

FACTUAL HISTORY

On May 13, 2011 appellant, then a 57-year-old customer contract representative, filed a traumatic injury claim alleging that on May 13, 2011 she sustained knee and back pain when she slipped on water and fell. OWCP accepted the claim for a left wrist sprain, a left knee sprain at the lateral collateral ligament, and neck sprain. On March 27, 2013 it expanded acceptance of the claim to include displacement of a cervical intervertebral disc without myelopathy.

Appellant worked with restrictions until May 25, 2011, when she resumed her usual employment. The employing establishment noted that the restrictions of Dr. Shevin D. Pollydore, an attending physiatrist, did not exceed the requirements of her usual position, which consisted of sitting, data input for three hours per day at a computer, no overhead reaching, walking, bending, and stooping intermittently, and intermittently lifting, carrying, pulling, and pushing no more than 20 pounds.

In progress reports dated August 2012 through April 2013, Dr. Pollydore diagnosed cervical strain, cervical facet pain, cervicgia, and numbness and tingling of the left upper extremity. He found that appellant could work lifting no more than 10 pounds frequently or 20 pounds occasionally, with no overhead lifting, reaching, and no pulling over 25 pounds. Dr. Pollydore indicated that her physicians at the Department of Veterans Affairs may have found her unable to work.

By letter dated February 20, 2013, the employing establishment advised appellant that it would remove her from employment if she did not return to work. It notified her that it had charged her as absent without leave (AWOL) from January 28 through February 1, February 4 through 8, February 11 through 15, and February 18 through 22, 2013.

In a February 27, 2013 response, appellant asserted that she was disabled as a result of her May 13, 2011 work injury and described the medical treatment she was receiving.

On March 8, 2013 appellant requested leave under the Family and Medical Leave Act from March 1 to June 7, 2013, citing as a reason severe depression and a herniated disc due to her May 13, 2011 work injury.

On April 11, 2013 the employing establishment advised appellant that it was removing her from employment effective April 15, 2013. On April 16, 2013 appellant resigned from the employing establishment, citing "personal reasons."

On October 26, 2013 appellant filed a claim for compensation for leave without pay from July 29, 2012 to April 14, 2013. The employing establishment challenged the claim, arguing that the medical evidence did not show total disability.

By decision dated December 10, 2013, OWCP denied appellant's claim for compensation for total disability from July 29, 2012 to April 15, 2013. It found that the medical evidence was insufficient to show that she was totally disabled beginning July 29, 2012 as a result of her May 13, 2011 employment injury. OWCP did, however, authorize payment of 184 hours of appointments for medical treatment and physical therapy during this period.

On December 17, 2013 OWCP paid appellant compensation for 184 hours of time lost due to physical therapy and medical appointments for the period July 29, 2012 through April 14, 2013. It noted that she had resigned from work on April 15, 2013.

On January 9, 2014 appellant requested a review of the written record by an OWCP hearing representative. Following a preliminary review, on May 7, 2014 the hearing representative vacated the December 10, 2013 decision. She noted that there was no Form CA-7a providing appellant's leave usage for the period July 29, 2012 to April 14, 2013 and thus "no basis for [OWCP's] payment of 184 hours of compensation during the period." While the employing establishment advised that appellant was not claiming intermittent wage loss, it appeared that she returned to work after a July 2012 psychiatric hospitalization. She noted that the medical evidence did not show that appellant was totally disabled as a result of her May 13, 2011 employment injury. The hearing representative remanded the case for OWCP to clarify the hours that it found appellant entitled to compensation from July 29, 2012 to April 15, 2013 and obtain her pay status from the employing establishment for the dates in question.²

On October 25, 2013 the employing establishment submitted a leave analysis for the period July 29, 2012 to April 15, 2013. It indicated that appellant was on leave without pay from July 29, 2012 until January 26, 2013 and marked as AWOL from January 28 to April 15, 2013.

On September 29, 2014 OWCP advised appellant of its preliminary determination that she received an overpayment of compensation in the amount of \$851.80 because it paid her compensation for intermittent time lost from work for the period January 28 to April 14, 2013 when she was AWOL. It calculated that she received an overpayment of \$851.80 because it paid her \$2,297.67 for 184 hours of time lost for medical appointments from July 29, 2012 to April 14, 2013 when she was only entitled to 116 hours, or \$1,445.87, as she was AWOL beginning January 28, 2013. OWCP further advised appellant of its preliminary determination that she was at fault in the creation of the overpayment as she knew or should have known that she was not entitled to compensation when AWOL. It requested that she complete the enclosed overpayment recovery questionnaire and submit supporting financial documents. Additionally, OWCP notified her that, within 30 days of the date of the letter, appellant could request a telephone conference, a final decision based on the written evidence, or a preresumption hearing. No response was received from her following the notice.

By decision dated October 31, 2014, OWCP found that appellant received an overpayment of compensation in the amount of \$851.80 for the period January 28 to April 14, 2013 and that she was at fault in creating the overpayment. It determined that she should submit a check for the entire amount as repayment.

On appeal appellant asserts that the employing establishment did not tell her that she was AWOL. She disagreed that the overpayment occurred or that she was at fault in its creation.

² The hearing representative also instructed OWCP to clarify if appellant sustained a herniated disc from C2 to C6 as a result of her work injury.

LEGAL PRECEDENT -- ISSUE 1

Section 8102 of FECA 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.³

Section 8116 of FECA defines the limitations on the right to receive compensation benefits. This section of FECA provides that, while an employee is receiving compensation, 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 state in pertinent part: 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.⁵

OWCP's procedures provide:

“A claimant who has returned to work following an accepted injury or illness may need to undergo examination, testing, or treatment. Such a claimant may be paid compensation for wage loss under 5 U.S.C. 8103 while obtaining the medical services or treatment --

(1) *Reimbursement for lost wages for attending* medical appointments includes a reasonable time spent traveling to and from the provider's location.

(2) *Wage loss if payable only if the examination, testing, or treatment is provided on a day which is a scheduled workday and during a scheduled tour of duty. Wage-loss compensation for medical treatment received during off-duty hours is not reimbursable.*”⁶ (Emphasis in the original.)

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.⁷ 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.⁸ The power to annul an award, however, is not an arbitrary one and an

³ 5 U.S.C. § 8102.

⁴ *Id.* at § 8116(a).

⁵ 20 C.F.R. § 10.500.

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Computing Compensation*, Chapter 2.901.19(a) (February 2013).

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

⁸ *John W. Graves*, 52 ECAB 160 (2000).

award for compensation can only be set aside in the manner provided by the compensation statute.⁹

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.¹⁰ It is well established that, once OWCP accepts the claim, it has the burden of justifying the termination or modification of compensation benefits.¹¹ Its burden of justifying termination or modification of compensation holds true where OWCP 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.¹²

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained a left wrist sprain, left knee sprain, neck sprain, and displacement of a cervical intervertebral disc without myelopathy due to a May 13, 2011 employment injury. Appellant worked with limitations until May 25, 2011, when she returned to her regular duties.

On October 26, 2013 appellant filed a claim for compensation from July 29, 2012 to April 14, 2013. She did not submit any medical evidence showing that she was unable to perform her employment duties as a result of her injury. On December 17, 2013 OWCP paid appellant net compensation of \$2,297.67 for 184 hours of time lost to attend medical appointments and physical therapy from July 29, 2012 to April 15, 2013. It noted that she had resigned from federal employment on April 15, 2013.

On May 7, 2014 an OWCP hearing representative remanded the case for OWCP to clarify appellant's pay status and the hours to which it found her entitled to compensation from July 29, 2012 to April 15, 2013. The employing establishment provided a leave analysis indicating that she was AWOL commencing January 28, 2013. On September 29, 2014 OWCP determined it had erroneously paid appellant compensation for time lost for medical and physical therapy appointments beginning January 28, 2013 because she was AWOL. It subtracted the entire amount paid for the period after January 28, 2013, \$1,445.87, from the \$2,297.67 previously paid from July 29 to April 14, 2013 to find an overpayment of \$851.80. OWCP did not explain, however, why appellant was not entitled to time lost for medical appointments during the period in which she was AWOL. An injured employee may be entitled to compensation for lost wages incurred while obtaining authorized medical services on a scheduled workday during a scheduled tour of duty.¹³ This includes the actual time spent

⁹ See 20 C.F.R. § 10.610; *Cary S. Brenner*, 55 ECAB 739 (2004); *Stephen N. Elliott*, 53 ECAB 659 (2002).

¹⁰ *L.C.*, 58 ECAB 493 (2007).

¹¹ *Andrew Wolfgang-Masters*, 56 ECAB 411 (2005).

¹² See *Amelia S. Jefferson*, 57 ECAB 183 (2005); *Delphia Y. Jackson*, 55 ECAB 373 (2004).

¹³ See 5 U.S.C. 8103(a); *Gayle L. Jackson*, 57 ECAB 546 (2006).

obtaining the medical services and a reasonable time spent traveling to and from the medical provider's location.¹⁴ Further, as OWCP previously found appellant entitled to compensation for this period, it has the burden to rescind acceptance of her claim for time lost due to medical appointments. As discussed, once it accepts a claim, it has the burden of justifying the termination or modification of compensation benefits.¹⁵ In establishing that its prior acceptance was erroneous, OWCP is required to provide a clear explanation of its rationale for rescission.¹⁶

The Board finds that OWCP did not meet its burden of proof to rescind acceptance of appellant's claim for compensation for time lost due to medical services from January 28 to April 14, 2013. Consequently, OWCP did not meet its burden of proof to establish the overpayment of compensation.

CONCLUSION

The Board finds that this case is not in posture and that the overpayment decision of October 31, 2014 is set aside.

¹⁴ *Supra* note 6 at Chapter 2.901.19(a)(1) (February 2013).

¹⁵ *Andrew Wolfgang-Masters*, 56 ECAB 411 (2005).

¹⁶ *Supra* note 12.

ORDER

IT IS HEREBY ORDERED THAT the October 31, 2014 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: June 4, 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