



of compensation.<sup>2</sup> The facts and circumstances outlined in the prior Board decision are incorporated herein by reference. The facts relevant to the present appeal are set forth below.

On September 29, 1997 appellant, then a 30-year-old computer assistant, filed a traumatic injury claim (Form CA-1) alleging that on September 26, 1997 she sustained lower back pain when she moved computer equipment and tables to different locations in the office.

On December 15, 1997 appellant was placed on the periodic rolls.

On September 28, 1998 appellant began to work part-time light duty working five hours per day. On May 6, 2012 appellant returned to work full time with no restrictions.

OWCP continued to disburse periodic roll compensation payments in the net amount of \$1,024.00 each for the periods of May 6 to June 2, June 3 to 30, and July 1 to 28, 2012. It calculated the total amount of wage-loss compensation for the period May 6 to July 28, 2012 for a total overpayment of \$3,072.00.

On August 17, 2012 OWCP reduced appellant's wage-loss compensation to zero finding that her actual earnings as a legal assistant fairly and reasonably represented her wage-earning capacity.

On September 5, 2012 OWCP issued a preliminary overpayment determination that appellant received an overpayment in compensation in the amount of \$3,072.00 for the period May 6 to July 28, 2012 because she returned to work full time, but continued to receive disability compensation. It found that she was without fault in the creation of the overpayment and requested that she provide financial information in order to determine waiver of recovery of the overpayment. Appellant was advised that, if she failed to complete the Form OWCP-20 and submit financial documents in support of waiver, within 30 days, pursuant to 20 C.F.R. § 10.438 waiver would be denied.

On October 1, 2012 OWCP received a signed overpayment action request form from appellant dated September 24, 2012. Appellant requested a telephone conference on the issues of fault and possible waiver of the overpayment. OWCP also received a completed overpayment recovery questionnaire (Form OWCP-20) from appellant dated September 25, 2015. Appellant explained that she was trying to climb out of debt and noted that she attached a credit report to show how much she owed that she was not able to pay. She stated that being on disability compensation did not give her any opportunity to get ahead financially. Appellant was contesting the overpayment because she notified OWCP and the employing establishment more than a month in advance that she was returning to work and she contended that she had no control over stopping her disability compensation payments in the system.

Appellant provided a credit record which demonstrated that she owed \$1,019.00 to Cavalry Portfolio Services for a past due amount, \$25,000.00 for U.S. Department of Education installment loan, and \$999.00 to a collection bureau for a past due amount, \$3,495.00 to Chase bank, and \$4,865.00 to a utilities company. She submitted bank statements which demonstrated that she had \$3.13 in a checking account, a negative balance in a credit union account, and \$404.07 in a savings account.

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<sup>2</sup> Docket No. 13-1145 (issued May 22, 2014).

Appellant reported that she received total monthly income of \$2,818.26 from earnings and that she had three dependents. She indicated that she had monthly expenses of \$1,100.00 for rent or mortgage, \$600.00 for food, \$500.00 for clothing, \$200.00 for utilities, \$50.00 for gas, \$200.00 for cable, \$153.00 and \$164.00 for telephones, \$240.00 for gasoline, \$250.00 for other miscellaneous household expenses, \$133.00 for automobile insurance, \$120.00 for personal necessities, and \$55.00 for monthly medication. Appellant further reported that she owed \$3,495.00 for a car loan with monthly payments of \$373.66 and \$4,865.00 back bill for utilities with monthly payments of \$300.00 for total monthly expenses of \$4,438.66. She noted that she had \$404.07 in her savings account.

By letter dated November 15, 2012, OWCP stated that it received appellant's completed overpayment recovery questionnaire and request for a telephone conference. It advised appellant to submit proof of her monthly bills and payments from the employing establishment for one month in order to schedule a telephone conference. OWCP reported that if no copies of the bills were received within 15 days, it would issue a final decision on the overpayment of \$3,072.00.

On December 4, 2012 OWCP received additional financial information from appellant, including employing establishment earnings and leave statements for November 2012, a copy of her lease agreement which indicated that rent was \$1,100.00 a month, and a November 23, 2012 letter from CVS Pharmacy where it reflected that she had three medications she paid \$60.00 for monthly.

By decision dated December 5, 2012, OWCP issued a final decision, finding that appellant had not submitted sufficient financial information to support a request for waiver.

On December 21, 2012, OWCP voided its December 5, 2012 decision and issued a new decision finalizing its preliminary determination that appellant received an overpayment in the amount of \$3,072.00. It denied waiver of recovery of the overpayment finding that the financial information received did not grant a basis for waiver of recovery of the overpayment. OWCP determined that it would deduct \$150.00 every 28 days from her continuing compensation benefits.

By order remanding case dated May 22, 2014, the Board set aside the December 21, 2012 OWCP decision finding that OWCP did not review and consider the financial information appellant submitted on October 1, 2012.<sup>3</sup> It remanded the case for OWCP to consider all of the financial information and to issue an appropriate decision on the issue of overpayment.

Following the Board's order, appellant submitted a May 28, 2014 statement. She alleged that she was never given the opportunity to defend herself on any of the allegations against her by OWCP or the employing establishment. Appellant believed that the actions taken against her were retaliation for her prior Equal Employment Opportunity (EEO) activity, union activity, and her involvement with prior OWCP claims.

In a June 2, 2014 statement, appellant contended that she was being set up to get kicked off of workers' compensation since she began to attend college classes. She stated that OWCP did nothing to help her return to work full-time, but she rehabilitated herself back to full-time

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<sup>3</sup> *Supra* note 2.

employment. Appellant reported that the workers' compensation situation had created a hostile work environment for her. She alleged that there was an abuse of authority on the part of the supervisors and OWCP personnel toward her.

On January 14, 2015 OWCP issued a *de novo* decision which finalized the overpayment in the amount of \$3,072.00 for the period May 6 to July 28, 2012.<sup>4</sup> It found that appellant was without fault, but denied waiver of recovery of the overpayment finding that the financial information received did not support her alleged expenditures.

### **LEGAL PRECEDENT**

Section 10.431 of OWCP's implementing regulations provides 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.<sup>5</sup> The written notification must also include a preliminary finding regarding whether the individual was at fault in the creation of the overpayment.<sup>6</sup> Additionally, OWCP is obliged to advise the individual of his or her right to inspect and copy the government records relating to the overpayment.<sup>7</sup> Lastly, the preliminary notice must inform the individual of his or her 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 waiver of recovery of the overpayment.<sup>8</sup> The recipient of the alleged overpayment may present evidence in response to OWCP's preliminary notice either in writing or at a precoupment hearing.<sup>9</sup> The evidence must be presented or the hearing requested within 30 days of the date of the written notice of overpayment.<sup>10</sup> Failure to request the hearing within this 30-day time period shall constitute a waiver of that right.<sup>11</sup>

OWCP procedures provide that, once an overpayment is identified and calculated, it is responsible for determining whether the claimant was with fault or without fault, issuing a preliminary finding, and unless a hearing is requested, it is responsible for issuing a final decision.<sup>12</sup> It indicates that any new determination which results in an overpayment warrants a separate formal decision and preliminary overpayment finding.<sup>13</sup> OWCP procedures further note

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<sup>4</sup> The decision noted that appellant began making payments in the amount of \$75.00 on October 4, 2013 and that the debt balance was currently \$2,397.00.

<sup>5</sup> 20 C.F.R. § 10.431(a).

<sup>6</sup> *Id.* at § 10.431(b).

<sup>7</sup> *Id.* at § 10.431(c).

<sup>8</sup> *Id.* at §10.431(d).

<sup>9</sup> *Id.* at § 10.432.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.4 (June 2009).

<sup>13</sup> *Id.*

that, if the claimant is determined to be without fault, Form CA-2202 (preliminary finding notice) must be released within 20 days of the date the overpayment is identified. It must clearly state the reason that the overpayment occurred and provide the preliminary finding that the claimant is without fault. Form CA-2202 informs the claimant of the right to submit evidence and the right to a preresoupment hearing on the issues of fact and amount of overpayment and waiver.<sup>14</sup>

### ANALYSIS

The Board finds the case not in posture for a decision.

In its May 22, 2014 order remanding case, the Board set aside OWCP's December 21, 2012 overpayment decision as OWCP had not considered the financial information appellant had submitted on October 1, 2012 in support of her request for waiver. The Board noted that appellant had requested a telephone conference on the issues of fault and possible waiver of the overpayment, but no telephone conference was held. The Board remanded the case for OWCP to consider the financial information submitted and issue an appropriate decision, after such further development of the evidence as necessary.

On January 14, 2015, OWCP issued a *de novo* decision, again denying waiver of recovery of the \$3,072.00 overpayment, stating that there was no financial information submitted in response to OWCP's November 12, 2012 request for financial records and that there was no evidence that appellant made payments to her alleged payees. The Board finds, however, that OWCP failed to follow its procedures in issuing its January 14, 2015 decision.<sup>15</sup>

Following its development of the issue of possible waiver, OWCP failed to issue a new preliminary determination providing appellant with the right to challenge the fact or amount of overpayment or allowing her to submit new information regarding waiver of recovery of the overpayment. The Board has previously held that if a case has been remanded to OWCP for additional development regarding waiver of overpayment, OWCP should issue a new preliminary overpayment determination providing appellant with new appeal rights, including the right to a preresoupment hearing, and the opportunity to submit current financial information which OWCP will evaluate to properly determine whether the overpayment should be waived.<sup>16</sup> The Board has explained that OWCP's failure to issue a preliminary determination following the Board's remand of an overpayment case infringes appellant's procedural rights under OWCP regulations.<sup>17</sup>

Accordingly, the Board finds that the case must be remanded for OWCP to issue a preliminary determination regarding the overpayment, in accordance with its procedures, prior to

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<sup>14</sup> *Id.* at Chapter 2.600.4(a)(2) (June 2009).

<sup>15</sup> 20 C.F.R. § 10.431, 103432; *see also* *K.H.*, Docket No. 11-603 (issued September 27, 2011); *K.G.*, Docket No. 08-2135 (issued April 16, 2009).

<sup>16</sup> *J.R.*, Docket No. 12-986 (issued November 13, 2012).

<sup>17</sup> *B.T.*, Docket No. 14-1909 (issued May 19, 2015). The Board found that OWCP's failure to issue a preliminary determination following the Board's remand of an overpayment case infringed appellant's procedural rights under its regulations at 20 C.F.R. §§ 10.431-432.

making any final overpayment determination. Following such further development as OWCP deems necessary, it shall issue an appropriate decision on whether overpayment should be waived.<sup>18</sup>

**CONCLUSION**

The Board finds the case not in posture. The case must be remanded to OWCP to issue a preliminary determination regarding the overpayment, in accordance with its procedures.

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 14, 2015 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.<sup>19</sup>

Issued: August 9, 2016  
Washington, DC

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

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

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<sup>18</sup> In light of the disposition reached in issue 1, issue 2 is moot.

<sup>19</sup> James A. Haynes, Alternate Judge, participated in the original decision but was no longer a member of the Board effective November 16, 2015.