

**United States Department of Labor
Employees' Compensation Appeals Board**

T.D., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Austin, TX, Employer**

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**Docket No. 16-0565
Issued: May 5, 2016**

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
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On February 3, 2016 appellant filed a timely appeal from a January 5, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether OWCP properly found an overpayment of \$23,753.04 was created; (2) whether OWCP properly found appellant was at fault in creating the overpayment and not eligible for waiver; and (3) whether OWCP properly determined the overpayment should be recovered by deducting \$500.00 from appellant's 28-day compensation payments.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On December 20, 2013 appellant, then a 49-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on December 17, 2013 she sustained injuries in the performance of duty. She reported that she was rear-ended by another vehicle as she was stepping out of her vehicle to deliver a parcel. Appellant stopped work on the date of injury. OWCP initially accepted the claim on January 10, 2014 for lumbar sprain and right shoulder joint derangement. The claim was also accepted for right shoulder bursae and tendon disorder, displacement of cervical intervertebral disc and displacement of lumbar intervertebral disc without myelopathy. Appropriate treatment and compensation benefits were paid.

Appellant submitted a Form CA-7 claim for compensation on March 5, 2014, claiming leave without pay (LWOP) from December 17, 2013 to February 21, 2014. She continued to submit CA-7 forms claiming LWOP from February 22, 2014. The record indicates that on February 14, 2014 appellant underwent right shoulder surgery that included a rotator cuff repair.

By letter dated March 13, 2014, appellant's counsel indicated that appellant was pursuing a third-party claim against the driver of the other vehicle. Counsel noted that should recovery be made from the negligent party, OWCP would have to be reimbursed. In a March 27, 2014 letter, OWCP indicated that \$24,275.60 in medical payments had been made to date. By letter dated April 18, 2014, it reported \$25,190.19 in medical payments as of that date, with no wage-loss compensation having been paid.

OWCP indicated in a May 5, 2014 letter to appellant's counsel that a Form CA-1108, Long Form Statement of Recovery, had been approved. It was noted that the Federal Government's statutory right to refund was \$16,794.30, and a payment in that amount should be made. OWCP also noted that under 5 U.S.C. § 8132, a claimant who receives a third-party recovery must refund the amount of compensation paid and credit any surplus toward future payments of compensation. The letter indicated that compensation included medical benefits and wage-loss compensation.

The Form CA-1108 dated April 24, 2014 reported that the gross recovery was \$100,000.00. After deducting attorney fees (\$33,333.00), court costs (\$5,487.96), and an additional 20 percent (\$12,235.81), the remainder was \$48,943.23. After deducting the medical benefits paid of \$25,190.19, the form indicated that a surplus of \$23,753.04 was created. As to the amount to be refunded to the United States, additional attorney fees of \$8,395.89 (33.33 percent) were deducted from the medical benefits paid of \$25,190.19, resulting in a refund owed of \$16,794.30.

The record indicates that OWCP received a \$16,794.30 payment dated May 21, 2014. By letter dated July 23, 2014, OWCP acknowledged receipt of the payment and noted the surplus of \$23,753.04.

Appellant was referred for a second opinion examination by Dr. James Butler, III, a Board-certified orthopedic surgeon, regarding whether appellant had a continuing employment-related condition. In a report dated November 19, 2014, Dr. Butler diagnosed lumbar sprain and

right shoulder rotator cuff. He opined that appellant continued to have disabling residuals of her right shoulder and lumbar spine injuries.

By letter to appellant dated January 30, 2015, OWCP noted that she had undergone right shoulder rotator cuff surgery on February 14, 2014, and returned to part-time work on October 14, 2014. It reported that “our office credited wage-loss compensation in the amount of \$24,129.07 for the period [February 1 to October 13, 2014].” The record indicates that on February 27, 2015 OWCP issued a wage-loss compensation payment of \$6,237.32 for the period October 14, 2014 to February 7, 2015.

In a letter dated February 17, 2015, OWCP advised appellant of a preliminary determination that an overpayment of \$23,753.04 had been created. According to OWCP, for the period February 1 to October 13, 2014, appellant was entitled to \$24,129.07 in wage-loss net compensation. OWCP also reported it had paid \$26,130.83 in medical benefits from June 26 to September 24, 2014. The preliminary determination further found, “Due to the fact that you surpassed the amount of your surplus total when the bills and compensation paid are combined, your case will not be closed however you do have an overpayment which was the amount of your surplus total, \$23,753.04.”

On March 13, 2015 appellant requested a preresoupment hearing. She argued that OWCP had stopped her wage-loss compensation and had exhausted the surplus. On October 22, 2015 appellant requested a review of the written record in lieu of a hearing.²

By decision dated January 5, 2016, the hearing representative finalized the preliminary determination that a \$23,753.04 overpayment was created and appellant was at fault in creating the overpayment. She found that the overpayment should be recovered by deducting \$500.00 from continuing compensation payments.

LEGAL PRECEDENT

FECA provides that where an injury or death for which compensation is payable is caused under circumstances creating a legal liability in a person other than the United States to pay damages and a beneficiary entitled to compensation from the United States for that injury or death receives money or other property in satisfaction of that liability as a result of suit or settlement by him or her in his or her behalf, the beneficiary, after deducting therefrom the costs of suit and a reasonable attorney’s fee, shall refund to the United States the amount of compensation paid by the United States and credit any surplus on future payments of compensation payable to him or her for the same injury.³ The applicable regulations reiterate that after the refund owed to the United States is calculated, FECA beneficiary retains any surplus remaining and this amount is credited, dollar for dollar, against future compensation for the same injury.⁴ OWCP will resume the payment of compensation only after the FECA

² A Form CA-110 memorandum of telephone call indicates that appellant missed a scheduled hearing on October 19, 2015 and requested a review of the written record.

³ 5 U.S.C. § 8132. *See also B.G.*, Docket No. 14-0850 (issued September 17, 2014).

⁴ 20 C.F.R. § 10.712.

beneficiary has been awarded compensation which exceeds the amount of the surplus.⁵ Where a beneficiary who has received a third-party recovery has made the required refund, but subsequent events result in payment of compensation benefits, including medical benefits, this may result in an overpayment of compensation.⁶

ANALYSIS

In the present case, the record indicates that appellant had received a third-party recovery payment in the amount of \$100,000.00. The April 24, 2014 Form CA-1108 provides the calculations for determining the amount that must be refunded directly to the United States, as well as any surplus that must be offset from future compensation benefits. The gross recovery is reduced for attorney fees, as well as court costs, in accord with 5 U.S.C. § 8132. Then an additional 20 percent is deducted, as 5 U.S.C. § 8132 provides that the beneficiary is entitled to retain at least one fifth of the recovery.⁷ After making these deductions, OWCP determined that \$48,943.23 was the adjusted recovery amount under 5 U.S.C. § 8132. The Form CA-1108 provided that after a refund of \$16,794.30, which was paid by appellant, and deduction of appropriate attorney fees, there was a remaining surplus of \$23,753.04.

The surplus of \$23,753.04 must be absorbed before appellant is entitled to additional compensation benefits. However, that does not establish that OWCP properly declared an overpayment of \$23,753.04 under the circumstances of this case. The preliminary determination does not support an overpayment of compensation and the hearing representative did not make additional findings on fact of overpayment. OWCP refers to both a *credit* for wage-loss compensation from February 1 to October 13, 2014, as well as payment for medical benefits from June 26 to September 24, 2014. It is evident from the record that appellant did not receive wage-loss compensation from February 1 to October 13, 2014. She only began receiving wage-loss compensation for the period commencing October 14, 2014.

The January 30, 2015 OWCP letter clearly indicated that the wage-loss compensation owed from February 1 to October 13, 2014 was being credited toward the surplus. By OWCP's own findings the compensation owed would be \$24,129.07, which was greater than the surplus. Once the surplus is absorbed, appellant is entitled to any additional wage-loss compensation.

Therefore there was no overpayment of compensation as OWCP had credited more than \$23,753.04 in wage-loss compensation during the period February 1 to October 13, 2014. The payment of medical benefits is not an overpayment under these circumstances, since the surplus is being reduced by the credited wage-loss compensation that OWCP found was owed to appellant but not paid to her. If appellant had actually been paid wage-loss compensation for the period February 1 to October 13, 2014, then an overpayment would have been created but that is not the situation presented in this case, as discussed above. OWCP did not establish an

⁵ *Id.*

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *FECA Third Party Subrogation Guidelines*, Chapter 2.1100.10 (March 2006).

⁷ 5 U.S.C. § 8132 provides that a beneficiary is entitled to retain, as a minimum, at least one fifth of the recovery after net expenses have been deducted.

overpayment of compensation. In view of the Board's finding, the issues of fault and recovery will not be addressed.

CONCLUSION

The Board finds that OWCP did not establish an overpayment of \$23,753.04 was created.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 5, 2016 is reversed.

Issued: May 5, 2016
Washington, DC

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

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board