

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

D.W., Appellant)

and)

DEPARTMENT OF THE INTERIOR,)
NATIONAL PARK SERVICE, Wawona, CA,)
Employer)

Docket No. 12-725
Issued: June 15, 2012

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

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 19, 2012 appellant filed a timely appeal of the July 28, 2011 overpayment 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 overpayment case.

ISSUES

The issues are: (1) whether OWCP properly found that appellant received an overpayment of compensation in the amount of \$9,336.57 from August 21, 2008 through April 11, 2009 after she returned to work; and (2) whether OWCP properly denied waiver of recovery of the overpayment.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board. In a December 23, 2010 decision, the Board reversed the July 1, 2009 OWCP overpayment decision.² The Board found that the case was not in posture for decision as to whether appellant received a \$9,336.56 overpayment from August 21, 2008 through April 11, 2009 after she returned to temporary work on August 21, 2008. The Board remanded the case to consider the sporadic/intermittent nature of her employment as a visitor use assistant from August 21 through October 31, 2008. The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference.³

In a March 9, 2011 telephone conference memorandum, OWCP listed appellant's actual earnings of \$6,066.24 from August 21 through October 31, 2008 as a visitor use assistant.

On March 10, 2011 OWCP utilized the formula in *Albert C. Shadrick*⁴ to determine that appellant had no wage loss for the period August 21 through October 31, 2008 in her temporary visitor use assistant position.

In a decision dated March 15, 2011, OWCP found that appellant received an overpayment of compensation in the amount of \$2,843.18 from August 21 through October 31, 2008 after she returned to temporary work as a visitor use assistant. It determined that she earned wages of \$6,066.24 and received \$2,843.18 in wage-loss compensation for total disability due to her accepted injury during the period. Since appellant had already repaid \$1,900.00 towards the original \$9,336.57 overpayment for the period August 21, 2008 through April 11, 2009, this payment would be deducted from the \$2,843.18 overpayment resulting in a balance of \$943.18.

By letter dated March 21, 2011, appellant, through her attorney, requested a telephone hearing before an OWCP hearing representative.

In a May 25, 2011 decision, an OWCP hearing representative reversed the March 15, 2011 decision and remanded the case to OWCP for issuance of a preliminary overpayment determination. The hearing representative found that a new overpayment amount and period of overpayment had been determined by OWCP. The hearing representative further found that

² Docket No. 10-361 (issued December 23, 2010).

³ OWCP accepted that on July 21, 2007 appellant, then a 48-year-old visitor use assistant, sustained a lumbar sprain while in the performance of duty. It paid her appropriate compensation for temporary total disability from July 21 through September 15, 2007. By letter dated August 18, 2008, appellant advised OWCP that she planned to return to work on August 21, 2008 in a seasonal short-term position at the employing establishment until late October 2008. OWCP continued to pay compensation for temporary total disability through April 2, 2009.

⁴ 5 ECAB 376 (1953).

OWCP did not include the period November 1, 2008 through April 11, 2009 in which appellant continued to receive wage-loss compensation after her employment ended on October 30, 2008.⁵

By letter dated June 8, 2011, OWCP issued a preliminary determination that appellant received a \$9,336.57 overpayment for the period August 21, 2008 through April 11, 2009 because she worked as a visitor use assistant from August 21 through October 31, 2008 while receiving temporary total disability compensation. The medical evidence failed to establish that she sustained a material worsening of her accepted condition after she stopped work on October 31, 2008 entitling her to total disability compensation. It noted that appellant received compensation in the amount of \$10,047.36 for the period August 21, 2008 through April 11, 2009. Appellant was only entitled to \$710.79 for the period August 3 through 20, 2008, creating a \$9,336.57 overpayment. She was found without fault in creating the overpayment because she accepted compensation payments after she reported her plan to return to work in August 2008. OWCP noted that appellant had already repaid \$943.18 and stated that this amount would be deducted from the \$9,336.57 overpayment.⁶ It requested that she complete an enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documents. OWCP notified appellant that, within 30 days of the date of the letter, she could request a telephone conference, a final decision based on the written evidence or a precoupment hearing.

On July 1, 2011 appellant requested a decision based on the written record. She also completed the Form OWCP-20 and stated that she no longer had the incorrectly paid checks or payments. Appellant reported monthly income of \$2,000.00 in her spouse's take-home earnings and approximately \$100.00 in other income from her savings account interest, totaling \$2,100.00. She listed monthly expenses which included \$448.12 for rent or mortgage, \$350.00 for food, \$175.00 for clothing, \$360.00 for utilities, \$570.00 for other expenses, \$430.00 for a Discover credit card and \$375.00 for an American Express credit card, totaling \$2,708.12. Appellant had \$15.00 cash on hand, \$501.02 in a checking account, \$5,000.66 in a savings account and \$10,000.12 value in stocks and bonds, totaling \$15,516.80.⁷

In a memorandum of a July 28, 2011 telephone conference, OWCP reported that appellant had \$6.00 cash on hand, \$26.00 in a checking account, \$1,267.00 in a savings account and \$7,950.00 value in stocks and bonds, totaling \$9,249.00. Appellant had monthly expenses which included \$448.42 for rent or mortgage and taxes, \$100.00 for home insurance, \$350.00 for food, \$75.00 for clothing, \$360.00 for utilities, \$117.50 for pest control, \$200.00 for automobile gasoline, \$75.00 for car insurance, \$200.00 for tolls, \$50.00 for a haircut and \$153.00 for a Discover credit card, totaling \$2,128.02. She stated that, effective August 1, 2011, \$400.00 would be deducted from her husband's pay check for health insurance. Appellant explained that her savings account balance had decreased due to a withdrawal to repair her car.

⁵ In a June 8, 2010 decision, OWCP denied appellant's claim alleging that she sustained a recurrence of disability from December 20, 2009 through May 15, 2010 due to her accepted injury. In a December 15, 2010 decision, an OWCP hearing representative affirmed the June 8, 2010 decision.

⁶ The record reflects that appellant repaid \$943.18 by check dated April 1, 2011.

⁷ It appears that appellant inadvertently calculated total assets of \$15,516.90 rather than \$15,516.80.

In a July 28, 2011 decision, OWCP finalized the \$9,336.57 overpayment, finding that appellant was not entitled to waiver of recovery of the overpayment. Appellant's assets exceeded the resource base of \$8,000.00 under FECA. OWCP noted that she had repaid \$2,943.18 and deducted this amount from \$9,336.57, resulting in a \$6,393.39 balance. It directed repayment of this overpayment balance at the rate of \$100.00 per month.

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 her duty.⁸ When an overpayment 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.⁹

If the claimant has been receiving compensation on the periodic rolls, the claims examiner should delete the payment record from the periodic rolls as soon as possible. If the deletion can be made effective with the current roll period, any additional compensation due should be paid on the daily rolls. Any compensation paid for total wage loss subsequent to the date of return to work should be declared an overpayment.¹⁰

If the claimant is entitled to compensation for partial wage loss after return to work, the claims examiner should compute entitlement using the *Shadrick* formula and authorize compensation on a 28-day payment cycle. The claims examiner should make every effort to avoid interruption of income to the claimant.¹¹ Earnings of a sporadic or intermittent nature which do not fairly and reasonably represent the claimant's loss of wage-earning capacity should be deducted from continuing compensation payments using the *Shadrick* formula (past earnings must be declared an overpayment). Sporadic or intermittent earnings should not be used as the basis for a loss of wage-earning capacity determination but they should be used to help establish the kind of work the claimant can perform.¹²

ANALYSIS -- ISSUE 1

The record establishes that an overpayment was created as appellant returned to work on August 21, 2008 as a temporary visitor use assistant. Appellant remained on the periodic rolls and received wage-loss compensation for total disability through April 11, 2009. OWCP determined that she received \$10,047.36 in compensation for total disability during the stated period. It found that appellant was only entitled to \$710.70 for the period August 3 through 20, 2008 and that she had no employment-related disability any time after her employment ended on

⁸ 5 U.S.C. § 8102(a).

⁹ *Id.* at § 8129(a).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 2.814.7(b)(1) (July 1997).

¹¹ *Id.* at Chapter 2.814.7(b)(2) (December 1995). See *Albert C. Shadrick*, *supra* note 5.

¹² FECA Procedure Manual, *supra* note 10 at Chapter 2.814.7(d)(3) (June 1996).

October 31, 2008. The Board finds that as she had earnings from employment as a visitor use assistant and no subsequent recurrence of disability, she should not have received compensation for total disability. Utilizing the *Shadrick* formula,¹³ OWCP determined that appellant had no loss of wage-earning capacity. It subtracted \$710.70, the amount of total disability compensation she was entitled to receive for the period August 3 through 20, 2008 from the \$10,047.36 she received for total disability and found that she received an overpayment of \$9,336.57. The Board finds that appellant's receipt of compensation created a \$9,336.57 overpayment in compensation. OWCP properly subtracted \$2,943.18, the amount she had already repaid, from \$9,336.57, resulting in a \$6,393.39 overpayment balance.

LEGAL PRECEDENT -- ISSUE 2

OWCP may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment.¹⁴

If OWCP finds that the recipient of an overpayment was not at fault, repayment will still be required unless: (1) adjustment or recovery of the overpayment would defeat the purpose of FECA; or (2) adjustment or recovery of the overpayment would be against equity and good conscience.¹⁵

Recovery will defeat the purpose of FECA if both: (a) the individual from whom recovery is sought needs substantially all of his current income (including periodic benefits under FECA) to meet current ordinary and necessary living expenses; and (b) the individual's assets do not exceed the resource base (including but not limited to cash, the value of stocks, bonds, savings accounts, mutual funds) of \$4,800.00 for an individual or \$8,000.00 for an individual with a spouse or one dependent, plus \$960.00 for each additional dependent. The first \$4,800.00 or more, depending on the number of claimant's dependents, is also exempted from recoupment as a necessary emergency resource. If an individual has current income or assets in excess of the allowable amount, a reasonable repayment schedule can be established over a reasonable, specified period of time. It is the individual's burden to submit evidence to show that recovery of the overpayment would cause the degree of financial hardship sufficient to justify waiver.¹⁶ An individual is deemed to need substantially all of his or her income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.¹⁷

Recovery of an overpayment is considered to be against equity and good conscience when any individual who received an overpayment would experience severe financial hardship

¹³ *Supra* note 5.

¹⁴ 20 C.F.R. § 10.433(a).

¹⁵ *Id.* at § 10.434. *See* 5 U.S.C. § 8129(b).

¹⁶ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a) (June 2009). *See Miguel A. Muniz*, 54 ECAB 217 (2002); 20 C.F.R. §§ 10.436, 10.437.

¹⁷ *Sherry A. Hunt*, 49 ECAB 467, 473 (1998).

in attempting to repay the debt.¹⁸ Recovery of an overpayment is also considered to be against equity and good conscience when any individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his position for the worse.¹⁹

ANALYSIS -- ISSUE 2

As OWCP found appellant without fault in the creation of the overpayment of compensation, 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.²⁰

Appellant furnished OWCP with an overpayment questionnaire on July 1, 2011. She reported monthly income of \$2,100.00, monthly expenses of \$2,708.12 and assets of \$15,516.80. During the July 28, 2011 telephone conference, appellant reported that she had assets totaling \$9,249.00 and monthly expenses of \$2,128.02. She did not submit any further supporting financial information. OWCP found that appellant's assets exceeded the applicable resource base. While her monthly expenses exceeded her monthly income, her assets of \$9,249.00 were greater than the resource base of \$8,000.00 allowed for an individual with a spouse. The Board finds, therefore, that OWCP properly found that recovery of the overpayment would not defeat the purpose of FECA.

Appellant does not argue, and the record does not establish, that recovery of the debt would be against equity and good conscience. She did not show that she gave up a valuable right or changed her position for the worse in reliance on the overpayment.

Because appellant has failed to establish that, recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience, the Board finds that she has failed to show that OWCP abused its discretion by refusing to waive the \$9,336.57 overpayment.²¹

CONCLUSION

The Board finds that OWCP properly found that appellant received an overpayment of compensation in the amount of \$9,336.57 from August 21, 2008 through April 11, 2009. The Board further finds that OWCP properly denied waiver of the overpayment.

¹⁸ 20 C.F.R. § 10.437(a).

¹⁹ *Id.* at § 10.437(b).

²⁰ *Id.* at §§ 10.436, 10.437.

²¹ As recovery from continuing compensation benefits under FECA is not involved in this case, the Board has no jurisdiction over the amount OWCP determined that appellant should repay each month. *Terry A. Keister*, 56 ECAB 559 (2005); *see also Cheryl Thomas*, 55 ECAB 610 (2004).

ORDER

IT IS HEREBY ORDERED THAT the July 28, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 15, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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