

FACTUAL HISTORY

On November 29, 2012 appellant, then a 51-year-old city letter carrier, filed an occupational disease claim (Form CA-2) alleging that he developed left plantar fasciitis and neuroma due to walking and standing in the performance of his job duties. He stopped work on the advice of his treating physician. Appellant was returned to light-duty work on December 14, 2012. OWCP accepted his claim on February 12, 2013 for plantar fibromatosis and lesion of the plantar nerve. Appellant filed claims for compensation (Form CA-7) for intermittent periods of disability because work was not available for partial days. OWCP authorized compensation for intermittent periods through March 28, 2013. Appellant completed a direct deposit sign-up form on April 3, 2013.

Appellant underwent surgical plantar fascial release and fasciectomy of the left foot on April 12, 2013 and filed CA-7 forms for intermittent periods. OWCP authorized partial, intermittent compensation benefits and entered appellant on the periodic rolls on February 9, 2014. Appellant received a payment through direct deposit on March 8, 2014 in the gross amount of \$2,897.84.

The employing establishment reported that appellant had returned to work on May 3, 2014 working six to 6.5 hours a day. Appellant later accepted a position on May 13, 2014 working six hours a day.

Through a letter dated May 14, 2015, OWCP requested that the employing establishment provide the date that appellant returned to work in any capacity in May 2014. It further requested reports of appellant's work hours following his return to work in 2014. The employing establishment *via* telephone reported that appellant worked six hours a day from May 2 through 15, 2014. Appellant then utilized sick leave from May 16 through 31, 2015. On November 13, 2015 OWCP requested additional information from the employing establishment regarding the date appellant returned to work and the number of hours he worked daily through May 31, 2014.

The employing establishment provided a daily work and leave breakdown which indicated that appellant returned to full-duty work on April 18, 2014 and worked eight hours on April 18, 19, 21, and 22, 2014. On April 24, 25, 26, 28, 29, and 30, 2014 appellant worked full time except for 1.29 hours of leave without pay (LWOP). He worked approximately six hours a day on May 2, 3, 5, 6, 7, 8, 12, 13, and 14, 2014 and used 20.58 hours of LWOP. On May 15, 2014 appellant worked 4.99 hours and used 3.01 hours of LWOP. He utilized eight hours of sick leave on May 16, 17, 20, and 21, 2014. Appellant used four hours of annual leave and four hours of sick leave on May 22, 2014. He then used eight hours of annual leave on May 23, 24, and 28, 2014. Appellant used six hours of annual leave on May 29, 2014. He used four hours of sick leave on May 31, 2014. Appellant did not request LWOP from May 16 through 31, 2014.

OWCP issued a preliminary determination on March 17, 2016 that appellant had received an overpayment of compensation in the amount of \$3,231.50 because he returned to work on

April 18, 2014 working intermittently through May 15, 2014³ and continued to receive compensation benefits for total disability through May 31, 2014. It found that he received compensation benefits in the amount of \$2,228.38⁴ for the period April 6, through May 3, 2014. OWCP calculated that \$2,228.38 divided by 28 (the number of days in the pay period) multiplied by 16 (the number of days appellant worked during the pay period) = \$1,273.36. It further noted that from May 4 through 31, 2014 he was paid \$2,323.38. OWCP added the sums of \$1,273.36 and \$2,323.38 to reach \$3,596.74. It noted that from April 18 through May 31, 2014 appellant was charged LWOP for 19.87 hours of work.⁵ OWCP subtracted this amount of \$365.24 from the total compensation paid, \$3,596.74, to reach a total overpayment of compensation in the amount of \$3,231.50.

OWCP made a preliminary finding that appellant was at fault in the creation of the overpayment because he was aware or should have reasonably been aware that he was not entitled to receive wage-loss benefits after returning to full-time work. It noted that its March 21, 2014 letter advised him that he was responsible to inform OWCP upon return to work and to return all payments received for periods after his return to work. OWCP provided appellant with an overpayment recovery questionnaire (OWCP-2) as well as his options for review and afforded him 30 days to respond.

On April 21, 2016 appellant disagreed with the amount of the overpayment, and requested waiver of recovery. He alleged that he was entitled to additional compensation benefits for two hours a day from July through December 15, 2013.

By decision dated May 12, 2016, OWCP finalized the overpayment of compensation in the amount of \$3,231.50 for the period of April 18 through May 31, 2014. It determined that appellant was at fault in the creation of the overpayment as he accepted compensation payments which he knew or should have known were incorrect. OWCP requested payment of the full amount within 30 days.

LEGAL PRECEDENT -- ISSUE 1

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.⁶ Monetary compensation for total or partial disability due to an employment injury is paid as a percentage of pay,⁷ meaning pay at the time of injury or pay at the time disability begins or pay at the time compensable disability recurs if

³ After May 15, 2014 appellant used sick and annual leave intermittently through May 31, 2014 but did not return to work or use additional LWOP.

⁴ OWCP's records show appellant was actually paid compensation benefits in the amount of \$2,323.28 for the period April 6 through May 3, 2014.

⁵ The Board notes that appellant used 21.87 hours of LWOP from April 25 through May 15, 2014.

⁶ 5 U.S.C. § 8102(a).

⁷ *Id.* at §§ 8105, 8106.

the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater.⁸

A claimant is not entitled to receive temporary total disability benefits and actual earnings for the same time period.⁹ An overpayment of compensation occurs when a claimant returns to work and continues to receive compensation.¹⁰

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.¹¹

ANALYSIS -- ISSUE 1

The Board finds that an overpayment of compensation was created.

OWCP accepted appellant's claim and paid wage-loss compensation, placing him on the periodic compensation rolls. The record establishes that appellant returned to full-time work on April 18, 2014 and worked eight hours on April 18, 19, 21, and 22, 2014. Appellant then worked less than eight hours a day from April 24 through May 15, 2014. This resulted in an overpayment of compensation.¹² Appellant was not entitled to receive temporary total disability benefits and actual earnings for the same time period.¹³

The Board, however, further finds that this case is not in posture for decision regarding the amount of the overpayment.

In the May 12, 2016 decision, OWCP found that appellant received an overpayment of compensation in the amount of \$3,231.50 for the period April 18 through May 31, 2014 based on his return to work and his continued receipt of compensation benefits for total disability. It determined the number of hours of LWOP that appellant was charged for this period and determined his entitlement to compensation for these hours. OWCP then credited LWOP from the total amount of wage-loss compensation he received. However, the Board notes that the employing establishment's leave records show that appellant had been charged 21.87 hours of leave without pay from April 25 through May 15, 2014 rather than the 19.87 hours of leave without pay found by OWCP. Because OWCP incorrectly calculated the amount of the overpayment by two hours and had also miscalculated the amount of wages appellant had been

⁸ *Id.* at § 8101(4); *John D. Williamson*, 40 ECAB 1179 (1989).

⁹ *L.S.*, 59 ECAB 350, 352-53 (2008).

¹⁰ *Id.*; Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2a (May 2004).

¹¹ 5 U.S.C. § 8129(a).

¹² *See R.G.*, Docket No. 16-1129 (issued December 27, 2016).

¹³ *Supra* note 9.

paid,¹⁴ the Board will set aside OWCP's May 12, 2016 decision and remand the case for further development. It should recalculate the overpayment appellant received for the period April 18 through May 31, 2014. Following such further development as it deems necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that OWCP properly found a fact of overpayment of compensation, but found that the case was not in posture for decision regarding the amount of the overpayment for the period April 18 through May 31, 2016.

ORDER

IT IS HEREBY ORDERED THAT the May 12, 2016 decision of the Office of Workers' Compensation Programs is affirmed in part as to fact of overpayment and set aside and the case remanded for further proceedings consistent with this decision of the Board.

Issued: May 26, 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

¹⁴ *Supra* note 4.