

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

_____	)	
C.S., Appellant	)	
	)	
and	)	<b>Docket No. 11-341</b>
	)	<b>Issued: September 26, 2011</b>
<b>DEPARTMENT OF VETERANS AFFAIRS,</b>	)	
<b>CENTRAL ARKANSAS VETERANS</b>	)	
<b>HEALTHCARE SYSTEM, Little Rock, AR,</b>	)	
<b>Employer</b>	)	
_____	)	

*Appearances:*  
*James W. Stanley, Jr., Esq., for the appellant*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
RICHARD J. DASCHBACH, Chief Judge  
COLLEEN DUFFY KIKO, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On November 23, 2010 appellant filed a timely appeal from a November 10, 2010 decision of the Office of Workers' Compensation Programs (OWCP) finding an overpayment of compensation. Pursuant to the Federal Employees' Compensation Act (FECA)<sup>1</sup> and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the case.

**ISSUES**

The issues are: (1) whether OWCP properly determined that appellant received an overpayment in the amount of \$14,822.73 for the period June 26, 2006 to January 7, 2007; and (2) whether it properly determined that she was at fault in the creation of the overpayment and therefore not entitled to a waiver.

\_\_\_\_\_  
<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On May 11, 2006 appellant, then a 46-year-old histopathology technician, filed a traumatic injury claim for right hand, arm, elbow and shoulder symptoms while operating an embedding machine. A June 12, 2006 letter from the employing establishment reported that appellant was off duty from May 11 to June 12, 2006. Appellant specified in a July 1, 2006 letter that she returned to work on June 12, 2006, but was limited to six-hour shifts due to her condition.

In June 9 and July 21, 2006 duty status reports, Dr. Harold H. Chakales, a Board-certified orthopedic surgeon, released appellant to work six hours a day effective June 12, 2006 and seven hours a day effective July 21, 2006.<sup>2</sup> In a November 1, 2006 note, he commented, “[Appellant] is working on a limited[-]duty basis, but we will have her work eight hours [a] day.”

On February 22, 2007 OWCP accepted the claim for aggravation of cervical spondylosis without myelopathy.<sup>3</sup> It advised appellant that she was owed total disability compensation only while she remained unable to perform her regular job duties due to the accepted condition and was required to return the compensation check if it included any payment for a period during which she worked so as to prevent an overpayment. OWCP advised that full compensation was only payable while she was unable to perform the duties of her job. On March 2, 2007 it issued appellant a supplemental roll compensation check for a net payment of \$16,805.95 for the period June 26, 2006 to January 7, 2007, representing 140 days of compensation.<sup>4</sup>

The employing establishment asserted in a June 2, 2010 letter to appellant that she received an overpayment as she returned to duty on June 12, 2006. It detailed that she worked six-hour days upon her return and that her shifts increased to seven and eight hours effective July 12 and December 4, 2006, respectively. Appellant also took paid leave on occasion.<sup>5</sup> The employing establishment noted that she was paid compensation for total disability from June 26, 2006 to January 7, 2007 for 1,120 hours of leave without pay, when she was working and taking leave. It estimated that appellant was only entitled to 83.5 hours of disability compensation.

In a June 28, 2010 e-mail, OWCP asked that the employing establishment provide all earnings for the period June 26, 2006 to January 7, 2007. It noted that it had only received earnings information for one pay period. In a subsequent e-mail, OWCP advised the employing establishment that it did not need appellant’s earnings information as it would base its overpayment determination on the employing establishment’s June 2, 2010 letter.

In a June 29, 2010 overpayment calculation form, OWCP determined that appellant worked 12 six-hour shifts from June 26 to July 11, 2006 and therefore missed 24 hours of work

---

<sup>2</sup> Dr. Chakales’ July 21 and August 6, 2006 reports essentially restated this information.

<sup>3</sup> In another claim, OWCP accepted a lumbar sprain stemming from a March 28, 2007 employment incident. File No. xxxxxx793. The claims were subsequently combined for administrative case management purposes.

<sup>4</sup> Appellant also received continuation of pay from May 12 to June 25, 2006.

<sup>5</sup> The employing establishment’s letter stated that copies of appellant’s time and leave documents were enclosed. However, the record does not contain these materials.

due to her accepted condition.<sup>6</sup> It also determined that she worked 103 seven-hour shifts from July 12 to December 3, 2006 and therefore missed 103 hours of work due to her condition.<sup>7</sup> Appellant resumed normal working hours on December 4, 2006. OWCP concluded that she was entitled to 127 hours of disability compensation. Multiplying 127 by \$15.6159 or three-quarters of appellant's hourly pay,<sup>8</sup> amounted to \$1,983.22. OWCP deducted this total from \$16,805.95 and calculated a \$14,822.73 overpayment.

On September 27, 2010 OWCP made preliminary findings that appellant received an overpayment of \$14,822.73 for the period June 26, 2006 to January 7, 2007 and was at fault in the creation of the overpayment as she was previously advised that she was not entitled to compensation for temporary total disability after she returned to work. Appellant was informed of her options if she wished to contest the fact or amount of overpayment or to request a waiver of recovery of the overpayment. She responded with an October 1, 2010 letter asking that the information regarding the overpayment be sent to her new attorney which OWCP provided on October 5, 2010.

By decision dated November 10, 2010, OWCP finalized that a \$14,822.73 overpayment occurred because appellant was paid compensation after she returned to work. It found that she was at fault in the creation of the overpayment because she was aware of her responsibility to report her return to work to OWCP and knowingly accepted compensation to which she was not entitled. Appellant was advised to take one of two actions within 30 days: (1) forward a check in the amount of \$14,822.73; or (2) contact OWCP to arrange a repayment plan.<sup>9</sup>

### **LEGAL PRECEDENT -- ISSUE 1**

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>10</sup> FECA also places limitations on an employee's right to receive compensation benefits. Section 8116 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.<sup>11</sup>

---

<sup>6</sup> OWCP multiplied 12 by two hours or the difference between appellant's normal eight-hour workday and her modified six-hour workday, to arrive at this figure.

<sup>7</sup> OWCP multiplied 103 by one hour or the difference between appellant's normal eight-hour workday and her modified one-hour workday, to arrive at this figure.

<sup>8</sup> This rate was based on appellant's supplemental roll and payment history data.

<sup>9</sup> The Board notes that, subsequent to the November 10, 2010 decision, OWCP received a request for a prerecoupment hearing that was postmarked October 23 and November 3, 2010. On January 19, 2011 OWCP denied the prerecoupment request as untimely. As appellant's entitlement to a prerecoupment hearing pertains to the same underlying overpayment issue that is presently before the Board, the January 19, 2011 decision is null and void. See *Arlonia B. Taylor*, 44 ECAB 591 (1993).

<sup>10</sup> 5 U.S.C. § 8102(a).

<sup>11</sup> *Id.* at § 8116; *R.H.*, Docket No. 09-1981 (issued June 11, 2010).

“Temporary total disability” is defined as the inability to return to the position held at the time of injury or earn equivalent wages or to perform other gainful employment, due to the work-related injury.<sup>12</sup> It is well established that an employee is not entitled to compensation for temporary total disability after returning to work.<sup>13</sup> Furthermore, an employee is not entitled to receive temporary total disability compensation and actual earnings for the same period. OWCP procedures provide that an overpayment in compensation is created when a claimant returns to work but continues to receive wage-loss compensation.<sup>14</sup>

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

The Board finds that the case is not in posture for decision with regards to the amount of overpayment.

The record supports that appellant received a net compensation payment of \$16,805.95 of temporary total disability compensation for the period June 26, 2006 to January 7, 2007, but had already returned to work. Although appellant did not immediately resume her regular eight-hour shifts, the employing establishment’s June 2, 2010 letter indicated that she returned to work for six hours daily beginning June 12, 2006, seven hours daily beginning July 12, 2006 and eight hours daily beginning December 4, 2006. Dr. Chakales’ June 9 and July 21, 2006 duty status reports stated that she performed her employment duties for six hours a workday effective June 12, 2006 and seven hours a workday effective July 21, 2006. His November 1, 2006 note also mentioned that appellant “will” resume eight-hour shifts, but did not specify a start date.

Since appellant received wage-loss compensation for total disability after she returned to her employment, an overpayment was clearly created. Nonetheless, OWCP’s explanation concerning the calculation of this overpayment was inadequate. The Board notes that the employing establishment’s June 2, 2010 letter to appellant noting the overpayment referenced a copy of supporting time and leave records, but no such records appear in the case file before the Board. OWCP initially requested such records but later decided to base its overpayment determination on the employer’s June 2, 2010 letter. The need for such records is important where the employer indicated in the June 2, 2010 letter that such records were available and that appellant was entitled to “approximately 83.5 hours of compensation.” This creates a discrepancy with OWCP calculations, which relied on the June 2, 2010 letter, which found entitlement to 127 hours of compensation. The Board has held that OWCP must provide a clearly written statement explaining how the overpayment was calculated.<sup>15</sup>

Because OWCP’s calculation are not based on actual employing establishment leave and earnings records for the period at issue and the employing establishment referenced that such records were available, the case will be remanded to recalculate the amount of overpayment of compensation. Upon return of the record, OWCP shall obtain all pertinent leave and earnings

---

<sup>12</sup> 20 C.F.R. § 10.400(b).

<sup>13</sup> *W.B.*, Docket No. 09-1440 (issued April 12, 2010).

<sup>14</sup> *D.C.*, Docket No. 09-1460 (issued April 19, 2010); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(a) (June 2009).

<sup>15</sup> *O.R.*, 59 ECAB 432 (2008); *Sandra K. Neil*, 40 ECAB 924 (1989). See also 20 C.F.R. § 10.431; FECA Procedure Manual, *id.*, Chapter 6.200.4(a).

records for the period at issue and base its overpayment calculation based on such records and clearly explain its calculation based on such records and in conformance with its procedures. As the amount of overpayment is not in posture for decision, it is premature to determine if appellant should be found at fault in creating the overpayment.

**CONCLUSION**

The Board finds that OWCP properly determined that appellant received an overpayment for the period June 26, 2006 to January 7, 2007. However, the Board further finds that the case is not in posture for decision with regards to the amount of overpayment or whether appellant is at fault in creating the overpayment of compensation.

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 10, 2010 decision of the Office of Workers' Compensation Programs is affirmed. The case is remanded in part for further action consistent with this decision of the Board.

Issued: September 26, 2011  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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