

compensation effective June 28, 2014 on the grounds that he had no further employment-related disability.

FACTUAL HISTORY

On April 17, 2012 appellant, then a 52-year-old tractor operator, filed an occupational disease claim alleging that he sustained a left shoulder condition due to both heavy lifting and the inability to use his right shoulder as a consequence of a prior injury. OWCP accepted the claim for neck sprain, a left shoulder, and upper arm sprain, displacement of a cervical intervertebral disc without myelopathy, and brachial neuritis or radiculitis not otherwise specified. It paid appellant compensation for lost wages beginning November 18, 2012.

Appellant's position as a tractor operator required light to moderate duties, including lifting and carrying up to 50 pounds without assistance and frequent stooping, bending, reaching, moving the arms and legs, and driving.

On October 26, 2012 Dr. Lewis C. Jones, a Board-certified orthopedic surgeon, performed an anterior acromioplasty on appellant's left shoulder. In a work restriction evaluation dated December 11, 2012, he found that appellant could work full time with restrictions of no use of the left upper extremity.

On December 20, 2012 the employing establishment offered appellant a 90-day term position as an administrative support clerk. It noted that the position was sedentary and had no physical demands. The employing establishment provided the position description for the administrative support clerk job. Appellant accepted the position and returned to work on January 7, 2013.

On March 7, 2013 the employing establishment related that appellant earned the same hourly rate as in his date-of-injury job. OWCP inquired whether the position was temporary or permanent. In a March 11, 2013 response, the employing establishment advised that appellant's position was temporary and that his duties included sitting and answering a telephone. It noted that his term appointment expired April 6, 2013 and that he was hired for an additional 90 days.

By letter dated June 17, 2013, the employing establishment related that appellant was on a term appointment that had been extended until July 13, 2013. It was not continuing his employment beyond that date due to its workload.

By decision dated June 26, 2013, OWCP reduced appellant's compensation to zero effective January 7, 2012 based on its determination that his actual earnings as an administrative support clerk fairly and reasonably represented his wage-earning capacity. It noted that he was working in a term appointment as a tractor operator at the time of his injury and that the medical evidence supported that he could perform the modified position.

On September 16, 2013 appellant filed a notice of recurrence of disability beginning July 11, 2013 causally related to his August 13, 2011 employment injury. On October 7, 2013 the employing establishment related that it did not withdraw his limited-duty position but that instead his term position had expired.

On September 16, 2013 Dr. Jones noted that an April 2013 magnetic resonance imaging scan study did not show a rotator cuff tear. He referred appellant to Dr. Val Irion, an orthopedic surgeon, for an evaluation of appellant's continued left shoulder pain.

In a report dated September 27, 2013, Dr. Irion related that appellant initially injured his back in 2008 and then sustained an injury to his left shoulder. He diagnosed impingement pain probably from a partial thickness rotator cuff tear, acromioclavicular (AC) joint arthritis, and biceps tendinitis. Dr. Irion requested authorization from workers' compensation for surgery.

In a statement dated November 8, 2013, appellant's attorney related that the medical evidence supported that his condition changed such that he required additional surgery. She noted that, subsequent to his left shoulder surgery, he experienced increased left shoulder pain and numbness from the cervical nerves.

In a progress report dated December 30, 2013, Dr. Irion indicated that an electromyogram revealed damage to the C7-8 nerve roots. He diagnosed impingement due most likely to a partial tear of the rotator cuff, AC degenerative joint disease, and biceps tendinitis. Dr. Irion stated, "[Appellant] never really improved from the surgery with Dr. Jones. I think there could still be a component of AC [joint] arthritis, biceps tendinitis, and a partial-thickness cuff tearing on the articular side that was not necessarily addressed on [the] last surgery." He requested authorization for surgery.

On January 15, 2014 OWCP advised that it had authorized surgery and would return appellant to the periodic rolls. On January 23, 2014 appellant underwent a left shoulder extensive debridement, an open distal clavicle excision, and an open subpectoral biceps tenodesis.

On February 3, 2014 Dr. Irion found that appellant could work using only his right side. On February 5, 2014 he noted that appellant was 10 days status post left shoulder surgery. Dr. Irion opined that appellant could perform light duty using only one arm.

On February 10, 2014 OWCP paid appellant compensation for total disability from July 13 through October 4, 2013. On April 8, 2014 it paid him compensation for total disability from October 5, 2013 through April 5, 2014.

By decision dated February 20, 2014, OWCP modified its June 26, 2013 loss of wage-earning capacity determination. It determined that it issued the loss of wage-earning capacity determination in error as appellant worked in a permanent position as a tractor operator on the date of injury, but received a job offer in an unrelated position for a term period.

In an e-mail dated February 26, 2014, the employing establishment related that appellant had always worked as a term employee. A notification of personnel action indicated that he returned to duty as a tractor operator on January 6, 2013 in an indefinite position.

On March 14, 2014 Dr. Irion diagnosed status post left shoulder open distal clavicle excision, open subpectoral biceps tenodesis, and rotator cuff debridement. He recommended physical therapy and found that appellant could perform modified duty with no lifting over 20 to 25 pounds on the left side. In a work restriction evaluation dated April 13, 2014, Dr. Irion

indicated that appellant was not able to perform his usual employment as he was recovering from shoulder surgery. He opined that he could perform light duty for eight hours per day with restrictions of reaching for three hours per day, reaching over the shoulder for one hour per day, operating a motor vehicle at work and to and from work for four hours per day, performing repetitive elbow movements for four hours per day and pushing, pulling, and lifting up to 25 pounds for four hours per day. Dr. Irion further found that appellant could squat and climb for four hours per day with 25 pounds of weight.

By decision dated April 22, 2014, OWCP rescinded its February 20, 2014 decision. It found that it had properly reduced appellant's compensation in its June 26, 2013 loss of wage-earning capacity determination. OWCP determined that a temporary job was proper for a loss of wage-earning capacity as he was a temporary employee when he was injured.

On April 24, 2014 OWCP advised appellant of its preliminary determination that he received a \$15,008.48 overpayment of compensation for the period July 13, 2013 to January 22, 2014 because it paid him compensation to which he was not entitled. It calculated the overpayment by adding the \$6,424.00 that it paid him from July 13 to October 5, 2013 to the \$8,584.48 that it paid him from October 5, 2013 to January 22, 2014 to find an overpayment of compensation in the amount of \$15,008.48.² OWCP further informed appellant of its preliminary determination that he was without fault in the creation of the overpayment. It requested that he complete the enclosed overpayment recovery questionnaire and submit supporting financial documents. Additionally, OWCP notified appellant that, within 30 days of the date of the letter, he could request a telephone conference, a final decision based on the written evidence or a preresumption hearing.

On April 28, 2014 OWCP notified appellant that it proposed to terminate his compensation based on its finding that the March 14 and April 13, 2014 reports from Dr. Irion established that he had no further employment-related disability.

By decision dated June 6, 2014, OWCP finalized its finding that appellant received an overpayment of compensation in the amount of \$15,008.48 for the period July 13, 2013 through January 22, 2014. It noted that it paid him compensation for this period even though he had no loss of wage-earning capacity. OWCP denied waiver of recovery of the overpayment after noting that it had not received a response to its preliminary determination. It instructed appellant to forward a check for the entire amount of the overpayment.

In a decision dated June 13, 2014, OWCP terminated appellant's compensation effective June 29, 2014. It determined that the evidence established that he had no further disability due to his employment injury. OWCP found that it was not required to modify the prior loss of wage-earning capacity determination given its finding that appellant had no further employment-related disability.

On appeal, appellant contends that he is unable to find a job due to his employment injury and that it would cause severe hardship to repay the overpayment.

² OWCP noted that appellant had not submitted evidence sufficient to show a change in his condition.

LEGAL PRECEDENT -- ISSUE 1

Section 8128 of FECA provides that the Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or application.³ The Board has upheld OWCP's authority to set aside or modify a prior decision and issue a new decision under section 8128 of FECA.⁴ The power to annul an award, however, is not an arbitrary one and an award for compensation can only be set aside in the manner provided by the compensation statute.⁵

Workers' compensation authorities generally recognize that compensation awards may be corrected, in the discretion of the compensation agency and in conformity with statutory provision, where there is good cause for so doing, such as mistake or fraud.⁶ It is well established that, once OWCP accepts the claim, it has the burden of justifying the termination or modification of compensation benefits.⁷ OWCP's burden of justifying termination or modification of compensation holds true where it later decides that it has erroneously accepted a claim of compensation. In establishing that its prior acceptance was erroneous, OWCP is required to provide a clear explanation of its rationale for rescission.⁸

Section 8115(a) of FECA⁹ provides that, in determining compensation for partial disability, the wage-earning capacity of an employee is determined by his actual earnings if his actual earnings fairly and reasonably represent her wage-earning capacity.¹⁰ Generally, wages actually earned are the best measure of a wage-earning capacity and in the absence of showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such a measure.¹¹ OWCP procedures provide that a determination regarding whether actual earnings fairly and reasonably represent wage-earning capacity should be made after an employee has been working in a given position for more than 60 days.¹² However, wage-earning capacity may not be based on an odd-lot or makeshift position designed for an employee's particular needs or a position that is seasonal in an area where year-round

³ 5 U.S.C. § 8128; *see also M.E.*, 58 ECAB 694 (2007).

⁴ *John W. Graves*, 52 ECAB 160 (2000).

⁵ *See* 20 C.F.R. § 10.610; *Cary S. Brenner*, 55 ECAB 739 (2004); *Stephen N. Elliott*, 53 ECAB 659 (2002).

⁶ *L.C.*, 58 ECAB 493 (2007).

⁷ *Andrew Wolfgang-Masters*, 56 ECAB 411 (2005).

⁸ *See Amelia S. Jefferson*, 57 ECAB 183 (2005); *Delphia Y. Jackson*, 55 ECAB 373 (2004).

⁹ *See supra* note 1.

¹⁰ 5 U.S.C. § 8115(a); *Loni J. Cleveland*, 52 ECAB 171 (2000).

¹¹ *Lottie M. Williams*, 56 ECAB 302 (2005).

¹² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on Actual Earnings*, Chapter 2.815.6(a) (June 2013).

employment is available.¹³ Reemployment of a temporary or casual worker in another temporary or casual position is proper, as long as it will last at least 90 days.¹⁴

The formula for determining loss of wage-earning capacity based on actual earnings, developed in the *Albert C. Shadrick* decision,¹⁵ has been codified at 20 C.F.R. § 10.403. OWCP calculates an employee's wage-earning capacity in terms of percentage by dividing the employee's earnings by the current pay rate for the date-of-injury job.¹⁶

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained neck sprain, a left shoulder, and upper arm sprain, displacement of a cervical intervertebral disc without myelopathy, and brachial neuritis or radiculitis due to factors of his federal employment. It paid him disability compensation beginning November 18, 2012. On January 7, 2013 appellant accepted the employing establishment's offer of a temporary position for 90 days as an administrative support clerk. He earned the same hourly rate as in his date-of-injury job. The employing establishment extended the position for an additional 90 days beginning April 6, 2013. On June 26, 2013 OWCP found that appellant had no loss of wage-earning capacity effective January 7, 2013 as his actual earnings as an administrative support clerk fairly and reasonably represented his wage-earning capacity. Appellant worked in the position until July 11, 2013, when his extended term expired. There is no evidence that the position was makeshift or tailored to his specific needs and his earnings met or exceeded those of his date-of-injury position.

In a decision dated February 20, 2014, OWCP found that it had issued the June 26, 2013 loss of wage-earning capacity determination in error as appellant worked in a permanent position as a tractor operator at the time of his injury, but received a job offer in a temporary position. On February 26, 2014 the employing establishment asserted that he was hired in a term position. In a decision dated April 22, 2014, OWCP rescinded its February 20, 2014 decision based on its finding that the offered position was proper as appellant was a temporary employee at the time of his injury.

The Board finds that OWCP provided sufficient rationale to justify the rescission of its modification of the June 26, 2013 wage-earning capacity determination. A loss of wage-earning capacity determination may be based on a temporary position where the position the employee held when injured was also temporary in nature, as long as the position lasts at least 90 days.¹⁷ OWCP explained that it had based its finding that the loss of wage-earning capacity determination was erroneous on the fact that appellant worked as a permanent employee at the time of his injury. The employing establishment subsequently informed OWCP, however, that

¹³ See *P.C.*, Docket No. 13-939 (issued August 27, 2013); *id.*, at Chapter 2.815.5(c)(2) (June 2013).

¹⁴ *Supra* note 12 at Chapter 2.815.5(c) (June 2013).

¹⁵ *Albert C. Shadrick*, 5 ECAB 376 (1953).

¹⁶ 20 C.F.R. § 10.403(c).

¹⁷ See *supra* note 14.

he was a term employee on the date of injury. OWCP provided a clear explanation for its rescission of the modification of the loss of wage-earning capacity determination.¹⁸ It thus properly reopened the case for further review and rescinded its modification of the June 27, 2013 loss of wage-earning capacity determination.

LEGAL PRECEDENT -- ISSUE 2

Section 8102 of FECA¹⁹ provides that the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.²⁰ Section 8129(a) of FECA provides, in pertinent part, “When an overpayment has been made to an individual under this subchapter 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 an individual is entitled.”²¹

ANALYSIS -- ISSUE 2

OWCP reduced appellant’s compensation to zero effective January 7, 2013 based on its determination that his actual earnings as an administrative support clerk fairly and reasonably represented his wage-earning capacity. Appellant’s term appointment ended on July 13, 2013. OWCP paid him compensation from July 13, 2013 to January 22, 2014 after finding that it had issued the loss of wage-earning capacity in error. On April 22, 2014, however, it rescinded its modification of the June 26, 2013 loss of wage-earning capacity decision. Consequently, OWCP determined that it erred in paying appellant compensation for this period based on its finding that the loss of wage-earning capacity determination was improper. It calculated that he received an overpayment of compensation in the amount of \$15,008.48 for the period July 13, 2013 to January 22, 2014 because it erroneously paid him compensation of \$6,424.00 from July 13 to October 5, 2013 and compensation of \$8,584.48 from October 5, 2013 to January 22, 2014. The record supports that appellant received an overpayment of compensation in the amount of \$15,008.48 from July 13, 2013 to January 22, 2014 due to OWCP’s rescission of its modification of the June 26, 2013 loss of wage-earning capacity determination.

LEGAL PRECEDENT -- ISSUE 3

Section 8129 of FECA⁵ provides that an overpayment must be recovered unless “incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.” Thus, a finding that appellant was without fault does not automatically result in waiver of the overpayment. OWCP must then exercise its discretion to determine whether recovery of the

¹⁸ See *R.P.*, Docket Nos. 14-857, 14-1536 (issued August 18, 2014); *H.S.*, Docket No. 11-734 (issued August 28, 2012).

¹⁹ See *supra* note 1.

²⁰ 5 U.S.C. § 8102.

²¹ *Id.* at § 8129(a).

overpayment would defeat the purpose of FECA or would be against equity and good conscience.⁶

According to 20 C.F.R. § 10.436, recovery of an overpayment would defeat the purpose of FECA if recovery would cause hardship because the beneficiary needs substantially all of his or her income (including compensation benefits) to meet current ordinary and necessary living expenses, and also, if the beneficiary's assets do not exceed a specified amount as determined by OWCP from data provided by the Bureau of Labor Statistics.²² An individual's liquid assets include but are not limited to cash, the value of stocks, bonds, savings accounts, mutual funds, and certificates of deposits.²³ Nonliquid assets include but are not limited to the fair market value of an owner's equity in property such as a camper, boat, second home, and furnishings and supplies.²⁴

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.²⁵ To establish that, a valuable right has been relinquished, it must be shown that the right was in fact valuable, that it cannot be regained and that the action was based chiefly or solely in reliance on the payments or on the notice of payment.²⁶

ANALYSIS -- ISSUE 3

OWCP, in its preliminary notification to appellant of the existence of the overpayment, informed him that he needed to explain his reasons for seeking a waiver, complete the recovery questionnaire form, and submit financial documents to support his claimed income and expenses. The overpayment recovery questionnaire is designed to obtain the financial information to determine whether adjustment or recovery would defeat the purpose of FECA. Appellant did not return the overpayment recovery questionnaire provided by OWCP and did not otherwise submit financial evidence or supporting documentation to establish that recovery of the overpayment would defeat the purpose of FECA. He also failed to submit evidence to establish that recovery of the overpayment would be against equity and good conscience because, in reliance on the overpaid compensation, he relinquished a valuable right or changed his position for the worse. Although appellant is without fault in the creation of the overpayment, he nevertheless bears responsibility for providing the financial information necessary to support his request to waive

²² 20 C.F.R. § 10.436. OWCP procedures provide that assets must not exceed a resource base of \$4,800.00 for an individual or \$8,000.00 for an individual with a spouse or dependent plus \$960.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a) (October 2004).

²³ *Id.*

²⁴ *Id.*

²⁵ 20 C.F.R. § 10.436.

²⁶ *Id.* at § 10.437(b)(1).

recovery of the overpayment. Section 10.438 of OWCP's regulations state that a claimant who received an overpayment of compensation is responsible for providing information about income, expenses, and assets to OWCP so that it may determine whether recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.²⁷ Failure to submit the information, which will also be used to determine a repayment schedule if necessary, without 30 days of a request from OWCP will result in a denial of a waiver of recovery of the overpayment and no further requests for waiver will be considered until the information is submitted.²⁸ Consequently, the Board finds that OWCP properly denied waiver of recovery of the overpayment.

On appeal, appellant contends that he is unable to work due to his injury and would experience severe financial hardship repaying the overpayment. As discussed, however, OWCP properly denied waiver as he failed to submit the requisite financial information.

LEGAL PRECEDENT -- ISSUE 4

Once OWCP accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits. It may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.²⁹ OWCP's burden of proof in terminating compensation includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.³⁰

ANALYSIS -- ISSUE 4

OWCP accepted that appellant sustained neck sprain, left shoulder, and upper arm sprain, displacement of a cervical intervertebral disc without myelopathy, and brachial neuritis or radiculitis. It paid him compensation for disability from November 18, 2012 until January 7, 2013, when he returned to work as an administrative support clerk. Appellant stopped work at the conclusion of his term appointment and OWCP paid him compensation for total disability from July 13, 2013 through January 22, 2014. However, it subsequently determined that it paid him compensation in error for this period. Appellant underwent left shoulder surgery on January 23, 2014. OWCP paid him compensation for total disability from January 23 until June 29, 2014, when it terminated his compensation.

OWCP based its termination of appellant's compensation on its finding that Dr. Irion's March 14, 2014 report established that he was no longer disabled due to his work injury. In a report dated March 14, 2014, Dr. Irion found that appellant was status post left shoulder surgery and that he could perform light duty lifting no more than 20 to 25 pounds on the left side. In an April 13, 2014 work restriction evaluation, he determined that appellant was unable to resume

²⁷ *Id.* at § 10.438(a).

²⁸ *Id.* at § 10.438(b); *Robert B. Hutchins*, 52 ECAB 344 (2001).

²⁹ *Elaine Sneed*, 56 ECAB 373 (2005); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

³⁰ *Gewin C. Hawkins*, 52 ECAB 242 (2001).

his usual employment but could work light duty pushing, pulling, and lifting up to 25 pounds for four hours per day, performing repetitive elbow movements for four hours per day, reaching for three hours per day, reaching over the shoulder for one hour per day, operating a motor vehicle at work for four hours per day. Dr. Irion's reports do not establish that appellant has no further disability as a result of his employment injury. Appellant's date-of-injury position as a tractor operator required light-to-moderate physical activity including frequent stopping, bending, reaching, moving the arm, and leg, driving, turning and lifting and carrying equipment weighing up to 50 pounds. Dr. Irion found that although appellant could do some light duty with no heavy lifting, he had continued disability due to his work injury such that he was unable to return to his date-of-injury position. In order to terminate compensation, OWCP must establish that the disability ceased or that it is no longer related to the employment injury.³¹ It has the burden to furnish rationalized medical opinion evidence that is based on a proper factual and medical history.³² OWCP did not provide such evidence and thus the Board finds that it failed to meet its burden of proof.

CONCLUSION

The Board finds that OWCP properly rescinded its decision modifying a June 27, 2013 loss of wage-earning capacity determination. The Board further finds that appellant received an overpayment of compensation in the amount of \$15,008.48 because OWCP erroneously paid him compensation from July 13, 2013 to January 22, 2014 and that OWCP properly denied waiver of recovery of the overpayment. The Board further finds, however, that OWCP improperly terminated his compensation effective June 28, 2014 on the grounds that he has no further employment-related disability.

³¹ See *I.J.*, 59 ECAB 408 (2008).

³² See *J.M.*, 58 ECAB 478 (2007).

ORDER

IT IS HEREBY ORDERED THAT the June 13, 2014 decision of the Office of Workers' Compensation Programs is reversed and the June 5 and April 22, 2014 decisions are affirmed.

Issued: February 19, 2015
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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