000.00 offset was a significant amount and appellant would have a better chance of having the debt waived if it was larger. He stated that appellant's monthly expenses included $850.00 for rent; $166.00 for car insurance; $300.00 for a car note; $156.00 for two cellphones with no home telephone; $100.00 for electricity and heat: $150.00 for his son's special needs tuition; $46.00 for garbage; $600.00 for food; $60.00 to $90.00 for diapers for a three-year old son; $75.00 for car repairs; $30.00 for school supplies; $25.00 for school lunches; $125.00 for clothing; $40.00 for yard work; $50.00 for miscellaneous that was allowed under OWCP procedure manual; and $25.00 for over-the-counter medication. Counsel stated that a creditor's garnishment was lifted and appellant owed Harrison Medical Center $1,150.00 or $100.00 a month. Appellant had a $700.00 balance for speech therapy for his son, which required a monthly payment of $110.00. He owed a children's dentist $1,150.00 or $75.00 a month. Appellant had no bank credit cards. He lost his 2001 Honda when he did not receive compensation. Appellant's wife testified that she had no jewelry, artwork, airplane, boat, all-terrain vehicle, second home, time share property, furs, stocks or bonds. She had about $192.00 in a bank account. Appellant and his wife had $27.00 in cash. He contended that they could not afford to repay the overpayment now, but maybe they could do so in a year. Appellant's monthly take-home pay was $3,746.00 and his wife had no income. Counsel concluded that Board case precedent indicated that the case should be remanded if an overpayment was not calculated correctly to allow appellant to have a prerecoupment hearing regarding the correct amount.

On November 1, 2012 appellant submitted a Form OWCP-20 and accompanying documents listing monthly income of $3,746.00. He reiterated his monthly expenses set forth during the October 25, 2012 prerecoupment hearing. Appellant also listed additional monthly expenses of $40.00 for Seattle Spine and Sports Medicine; $150.00 for Puget Sound Collections; $375.00 for tithes; $480.00 for gasoline; and $400.00 balance for his surrendered automobile,

totaling $4,629.00. He submitted financial documents. Bank of America checking account statements showed direct deposits on April 24, 2012 for $602.81, May 8, 2012 for $350.29 and June 5, 2012 for $207.61 from Communitas Group. The statements also showed direct deposits for $918.83 on July 10, 2012 and $341.88 on August 10, 2012 from Kitsap Tenant Payroll. These direct deposits were made in appellant's wife's name. The bank statements indicated that appellant transferred $5,613.93 from his savings account to his checking account during the period March 14 to September 7, 2012.

In a January 2, 2013 decision, an OWCP hearing representative finalized the $2,934.53 overpayment, finding that appellant was not entitled to waiver of recovery of the overpayment. The hearing representative found that OWCP did not make a $1,000.00 offset. The offset was only $96.70 and OWCP properly considered the offsets in its calculations according to Board legal precedent. The hearing representative further found that appellant's monthly income exceeded his monthly expenses by $50.00. Discrepancies in appellant's testimony regarding his lack of assets cast serious doubt on his claim that he would experience serious hardship in repaying the overpayment. The hearing representative noted his statement that his only income was his federal salary, but also noted that the Bank of America statements showed payroll payments made to his wife. Appellant's wife testified that they only had $192.00 in a bank account, but a bank statement showed that $5,613.93 was transferred from appellant's savings account to his checking account. The hearing representative stated that appellant did not report this asset on the Form OWCP-20. She allowed documented expenses for rent, food, clothing, Puget Sound Collections, car note, insurance, electricity, water, garbage collection, gasoline, diapers, school supplies, miscellaneous and over-the-counter medication. The hearing representative disallowed expenses for Seattle Spine and Sports Medicine, cell phones, Internet, tuition, car repairs, yard work, Harrison Medical Center, speech therapy, school supplies and dentist in the amount of $842.00 because appellant had not submitted financial documents to support these expenses. Based on the evidence of record the hearing representative found that appellant could repay the overpayment in the amount of $100.00 every month.

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 his duty.[5] Section 8129(a) of FECA provides, in pertinent part, "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."[6]

Section 8116 of FECA defines the limitations on the right to receive compensation benefits. This section of FECA provides that, while an employee is receiving compensation, he or she may not receive salary, pay or remuneration of any type from the United States, except in limited circumstances.[7] OWCP regulations provide that compensation for wage loss due to

[5] 5 U.S.C. § 8102(a).

[6] *Id.* at § 8129(a).

[7] *Id*. at § 8116(a); *R.H.*, Docket No. 09-1981 (issued June 11, 2010).

disability is available only for any periods during which an employee's work-related medical condition prevents him or her from earning the wages earned before the work-related injury.[8] An employee is not entitled to compensation for total disability after returning to full-time work.[9]

ANALYSIS -- ISSUE 1

The Board finds that appellant has received an overpayment of compensation as he was paid total disability compensation for the period June 3 to 30, 2012 after his return to work at the employing establishment effective June 2, 2012.[10] However, OWCP has not properly determined the amount of the overpayment.

OWCP determined that appellant received an overpayment of compensation in the amount of $2,934.53. It, however, offset this amount with the under-withholding of health benefits and basic and optional life insurance premiums and the underpayment of compensation created when it failed to pay appellant compensation for a June 8, 2012 medical appointment. Such offsets are not allowed, as they permit an unrestricted recovery of the offset portion of the overpayment without regard to the relevant factors set forth in 20 C.F.R. § 10.441(a),[11] which deny administrative due process with respect to the amounts offset.[12] The case will, therefore, be remanded for OWCP to properly calculate the entire amount of the overpayment of compensation and to consider waiver of the entire amount of the overpayment. After conducting such further development as is deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that appellant received an overpayment of compensation from June 3 to 30, 2012 as he received compensation for total disability after he returned to work. However, the Board finds that the case is not in posture for determining the amount of overpayment.[13]

[8] 20 C.F.R. § 10.500.

[9] *M.J.*, Docket No. 09-469 (issued August 24, 2009).

[10] 5 U.S.C. § 8116(a); 20 C.F.R. § 10.500.

[11] This section states that in collecting an overpayment of compensation OWCP shall decrease later payment of compensation by 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.

[12] *Diana L. Booth*, 52 ECAB 370, 373 (2001) (finding that OWCP's offset practice denied administrative due process rights with respect to the amount offset); *Michael A. Grossman*, 51 ECAB 673, 678 (2000).

[13] As OWCP has not established the amount of overpayment, it is not necessary for the Board to address the issue of waiver.

ORDER

IT IS HEREBY ORDERED THAT the January 2, 2013 decision of the Office of Workers' Compensation Programs is affirmed as to the fact of the overpayment. The decision is set aside as to the amount of the overpayment and remanded for further action consistent with this decision of the Board.

Issued: February 24, 2014
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