

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

J.L., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Charlotte, NC, Employer**

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**Docket No. 14-396
Issued: May 19, 2014**

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 December 12, 2013 appellant filed a timely appeal from an August 28, 2013 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 case.

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$245.57 from May 29 through June 1, 2013; (2) whether OWCP properly denied waiver of recovery of the overpayment; and (3) whether OWCP properly required repayment of the overpayment by deducting \$245.57 from appellant's compensation benefits.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On August 12, 2010 appellant, then a 47-year-old rural carrier, filed an occupational disease claim (Form CA-2) alleging that she sustained right shoulder impingement syndrome in the performance of duty. On August 17, 2010 OWCP accepted her claim for right rotator cuff syndrome/impingement. Appellant stopped work on August 31, 2010. On February 22, 2011 she returned to a modified-duty assignment working 2 hours per day, or a total of 10 hours per week. Appellant's effective weekly base pay rate for compensation was \$1,116.88 per week and the modified rural carrier position's pay rate was \$283.53 per week.

On November 22, 2011, based upon a second opinion evaluation, OWCP determined that appellant should be placed on an informal loss of wage-earning capacity and be paid each 28-day period for her loss of six hours of wages per day. It determined that appellant's weekly pay rate when her disability began was \$1,116.00; the current pay rate for her position and step when injured was \$1,116.88; and her current earning capacity was \$283.53 per week. OWCP advised appellant: "If you receive an increase in pay over the amount cited above," that of \$283.53 per week, "you should notify us of the increase immediately. Failure to do so could cause an overpayment of compensation." OWCP calculated that appellant was earning 25 percent of her wage-earning capacity, and that her adjusted wage-earning capacity amount per week was \$279.22. Her loss in earning capacity per week was calculated as \$837.66. Appellant's compensation rate was \$558.44 per week and her first check at the new rate totaled \$2,233.76. On June 1, 2013 OWCP began paying her by direct deposit.

On December 29, 2012 appellant indicated on a Form EN-1032 that she began work at the employing establishment in a modified assignment for 2 hours per day, or 10 hours per week, on February 22, 2011.

In a memorandum of a telephone conversation dated May 29, 2013, a claims examiner noted that appellant had advised her that she had returned to work 6 hours per weekday and 2 hours on Saturdays, or 32 hours per week. The claims examiner told appellant that the employing establishment had not advised OWCP of the job offer, but that because it was not a permanent offer, it did not require OWCP approval.

In a report of termination of disability and/or payment (Form CA-3) dated May 30, 2013, the employing establishment reported that appellant had accepted a modified job offer increasing her work hours from 10 to 32 per week. It included her signature on a form offer of modified assignment, dated May 29, 2013.

In a record of a telephone conversation dated July 19, 2013, the employing establishment advised OWCP that appellant's hours of work were not going to change from 32 hours per week.

In a wage-earning capacity CA-816 form dated July 24, 2013, OWCP noted that appellant had increased the number of work hours to 32 per week as of May 29, 2013. As of that date, appellant's actual weekly earning capacity was \$934.08. This represented an 80 percent wage-earning capacity. OWCP found her pay rate when injured to be \$1,116.88 and the current weekly pay rate for the job and step when injured to be \$1,167.56. Appellant's four-week entitlement to compensation was \$625.00.

On July 25, 2013 OWCP issued a preliminary determination that appellant received a \$245.57 overpayment of compensation from May 29 to June 1, 2013. The overpayment was created as a result of increasing the number of hours she worked per week from 10 to 32 as of May 29, 2013, while her compensation remained the same through June 1, 2013. The compensation paid to her during the period totaled \$334.86, but she was only entitled to \$89.29. OWCP found that she was without fault in creating the overpayment because the payment of June 1, 2013 occurred through electronic funds transfer and that this was the first payment she had received electronically.

In a *Shadrick*² documentation memorandum dated July 30, 2013, OWCP determined that appellant's weekly pay as of the date of injury was \$1,116.88; her total current weekly pay for the position she held at the date of injury was \$1,167.56; and her total actual or constructed earnings per week was \$938.08.

In an August 28, 2013 decision, OWCP finalized the overpayment in the amount of \$245.57, for which appellant was found not at fault. The overpayment occurred because she was paid compensation based on an informal wage-earning capacity determination of 10 hours of work per week when she actually worked 32 hours per week from May 29 to June 1, 2013. While OWCP found appellant without fault, it did not waive the overpayment, as she did not respond to the preliminary decision or establish that recovery would defeat the purpose of FECA or be against equity and good conscience. It determined that the debt would be collected by withholding the sum of \$245.57 from her continuing compensation payment beginning September 21, 2013.

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 duty.³ 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.⁴ OWCP's 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.⁵ A claimant is not entitled to receive temporary total disability and actual earnings for the same period.⁶

² *Albert C. Shadrick*, 5 ECAB 376 (1953).

³ 5 U.S.C. § 8102(a).

⁴ *Id.* at § 8116(a).

⁵ 20 C.F.R. § 10.500(a).

⁶ *See Daniel Renard*, 51 ECAB 466, 469 (2000).

OWCP's 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.⁷

ANALYSIS -- ISSUE 1

On February 22, 2011 appellant returned to work in a modified-duty assignment working 10 hours per week, or 2 hours per day. In a letter dated November 22, 2011, OWCP determined that she should be placed on an informal loss of wage-earning capacity and be paid each 28-day period for her loss of six hours of wages per day. The letter stated, "If you receive an increase in pay over the amount cited above," that of \$283.53 per week, "you should notify us of the increase immediately. Failure to do so could cause an overpayment of compensation."

On May 30, 2013 the employing establishment reported that appellant had accepted a modified-job offer increasing her work hours from 10 to 32 per week. On July 25, 2013 OWCP made a preliminary determination that appellant received a \$245.57 overpayment of compensation from May 29 to June 1, 2013 as a result of increasing the number of hours she worked per week from 10 to 32 as of May 29, 2013, while her compensation remained the same through June 1, 2013. Appellant was paid \$334.86 for the period May 29 to June 1, 2013, but as her actual hours worked increased during the period, she was only entitled to compensation benefits of \$89.29, which created an overpayment of \$245.57.

When an employee has earnings from employment, she is not entitled to receive temporary total disability benefits and actual earnings for the same time period.⁸ Under such circumstances, OWCP offsets actual earnings pursuant to the *Shadrick* formula.⁹ If a reduction of benefits based upon actual earnings is not accompanied by a determination that the actual earnings fairly and reasonably represent wage-earning capacity, an informal reduction of benefits utilizing the *Shadrick* formula is proper rather than a formal loss of wage-earning capacity determination.¹⁰ OWCP made an informal determination of the amount owed based on her actual earnings using the *Shadrick* formula. The Board finds that OWCP properly applied the *Shadrick* formula to compute appellant's entitlement to compensation for the period in question.

Consequently, the Board finds that OWCP properly determined that from May 29 to June 1, 2013 appellant received a \$245.57 overpayment because she was paid compensation under an informal wage-earning capacity based on 10 hours of work per week while she actually worked a 32-hours-per-week schedule. 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 May 29 to June 1, 2013.

⁷ See *L.S.*, 59 ECAB 350, 353-54 (2008); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(a) (September 2010).

⁸ *Supra* note 6.

⁹ *Supra* note 2 at 376, 384; 20 C.F.R. § 10.403.

¹⁰ *Id.*; see also *D.C.*, Docket No. 09-1460 (issued April 19, 2010).

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of FECA¹¹ provides that, where an overpayment of compensation has been made because of an error of fact or law, adjustments shall be made by decreasing later payments to which an individual is entitled.¹² The only exception to this requirement is found in section 8129(b) of FECA, which provides that adjustments or recovery may not be made when incorrect payments have been made to an individual who is without fault and when such adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.¹³

Thus, a finding that appellant was without fault is not sufficient, in and of itself, for OWCP to waive the overpayment.¹⁴ OWCP must exercise its discretion to determine whether recovery of the overpayment would defeat the purpose of FECA or would be against equity and good conscience, pursuant to the guidelines provided in sections 10.434 and 10.437 of the implementing federal regulations.¹⁵

Section 10.438 of FECA's implementing regulations provide that the individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by OWCP. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of FECA or be against equity and good conscience. Failure to submit the requested information within 30 days of the request shall result in the denial of waiver and no further request for waiver shall be considered until the requested information is furnished.¹⁶

As the only limitation on OWCP's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deductions from known facts.¹⁷

ANALYSIS -- ISSUE 2

OWCP advised appellant by July 25, 2013 notice of its preliminary determination of the \$245.57 overpayment and that she was not at fault. It advised her to submit information regarding her income, assets, and expenses by completing a questionnaire and providing supporting documentation. However, appellant did not provide any financial information or documentation before OWCP finalized its decision on August 28, 2013. In the absence of the

¹¹ 5 U.S.C. § 8129(a).

¹² *Id.*

¹³ *Id.* at § 8129(b).

¹⁴ *James Lloyd Otte*, 48 ECAB 334, 338 (1997); *see William J. Murphy*, 40 ECAB 569, 571 (1989).

¹⁵ 20 C.F.R. §§ 10.434 and 10.437.

¹⁶ *Id.* at § 10.438; *Linda Hilton*, 52 ECAB 476, 479 (2001).

¹⁷ *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

information requested, OWCP could not determine whether or not recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience. Therefore, OWCP's denial of waiver of recovery was proper and not an abuse of discretion.¹⁸

LEGAL PRECEDENT -- ISSUE 3

Section 10.441 of Title 20 of the Code of Federal Regulations provide that, if an overpayment of compensation has been made to one entitled to future payments, proper adjustment shall be made by decreasing subsequent 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.¹⁹ When an individual fails to provide request 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.²⁰

ANALYSIS -- ISSUE 3

The record supports that, in requiring repayment of the overpayment by deducting \$245.57 from appellant's continuing compensation payments beginning on September 21, 2013, OWCP took into consideration the factors set forth in section 10.441 and found that this method of recovery would minimize any resulting hardship on appellant. By this method of recovery, OWCP estimated that the overpayment would be absorbed by October 19, 2013. The Board notes that appellant failed to provide information on income, expenses and assets, and that OWCP followed minimum collection guidelines by requiring installments large enough to collect the debt promptly. Thus, OWCP properly and promptly required repayment of the overpayment by deducting \$245.57 from appellant's continuing compensation benefits.

CONCLUSION

The Board finds that OWCP properly found that an overpayment of \$245.57 was created. The Board finds that it properly denied waiver of recovery. The Board further finds that OWCP properly required repayment of the overpayment by deducting \$245.57 from appellant's continuing compensation.

¹⁸ See 20 C.F.R. §§ 10.434 and 10.437.

¹⁹ *Id.* at § 10.441.

²⁰ *Gail M. Roe*, 47 ECAB 268, 276 (1995).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 28, 2013 is affirmed.

Issued: May 19, 2014
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