

FACTUAL HISTORY

On March 21, 2007 appellant then, a 47-year-old supervisory information technology (IT) specialist, filed an occupational disease claim (Form CA-2) under File No. xxxxxxx698 alleging that on March 10, 2007 she first realized that her carpal tunnel syndrome of both wrists was caused by her repetitive work duties. On April 27, 2007 OWCP accepted the claim for bilateral carpal tunnel syndrome. Appellant underwent right carpal tunnel release on April 5, 2007 and left carpal tunnel release on September 20, 2007.

On July 27, 2007 appellant filed a Form CA-2 under File No. xxxxxx269. OWCP accepted the claim for deep cervical nerve root impingement. It paid appellant total disability compensation benefits. The claims under File Nos. xxxxxxx698 and xxxxxx269 were combined into Master File No. xxxxxxx698.

In an April 2, 2012 medical report, Dr. Suneela Harsoor, an attending Board-certified anesthesiologist with a subspecialty in pain medicine, diagnosed cervical radiculopathy and carpal tunnel syndrome. She addressed her treatment plan.

By letter dated July 25, 2012, QTC Medical Services, OWCP's medical appointment scheduler, notified appellant that she was scheduled for an August 30, 2012 appointment for a second opinion with Dr. James P. Elmes, a Board-certified orthopedic surgeon. In a September 4, 2012 report, Dr. Elmes diagnosed mild C5-C6 foraminal stenosis, C6-C7 disc protrusion and C3-C4 and C4-C5 disc bulge, mild cervical degenerative disc disease and exogenous obesity. He advised that appellant was five years, four months post release of right carpal tunnel syndrome and five years postsurgical release of left carpal tunnel syndrome with residual pain. Dr. Elmes stated that there was no evidence to establish a causal relationship between appellant's bilateral carpal tunnel syndrome, cervical disc impingement, and her work factors. There were insufficient objective findings to support her subjective complaints of bilateral hand and wrist pain and neck pain. Dr. Elmes concluded that appellant could perform her usual job with no restrictions.

On October 19, 2012 OWCP determined that there was a conflict in medical opinion between Dr. Harsoor and Dr. Elmes regarding causal relationship and appellant's continuing residuals and work capacity. It referred appellant to Dr. G. Klud Miller, a Board-certified orthopedic surgeon, for an impartial medical examination. In a December 5, 2012 report, Dr. Miller found that appellant's carpal tunnel syndrome and cervical radiculopathy were not causally related to her repetitive work duties. He found evidence of symptom magnification. Dr. Miller agreed with Dr. Elmes' finding that there was no objective reason why appellant could not return to full-duty work as an IT specialist.

In a notice dated December 13, 2012, OWCP proposed to terminate appellant's wage-loss compensation and medical benefits. It found that the weight of the medical evidence rested with the opinion of Dr. Miller who found that appellant had no residuals or disability causally related to her accepted employment-related conditions. Appellant was given 30 days to submit further evidence.

By letter dated January 4, 2013, appellant disputed Dr. Miller's opinion. She requested an opportunity to submit an opinion from her attending physician to rebut his opinion.

By letter dated January 23, 2013, OWCP requested clarification from Dr. Miller as to whether appellant had any residuals of her employment-related bilateral carpal tunnel syndrome and cervical nerve root impingement. In a February 11, 2013 report, Dr. Miller stated that appellant had no objective evidence of residuals of any physiologic process. Her sensory examination was completely normal. The ranges of motion of the neck and arms were completely normal. There was no evidence of significant tenderness in anything that could be related to either the cervical spine or carpal tunnel syndrome. Dr. Miller stated that appellant had some weakness bilaterally, but she did not fulfill validity criteria on Jamar dynamometer testing. Therefore, he stated that this weakness was nonphysiologic and did not support an objective residual abnormality. Dr. Miller opined there were no residuals that could be related to the accepted conditions. He reiterated that there was no objective evidence of any residuals of either accepted condition.

In a notice dated April 1, 2013, OWCP proposed to terminate appellant's wage-loss compensation and medical benefits based on Dr. Miller's opinion that she had no residuals or disability causally related to the accepted employment injuries. Appellant was given 30 days to submit further evidence.

By letter dated April 26, 2013, appellant again disputed Dr. Miller's opinion. She requested an opportunity to submit an opinion from her attending physician regarding her continuing residuals.

In reports dated April 12 and 26, 2013, Dr. Blair A. Rhode, a Board-certified orthopedic surgeon, advised that appellant had bilateral carpal tunnel syndrome and wrist pain, and reflex sympathetic disorder of the upper limb. He further stated that she was totally disabled for work.

In a May 23, 2013 decision, OWCP finalized the termination of appellant's compensation benefits, effective that day. It found that the medical evidence submitted was insufficient to outweigh the weight accorded to Dr. Miller's opinion.

On May 28, 2013 appellant, through her attorney, requested a telephone hearing with an OWCP hearing representative.

In reports dated May 31, July 12 and October 3, 2013, Dr. Rhode reiterated his prior diagnoses and opinion regarding appellant's disability for work.

On July 5, 2013 OWCP advised appellant that her compensation had not been terminated in accordance with the May 23, 2013 decision.

In a December 23, 2013 decision, an OWCP hearing representative affirmed the May 23, 2013 termination decision.

On January 31, 2014 OWCP issued a preliminary determination that appellant received a \$7,098.21 overpayment of compensation for the period May 23 through June 29, 2013 because she received wage-loss compensation after her benefits were terminated. Appellant was found at

fault in the creation of the overpayment because she accepted payments that she knew or should have known to be incorrect. She was provided an overpayment action request form and an overpayment questionnaire. An automated computer payment system (ACPS) form, bearing a run date of July 5, 2013, reflected disability payments for the period May 23 through June 29, 2013. Appellant received a check, dated June 1, 2013, in the amount of \$1,867.95 for the period May 23 through June 1, 2013. She also received a check dated June 29, 2013 in the amount of \$5,230.26 for the period June 2 through 29, 2013, for a total net amount of \$7,098.21.

On February 15, 2014 appellant requested a telephone conference on the issues of fault and possible waiver of the overpayment. She contended that any overpayment occurred through no fault of her own. Appellant believed that she was entitled to the funds paid to her and she sought waiver of recovery of the overpayment. She submitted an overpayment questionnaire.

During the April 25, 2014 telephone conference, an OWCP claims examiner questioned some of the expenses listed on the overpayment questionnaire.

In a May 20, 2014 decision, OWCP finalized its determination that appellant had received an overpayment in the amount of \$7,098.21 and that she was “without fault in its creation, because they were not aware of compensation to which they were not entitled.” It directed repayment of the overpayment in full.

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 his duty.² 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 OWCP, by decreasing later payments to which the individual is entitled.³ Section 10.500 of OWCP regulations provide that compensation for wage loss due to disability is available only for any periods during which an employee’s work-related medical condition prevents him or her from earning the wages earned before the work-related injury.⁴

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$7,098.21 for the period May 23 through June 29, 2013. The record reflects that OWCP terminated her wage-loss compensation benefits effective May 23, 2013; however, she continued to receive monetary benefits through June 29, 2013.

The July 5, 2013 ACPS form reflects that checks totaling \$7,098.21 for wage-loss compensation were sent to appellant on June 1 and 29, 2013 for the period May 23 through June 29, 2013. Appellant’s wage-loss compensation was terminated as of May 23, 2013. On

² 5 U.S.C. § 8102(a).

³ *Id.* at § 8129(a).

⁴ 20 C.F.R. § 10.500.

appeal, appellant did not contest the fact or amount of the overpayment. The Board finds that an overpayment of \$7,098.21 was created in this case.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA provides that an overpayment in compensation shall be recovered by OWCP 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.⁵ Section 10.438 of OWCP 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 on an overpayment would defeat the purpose of FECA or be against equity and good conscience.⁶ Failure to submit the requested information within 30 days of the request shall result in denial of waiver.⁷

OWCP procedures provide that 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 \$50.00.⁸

ANALYSIS -- ISSUE 2

The Board finds that the case is not in posture for decision regarding waiver. By its preliminary overpayment finding on January 31, 2014, OWCP found appellant at fault in creating the \$7,098.21 overpayment because she knew or should have known that OWCP had paid compensation incorrectly, yet when issuing the final overpayment decision on May 20, 2014, OWCP stated that it had determined that the preliminary finding was correct, but found appellant without fault.

As OWCP found appellant without fault in the creation of the overpayment in compensation, waiver must be considered, and repayment is still required unless it is determined that adjustment or recovery of the overpayment would defeat the purpose of FECA or be against

⁵ 5 U.S.C. § 8129.

⁶ Recovery of an overpayment will defeat the purpose of FECA if such recovery would cause hardship to a currently or formerly entitled beneficiary because: (a) the beneficiary from whom OWCP seeks recovery needs substantially all of his or her current income (including compensation benefits) to meet current or ordinary and necessary living expenses; and (b) the beneficiary's assets do not exceed a specified amount as determined by OWCP from data furnished by the Bureau of Labor Statistics. 20 C.F.R. § 10.436. 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. *Id.* at § 10.437.

⁷ 20 C.F.R. § 10.438.

⁸ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6.a(1)(b) (June 2009).

equity and good conscience.⁹ In this case, OWCP did not consider waiver in its final decision. Appellant submitted an overpayment action request in which she requested waiver. She also submitted an overpayment questionnaire and financial information. The case must therefore be remanded to OWCP to properly consider waiver. On remand, OWCP should obtain updated financial information from appellant to be followed by a decision on whether she is eligible for waiver.

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$7,098.21 for the period May 23 through June 29, 2013 and that OWCP erred in not determining whether appellant was entitled to waiver of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the May 20, 2014 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part and the case is remanded to OWCP for proceedings consistent with this decision of the Board.

Issued: January 13, 2015
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

⁹ 20 C.F.R. §§ 10.436, 10.437.