

On appeal appellant disputes the amount of the overpayment of compensation and requests a waiver of recovery.

FACTUAL HISTORY

On December 2, 2004 appellant, then a 45-year-old maintenance worker, filed a traumatic injury claim (Form CA-1) alleging that he sustained a lower back injury on July 3, 2004 while lifting and loading scrap pipe in the performance of duty. OWCP accepted the claim for lumbar spinal stenosis and disc protrusion at L4-5 and L5-S1. It paid compensation benefits and authorized back surgery, which occurred on April 21, 2005.³ Appellant returned to work on and off with restrictions. He stopped work on April 26, 2006 as the employing establishment could no longer provide work within his restrictions. OWCP accepted a recurrence of disability commencing April 26, 2006, which entitled appellant to a recurrent pay rate effective April 26, 2006.

By decision dated November 20, 2009, OWCP found that appellant had the capacity to earn wages as a customer service representative. It determined that he had a 51 percent loss of wage-earning capacity (LWEC) and his compensation was reduced to a net compensation of \$934.64 every four weeks.⁴

On April 12, 2013 OWCP made a preliminary determination that appellant received compensation totaling \$184,978.22 for the period April 19, 2006 through April 6, 2013 due to a change in his pay rate resulting in an overpayment of \$2,777.56.⁵ The record contains evidence of payments made to appellant and worksheets explaining how it calculated the overpayment amount.⁶ OWCP found that, from April 19, 2006 to April 6, 2013, appellant was paid at an incorrect weekly pay rate of \$831.19 at the 75 percent compensation rate, for a total net compensation of \$184,978.22. Appellant was further informed that a complete review had been made of his case file also finding an underpayment of compensation since April 26, 2006, when he was not paid at a new rate of pay due to a recurrence of disability. OWCP found that he should have been paid at a weekly recurrence pay rate of \$861.69 at the 75 percent compensation rate, for a total net compensation of \$182,200.66. Crediting appellant for the underpayment, it found that nevertheless there was an overpayment of \$2,777.56. OWCP found that he was paid at an incorrect pay rate for the following periods: April 19 through 28, 2006 (37 hours); April 26 through 28, 2006 (16 hours); April 30 through September 30, 2006 (total disability workdays);

³ In a January 8, 2014 letter, OWCP also authorized a surgical procedure which occurred on June 5, 2013.

⁴ In a January 7, 2013 decision, OWCP denied modification of its November 20, 2009 LWEC determination. By decision dated February 18, 2014, the Board affirmed OWCP's January 7, 2013 decision. Docket No. 13-1504 (issued January 7, 2013). The Board denied appellant's petition for reconsideration on July 29, 2014. *Order Denying Petition for Reconsideration*, Docket No. 13-1504 (issued July 29, 2014). In a decision dated April 28, 2014, OWCP modified its November 20, 2009 LWEC determination finding that appellant was entitled to compensation for total disability effective November 7, 2012 on the basis that he submitted sufficient evidence to establish a material worsening of the accepted conditions.

⁵ The cover letter of OWCP's April 12, 2013 decision incorrectly identifies the period of overpayment as April 9, 2006 through April 6, 2013.

⁶ There is no indication that appellant was provided with this evidence in connection with OWCP's preliminary overpayment determination.

October 1 through November 25, 2006 (211 hours); November 26, 2006 through February 3, 2007 (total disability workdays); February 7 through March 31, 2007 (284 hours); April 1 through August 4, 2007 (total disability workdays); August 5, 2007 through November 21, 2009 (total disability calendar days); and November 22, 2009 through April 6, 2013 (LWEC payments).

OWCP found that the total amount of the overpayment for the period April 19, 2006 through April 6, 2013 was \$2,777.56 (\$184,978.22 - \$182,200.66). Appellant was found without fault in creating the overpayment. With respect to waiver, OWCP enclosed an overpayment recovery questionnaire (OWCP-20) and requested that appellant complete the form and submit supporting financial documentation, such as bank account statements, pay slips, and other relevant documents. It advised him that failure to submit the requested information within 30 days would result in denial of waiver.

On May 13, 2013 appellant requested a prerecoupment hearing and waiver of recovery of the overpayment contending that he was not at fault in its creation. He indicated that he was not aware of incorrect payments until his spouse started investigating slight differences and stated that he did not believe his wages had been configured properly. Appellant further contended that repayment would only cause further hardship and indebtedness.

In a completed overpayment recovery questionnaire (Form OWCP-20) received on May 14, 2013, appellant reported monthly income of \$2,954.90 in Social Security Administration (SSA) benefits and disability benefits from the Department of Veterans Affairs (VA) and OWCP. He also reported approximately \$2,850.00 in monthly household expenses and \$430.82 in monthly debts. Appellant reported the following assets: \$9.00 cash on hand, \$140.00 in a checking account, and \$50.00 in a savings account, totaling \$199.00. He submitted a number of financial documents and bills in support of his claim.

A telephonic prerecoupment hearing was held before an OWCP hearing representative on October 30, 2013. Appellant's representative argued that the pay rate did not accurately reflect the date of recurrence⁷ and was not adjusted for the Consumer Price Index (CPI). The hearing representative explained that OWCP's acceptance of a recurrence did not automatically constitute a recurrent pay rate.

By decision dated January 17, 2014, an OWCP hearing representative finalized the overpayment and found that appellant was without fault in its creation. She found that appellant had a monthly income of \$1,246.90 from SSA benefits, \$251.00 from VA benefits, and \$1,578.42 from OWCP compensation benefits, totaling \$3,076.32. Regarding monthly expenses, the hearing representative added up only the monthly expenses supported by documentation provided and included the claimed food and clothing expenses. She noted that appellant claimed more than \$892.38 for insurance expenses deducted by OWCP, however, a review of OWCP health and optional life insurance deductions did not support the amount claimed. Thus, the hearing representative found that appellant had a total of \$2,622.28 in monthly expenses,

⁷ The Board notes that OWCP's April 12, 2013 preliminary determination stated that appellant's recurrence pay rate was effective April 26, 2006 and finds that the attached memorandum's April 30, 2006 date of recurrence is a harmless typographical error.

equaling \$454.04 in discretionary income.⁸ She also found that the evidence submitted was insufficient to warrant waiver of recovery of the overpayment. The hearing representative directed recovery of the overpayment by deducting \$225.00 from appellant's continuing compensation payments every four weeks. She considered appellant's financial circumstances in reaching this determination.

LEGAL PRECEDENT -- ISSUE 1

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.⁹ Monetary compensation for total or partial disability due to an employment injury is paid as a percentage of pay,¹⁰ meaning pay at the time of injury or pay at the time disability begins or pay at the time compensable disability recurs if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater.¹¹

Section 8129(a) of FECA provides that 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.¹²

Section 10.431 of the implementing regulations provide that before seeking to recover an overpayment or adjust benefits, OWCP will advise the individual in writing that the overpayment exists and the amount of the overpayment.¹³ The written notification must also include a preliminary finding regarding whether the individual was at fault in the creation of the overpayment.¹⁴ Additionally, OWCP is obliged to advise the individual of his right to inspect and copy the government records relating to the overpayment.¹⁵ Lastly, the preliminary notice must inform the individual of the right to challenge the fact or amount of the overpayment, the right to contest the preliminary finding of fault in the creation of the overpayment, if applicable, and the right to request a waiver of recovery of the overpayment.¹⁶

⁸ A monthly income of \$3,076.32 minus \$2,622.28 in monthly expenses equals \$454.04 in discretionary income.

⁹ 5 U.S.C. § 8102(a).

¹⁰ *Id.* at §§ 8105, 8106.

¹¹ *Id.* at § 8101(4); *John D. Williamson*, 40 ECAB 1179 (1989).

¹² *Id.* at § 8129(a).

¹³ 20 C.F.R. § 10.431(a).

¹⁴ *Id.* at § 10.431(b).

¹⁵ *Id.* at § 10.431(c).

¹⁶ *Id.* at § 10.431(d).

ANALYSIS -- ISSUE 1

The Board finds that OWCP did not meet its burden of proof to establish that appellant received an overpayment of compensation in the amount of \$2,777.56 for the period April 19, 2006 through April 6, 2013.

OWCP is required by statute and regulations to make findings of fact.¹⁷ OWCP procedures further specify that a final decision of OWCP must include findings of fact and provide clear reasoning which allows the claimant to understand the specific defect of his claim and the kind of evidence which would tend to overcome it.¹⁸ These requirements are supported by Board precedent.¹⁹ In the present case, the record does not contain findings which would allow appellant to understand the basis of his alleged overpayment or the evidence which would tend to overcome it. Thus, the Board finds the evidence of record insufficient to establish that appellant received an overpayment of compensation in the amount of \$2,777.56.

In its April 12, 2013 preliminary determination, OWCP found that appellant received compensation totaling \$184,978.22 for the period April 19, 2006 through April 6, 2013 due to an incorrect pay rate. It found that, from April 19, 2006 to April 6, 2013, appellant was paid at an incorrect weekly pay rate of \$831.19 at the 75 percent compensation rate, for a total net compensation of \$184,978.22. Appellant was further informed that a complete review had been made of his case file and that this showed there had been an underpayment of compensation since April 26, 2006, due to a recurrence of disability. OWCP found that he should have been paid at a weekly recurrence pay rate of \$861.69 at the 75 percent compensation rate, for a total net compensation of \$182,200.66. Crediting appellant for the underpayment it found that nevertheless there was an overpayment of \$2,777.56.

The Board finds that the April 12, 2013 preliminary determination worksheet was not sufficient, of itself, to explain or support the overpayment calculations.²⁰ OWCP found that appellant was paid at an incorrect pay rate for the following periods: April 19 through 28, 2006 (37 hours); April 26 through 28, 2006 (16 hours); April 30 through September 30, 2006 (total disability workdays); October 1 through November 25, 2006 (211 hours); November 26, 2006 through February 3, 2007 (total disability workdays); February 7 through March 31, 2007 (284 hours); April 1 through August 4, 2007 (total disability workdays); August 5, 2007 through November 21, 2009 (total disability calendar days); and November 22, 2009 through April 6, 2013 (LWEC payments). However, it failed to sufficiently explain the nature of these periods or account for the number of hours calculated for each period. Further, OWCP failed to distinguish and explain the difference between the periods of overpayment and underpayment of compensation. There is no indication that appellant was provided with a worksheet in

¹⁷ 5 U.S.C. § 8124(a) provides that OWCP shall determine and make a finding of facts and make an award for or against payment of compensation. 20 C.F.R. § 10.126 provides in pertinent part that the final decision of OWCP shall contain findings of fact and a statement of reasons.

¹⁸ See *R.W.*, Docket No. 11-1303 (issued January 9, 2012); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.5 (February 2013).

¹⁹ See *id.*; *James D. Boller, Jr.*, 12 ECAB 45, 46 (1960).

²⁰ See *supra* *R.W.*, note 18.

connection with OWCP hearing representative's January 17, 2014 decision finalizing the overpayment of compensation. As noted, OWCP's burden of proof includes providing appellant with factual findings and reasoning which would allow him to understand the precise nature of the determination being made by OWCP. On remand it should issue a preliminary determination of overpayment for the period April 19, 2006 through April 6, 2013 according to its procedures.²¹

CONCLUSION

The Board finds that OWCP improperly found an overpayment of compensation in the amount of \$2,777.56 for the period April 19, 2006 through April 6, 2013.

ORDER

IT IS HEREBY ORDERED THAT the January 17, 2014 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further proceedings consistent with this decision of the Board.

Issued: August 20, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

²¹ In light of the Board's disposition of the overpayment of compensation issue, the issues regarding recovery of the overpayment are moot.