United States Department of Labor
Employees' Compensation Appeals Board

R.H., Appellant	)	
and	)	**Docket No. 15-0392**
	)	**Issued: February 3, 2016**
U.S. POSTAL SERVICE, POST OFFICE, Savannah, GA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On December 9, 2014 appellant filed a timely appeal of two September 10, 2014 merit decisions and a December 1, 2014 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

ISSUES

The issues are: (1) whether OWCP properly determined that an overpayment in the amount of $14,526.68 for the period July 22, 2006 through November 30, 2008 was created due to appellant being paid at an incorrect pay rate; (2) whether OWCP properly denied waiver of the overpayment; (3) whether OWCP met its burden of proof to terminate appellant's wage-loss compensation based on his refusal of an offer of temporary suitable work effective

[1] 5 U.S.C. § 8101 *et seq.*

[2] Appellant's AB-1 appeal form states his appeal is from OWCP's decision of August 6, 2014. The Board is also taking jurisdiction to consider decisions of September 10 and December 1, 2014.

September 10, 2014; and (4) whether OWCP properly refused to reopen the case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On July 26, 2006 appellant, then a 41-year-old automation clerk, filed an occupational disease claim (Form CA-2) alleging that on July 13, 2006 he first became aware that his lower back pain was due to his employment. The employing establishment noted that at the time of the injury he was a part-time flexible employee and did not work a 40-hour per week schedule. OWCP accepted the claim for lumbar sprain, closed lumbar vertebra fracture without spinal cord injury, acquired spondylolisthesis, and lumbar or thoracic neuritis or radiculitis.

On August 24, 2006 OWCP received a notification of personnel action (Form SF-50) which was processed on March 1, 2006. The form stated that appellant received a step increase to grade 05 step K, effective February 18, 2006. The form indicated that his title was mail processing clerk, the position type was part-time flexible, the pay rate code as hourly, and base salary was $21.32.

In an October 23, 2006 claim for compensation (Form CA-7), appellant claimed wage-loss compensation for the period July 14 to October 23, 2006. The employing establishment noted base pay of $21.89 per hour, night differential of $26.61 per year and Sunday premium of $4.01 per year. It noted the pay for night differential and Sunday premium were "average." The employing establishment checked "no" to the question of whether appellant worked a fixed 40-hour per week schedule. It noted appellant's work schedule for the two-week period prior to stopping work and that he worked four days per week. Appellant received disability benefits on the short-term rolls as of July 22, 2006.

In a January 5, 2007 memorandum to file, OWCP calculated appellant's pay rate as of July 13, 2006, the date of injury, at a 66 2/3 compensation rate. It noted the weekly pay rate as $875.60, night differential pay of $38.28, and Sunday premium of $19.81 for a total weekly pay rate of $933.69. Under special instructions, OWCP reported that the pay for night differential and Sunday premium were confirmed by a December 18, 2006 Form CA-110 and the weekly pay rate was calculated by multiplying $21.89 by 2080 and dividing by 52 to reach a weekly salary of $875.60.

On December 24, 2006 appellant was placed on the periodic rolls for temporary total disability. His weekly pay rate was determined to be $933.69 and his percentage of pay was indicated as 66 2/3. OWCP informed him that he had been paid the net amount of $11,556.68 for the period July 22 to November 20, 2006 and a regular net payment of $2,285.00 was paid for the period November 28 to December 23, 2006. Appellant was informed that compensation benefits were paid every four weeks and that his first payment would be paid within 15 days.

On January 18, 2007 OWCP received a January 17, 2007 court order to withhold income from appellant for child support.

On February 27, 2007 OWCP adjusted appellant's compensation rate to 75 percent and paid him $2,801.07 for the period February 18 to March 17, 2007. The weekly pay rate was listed as $933.69.

On March 7, 2007 OWCP calculated the amount appellant was owed for the incorrect compensation rate and issued a separate payment for the difference in pay based on the correct pay rate of 75 percent and the incorrect pay rate of 66 2/3 that appellant was paid for the periods July 22 to November 20, 2006 and November 28, 2006 through February 17, 2007.

On February 12, 2008 the employing establishment informed OWCP that appellant had returned to full-time modified duty on February 6, 2008.

In a February 26, 2008 Form CA-7, claim for wage-loss compensation, appellant claimed for the period February 9, 2008 to the present. Under section 8, appellant's base pay was listed as $22.50 per hour and that he was entitled to pay for night differential and Sunday premium.

In an April 16, 2008 Form CA-7, claim for wage-loss compensation, appellant's base salary as of July 13, 2006 was listed as $24.00 per hour.

On CA-7 forms dated June 4, 10, and 19, 2008 appellant's base pay as of July 17, 2006 was listed as $23.20. The employing establishment checked "yes" to the question of whether appellant worked a fixed 40-hour per week schedule and noted the scheduled workdays.

On April 17, 2008 Form CA-110 notes OWCP stated that appellant had called to say he accepted an offer of suitable work and was waiting for a return to work date.

On August 13, 2008 appellant accepted a permanent full-time modified job as mail processing clerk at the Savannah Processing and Distribution Center.

Appellant stopped work on October 26, 2008 and returned to work on December 1, 2008.

In CA-7 forms dated December 2, 2008, appellant's base salary as of October 26, 2008 was listed as $25.32 per hour. The employing establishment checked "yes" to the question of whether he worked a fixed 40-hour per week schedule and noted the scheduled workdays.

By decision dated February 3, 2009, OWCP denied appellant's claim for wage-loss compensation for the period October 26 to December 29, 2008.

On October 30, 2009 appellant filed a claim for a recurrence of disability (Form CA-2a) commencing October 29, 2009.

By decision dated February 4, 2010, OWCP affirmed as modified the February 3, 2009 decision. It found appellant was entitled to wage-loss compensation for the period October 29 to November 30, 2008, but it affirmed the denial of wage-loss compensation for the period December 1 to 29, 2008.

On February 9, 2010 the employing establishment provided information regarding appellant's pay rate as of October 29, 2008. It noted the annual pay as $51,640.00, weekly night differential pay of $51.45, and weekly Sunday premium pay as $99.31.

On March 1, 2010 OWCP paid appellant wage-loss compensation for the period October 29 to November 30, 2008. The weekly pay rate was found to be $1,143.84, based on a base pay rate of $993.08 and additional pay of $150.76 and based upon the date of his recurrence of disability.

On September 28, 2012 appellant filed a Form CA7, claim for wage-loss compensation, for the period April 29, 2012 to the present.

In a letter dated October 11, 2012, OWCP advised appellant as to the evidence required to establish his claim for a recurrence of disability.

By decision dated November 14, 2012, OWCP denied appellant's recurrence claim.

OWCP received, as to the termination issue, a May 2, 2013 functional capacity evaluation (FCE) and July 3, 2013 report from Dr. Thomas E. Runyan, an examining Board-certified pain medicine physician and anesthesiologist, as set forth below.

Under assesment, the May 2, 2013 FCE found appellant was capable of performing sedentary work. It defined sedentary work as lifting up to 10 pounds occassionally, frequent negligible amounts of force or constantly to lift, push/pull, carry or otherwise move objects, sitting most of the time and may involve brief periods of walking or standing. The FCE related that appellant "did not consistently demonstrate this demand level in the fact that he cannot consistently handle 10 pounds of force and he could not tolerate prolonged sitting."

In a report dated July 3, 2013, Dr. Runyan diagnosed lower extremity radicular syndrome, thoracic or lumbasacral radiculitis or neuritis, lumbago, and lumbar sprains/strains. He provided physical examination findings and reviewed the May 2, 2013 FCE. Dr. Runyan noted that he disagreed with the findings found on the FCE. He submitted a July 3, 2013 duty status report (Form CA-17) indicating that appellant was capable of working eight hours with restrictions. The restrictions included up to 10 pounds of intermittent lifting/carrying; up to eight hours of intermittent sitting; up to four hours of intermittent walking; up to two hours of intermittent walking, kneeling, twisting, and bending/stooping; up to eight hours of continuous reaching above the shoulder; and up to one of kneeling.

On September 5, 2013 appellant requested reconsideration of the November 14, 2012 decision denying his claim for a recurrence of disability on and after April 29, 2012 due to a worsening of his condition.

By decision dated October 11, 2013, OWCP affirmed in part and modified in part the November 14, 2012 decision. It found the evidence insufficient to establish compensation benefits for the period April 29, 2012 to February 12, 2013, but sufficient to establish wage-loss compensation on and after February 13, 2013.

OWCP received evidence regarding appellant's disability, work restrictions, and modified job offers from the employing establishment.

On September 30, 2013 the employing establishment offered appellant a position as a modified sales and service/distribution associate at the Bluffton Main Post Office.

On March 25, 2014 an OWCP medical adviser reviewed the May 2, 2013 FCE and recommended referral for a second opinion evaluation.

On March 28 and April 29, 2014 OWCP placed appellant on the periodic rolls for temporary total disability.

On April 16, 2014 OWCP referred appellant for a second opinion evaluation with Dr. Douglas Hein, a Board-certified orthopedic surgeon, regarding the degree and extent of appellant's injury-related disability and work capacity, if any.

In a May 28, 2014 report, Dr. Hein, based on a review of the medical evidence, statement of accepted facts, and physical examination, noted the accepted conditions of lumbar and back sprains, closed lumbar vertebra fracture without spinal cord injury, acquired spondylolisthesis, and lumbosacral or thoracic neuritis and radiculitis. Review of x-rays showed solid L3-4 arthrodesis instrumentation with normal alignment while a March 13, 2013 magnetic resonance imaging (MRI) scan showed L3-4 arthrodesis with no evidence of foraminal encroachment. A physical examination revealed 90 degrees thoracolumbar flexion, 15 degrees lateral extension, 25 degrees bending, 30 degrees rotation, and no manual motor deficits. Dr. Hein reviewed the May 2013 FCE which indicated that appellant was capable of sedentary work. He noted that he disagreed with the restrictions found by the test, but opined that a new FCE was unnecessary. On the attached work capacity evaluation form (Form OWCP-5c), Dr. Hein opined that appellant was capable of working with restrictions. Restrictions included no bending/stooping, up to two hours of pushing/pulling and lifting up to 20 pounds, and no climbing ladders.

On July 23, 2014 the employing establishment offered appellant the temporary position of modified clerk working at the Bluffton Post Office with days off on Sunday and Wednesday with hours of Tour 2 listed as 9:00 a.m. to 6:00 p.m and the position restrictions. Restrictions for the position included: no bending/stooping, no climbing ladders, and up to two hours of pushing/pulling/lifting up to 20 pounds. The employing establishment informed appellant that the position was available August 1, 2014. The job required physical activity of up to two hours of intermittent lifting of up to 20 pounds; up to hours of pushing and pulling up to 20 pounds intermittently; intermittent standing and sitting; and avoiding bending and stooping, but may squat to pick items weighing under 20 pounds up from the floor. Duties of the position included casing box mail, assisting customers, clerical duties, and operating the register to process packages and orders for goods. The employing establishment noted that appellant would need window training and Soheme training.

By letter dated August 4, 2014, OWCP issued a notice proposing to reduce appellant's compensation based on his refusal of a temporary light-duty assignment as a modified clerk. It advised him that he had the capacity to earn wages in the temporary position of modified clerk of $1,068.73 per week. OWCP calculated that appellant's compensation should be adjusted to

$1,073.14 using the *Shadrick*[3] formula. It noted that the salary for his job when disability recurred was $1,129.62, that the current salary for his job and step as of August 4, 2014 was $1,129.62, and that he was currently capable of earning $1,068.73 per week, as a temporary modified clerk. OWCP therefore determined that appellant had 95 percent wage-earning capacity. It found that his current adjusted compensation rate per four-week period was $172.00. OWCP noted that the 40-hour per week light-duty assignment was in accordance with the restrictions noted by Dr. Hein, an OWCP referral physician. Appellant was given 30 days to report to the light-duty job assignment or show why his declining the position was justified.

With respect to the issue of overpayment due to an incorrect pay rate, OWCP received an August 5, 2014 letter from the employing establishment informing OWCP that from July 22, 2005 to July 22, 2006 appellant averaged 34.10 hours a week and became a full-time employee on September 1, 2007. It attached a September 1, 2007 Form SF-50 notification of personnel action which stated that appellant had been converted to a full-time employee effective that day. Appellant's position title was mail processing clerk with the Savannah, Georgia Processing and Distribution Center listed as place of employment.

In an August 6, 2014 preliminary notice of overpayment, OWCP informed appellant that it determined that he had been overpaid in the amount of $14,528.68[4] for the period July 22, 2006 to November 30, 2008 because he had been paid at an incorrect pay rate. It noted that he had been incorrectly paid at the rate for a full-time employee when he was a part-time flexible employee for the period July 22, 2006 to November 30, 2008 or 863 calendar days. OWCP noted that appellant's pay had been initially calculated based on a base weekly pay rate of $875.60, weekly night differential pay rate of $38.28, and weekly Sunday premium pay rate of $19.81. It calculated his total pay for the period July 22, 2006 to February 29, 2008 or 588 days as $933.69 times 75 percent which equaled $700.27 per week. OWCP then divided $700.27 by seven to find a daily pay rate of $100.04. Then it multiplied $100.04 by 588 days to arrive at a total of $58,822.47. Next, OWCP calculated the amount appellant received for the period March 1 to November 30, 2008 or 275 days as $933.69 times 75 percent plus $29.98 for cost-of-living increase resulting in a total of $730.25 per week. It then divided $730.25 by seven to find a daily pay rate of $104.32. Next, OWCP multiplied $104.32 by 275 days to arrive at a total of $28,688.39. It then combined the two calculated amounts to arrive at a total of $87,510.86 as the amount he had actually been paid for the period July 22, 2006 to November 30, 2008.

Next, OWCP calculated the amount appellant should have been paid based on his earnings for the year prior to disability. It divided his base pay of $37,588.86 by 52 to arrive at a weekly pay rate of $722.86. OWCP also divided $1,913.99 by 52 (night differential pay) to arrive at $36.81 weekly pay rate for night differential and $990.52 by 52 (Sunday premium) to arrive at $19.05 weekly pay rate for Sunday premium pay. It calculated appellant's total pay that he should have received during the period July 22, 2006 to February 29, 2008 or 588 days as $788.75 times 75 percent which equaled $584.04 which was divided by 7 to find a daily pay rate of $83.43. Then OWCP multiplied $83.43 by 588 days to arrive at a total of $49,059.26. Next,

[3] 5 ECAB 376 (1953).

[4] This appears to be a typographical error as OWCP calculated an overpayment of $14,626.68 in the attached memorandum.

it calculated the amount appellant received for the period March 1 to November 30, 2008 or 275 days as $788.75 times 75 percent plus $25.21 for cost-of-living increasing resulting in a total weekly pay rate of $609.25. OWCP then divided $609.25 by seven to find a daily pay rate of $87.04. It multiplied the daily pay rate of $87.04 by 275 days to arrive at a total of $2,934.32. OWCP then combined the amounts to arrive at a total of $72,994.18 as the amount appellant should have been paid for the period July 22, 2006 to November 30, 2008. It then calculated and found an overpayment of $14,526.68 when $72,994.18 was subtracted from $87,510.86. OWCP advised that appellant had been found without fault in the creation of the overpayment.

On September 3, 2014 OWCP received the following regarding its preliminary overpayment findings. In a form dated August 18, 2014, appellant requested waiver of the overpayment. In an undated and unsigned Overpayment Recovery Questionnaire form (Form OWCP-20), he indicated that he had no in cash on hand, no checking or savings account balances, no stock or bonds, no real estate, and no personal property or other funds. Appellant disagreed that there was an overpayment as the employing establishment was responsible for information regarding his pay rate.

In an August 18, 2014 statement, appellant requested a closer review of his claim. He noted that he had worked 40 hours per week, his base pay was $37,588.86, he earned $47,440.00 in 2005 and $55,101.00 in 2004. Appellant argued that he was not a part-time employee as he received benefits for thrift savings, health and life insurance, annual and sick leave, Sunday premium pay, and night differential pay.

By decision dated September 10, 2014, OWCP finalized the overpayment determination. It denied waiver of an overpayment of $14,526.68 as appellant failed to submit any supporting financial documentation or fully completed overpayment questionnaire form to establish waiver of the overpayment.

By separate decision dated September 10, 2014, OWCP terminated appellant's wage-loss compensation effective that day. It found that he had refused an suitable offer of temporary work and that his wage loss was thus terminated under 20 C.F.R. § 10.500(a). OWCP advised appellant to file a recurrence, Form CA-2a, if the July 23, 2014 light-duty assignment was withdrawn or his employment-related condition worsened such that he could not perform the duties of the light-duty assignment.

In a letter dated September 22, 2014, appellant disagreed with the overpayment decision.

In an appeal form request dated September 22, 2014, appellant checked that he was requesting reconsideration of the September 10, 2014 OWCP decision which terminated his compensation based on his refusal of an offer of temporary suitable work.

On October 10, 2014 appellant requested reconsideraton of the September 10, 2014 OWCP decision terminating his wage-loss compensation under 20 C.F.R. § 10.500(a)(1). In a letter dated October 10, 2014, he argued that OWCP erred in reducing his wage-loss compensation.

In support of his request appellant submitted medical evidence as set forth below.

In an April 9, 2014 report signed by Rachel Landing, a certified nurse pracitioner, and cosigned by Dr. Ortelio Bosch, an examining Board-certified pain medicine physician and anesthesiologist, released appellant to work with restrictions. The restrictions included: no lifting more than 10 pounds, no repetitive bending or twisting, and no prolonged standing.

By decision dated December 1, 2014, OWCP denied reconsideration of the September 10, 2014 termination decision.

LEGAL PRECEDENT -- ISSUE 1

An employee is paid compensation for total disability equal to a percentage of his or her monthly pay.[5] To calculate monthly pay, the initial issue is the determination of the specific time when the employee's monthly pay will be calculated. Under 5 U.S.C. § 8101(4), the monthly pay is determined at the time of injury, the time disability begins, or the time compensable disability recurs, if the recurrence begins more than six months after a return to regular full-time employment.[6]

Once the proper time period is determined, the pay rate is determined under 5 U.S.C. § 8114(d). This section provides a specific methodology for determining pay rate:

> "(1) If the employee worked in the employment in which he was employed at the time of his injury during substantially the whole year immediately preceding the injury and the employment was in a position for which an annual rate of pay--
>
> > (A) was fixed, the average annual earnings are the annual rate of pay; or
> >
> > (B) was not fixed, the average annual earnings are the product obtained by multiplying his daily wage for particular employment, or the average thereof if the daily wage has fluctuated, by 300 if he was employed on the basis of a 6-day workweek, 280 if employed on the basis of a 5-day week, and 260 if employed on the basis of a 5-day week.
>
> "(2) If the employee did not work in employment in which he was employed at the time of his injury during substantially the whole year immediately preceding the injury, but the position was one which would have afforded employment for substantially a whole year, the average annual earnings are a sum equal to the average annual earnings of an employee of the same class working substantially the whole immediately preceding year in the same or similar employment by the United States in the same or neighboring place, as determined under paragraph (1) of this subsection.
>
> "(3) If either of the foregoing methods of determining the average annual earnings cannot be applied reasonably and fairly, the average annual earnings are a sum

[5] 5 U.S.C. § 8106(c).

[6] *Id*. at § 8101(4).

that reasonably represents the annual earning capacity of the injured employee in the employment in which he was working at the time of the injury having regard to the previous earnings of the employee in federal employment, and of other employees of the United States in the same or most similar employment in the same or neighboring location, other previous employment of the employee, or other relevant factors. However, the average annual earnings may not be less than 150 times the average daily wage the employee earned in the employment during the days employed within one year immediately preceding his injury."

ANALYSIS -- ISSUE 1

OWCP found an overpayment of compensation occurred during the period July 22, 2006 to November 30, 2008 because appellant had been paid compensation based on an incorrect rate of pay. Appellant received wage-loss compensation based on a pay rate of $933.69 per week. This amount was based on a full-time salary when appellant was a part-time flexible employee at the time of his injury. The Board finds, however, the correct pay rate must be determined in accord with the provisions of 5 U.S.C. § 8114.

The evidence indicates that appellant worked in the employment in which he was employed at the time of his injury during substantially the whole year immediately preceding the injury. While appellant argues that he was full-time employee, the probative evidence of record does not support this argument. The SF-50 clearly indicates that he was a part-time flexible employee with no regular scheduled work hours per week. The February 28, 2006 SF-50 notice of personnel action notes a base salary of $21.32 per hour. In an August 5, 2014 letter, the employing establishment advised that from July 22, 2005 to July 22, 2006 appellant averaged 34.10 hours per week and became a full-time employee on September 1, 2007. Therefore, the applicable section is 5 U.S.C. § 8114(d)(1)(b), which determines the pay rate based on the average annual earnings of the employee. As noted above appellant worked an average of 34.10 hours per week.

The Board accordingly finds that pursuant to 5 U.S.C. § 8114(d)(1)(b) appellant's pay rate was his annual rate of pay based on an averaged 34.10 hours per week. Since appellant received FECA compensation based on a full-time employee's salary, there was an overpayment of compensation for the period July 22, 2006 to August 31, 2007.

However, the Board finds that OWCP did not make adequate findings as to how the overpayment of compensation was calculated for the period September 1, 2007 through November 30, 2008. The record establishes that appellant became a full-time employee on September 1, 2007. The record remains unclear as to whether this was a modified position, or whether he in fact returned to this position on September 1, 2007. The record also indicates that appellant returned to a full-time position on February 6, 2008 and then stopped work again on October 26, 2008. It is unclear why he was made a full-time employee as of September 1, 2007 when he was receiving wage-loss compensation on the periodic rolls for temporary total disability. If appellant was a full-time employee as of September 1, 2007, as the SF-50 establishes, OWCP has not provided any explanation as to why he continued to receive disability wage-loss compensation.

If appellant did return to regular full-time work at some point after September 1, 2007, OWCP has also not explained why he would not be entitled to wage-loss compensation based on a full-time employee salary, when he claimed his subsequent recurrence of disability, which was accepted for the period October 26 to December 29, 2008. If, however, he only returned to modified work after his original injury, he would not be entitled to a recurrent pay rate, pursuant to the statute.[7] As previously noted, under 5 U.S.C. § 8101(4) the monthly pay is determined at the time of injury, the time disability begins, or the time compensable disability recurs, if the recurrence begins more than six months after a return to regular full-time employment.

The Board thus finds that there was an overpayment of compensation for the period July 22, 2006 to August 31, 2007, but finds that further findings are required regarding the amount of the overpayment for the period September 1, 2007 to November 30, 2008. Since OWCP has not fully explained whether appellant returned to work on September 1, 2007 or why he would not be entitled to the pay rate for a full-duty employee on and after September 1, 2007, the date he became a full-duty employee, further findings are required. The case will be remanded to OWCP for further development and a proper decision on the period appellant was paid at an incorrect pay rate.

Thus the Board affirms the fact of overpayment for the period July 22, 2006 to August 31, 2007, but remands for further findings as to the amount of the overpayment and whether the amount of overpayment for the period September 1, 2007 through November 30, 2008.

LEGAL PRECEDENT -- ISSUE 2

When an overpayment of compensation has been made 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.[8] OWCP may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating an overpayment.[9]

The individual who received the overpayment is responsible for providing information about income, expenses, and assets as specified by OWCP. This information is necessary to determine whether an overpayment should be waived. This information will also be used to determine the repayment schedule, if necessary. Failure to submit the requested information within 30 days of the request shall result in denial of waiver and no further request for waiver shall be considered until the requested information is furnished.[10]

[7] *See L.W.*, Docket No. 10-1425 (issued April 26, 2011).

[8] 5 U.S.C. § 8129(a).

[9] 20 C.F.R. § 10.433(a).

[10] *Id.* at § 10.438.

ANALYSIS -- ISSUE 2

As appellant was found to be without fault in the creation of the overpayment in compensation, waiver must therefore be considered, and repayment is still required unless adjustment or recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.

OWCP requested, in its preliminary notice of overpayment dated September 12, 2014, that appellant provide financial information and a completed overpayment recovery questionnaire. Appellant failed to submit any financial information or a fully completed overpayment questionnaire form for OWCP to determine whether waiver of the overpayments was appropriate. Because he failed to submit the requested information within 30 days, OWCP had no discretion in the matter; the law required a denial of waiver.[11] OWCP regulations mandate that the failure to submit requested information results in the denial of waiver of the overpayment.[12] Thus, it properly denied appellant's request for waiver of recovery of the overpayment.

LEGAL PRECEDENT -- ISSUE 3

Once OWCP accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits.[13] Section 10.500(a) states that appellant is only entitled to wage-loss compensation for the "periods during which an employee's work-related medical condition prevents him from earning the wage earned before the work-related injury."[14]

OWCP procedures note that 20 C.F.R. § 10.500 provides the basic rules governing continuing receipt of compensation benefits and return to work as follows:

> "(a) Benefits are available only while the effects of a work-related condition continue. 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. For example, an employee is not entitled to compensation for any wage-loss claimed on a CA-7 to the extent that evidence contemporaneous with the period claimed on a CA-7 establishes that an employee had medical work restrictions in place; that light duty within those work restrictions was available; and that the employee was previously notified in writing that such duty was available. Similarly, an employee receiving continuing periodic payments for disability was not prevented from earning the wages earned before the work-related injury if the evidence establishes that the employing establishment had offered, in accordance with

[11] *J.V.*, Docket No. 15-0140 (issued November 25, 2015).

[12] 20 C.F.R. § 10.438(b).

[13] *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

[14] 20 C.F.R. § 10.500(a).

OWCP procedures, a temporary light-duty assignment within the employee's work restrictions. (The penalty provision of 5 U.S.C. 8106(c)(2) will not be imposed on such assignments under this paragraph.)"[15]

Section 8123(a) provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.[16] When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of FECA, to resolve the conflict in the medical evidence.[17]

ANALYSIS -- ISSUE 3

OWCP accepted the claim for lumbar sprain, closed lumbar vertebra fracture without spinal cord injury, acquired spondylolisthesis, and lumbar or thoracic neuritis or radiculitis. It placed appellant on the periodic rolls for temporary total disability by letters dated March 28 and April 29, 2014. By decision dated August 4, 2014, OWCP advised him that it was proposing to reduce his compensation based on his refusal of a suitable temporary light-duty job and gave him 30 days to either report to the position or provide a reason why his declining the position was justified. By decision dated September 10, 2014, it terminated appellant's monetary compensation pursuant to section 10.500(a) effective September 10, 2014 because he refused a July 23, 2014 offer of temporary light-duty assignment as modified clerk. OWCP found that the weight of the medical evidence established that the modified clerk position was within the restrictions found by Dr. Hein and as set forth in the July 23, 2014 temporary light-duty job offer. The Board finds OWCP erred in terminating appellant's compensation.

Initially, the Board finds there is an unresolved conflict in the medical opinion evidence between Dr. Hein, an OWCP referral physician, and Drs. Bosch and Runyan, appellant's treating physicians, regarding appellant's work restrictions.

In a report dated July 3, 2013, Dr. Runyan, an examining Board-certified pain medicine physician and anesthesiologist, reviewed and concurred with a May 2, 2013 FCE. He also submitted a July 3, 2013 duty status report indicating that appellant was capable of working eight hours with restrictions. The restrictions included up to 10 pounds of intermittent lifting/carrying; up to eight hours of intermittent sitting; up to four hours of intermittent walking; up to two hours of intermittent walking, kneeling, twisting, and bending/stooping; up to eight hours of continuous reaching above the shoulder; and up to one of kneeling.

[15] 20 C.F.R. § 10.500(a); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.2(c)(a) (June 2013).

[16] 5 U.S.C. § 8123(a). *See S.R.*, Docket No. 09-2332 (issued August 16, 2010); *Y.A.*, 59 ECAB 701 (2008); *Darlene R. Kennedy*, 57 ECAB 414 (2006).

[17] *A.R.*, Docket No. 09-1566 (issued June 2, 2010); *M.S.*, 58 ECAB 328 (2007); *Bryan O. Crane*, 56 ECAB 713 (2005).

In an April 9, 2014 report signed by Ms. Landing, a certified nurse practitioner, and cosigned by Dr. Bosch, provided work restrictions for appellant which included no lifting more than 10 pounds, no prolonged standing, and no repetitive bending or twisting.

In a May 28, 2014 report, Dr. Hein, an OWCP referral physician, reviewed the May 2013 FCE which indicated that appellant was capable of sedentary work. He noted that he disagreed with the restrictions found by the test, but opined that a new FCE was unnecessary. On the attached work capacity evaluation (Form OWCP-5c), Dr. Hein indicated that appellant was capable of working with restrictions. Restrictions included: no bending/stooping, up to two hours of pushing/pulling/lifting up to 20 pounds, and no climbing ladders.

OWCP found that the weight of medical evidence rested with the report of Dr. Hein, the second opinion physician. It determined that the temporary light-duty position offered by the employing establishment was suitable as it was within the restrictions as set forth by Dr. Hein. The Board finds that a conflict in medical opinion arose between Dr. Hein and Drs. Runyan and Bosch, appellant's treating physicians, on the issue of appellant's lifting restrictions and whether the offered position was suitable. Appellant's treating physicians and OWCP's second opinion physician were in agreement regarding the work restriction of no bending or stooping, but disagreed on how the lifting restriction. Both Drs. Runyan and Bosch opined that appellant was limited to lifting no more than 10 pounds while Dr. Hein concluded that appellant was capable of lifting up to 20 pounds. The temporary position offered by the employing establishment included up to 2 hours of lifting up to 20 pounds, which was outside the weight restriction noted by Drs. Runyan and Bosch.

Due to the unresolved conflict in medical opinion on the issue of appellant's lifting restriction, the weight of the evidence does not establish the suitability of the offered position. The Board finds that OWCP did not discharge its burden of proof to justify the termination of appellant's monetary compensation under 20 C.F.R. § 10.500(a).

Secondly, Board notes OWCP failed to follow its procedures under section 2.900.9 regarding formal decisions denying compensation under 20 C.F.R. § 10.500(a). The procedure manual states:

> "(a) Because the denial of compensation under 20 C.F.R. § 10.500(a) is not a termination of benefits for refusal to accept suitable work, a formal denial of compensation under the auspices of 20 C.F.R. § 10.500(a) should:
>
> > (1) Deny compensation for wage loss, or reduce compensation based upon the expected WEC had the light[-]duty assignment been accepted, for the duration of the assignment or indefinitely (depending on whether the light[-]duty assignment was for a specific period of time or was to be provided indefinitely)"[18]

[18] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.9(7)(a)(1) (June 2013).

In its September 10, 2014 decision, OWCP terminated appellant's compensation based on his refusal of what it deemed to be a suitable temporary light-duty job. However, it failed to explain why it terminated appellant's wage-loss compensation instead of reducing the compensation based on the August 4, 2014 proposed reduction of compensation.

For the reasons set forth above, the Board reverses OWCP's September 10, 2014 decision terminating appellant's wage-loss compensation for refusing an offer of suitable temporary work under 20 C.F.R. § 10.500(a).

CONCLUSION

The Board finds OWCP properly determined that appellant received an overpayment in for the period July 22, 2006 to August 31, 2007, but remands for further findings on the amount of the overpayment and whether there was an overpayment of compensation for the period September 1, 2007 through November 30, 2008. The Board also finds that OWCP properly denied waiver of the overpayment. The Board further finds that OWCP improper terminated appellant's wage-loss compensation under 20 C.F.R. § 10.500(a)(1). In light of the Board's disposition on the third issue, the fourth issue is moot.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 10, 2014 concerning an overpayment of compensation is affirmed in part and remanded in part for further consideration as set forth above. The decision of the Office of Workers' Compensation Programs dated September 10, 2014 terminating appellant's wage-loss compensation is reversed.

Issued: February 3, 2016
Washington, DC

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

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

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