

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

C.F., Appellant)	
)	
and)	Docket No. 16-1718
)	Issued: August 21, 2017
DEPARTMENT OF THE NAVY,)	
CAMP SMEDLEY D. BUTLER,)	
Okinawa, Japan, Employer)	

Appearances: *Case Submitted on the Record*
Appellant, pro se
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 24, 2016 appellant filed a timely appeal from a June 23, 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 to consider the merits of the case.

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$3,605.65 because he received compensation for the period August 9, 2007 through May 9, 2009 at the same time he received earnings from other employment; and (2) whether he was at fault in creating the overpayment, thereby precluding waiver of recovery of the overpayment.

On appeal appellant contends that the amount deducted from his continuing compensation was never readdressed or adjusted after the overpayment amount was reduced

¹ 5 U.S.C. § 8101 *et seq.*

from \$12,074.98 to \$3,605.65 and that OWCP continued to make deductions of \$150.00 from each of appellant's compensation checks after the overpayment had been paid in full.

FACTUAL HISTORY

This case has previously been before the Board.² The facts of the case as presented in the prior decisions are incorporated herein by reference. The relevant facts are as follows.

On April 14, 2003 OWCP accepted that appellant, then a 46-year-old athletic director, sustained hypertensive pneumonitis due to poor air circulation in his office. It paid wage-loss compensation and medical benefits on the periodic rolls commencing May 20, 2003. Appellant received his compensation benefits by check.

By letter dated June 26, 2003, OWCP explained how the compensation rate was determined. It also informed appellant in this letter that in order to minimize the possibility of an overpayment of compensation, he should notify OWCP immediately when he returned to work. It noted that FECA provides that a partially disabled employee shall be paid compensation based on the difference between the monthly pay and the employee's wage-earning capacity, as determined by the employee's actual earnings or by OWCP.

While appellant was receiving full-time wage-loss compensation under FECA he was also working part time at Ritz Camera beginning August 10, 2007 making \$7.00 per hour and as a part-time athletic assistant in the summer of 2017 earning \$8.21 per hour, for the Maryland National Park and Planning Commission. These jobs were noted by the vocational rehabilitation counselor assigned to appellant's case at that time.

On May 27, 2009 OWCP issued an informal loss of wage-earning capacity (LWEC) determination. It found that as appellant had returned to work as an imaging specialist with wages of \$210.00 per week effective August 10, 2007, his monetary compensation would be reduced based on his actual earnings. Effective June 7, 2009, OWCP reduced appellant's compensation payment every 28 days from \$2,358.00 to \$1,904.00.

On September 30, 2009 OWCP issued a preliminary determination of an overpayment of compensation. It calculated that, for the period August 9, 2007 through May 29, 2009, appellant had received a total of \$55,008.08 in wage-loss compensation whereas he was only entitled to \$42,933.10. This resulted in an overpayment of compensation in the amount of \$12,074.98. OWCP also made a preliminary determination that appellant was with fault in the creation of the overpayment as he accepted payments he knew or should have known were incorrect.

In a February 23, 2010 decision, OWCP finalized the preliminary overpayment determination. It determined that appellant received an overpayment of compensation in the amount of \$12,074.98 because he received compensation for the period August 9, 2007 through May 9, 2009 at the same time he received earnings from other employment. OWCP also found that appellant was at fault in the creation of the overpayment as he accepted payments he knew

² Docket No. 10-2163 (issued March 18, 2011); Docket No. 14-0165 (issued September 25, 2014).

or should have known were incorrect. It commenced deductions of \$150.00 from each of appellant's continuing compensation payments.

On August 24, 2010 appellant filed an appeal with the Board. By decision dated March 18, 2011, the Board found that OWCP had not followed proper procedures in that it had not properly served appellant with the preliminary findings of overpayment at his correct address. The Board noted that OWCP sent the preliminary notice of overpayment to appellant at his old address, despite the fact that appellant had provided OWCP with proper notice of his new address. The Board further found that OWCP had not adequately substantiated the amount of overpayment, \$12,074.08. Accordingly, the Board set aside OWCP's overpayment decision and remanded the case for further consideration consistent with the decision.³

In a revised preliminary notice of overpayment dated June 24, 2011, OWCP calculated that appellant had received an overpayment of compensation only in the amount of \$3,605.65. It noted that at the time of its initial overpayment decision, appellant had not submitted evidence of actual earnings. Accordingly, OWCP recalculated the amount of overpayment based on appellant's actual wage and earning statements pursuant to the LWEC decision issued on May 27, 2009. It determined that for the period August 1, 2007 through January 1, 2009, appellant received compensation in the amount of \$43,587.65. During this period, appellant actually earned \$9,028.00. OWCP determined that averaging appellant's actual earnings over 17 months resulted in a monthly income of \$531.06 (weekly pay rate of \$132.77). It determined that appellant would have been entitled to \$39,982.00 of FECA wage-loss benefits, based on his actual earnings, and that therefore the overpayment was \$3,605.65 (\$43,587.65 minus \$39,982.00). OWCP noted that his seasonal summer earnings could not be considered. OWCP also found that appellant was at fault in the creation of the overpayment as he received dual payments. Appellant was provided appropriate options to dispute the overpayment. He did not respond to the revised preliminary overpayment determination at that time, although the June 24, 2011 preliminary determination was mailed to his address of record.

By letter to OWCP dated May 3, 2013, appellant contended that the deductions from his compensation had not stopped despite the Board's March 18, 2011 decision. He also noted that OWCP had not contacted him since the Board's decision and that he had been unable to reach the claims examiner. Appellant argued that there were still discrepancies in the amount of wage-loss compensation he should have received following the appeal, the total amount of overpayment, and the amount actually paid back to date.

In a decision dated July 19, 2013, OWCP finalized the overpayment of compensation in the amount of \$3,605.65 for the period August 1, 2007 through January 1, 2009 due to appellant's receipt of compensation payments concurrently with earnings from other employment. It also found that he was at fault in the creation of the overpayment and, therefore, not entitled to waiver of recovery.

By letter dated September 12, 2013, OWCP advised appellant that the entire overpayment of compensation in the amount of \$3,605.65 had been paid in full and that the overpayment account had been closed.

³ Docket No. 10-2163 (issued March 18, 2011).

On October 30, 2013 appellant filed an appeal with the Board from the July 19, 2013 decision. On September 25, 2014 the Board issued an Order Remanding Case. The Board determined that OWCP had never addressed the specific issue in appellant's May 3, 2013 letter wherein he contended, *inter alia*, that the deductions from his compensation were not proper, that he had tried unsuccessfully to contact OWCP, and that there were still discrepancies in the amount of the overpayment compared to what he had already paid.⁴

By decision dated June 23, 2016, OWCP finalized the overpayment of compensation in the amount of \$3,605.65. It also found appellant was at fault in the creation of the overpayment because he accepted earnings while also receiving wage-loss compensation under FECA. OWCP also noted that the overpayment had been paid in full. OWCP acknowledged appellant's May 3, 2013 letter and determined that appellant had been properly notified of the overpayment and that no evidence had been received to dispute the overpayment amount. It also incorporated, by reference, the June 24, 2011 preliminary decision, which provided an explanation as to how the overpayment had been calculated.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of FECA⁵ provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.⁶ A claimant is not entitled to receive temporary total disability benefits and actual earnings for the same time period.⁷

An overpayment of compensation occurs when a claimant returns to work and continues to receive compensation.⁸ Section 8129(a) of FECA provides that when an overpayment has been made to an individual 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 the individual is entitled.⁹

ANALYSIS -- ISSUE 1

The Board, having duly considered the matter, finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$3,605.65 because appellant received wages for the period August 9, 2007 through May 9, 2009 while also receiving total disability compensation.

During the period August 1, 2007 through January 1, 2009, appellant received wages from part-time employment in the amount of \$9,028.00. As previously noted, a claimant is not

⁴ Docket No. 14-0165 (issued September 25, 2014).

⁵ *Supra* note 1.

⁶ *Id.* at § 8102(a).

⁷ *L.S.*, 59 ECAB 350, 352-53 (2008).

⁸ *R.G.*, Docket No. 16-1129 (issued December 27, 2016).

⁹ 5 U.S.C. § 8129(a).

entitled to receive temporary total disability benefits and actual earnings for the same time period.¹⁰ Had proper adjustments been made to his disability compensation to reflect his part-time employment, appellant would have received \$39, 982.00 for this time period. However, appellant received compensation for this period in the amount of \$43,587.65. The difference between these two amounts, \$3,605.65, is the amount of the overpayment, as properly calculated by OWCP. Accordingly, the Board will affirm the fact and the amount of the overpayment.

Appellant contended that his wage-loss compensation payments had never returned to that which he received before the overpayment case. However, the reduction of his payments were based on the informal LWEC decision dated June 7, 2009 which reduced his monthly payment from \$2,538.00 to \$1,904.00. That decision is not before the Board at this time.¹¹

LEGAL PRECEDENT -- ISSUE 2

An individual who is found at fault in either accepting or creating an overpayment is not eligible for a waiver of recovery of overpayment.¹² A benefits recipient will be at fault if the individual: (1) made an incorrect statement as to a material fact which he knew or should have known to be incorrect; (2) failed to provide information which he knew or should have known to be material; or (3) accepted a payment which he knew or should have known to be incorrect.¹³

ANALYSIS -- ISSUE 2

Under OWCP regulations, waiver of the recovery of an overpayment may be considered only if the individual to whom it was made was not at fault in accepting or creating the overpayment.¹⁴

Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payment he receives from OWCP is proper.¹⁵ Appellant was informed by OWCP's letter dated June 26, 2003 that FECA provided that a partially disabled employee shall be paid compensation based on the difference between the monthly pay and employee's wage-earning capacity. Thus, appellant should have been aware that he was not entitled to receive full wage-loss compensation during the time of his part-time employment. The fact that OWCP may have been negligent in issuing the payments does not mitigate this finding.¹⁶

As appellant was at fault in the creation of the overpayment, he is not eligible for waiver of recovery of the overpayment.

¹⁰ *K.L.*, Docket No. 16-1490 (issued May 26, 2017).

¹¹ *See* 20 C.F.R. §§ 501.2(c) and 501.3.

¹² 5 U.S.C. § 8129(b); 20 C.F.R. §§ 10.433(a) and 10.434.

¹³ *Id.* at § 10.433(a).

¹⁴ *Id.*

¹⁵ *K.M.*, Docket No. 16-0802 (issued November 23, 2016).

¹⁶ *Id.*

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$3,605.65 because he received compensation for the period August 9, 2007 through May 9, 2009 at the same time he received earnings from other employment. OWCP also properly determined that appellant was at fault in creating the overpayment, thereby precluding waiver of recovery of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the June 23, 2016 decision of the Office of Workers' Compensation Programs is affirmed.¹⁷

Issued: August 21, 2017
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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

¹⁷ Although the Board recognizes that the full amount of the overpayment has been repaid, upon return of the case record, OWCP shall verify that only the amount of the overpayment, *i.e.*, \$3,605.65, was recovered from appellant's continuing compensation payments.