

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

L.C., Appellant)	
)	
and)	Docket No. 14-725
)	Issued: August 13, 2014
DEPARTMENT OF THE NAVY, NORFOLK)	
NAVAL AIRSTATION, Norfolk, VA, Employer)	
)	

Appearances:
Edward M. Bull, III, 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
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On February 11, 2014 appellant, through counsel, filed a timely appeal of August 15, 2013 and January 24, 2014 merit decisions 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 case.²

ISSUES

The issues are: (1) whether OWCP properly found that appellant received an overpayment of compensation in the amount of \$27,298.93 for the period September 18, 2010 through July 9, 2012 because he received disability compensation based on an incorrect loss of wage-earning capacity (LWEC) when he should have been paid compensation based on his actual earnings; (2) whether OWCP properly found that appellant received an overpayment of

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the issuance of the January 24, 2014 OWCP decision, appellant submitted new evidence. The Board is precluded from reviewing evidence which was not before OWCP at the time it issued its final decision. See 20 C.F.R. § 501.2(c)(1).

compensation in the amount of \$4,322.44 for period February 15 through April 6, 2013 because he received wage-loss compensation after he returned to work; (3) whether OWCP properly denied waiver of recovery of the overpayments of compensation; and (4) whether OWCP properly required repayment of the overpayment in the amount of \$27,298.93 at the rate of \$195.00 per month for the \$4,322.44 overpayment.

On appeal, counsel contends that: (1) OWCP failed to meet its burden of proof to establish an overpayment of compensation and if there was an overpayment, it was incorrectly calculated; (2) OWCP failed to provide any evidence that the type of position appellant held was similar in nature to the kind of appointment he had at his date of injury or that the earnings were from jobs that were part time, sporadic, seasonal or temporary; (3) appellant was underpaid benefits for the period July 10, 2012 through February 2013 and any such underpayment should have been applied as a credit towards any overpayment; and (4) appellant was without fault for any overpayment and thus recovery should be waived as it would result in severe financial hardship for appellant.

FACTUAL HISTORY

This case was previously before the Board. Appellant sustained injuries to both hands, fingers and wrists on February 24 and March 26, 2003 working as a boatswain mate with the Military Sealift Command (MSC). He subsequently completed a course of vocational rehabilitation and returned to work as an electronics technician with Central Gulf Lines effective September 18, 2010. In a decision dated September 26, 2012, the Board reversed a May 16, 2011 decision of OWCP which reduced appellant's compensation on the basis that the actual wages he received as an electronics technician with Central Gulf Lines fairly and reasonably represented his wage-earning capacity.³ The Board found that the record did not sufficiently describe the position appellant held, whether it was similar in nature to the kind of appointment or tour of duty he held on the date of injury, or whether it was permanent, full time or seasonal. The case was returned to OWCP for clarification and recalculation of the compensation to which appellant was entitled during the period of the LWEC determination. The facts of the case, as set forth in the prior decision, are incorporated by reference.

The record contains a letter dated March 8, 2006 from OWCP advising appellant of his disability compensation, including information regarding returning to work and how to avoid an overpayment of compensation benefits.

On January 29, 2013 OWCP notified appellant of its preliminary determination that he received an overpayment of compensation in the amount of \$27,298.93 for the period September 18, 2010 through July 9, 2012 because he received disability compensation based on

³ Docket No. 11-2123 (issued September 26, 2012). On February 25, 2003 appellant, then a 49-year-old boatswain mate (supervisory able seaman), filed a traumatic injury claim (Form CA-1) alleging that he sustained a left hand injury while carrying a load of pipes on February 24, 2003. OWCP accepted his claim for fracture of the left phalanx, crushing injury to the left fingers, left interphalangeal sprain, left hand arthropathy and giant cell tumor left tendon sheath. Appellant underwent left little finger surgery on June 25, 2004. Subsequently, OWCP accepted bilateral ulnar neuritis, bilateral tenosynovitis of the wrists, crush injury, left little finger, status post joint replacement arthroplasty of the proximal interphalangeal joint and mallet finger deformity. On August 19, 2005 under a combined claim (OWCP File No. xxxxxx442), appellant underwent left wrist surgery.

an actual earnings wage-earning capacity decision that was later determined by the Board to be incorrect. It found that appellant should have been paid compensation based on the actual earnings he had received from his previous employer MSC and Horizon Lines Vessels, LLC. OWCP calculated appellant's actual earnings as follows:

1. September 18 to December 31, 2010 (105 days): Actual earnings -- \$13,404.54

According to an itemized statement from the Social Security Administration, appellant earned \$13,404.54 for the year 2010. As appellant received compensation for total temporary disability until he returned to work on September 18, 2010 and worked from September 18 to December 31, 2010, these earnings would have covered that period.

2. January 1 to December 31, 2011 (365 days): Actual earnings -- \$35,325.08

The record contains W-2 Forms submitted by appellant, indicating that he worked for Horizon Vessel Lines, LLC, earning \$323.14 in 2011. He also worked for his previous employer, MSC, earning \$35,001.94 in 2011. Adding together these figures, appellant's actual earnings for the year 2011 was \$35,325.08.

3. January 1 through July 9, 2012 (191 days -- leap year): Actual earnings -- \$32,462.96

Appellant submitted a Mariner Leave and Earnings Statement from MSC, indicating that for the period January 1 through July 9, 2012 his gross pay was \$32,462.96. He stopped working on July 9, 2012 to undergo surgery.

Total earnings of \$81,192.58 divided by 661 total days equaled \$122.83 per day, which multiplied by 7 days (calendar days are used to compute payments on the periodic rolls) equaled \$859.83 per week of actual earnings. OWCP had previously determined that his actual earnings were only \$537.92 per week. It found that utilizing the corrected figures for the period September 18, 2010 through July 9, 2012 for actual earnings, appellant would have been entitled only to compensation in the amount of \$2,245.00. Although the wage-earning capacity decision was overturned by the Board, OWCP calculations and worksheets reflected that he received compensation in the amount of \$29,543.93, but was entitled to only \$2,245.00 based on actual earnings, resulting in an overpayment of \$27,298.93. It found that appellant was without fault in the creation of the overpayment, as he was not aware that the Board's decision reversing the LWEC decision would effect a reduction of his compensation based on actual wages. OWCP advised appellant of his right to request a telephone conference, a final decision based on the written evidence or a precoupment hearing, if he objected to the decision or requested waiver of the recovery of the overpayment. Appellant was advised to complete an overpayment recovery questionnaire and to submit supporting financial documents.⁴

⁴ By decision dated April 9, 2013, the Board dismissed appellant's appeal of OWCP's January 29, 2012 preliminary overpayment determination on the grounds that it was not a final adverse decision of OWCP, over which the Board had jurisdiction. *See* Docket No. 13-712 (issued April 9, 2013).

On February 5, 2013 appellant, through his attorney, requested a prerecoupment hearing. He submitted over 120 pages in documentation, including an overpayment recovery questionnaire (OWCP-20 Form) dated February 14, 2013 indicating that his monthly income was \$5,156.00 in social security benefits and \$6,681.22 in monthly expenses for mortgage, food, clothing, etc. Appellant had a total of \$2,6450.00 in assets, including \$110.00 cash on hand, \$190.00 in a checking account and \$2,360.00 in a savings account. He requested a waiver of the recovery of the overpayment of compensation.

A prerecoupment hearing was held before an OWCP hearing representative on May 30, 2013.

On March 18, 2013 appellant was referred for vocational rehabilitation services and returned to full-time regular duty effective February 15, 2013.

In a June 27, 2013 letter, OWCP notified appellant that his payments were stopped because he had returned to regular duty on February 15, 2013.

On July 11, 2013 OWCP advised appellant that it had made a preliminary determination that a second overpayment of compensation was created in the amount of \$4,322.44 because he returned to work full time aboard the U.S.S. Emory Lando on February 15, 2013 but received compensation for total disability through April 6, 2013. It found that he was at fault in the creation of the overpayment, as he knew or reasonably should have known that compensation payments were incorrect. OWCP advised appellant of his right to request a telephone conference, a final decision based on the written evidence or a prerecoupment hearing, if he objected to the decision or requested waiver of the recovery of the overpayment. Appellant was also advised to complete an overpayment recovery questionnaire and to submit supporting financial documents.

On August 8, 2013 appellant's attorney requested a prerecoupment hearing and argued that no overpayment occurred that OWCP had miscalculated appellant's LWEC and any overpayment of compensation should be waived as it would result in extreme financial hardship for appellant.

By decision dated August 15, 2013, an OWCP hearing representative finalized the preliminary determination that appellant received an overpayment of compensation in the amount of \$27,298.93 for the period September 18, 2010 through July 9, 2012. The hearing representative found that appellant was without fault in the creation of the overpayment, but denied waiver of recovery on the basis that appellant had not provided sufficient evidence to establish the need for waiver or a reasonable monthly repayment amount.

Appellant submitted another overpayment recovery questionnaire (OWCP-20 Form) indicating that his monthly income was \$5,520.00 and monthly expenses were \$5,310.00 for mortgage, food, clothing, utilities, cell phones, insurance, karate fees, school allowance, car/home repairs and parental support. He also submitted a Mariner Leave and Earnings Statement from MSC indicating that he received \$46,188.00 in 2013.

A prerecoupment hearing was held before an OWCP hearing representative on November 20, 2013 for the second overpayment. Counsel argued that appellant was underpaid

compensation benefits and should have any such under payment applied as a credit towards any overpayment. Appellant submitted a list and documentation of monthly bills.

By decision dated January 24, 2014, OWCP's hearing representative finalized the preliminary determination that appellant received an overpayment of compensation in the amount of \$4,322.44 for the period February 15 through April 6, 2013 because he received wage-loss compensation after he returned to work at salary. The hearing representative found that appellant was with fault in the creation of the overpayment and therefore was not entitled to a waiver of recovery. Referencing financial information reflecting that appellant's monthly income exceeded his expenses by \$210.00, the hearing representative found that recovery would not defeat the purpose of FECA or be against equity and good conscience and directed recovery at the rate of \$195.00 per month to allow collection of the overpayment without depriving appellant of funds to meet ordinary and necessary living expenses.

LEGAL PRECEDENT -- ISSUES 1 & 2

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 duty.⁵ FECA, however, also places limitations on an employee's right to receive compensation benefits. Section 8116 provides that, while an employee is receiving benefits he or she may not receive salary, pay or remuneration of any type from the United States, except in limited circumstances.⁶ OWCP regulations further state that compensation for wage loss due to disability is available only for the period where an employee's work-related medical condition prevents him or her from earning the wages earned before the work-related injury.⁷ A claimant is not entitled to receive temporary total disability and actual earnings for the same period.⁸ OWCP procedures provide that an overpayment in compensation is created when a claimant returns to work and has earnings but continues to receive wage-loss compensation.⁹

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$27,298.93 for the period September 18, 2010 through July 9, 2012 because he received disability compensation based on an incorrect LWEC when he should have been paid compensation based on his actual earnings.

In its May 16, 2011 decision, OWCP reduced appellant's compensation on the basis that the actual wages he received as an electronics technician with Central Gulf Lines fairly and

⁵ 5 U.S.C. § 8102(a).

⁶ *Id.* at § 8116(a).

⁷ 20 C.F.R. § 10.500(a).

⁸ *See Daniel Renard*, 51 ECAB 466, 469 (2000).

⁹ *See* Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(a) (September 2010); *see also L.S.*, 59 ECAB 350 (2008).

reasonably represented his wage-earning capacity. Following the Board's September 26, 2012 reversal of this decision, OWCP properly reevaluated appellant's entitlement to compensation. It compared his actual wages earned during the period by the LWEC decision with his eligibility for receipt of compensation for total disability.¹⁰ OWCP determined that appellant's actual wages during this period were higher than the benefits he received under the LWEC decision. Therefore, appellant had received an overpayment of compensation.

The evidence reflects that for the period September 18, 2010 through July 9, 2012 appellant received compensation benefits based on the LWEC rate in the amount of \$29,543.93. However, based on his actual earnings he was entitled to only \$2,245.00. This resulted in an overpayment of \$27,298.93. OWCP correctly compared the compensation appellant received based on his actual average weekly earnings during each period, in order to calculate the amount of overpayment for each period. It properly found that he received an overpayment of compensation in the amount of \$27,298.93 for the period September 18, 2010 through July 9, 2012.

ANALYSIS -- ISSUE 2

The Board finds that appellant received an overpayment in the amount of \$4,322.44 for the period February 15 through April 6, 2013 because he received wage-loss compensation after he returned to full-time work at his regular salary.

The record reflects that appellant returned to full-time work aboard the U.S.S. Emory Lando on February 15, 2013. Appellant continued to receive wage-loss compensation until April 6, 2013. OWCP determined that the amount of compensation he received for the period February 15 through April 6, 2013 totaled \$4,322.44.

Because appellant received regular full-time wages from the employing establishment during the period February 15 through April 6, 2013, he was not entitled to compensation for total disability from OWCP for the same period. The Board finds that his receipt of dual payments created an overpayment of compensation. There is no contrary evidence. Thus, the Board finds that appellant received an overpayment in the amount of \$4,322.44 for the period February 15 through April 6, 2013.

On appeal, counsel contends that OWCP failed to meet its burden of proof to establish an overpayment of compensation and if there was an overpayment, it was incorrectly calculated. Based on the findings and reasons stated above, the Board finds the attorney's argument is not substantiated.

Counsel also argues that appellant was underpaid benefits for the period July 10, 2012 through February 2013 and should have any underpayment applied as a credit towards the overpayment. There is no evidence of record to support this argument.

¹⁰ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on Actual Earnings*, Chapter 2.815.4 (June 2013); see also *K.K.*, Docket No 09-207 (issued October 2, 2009).

LEGAL PRECEDENT -- ISSUE 3

According to section 8129(a) of FECA, adjustment or recovery shall be made under regulations prescribed by the Secretary of Labor when an overpayment of compensation was made because of an error of fact or law.¹¹ The only exception is if the individual is without fault in the creation of the overpayment and when adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.¹² Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from OWCP are proper.¹³ A recipient is at fault in the creation or acceptance of an overpayment if he or she has done any of the following: (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.¹⁴

Section 10.436 of the implementing federal regulations provide that recovery of an overpayment will defeat the purpose of FECA if recovery would cause undue hardship by depriving a presently or formerly entitled beneficiary of income and resources needed for ordinary and necessary living expenses and outlines the specific financial circumstances under which recovery may be considered to defeat the purpose of FECA.¹⁵

Section 10.437 provides that 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 attempting to repay the debt; and when an individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.¹⁶ To establish a position for the worse, the individual must show that he made a decision he otherwise would not have made in reliance on the overpaid amounts and that this decision resulted in a loss. Conversion of the overpayment into a different form from which the claimant derived some benefit does not constitute loss for this purpose.¹⁷

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly denied waiver of recovery of the overpayments of compensation.

¹¹ 5 U.S.C. § 8129(a).

¹² *Id.* at § 8129(b).

¹³ 20 C.F.R. § 10.433(a). *See K.C.*, Docket No. 11-1307 (issued January 10, 2012).

¹⁴ *Id.* *See B.H.*, Docket No. 09-292 (issued September 1, 2009).

¹⁵ 20 C.F.R. § 10.436.

¹⁶ *Id.* at § 10.437.

¹⁷ *See Jorge O. Diaz*, 51 ECAB 124 (1999).

Regarding the \$27,298.93 overpayment of compensation, OWCP found that appellant was not with fault in the creation of the overpayment, but denied waiver of recovery on the basis that he did not provide sufficient evidence to establish the need for waiver or a reasonable monthly repayment amount. Although it found that appellant was without fault in the matter of the overpayment, repayment is still required unless adjustment or recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.¹⁸

On appeal, counsel contends that appellant would experience severe financial hardship in attempting to repay the debt. The Board finds that his contention is without merit. The record reflects that appellant receives total monthly income in the amount of \$5,520.00. Appellant stated his monthly expenses to be \$5,310.00. Accepting these amounts as accurate, his monthly income exceeds monthly expenses by \$210.00. In that his monthly income exceeds his expenses by more than \$50.00, appellant is not deemed to need substantially all of his current income (including compensation benefits) to meet current ordinary and necessary living expenses.¹⁹ Additionally, he has a total of \$2,645.00 in assets, including \$110.00 cash on hand, \$190.00 in a checking account and \$2,360.00 in a savings account. OWCP properly concluded that recovery of the overpayment would not defeat the purpose of FECA, be against equity or good conscience, or cause hardship to appellant. Thus, the Board finds that OWCP properly denied waiver of recovery of the overpayment in the amount of \$27,298.93.

Regarding the \$4,322.44 overpayment of compensation, OWCP found that appellant was at fault in the creation of the overpayment and therefore was not entitled to a waiver of recovery. It found that he was at fault in the creation of the overpayment because he accepted a payment which he knew or should have known to be incorrect, applying the third criterion listed above.²⁰ To establish that appellant was at fault, OWCP must establish that at the time he accepted the compensation check in question he knew or should have known that the payment was incorrect.

When a disabled employee is placed on the periodic compensation rolls, OWCP routinely advises the employee of this fact and issues a CA-1049 identifying the weekly pay rate, the compensation rate, the gross payment, any applicable deductions, and the net amount to be disbursed.²¹ The CA-1049 is generally accompanied by an EN1049, which explains the employee's rights and responsibilities with respect to the receipt of compensation.²² This latter document provides pertinent information regarding returning to work and how to avoid an overpayment of benefits. It also includes a certification that the benefits recipient has read and

¹⁸ See *Wade Baker*, 54 ECAB 198 (2002).

¹⁹ See Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6a(1)(b) (June 2009). An individual is deemed to need substantially all of his or her current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. In other words, the amount of monthly funds available for debt repayment is the difference between current income and adjusted living expenses (*i.e.*, ordinary and necessary living expenses plus \$50.00).

²⁰ See *supra* note 14.

²¹ See *K.C.*, *supra* note 13; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Periodic Review of Disability Cases*, Chapter 2.812.4 (March 2010).

²² *Id.*

understands the terms and conditions under which he or she may receive compensation. OWCP provided appellant this information by letter dated March 8, 2006.

In this case, appellant received compensation for total disability by check and also received wages from the employing establishment for the period February 15 through April 6, 2013. The period of the payment was listed on each check that he received. In the March 8, 2006 letter, OWCP properly advised appellant of his responsibilities to immediately inform OWCP upon his return to work to avoid an overpayment in compensation and that, if he worked during any period covered by a compensation payment, he was obligated to return the payment to OWCP. Under these circumstances, appellant knew or should have known that he could not receive wage-loss compensation during any period that he worked or continued to receive wages from the employing establishment.²³ OWCP was notified that he returned to work on February 15, 2013. Appellant, however, did not return the compensation he received by check for the period February 15 through April 6, 2013. The Board finds that, when he returned to work on February 15, 2013 and began to receive salary from the employing establishment, he was not entitled to concurrently receive disability compensation for the same period and had an obligation to return payments that he knew or should have known to be incorrect. Under section 10.433(a) of OWCP regulations, appellant is at fault and is not entitled to waiver of the overpayment of compensation in the amount of \$4,322.44.

LEGAL PRECEDENT -- ISSUE 4

When an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to OWCP the amount of the overpayment as soon as the error is discovered or his or her attention is called to same. If no refund is made, OWCP shall decrease later payments of compensation, 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.²⁴

ANALYSIS -- ISSUE 4

OWCP required repayment of the overpayment in the amount of \$27,298.93 in full and at the rate of \$195.00 per month for the \$4,322.44 overpayment. At the time of OWCP's overpayment determinations, appellant was not receiving compensation from OWCP. He last received OWCP compensation on February 15, 2013. Therefore, the Board does not have jurisdiction over the issue of whether or not OWCP properly determined the method of recovery for the \$27,298.93 and \$4,322.44 overpayments of compensation received by appellant.²⁵

²³ See *id.*

²⁴ 20 C.F.R. § 10.441(a).

²⁵ See *B.M.*, Docket No. 13-1949 (issued January 13, 2014). See also *Levon H. Knight*, 40 ECAB 658 (1989); *Robert N. Vachon*, 36 ECAB 502 (1985).

CONCLUSION

The Board finds that OWCP properly found that appellant received an overpayment in the amount of \$27,298.93 for the period September 18, 2010 through July 9, 2012 and an overpayment in the amount of \$4,322.44 for period February 15 through April 6, 2013. The Board further finds that OWCP properly denied waiver of recovery of the overpayments of compensation. The Board finds that it does not have jurisdiction over the issue of whether OWCP properly determined the method of recovery for the \$27,298.93 and \$4,322.44 overpayments of compensation received by appellant.

ORDER

IT IS HEREBY ORDERED THAT the January 24, 2014 and August 15, 2013 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 13, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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