

FACTUAL HISTORY

This case has previously been before the Board. In a July 20, 2009 decision, the Board affirmed the denial of appellant's claim for compensation from February 1, 2001 to December 8, 2004 as she failed to establish that her disability was causally related to the accepted injury.² The facts of the case as set forth in the Board's prior decision are incorporated herein by reference.³ Appellant returned to work full time at limited duty. Her salary at the time of the injury was \$44,710.40.

On September 30, 2009 appellant filed a Form CA-7 claim for compensation for nine hours from September 23 to 25, 2009. In a Form CA-7a time analysis, she used 2.01 hours of leave without pay on September 23, 2009, 3.49 hours on September 23, 2009 and 3.5 hours on September 25, 2009. Appellant noted a loss of work hours beginning September 23, 2009 under the National Reassessment Process (NRP). In a supplemental rolls payment worksheet, OWCP noted that on September 23, 2009 the employing establishment could not provide full-time work for appellant due to NRP. It found that appellant's partial disability began on that date.

In an April 2, 2010 telephone memorandum, the employing establishment confirmed that, from September 23, 2009 to March 26, 2010, appellant had wage loss of 361.48 hours or 14 hours a week. This averaged 25.81 to 26 hours lost every two weeks

In an April 20, 2012 memorandum, OWCP noted that appellant currently worked an average of 2.8 hours a day. To facilitate her receipt of compensation, it calculated her hours of wage loss at an average of 5.2 hours a day. This represented a 36 percent wage-earning capacity (WEC). It was recommended that appellant be placed on the periodic rolls. OWCP found her pay rate when disability recurred to be \$1,032.38 and the current pay rate for the job held when injured to be \$985.23. Based on the average 2.8 hours worked a day, appellant's actual weekly earnings were \$351.54. Her four-week entitlement to compensation would be \$1,982.16.

In an April 27, 2010 letter, OWCP notified appellant that since her wage loss had been consistent it was placing her on the periodic rolls and she no longer had to file CA-7 forms to claim compensation biweekly. Appellant was advised of the temporary WEC determination, representing the difference between her actual earnings and what she could have earned if not injured. She was notified that she would receive periodic roll payments of \$1,982.16 every four weeks after an initial payment of \$2,052.95. OWCP also noted:

“As this placement is a temporary wage-earning capacity (WEC), you must notify this office immediately should your hours increase. This is extremely important so that you will not be overpaid in compensation.”

² On December 15, 2004 appellant, a carrier, filed an occupational disease claim for a right knee condition due to walking and climbing stairs at work. She did not stop work. On December 29, 2005 OWCP accepted the claim for aggravation of osteoarthritis of the right knee and aggravation of occupational bursitis of the right knee.

³ Docket No. 09-226 (issued July 20, 2009).

On May 5, 2010 appellant was offered a limited-duty assignment as a modified city carrier effective May 10, 2010. The salary of the position was \$53,684.00 a year with a tour of duty from 7:30 a.m. to 1:30 p.m. and rotating days off.

In a May 21, 2010 telephone memorandum, the employing establishment contacted OWCP to advise that appellant had accepted the limited-duty job offer with an increase in work hours. Appellant did not work a fixed schedule. OWCP noted that she was recently placed on a WEC based on averaging 2.8 hours of work a day for the prior six months.

On October 21, 2010 the employing establishment offered appellant a limited-duty assignment as a letter carrier effective that day. The tour of duty was from 11:00 a.m. to 2:30 p.m. with rotating days off. The salary in the position was \$54,619.00. Appellant accepted the job on October 25, 2010.

In an October 28, 2010 letter, the employing establishment notified OWCP that appellant continued to be paid every 28 days under WEC determination. Appellant's actual work hours, however, had increased since May 6, 2010. The employing establishment noted that her hours worked were not consistent but were up to seven hours a day.

In a January 10, 2011 telephone memorandum, appellant's representative contacted OWCP to advise that appellant was concerned about an overpayment. The representative requested that the loss of WEC be reviewed and adjusted based on the increase in her work hours.

In letters dated January 10 and March 4, 2011, OWCP requested that the employing establishment provide information on the total hours worked by appellant from April 12, 2010 to January 15, 2011. It advised appellant of having been overpaid if she worked more hours than contemplated in the April 27, 2010 temporary WEC determination. OWCP deleted her payment under the periodic rolls and instructed her to file CA-7 forms to claim actual time lost due to no available work.

On March 7, 2011 the employing establishment submitted an hourly record. Appellant worked a total of 964.15 hours from April 12, 2010 to January 14, 2011. An OWCP compensation payment history sheet noted that, from March 13 to April 10, 2010, she was paid \$2,052.95; and for the 10 monthly payments on the periodic rolls, from April 11 to January 15, 2011, she received compensation of \$1,982.16 each period. The total net compensation paid to appellant, from March 13, 2010 to January 15, 2011, was \$21,874.55.

In a March 23, 2011 overpayment memorandum, OWCP noted that on April 27, 2010 appellant was placed on a temporary WEC beginning March 13, 2010. It was based on actual average earnings at work of 2.8 hours a day. As appellant's actual work hours were increased and greater than the average hours used under the temporary WEC, an overpayment was created. On January 10, 2011 she was removed from the periodic rolls. OWCP determined that, for the period March 13, 2010 to January 15, 2011, appellant was receiving compensation of \$21,874.55 but was only entitled to \$7,154.40, which created an overpayment of \$14,720.15.

On April 20, 2011 OWCP made a preliminary determination that appellant received a \$14,720.15 overpayment of compensation from March 13, 2010 to January 15, 2011. The

overpayment was created as she sporadically lost time from work due to the employing establishment's inability to provide her with full-time limited duty. While her wage loss varied, OWCP used an average of 2.8 hours a day to determine her wage-loss entitlement. As of March 13, 2010, appellant was placed on the periodic rolls based on her temporary WEC. The overpayment occurred because she was paid compensation under the assumption that she worked an average of 2.8 hours a day when she was actually averaged at least 5.5 hours a day. From March 13, 2010 to January 15, 2011 appellant was paid \$21,874.55; but she was only entitled to compensation of \$7,154.40, which created an overpayment of \$14,720.15. OWCP found that she was at fault in creating the overpayment because she accepted payments she knew or should have known to be incorrect. Appellant was notified as to her right to a prerecoupment hearing

Appellant requested a prerecoupment hearing that was held on August 15, 2011. In response to questions by OWCP's hearing representative, she stated that she knew of the overpayment of compensation but that she used the money to pay for dental work and to support her children in college. On May 10, 2011 appellant submitted an overpayment questionnaire and listed total monthly income of \$3,300.00 and monthly expenses of \$3,304.00. She listed a monthly rent or mortgage of \$550.00, food of \$600.00, clothing of \$400.00, utilities of \$400.00, other expenses of \$500.00, credit card payment of \$256.00 and a car loan payment of \$598.00. In a September 9, 2011 letter, appellant's representative asserted that appellant was not at fault in creating the overpayment and that it would create a hardship to repay the overpayment as appellant relied to her detriment on the income that she was overpaid. Appellant listed additional expenses of a dental bill of \$7,616.00; automobile insurance of \$420.00 a month for 10 months; dental expenses of \$100.00 a month; college housing expenses for her two children of \$200.00 a month; storage expenses of \$134.00 a month; a master card bill of \$35.00 month; a master card bill of \$25.00 per month; and student loans of \$58.00 per month. She listed funds including cash, a checking account balance and a savings account balance of \$350.00. On September 8, 2011 appellant submitted a new overpayment questionnaire noting income of \$3,400.00 and expenses of \$3,551.00. No additional documentation regarding her monthly expenses was received.

In a November 14, 2011 decision, OWCP's hearing representative finalized the overpayment in the amount of \$14,720.15 for which appellant was found at fault. The overpayment occurred because appellant was paid compensation based on a temporary WEC determination of 2.8 hours of work a day when she actually averaged at least 5.5 hours a day. The compensation paid to her during the period totaled \$21,874.55, but she was only entitled to \$7,154.40. The hearing representative noted that, at the prerecoupment hearing, she acknowledged that appellant was being overpaid. The April 27, 2010 letter advised appellant that she was in receipt of wage-loss compensation based on the assumption she worked 2.8 hours a day and to immediately contact OWCP should her hours increase. Appellant knew or should have known of her receipt of multiple incorrect payments after her work hours increased. Recovery of the overpayment was directed by withholding \$200.00 from her continuing compensation payments. The hearing representative noted that appellant did not submit supporting documentation pertaining to her May 20 and September 8, 2011 listing of monthly income and expenses; therefore, minimum collection guidelines were followed to set the rate of recovery.

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.⁴ When an overpayment has been made to an individual because of an error of fact or law, adjustments shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which the individual is entitled.⁵

ANALYSIS -- ISSUE 1

On September 23, 2009 appellant began to sporadically lose time from work on a daily basis due to the employing establishment's inability to provide her with limited-duty work on a full-time basis under NRP. OWCP determined her wage loss based on an average 2.8 hours of work a day. As of March 13, 2010, it placed appellant on the periodic rolls to reflect her temporary WEC. The April 27, 2010 letter advised her how her wage-loss benefits were calculated and of her responsibility to notify OWCP immediately should her actual work hours increase.

On May 21, 2010 the employing establishment informed OWCP that appellant accepted a limited-duty job offer which increased her work hours. Appellant's representative contacted OWCP to inquire if appellant was being properly paid. OWCP developed the evidence and determined that an overpayment occurred because appellant was paid compensation under the temporary WEC determination based on the assumption of 2.8 hours work a day; but she actually averaged at least 5.5 hours a day. Appellant was paid \$2,052.95 for the period March 13 to April 10, 2010 and received 10 periodic roll payments of \$1,982.16 from April 11, 2010 to January 15, 2011, for total wage-loss compensation of \$21,874.55. As her actual hours worked increased during the period, she was only entitled to compensation benefits of \$7,154.40, which created an overpayment of \$14,720.15.

OWCP properly determined that from March 13, 2010 to January 15, 2011 appellant received a \$14,720.15 overpayment because she was paid compensation under a temporary WEC based on an average of 2.8 hours work a day when actually averaging about 5.5 hours a day. Appellant did not dispute that she received the overpayment in question or the amount. OWCP explained how the overpayment occurred and provided this information to her with the preliminary notice of overpayment. The Board finds that it properly determined the fact and amount of the overpayment for the period March 13, 2010 to January 15, 2011.

LEGAL PRECEDENT -- ISSUE 2

Under OWCP regulations, waiver of the recovery of an overpayment may be considered only if the individual to whom it was made was not at fault in accepting or creating the overpayment.⁶ The fact that the overpayment was the result of error by OWCP or another

⁴ 5 U.S.C. § 8102(a).

⁵ *Id.* at § 8129(a).

⁶ *Id.* at § 10.433(a).

government establishment does not by itself relieve the individual who received the overpayment of liability for repayment if the individual also was at fault for receiving the overpayment.⁷ Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she received from OWCP are proper. The recipient must show good faith and exercise a high degree of care in reporting events that may affect entitlement to or the amount of benefits. A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment: (1) made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; (2) failed to provide information which he or she knew or should have known to be material; or (3) accepted a payment which he or she knew or should have known to be incorrect (this provision applies only to the overpaid individual).⁸

Whether or not OWCP determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid.⁹

ANALYSIS -- ISSUE 2

OWCP applied the third standard in determining that appellant was at fault in creating the overpayment, that she accepted payments that she knew or should have known to be incorrect. The Board finds that she was at fault in the creation of the overpayment.

The record reflects that appellant was placed on the periodic rolls in receipt of wage-loss compensation based on the assumption that she worked 2.8 hours a day. OWCP notified her on April 27, 2010 that to facilitate her receipt of compensation, a temporary WEC determination was made based on the assumption of 5.2 hours wage-loss a day. Appellant was specifically advised:

“As this placement is a temporary wage-earning capacity (WEC), you must notify this office immediately should your hours increase. This is extremely important so that you will not be overpaid in compensation.”

As of May 5, 2010, appellant accepted a limited-duty assignment as a modified city carrier effective May 10, 2010 and the hours she worked increased. On October 21, 2010 she accepted another limited-duty assignment effective October 25, 2010 with an increase in salary, working in excess of 2.8 hours a day. As of January 10, 2011, when appellant's representative notified OWCP about the increase in work hours and of her concern of overpayment, she was removed from the periodic rolls and advised to submit Form CA-7 claims for actual hours of work lost.

⁷ *Id.* at § 10.435(a).

⁸ *Supra* note 6.

⁹ *Id.* at § 10.433(b).

The Board finds that the record supports that appellant knew or should have known that she received incorrect payments of compensation based on the increase in actual hours worked a day. At the hearing, appellant acknowledged that she knew of the overpayment of compensation but used the money to pay for dental work and to support her children at college. While appellant noted that she attempted to contact OWCP concerning her receipt of benefits, she accepted multiple incorrect periodic roll payments of compensation after a significant increase in the hours she actually worked to approximately 5.5 hours a day and for which she received increases in salary. Even though OWCP may have been negligent in continuing periodic roll payments after notice from the employing establishment that appellant's hours had increased, this does not excuse her acceptance of the payments she knew or should have known to be incorrect.¹⁰ Since it is determined that appellant is at fault in the creation of the overpayment, it is not subject to waiver.

LEGAL PRECEDENT -- ISSUE 3

Section 10.411(a) of OWCP's implementing federal regulations provides that when an overpayment of compensation has been made to an individual entitled to further payments, the individual shall refund to OWCP the amount of the overpayment or, if no refund is made, OWCP shall decrease later payments of compensation, taking into account the probably extent of future payments, the rate of compensation, the financial circumstances of the individual and other relevant factors, so as to minimize any hardship.¹¹

The Board has held that when an individual fails to provide the requested information on income, expenses and assets, OWCP should follow minimum collection guidelines, which state in general that government claims should be collected in full and that, if an installment plan is accepted, the installments should be large enough to collect the debt promptly.¹²

ANALYSIS - ISSUE 3

OWCP's hearing representative found that, although appellant submitted OWCP-20 forms listing her monthly income and expenses, she did not submit any supporting documentation to substantiate the amounts claimed on the forms. He noted that her responsibility under the federal regulations to submit such information, citing section 10.438 which provides that the information is used to set the amount of repayment, if necessary, and that failure to submit the requested information shall result in the denial of waiver.¹³ In turn, the procedure manual provides that if a claimant is being paid compensation or is due accrued benefits, the debt should be recovered as quickly as possible.¹⁴ The hearing representative noted

¹⁰ See *Rosemary A. Kayes*, 54 ECAB 373 (2003); *Russell E. Wageneck*, 46 ECAB 653 (1995).

¹¹ 20 C.F.R. § 10.441(a). See *J.S.*, 58 ECAB 515 (2007).

¹² See *Harold F. Franklin*, 57 ECAB 387 (2006).

¹³ 20 C.F.R. § 10.438.

¹⁴ See *Frederick Arters*, 53 ECAB 397 (2002), citing Federal (FECA) Procedure Manual, Part 6 -- *Debt Management, Initial Overpayment Actions*, Chapter 6.200.4(c)(2) (September 1994).

that appellant was in receipt of partial disability compensation benefits as her work hours varied and directed recovery in the amount of \$200.00 every 28 days from her continuing benefits. The Board finds that he did not abuse his discretion in this matter. Consideration was given to the evidence of record, the applicable federal regulations and appropriate sections of the procedure manual.

CONCLUSION

The Board finds that appellant received an overpayment of \$14,720.15 in compensation from March 13, 2010 to January 15, 2011 for which she was at fault.

ORDER

IT IS HEREBY ORDERED THAT the November 14, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 12, 2013
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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