

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$141,365.35 for the period June 17, 2005 through August 2, 2008; and (2) whether she was at fault in creating the overpayment, thereby precluding waiver of recovery.

FACTUAL HISTORY

Appellant, a 76-year-old former quality assurance clinical reviewer, sustained injuries to her neck, low back, right shoulder, and right knee/leg when she slipped and fell at work on September 9, 1990 (File No. xxxxxx004). Her accepted conditions include low back strain, right knee/leg strain, right shoulder impingement, aggravation of preexisting cervical strain, aggravation of spinal stenosis, and permanent aggravation of lumbar degenerative joint disease. Appellant sustained another work-related traumatic injury on July 26, 1993, which OWCP initially accepted for left knee degenerative arthritis (File No. xxxxxx039).⁴ On September 25, 1995 she underwent left knee arthroscopic surgery, and on November 29, 1995 she had lumbar surgery. OWCP authorized both surgical procedures.

Effective May 11, 2002 appellant accepted a disability retirement annuity from the Office of Personnel Management (OPM). However, she subsequently elected to receive FECA wage-loss benefits in lieu of OPM benefits.

On September 18, 2003 OWCP terminated appellant's medical benefits with respect to her left knee condition and denied authorization for left knee arthroplasty. In a separate decision, also dated September 18, 2003, it terminated appellant's medical benefits with respect to her right knee/leg strain and aggravation of preexisting cervical strain. However, appellant remained eligible for medical benefits with respect to her accepted lumbar and right shoulder conditions.

By decision dated December 22, 2003, OWCP terminated appellant's entitlement to wage-loss compensation and schedule award benefits because of her refusal to accept suitable work, pursuant to 5 U.S.C. § 8106(c)(2).⁵ It issued its December 22, 2003 decision under File No. xxxxxx039. Appellant requested reconsideration.

⁴ OWCP subsequently expanded the July 26, 1993 traumatic injury claim to include exacerbation of chronic pain of the left knee and right shoulder. Additionally, it combined the September 9, 1990 and July 26, 1993 traumatic injury claims and designated the latter claim as the master File No. (xxxxxx039).

⁵ On August 20, 2003 the employing establishment offered appellant a limited-duty assignment as a social services assistant, which appellant declined. On September 29, 2003 OWCP advised appellant that it considered the offered position suitable in accordance with the July 11 and September 28, 2001 medical restrictions identified by Dr. Teresa L. Gurin, a Board-certified physiatrist and impartial medical examiner. Additionally, it advised appellant that she had 30 days to either accept the job offer or submit factual and/or medical evidence explaining her continued refusal. Appellant did not accept the position citing medical evidence indicating an inability to resume work due to her orthopedic condition and chronic pain. On October 30, 2003 OWCP indicated that it had considered appellant's reasons for refusing the position and did not find them to be valid. Consequently, it afforded appellant an additional 15 days to accept the offered position and arrange for a report date. Moreover, OWCP advised appellant that, if she did not accept the position by November 14, 2003, her entitlement to wage-loss compensation and schedule award benefits would be terminated in accordance with 5 U.S.C. § 8106(c)(2).

On January 3, 2005 OWCP denied modification of its December 22, 2003 decision terminating appellant's entitlement to wage-loss compensation and schedule award benefits pursuant to 5 U.S.C. § 8106(c)(2).

On June 17, 2005 appellant underwent a left total knee arthroplasty, which OWCP authorized under her September 9, 1990 traumatic injury claim (File No. xxxxxx004).

By letter dated September 14, 2005, OWCP advised appellant that she was eligible to receive compensation for her "left total knee replacement *only*." (Emphasis in the original.) It specifically referenced appellant's September 9, 1990 employment injury under File No. xxxxxx004. Appellant subsequently filed a claim for compensation (Form CA-7) referencing File No. xxxxxx004, which the employing establishment forwarded to OWCP on October 5, 2005.

On November 22, 2005 OWCP advised appellant that she was entitled to wage-loss compensation beginning June 17, 2005. It placed her on the periodic compensation rolls effective October 30, 2005. Although appellant filed her Form CA-7 under the September 9, 1990 claim (File No. xxxxxx004), OWCP's November 22, 2005 award letter referenced File No. xxxxxx039 with a July 26, 1993 date of injury. Appellant had been receiving OPM retirement benefits, but elected instead to receive FECA wage-loss compensation effective June 17, 2005. OWCP continued to pay her wage-loss compensation for temporary total disability through August 2, 2008. For this period, June 17, 2005 through August 2, 2008, it paid appellant \$141,365.35.

Effective August 3, 2008 OWCP terminated appellant's wage-loss compensation in light of its December 22, 2003 decision sanctioning her under 5 U.S.C. § 8106(c)(2).⁶ OPM subsequently resumed payment of retirement benefits.

More than five years elapsed before OWCP initiated overpayment proceedings. The action was prompted by a series of inquiries from the employing establishment beginning in October 2013. OWCP initially disagreed with the employing establishment's position that an overpayment existed. Furthermore, it questioned whether it had properly suspended compensation benefits in August 2008, but the employing establishment was persistent in challenging appellant's receipt of compensation for the period June 17, 2005 through August 2, 2008.

On April 4, 2014 OWCP issued a preliminary determination of an overpayment of compensation in the amount of \$141,365.35. It explained that because appellant had been sanctioned under 5 U.S.C. § 8106(c)(2) effective December 27, 2003, she was not entitled to the wage-loss compensation she received for the period June 17, 2005 through August 2, 2008. Additionally, OWCP determined that appellant was at fault in creating the overpayment as she knowingly accepted compensation she was not entitled to receive.

Appellant timely requested a precoupment hearing before an OWCP hearing representative, which was held on November 13, 2014. She challenged the overpayment on the

⁶ OWCP initially discovered the error in May 2007, but did not suspend compensation at the time. It revisited the issue more than a year later when responding to a July 21, 2008 Congressional inquiry.

basis that OWCP advised her on September 14, 2005 that she was eligible to receive compensation for her left knee replacement.⁷ Additionally, appellant submitted an overpayment recovery questionnaire (Form OWCP-20), which revealed that her then-current monthly income (\$3,856.85) exceeded her monthly expenses (\$3,154.69) by more than \$700.00.

In a January 29, 2015 decision, an OWCP hearing representative finalized the preliminary overpayment determination in all respects, including finding appellant at fault. Notwithstanding OWCP's September 14, 2005 correspondence advising appellant that she was eligible to receive compensation, the hearing representative found that the December 22, 2003 decision put appellant on notice that she was not entitled to additional compensation under File No. xxxxxx039. Because appellant was at fault in creating the overpayment, the hearing representative denied waiver of recovery. Additionally, she found that appellant's monthly income exceeded her monthly expenses, and therefore, she could repay \$500.00 each month.⁸

LEGAL PRECEDENT -- ISSUE 1

A partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for him or her is not entitled to compensation.⁹ It is the employee's burden to show that this refusal or failure to work was reasonable or justified.¹⁰ Whether an employee has the ability to perform an offered position is primarily a medical question that must be resolved by the medical evidence.¹¹ In evaluating the suitability of a particular position, OWCP must consider the employment-related condition(s), as well as preexisting and subsequently acquired medical conditions.¹² If medical reports in the file document a condition which has arisen since the compensable injury, and this condition disables the claimant from the offered job, the position will be considered unsuitable even if the subsequently acquired condition is not work related.¹³

When OWCP considers a job to be suitable, it shall advise the employee of its finding and afford her 30 days to either accept the job or present any reasons to counter OWCP's finding of suitability.¹⁴ If the employee presents such reasons and OWCP determines that the reasons

⁷ Appellant also noted that OWCP's claims examiner who advised her of her eligibility on September 14, 2005 was the same individual who issued the April 4, 2014 preliminary determination and found her at fault for accepting those payments.

⁸ OPM has been withholding funds from appellant's federal retirement annuity. Because appellant is not currently receiving FECA compensation benefits, the manner in which OWCP recovers the overpayment is not an issue currently before the Board. See *Judith A. Cariddo*, 55 ECAB 348, 353 (2004).

⁹ 5 U.S.C. § 8106(c)(2); 20 C.F.R. § 10.517.

¹⁰ *Id.* at § 10.517.

¹¹ *Gayle Harris*, 52 ECAB 319, 321 (2001).

¹² *Id.*; *Martha A. McConnell*, 50 ECAB 129, 132 (1998).

¹³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers & Return to Work*, Chapter 2.814.4c(7) (June 2013).

¹⁴ 20 C.F.R. § 10.516.

are unacceptable, it will notify the employee of that determination and further inform the employee that she has 15 days within which to accept the offered work without penalty.¹⁵ If the employee declines the position after having received both a 30-day notice and a 15-day notice, OWCP will terminate entitlement to further wage-loss compensation and schedule award benefits.¹⁶ However, the employee remains entitled to medical benefits.¹⁷

ANALYSIS -- ISSUE 1

By decision dated December 22, 2003, OWCP terminated appellant's entitlement to wage-loss compensation and schedule award benefits pursuant to 5 U.S.C. § 8106(c)(2). On January 3, 2005 OWCP denied modification of its December 22, 2003 decision. Neither appellant nor her representative timely requested further review of OWCP's January 3, 2005 merit decision.¹⁸ Accordingly, the December 22, 2003 decision remains in effect to date, thereby precluding entitlement to compensation benefits on or after December 27, 2003.

On appeal, counsel argues that the December 22, 2003 decision only pertained to File No. xxxxxx039, and therefore, appellant was eligible to receive wage-loss compensation under File No. xxxxxx004, as indicated by OWCP in its September 14, 2005 correspondence. Although OWCP's September 14, 2005 correspondence advised that appellant was eligible to receive compensation for her "left total knee replacement *only*," and specifically referenced her September 9, 1990 injury under File No. xxxxxx004, OWCP ultimately paid compensation under File No. xxxxxx039.¹⁹ The November 22, 2005 wage-loss compensation award letter specifically referenced File No. xxxxxx039 with a July 26, 1993 date of injury.

Having refused an offer of suitable employment, appellant was not entitled to further compensation on all claims where the injury occurred prior to OWCP's December 22, 2003 termination decision.²⁰ Despite OWCP's authorization of the June 2005 left total knee arthroplasty, appellant was not entitled to wage-loss compensation she received for the period June 17, 2005 through August 2, 2008. The record reveals that OWCP overpaid her \$141,365.35. Accordingly, the Board affirms OWCP's findings with respect to the fact and amount of overpayment.

¹⁵ *Id.* The 15-day notification need not explain why OWCP found the employee's reasons for refusal unacceptable. *Id.*

¹⁶ 20 C.F.R. § 10.517(b).

¹⁷ *Id.*

¹⁸ The propriety of OWCP's December 22, 2003 suitable work termination is not an issue currently before the Board. *See* 20 C.F.R. § 501.3(e).

¹⁹ Moreover, File No. xxxxxx004 involved appellant's right knee, not her left. Counsel offered no plausible explanation for appellant's purported entitlement to compensation for a left knee condition ostensibly unrelated to her September 9, 1990 injury under File No. xxxxxx004.

²⁰ 20 C.F.R. § 10.517(b).

LEGAL PRECEDENT -- ISSUE 2

OWCP may consider waiving an overpayment only if the individual to whom it was made was not at fault in either accepting or creating the overpayment.²¹ Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments she receives from OWCP are proper.²² The recipient must show good faith and exercise a high degree of care in regard to receipt of their benefits.²³ A recipient will be found to be at fault with respect to creating an overpayment if she “[a]ccepted a payment which [she] knew or should have known to be incorrect.”²⁴

A benefits recipient may be found without fault where the overpayment resulted from an individual’s action or inaction based on misinformation supplied by either OWCP or the employing establishment.²⁵

An individual who is without fault in creating or accepting an overpayment is nonetheless subject to recovery of the overpayment unless adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.²⁶ Recovery of an overpayment will defeat the purpose of FECA if such recovery would cause hardship to a current or former beneficiary because the beneficiary from whom OWCP seeks recovery needs substantially all of his current income, including compensation benefits, to meet current ordinary and necessary living expenses, and the beneficiary’s assets do not exceed a specified amount as determined by OWCP.²⁷ Additionally, 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 in attempting to repay the debt or when an individual, in reliance on such payment or on notice that such payments would be made, relinquished a valuable right or changed his position for the worse.²⁸

The individual who received the overpayment is responsible for providing information about income, expenses, and assets as specified by OWCP.²⁹ This information is necessary for

²¹ *Id.* at § 10.433(a).

²² *Id.*

²³ *Id.*

²⁴ 20 C.F.R. § 10.433(a)(3).

²⁵ In such cases, there must be documentation to show that misinformation was communicated. Furthermore, there cannot be any evidence that the individual knew or should have known the proper course of action to be followed. Federal (FECA) Procedure Manual, Part 6 - Debt Management, *Initial Overpayment Actions*, Chapter 6.200.5b(2) (June 2009).

²⁶ 5 U.S.C. § 8129(b); 20 C.F.R. §§ 10.433, 10.434, 10.436, 10.437.

²⁷ 20 C.F.R. § 10.436(a), (b). For an individual with no eligible dependents the asset base is \$4,800.00. The base increases to \$8,000.00 for an individual with a spouse or one dependent, plus \$960.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6a(1)(b) (June 2009).

²⁸ 20 C.F.R. § 10.437(a), (b).

²⁹ *Id.* at § 10.438(a).

determining whether a waiver of recovery of the overpayment is warranted.³⁰ The information is also used to determine an appropriate repayment schedule, if necessary.³¹ Failure to submit the requested information within 30 days of the request shall result in denial of waiver.³²

ANALYSIS -- ISSUE 2

Both the claims examiner and the hearing representative found appellant at fault because she accepted payments which she knew or should have known to be incorrect. Whether an individual is at fault in creating an overpayment depends on the circumstance of the overpayment.³³ The degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that she is being overpaid.³⁴ In determining fault OWCP applies a "reasonable person" standard.³⁵

Although the December 22, 2003 decision clearly advised appellant that she was no longer entitled to receive compensation due to her refusal to accept suitable employment, OWCP subsequently misinformed appellant that she was "eligible to receive compensation for [her] left total knee replacement *only*." OWCP's claims examiner who misinformed appellant on September 14, 2005 is the same claims examiner who initially found appellant at fault for essentially following her advice to file a Form CA-7. As noted, a benefits recipient may be found without fault where the overpayment resulted from an individual's action or inaction based on misinformation supplied by either OWCP or the employing establishment.³⁶

By decision dated September 18, 2003, OWCP terminated medical benefits with respect to appellant's July 26, 1993 left knee injury. At the time, there was a pending request for authorization for left knee arthroplasty, which it denied. However, in April 2005, OWCP reversed course and authorized a total knee arthroplasty under File No. xxxxxx004. After undergoing left knee surgery on June 17, 2005, appellant submitted an election of benefits form to OWCP requesting a transfer to FECA rolls effective June 17, 2005. She also noted that OWCP had authorized a total knee replacement.

The September 14, 2005 correspondence from OWCP appears to have been in response to the election of benefits form appellant filed. As indicated, OWCP informed appellant that she was "eligible to receive compensation for [her] left total knee replacement *only*." The claims examiner advised appellant that she needed to submit a Form CA-7 in order to receive compensation. The claims examiner further explained that OWCP could not pay benefits until it received confirmation from OPM that appellant's retirement benefits had been suspended.

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at § 10.438(b).

³³ *Id.* at § 10.433(b).

³⁴ *Id.*; *J.S.*, 58 ECAB 515, 521-22 (2007).

³⁵ *L.D.*, 59 ECAB 673, 679 (2008).

³⁶ Federal (FECA) Procedure Manual, *supra* note 25.

Appellant subsequently filed the Form CA-7 as instructed, and OPM confirmed that her benefits were suspended effective September 1, 2005. On November 22, 2005 OWCP advised her of her entitlement to wage-loss compensation retroactive to June 17, 2005. Appellant received a lump-sum payment of \$12,628.33, and OWCP placed her on the periodic compensation rolls, effective October 30, 2005.

The Board finds that the \$141,365.35 overpayment of compensation appellant received was the result of misinformation provided by OWCP. Appellant is precluded from receiving additional compensation based on the December 22, 2003 decision. However, OWCP's April 2005 authorization of a total knee arthroplasty and the misinformation it provided her on September 14, 2005 regarding her eligibility for compensation ostensibly nullified the December 22, 2003 suitable work termination. One cannot reasonably conclude under these circumstances that appellant knew or should have known that the 5 U.S.C. § 8106(c)(2) sanction remained in effect at the time she began receiving wage-loss compensation on November 22, 2005.³⁷ Accordingly, OWCP's finding that appellant was at fault in creating the overpayment shall be reversed. The case will be remanded to OWCP for consideration of waiver of recovery of the overpayment and for a determination of whether recovery of the overpayment would defeat the purpose of FECA or would be against equity and good conscience. Additionally, OWCP shall provide appellant the opportunity to submit an updated Form OWCP-20 with information regarding her current income, expenses, assets, and liabilities.³⁸ After appropriate development, OWCP shall issue a *de novo* decision.

CONCLUSION

Appellant received an overpayment of compensation in the amount of \$141,365.35 for the period June 17, 2005 through August 2, 2008. However, OWCP incorrectly found her at fault in creating the overpayment.

³⁷ Even after suspending compensation in August 2008, OWCP questioned whether its decision was proper.

³⁸ The Board notes that for the period appellant was improperly paid FECA benefits, June 17, 2005 through August 2, 2008, she had voluntarily foregone receipt of OPM retirement benefits so as to avoid the receipt of a prohibited dual benefit. *See supra* note 28.

ORDER

IT IS HEREBY ORDERED THAT the January 29, 2015 decision of the Office of Workers' Compensation Programs is affirmed in part and reversed in part, and the case is remanded for further action consistent with this decision.

Issued: September 26, 2016
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board