

FACTUAL HISTORY

This case has previously been before the Board. The facts and circumstances outlined in the Board's prior decision are incorporated herein by reference. The relevant facts are set forth below.

On March 13, 2013 appellant, then a 34-year-old correctional officer, injured his right knee at work. OWCP accepted his claim for a traumatic injury (Form CA-1) for sprain of the lateral collateral ligament of the right knee, a pathologic fracture of other specified parts of the right femur, a tear of the right medial meniscus, a right neoplasm of uncertain behavior of the right connective and other soft tissue, and chondromalacia patellae of the right knee. It paid compensation for total disability beginning April 28, 2014. On November 17, 2014 appellant underwent a right tibial subchondroplasty. On February 9, 2015 he underwent surgery for an osteochondral lesion on the lateral femoral trochlea of the right knee.

In an April 22, 2015 letter, the employing establishment informed appellant that it had a temporary position for him within his restrictions beginning April 23, 2015. Appellant accepted the position and returned to work on April 23, 2015.

OWCP paid appellant compensation for total disability from April 5 to May 2, 2015 by electronic funds transfer. It continued to pay him compensation on the periodic rolls until July 25, 2015.

An OWCP rehabilitation specialist, on June 16, 2015, noted that the vocational rehabilitation counselor indicated that appellant's physician had released him to sedentary employment following his surgery. The specialist approved vocational testing, which he completed on June 30, 2015.

The vocational rehabilitation counselor, on August 5, 2015, advised OWCP's rehabilitation specialist that the employing establishment confirmed that appellant had returned to work on April 23, 2015 as a telephone monitor.

OWCP, by letter dated August 17, 2015, notified appellant of its preliminary determination that he received an overpayment of compensation in the amount of \$8,405.72 as he returned to work on April 23, 2015, but continued to receive wage-loss compensation until July 25, 2015. It further advised him of its preliminary determination that he was at fault in the creation of the overpayment. OWCP requested that appellant complete the enclosed overpayment recovery questionnaire and submit supporting financial documents. Additionally, it notified him that, within 30 days of the date of the letter, he could request a telephone conference, a final decision based on the written evidence, or a preresoupment hearing.

In an August 28, 2015 report, the vocational rehabilitation counselor related that appellant advised in an August 6, 2015 telephone call that he had resumed work in April 2015. Appellant did not inform her of his return to work because it was not to his usual position.

Appellant, on September 29, 2015, requested a telephone conference. He challenged fact and amount of overpayment as well as the finding of fault. Appellant related that he was still on

light duty which was “[t]he same status I was on when receiving benefits from OWCP.” He provided information regarding his income and expenses.

In an October 21, 2015 letter, OWCP informed appellant that it had scheduled a telephone conference for 1:30 p.m. on November 2, 2015. Appellant was advised to notify OWCP immediately if he could not participate in the conference at that time.

OWCP telephoned appellant twice on November 2, 2015 at the scheduled time, but he did not answer.

By decision dated November 2, 2015, OWCP found that appellant received an overpayment of compensation in the amount of \$8,405.72 for the period April 23 to July 25, 2015, because he had returned to work, but continued to receive wage-loss compensation. It determined that he was at fault in the creation of the overpayment and requested that he submit \$250.00 each month as repayment.

Appellant appealed to the Board on November 12, 2015. In a decision dated July 21, 2016, the Board affirmed in part and set aside in part the November 2, 2015 decision.³ The Board affirmed the finding that appellant received an overpayment of compensation in the amount of \$8,405.72 for the period April 23 through July 25, 2015 and that he was at fault for the creation of the overpayment from May 3 to July 25, 2015. The Board found, however, that he was without fault for the portion of the overpayment created from April 23 to May 2, 2015. The Board explained that there was no evidence that appellant had a clear knowledge at the time he received the May 2, 2015 electronic transfer that a portion was incorrect. The Board remanded the case for OWCP to determine whether appellant was entitled to waiver of recovery of the overpayment for the period April 23 to May 2, 2015.

OWCP paid appellant compensation for total disability on the periodic rolls beginning August 21, 2016 after the employing establishment withdrew his temporary assignment.

By decision dated August 31, 2016, OWCP denied waiver of recovery of the overpayment created for the period April 23 to May 2, 2015. It found that appellant had failed to submit adequate financial documentation with his 2015 overpayment recovery questionnaire. OWCP considered the income and expenses provided in 2015 and determined that it would recover the overpayment by deducting \$250.00 from continuing compensation payments.

On appeal appellant asserts that he informed the rehabilitation counselor of his return to work in April 2015 and she told him to tell her when he returned to full duty. However, the counselor did not notify OWCP of his return to work until July 2015.

LEGAL PRECEDENT -- ISSUE 1

OWCP’s regulations provide that, before seeking to recover an overpayment or adjust benefits, it will advise the individual in writing that the overpayment exists and the amount of the

³ Docket No. 16-0186 (issued July 21, 2016).

overpayment.⁴ The written notification must also include a preliminary finding regarding whether the individual was at fault in the creation of the overpayment.⁵ OWCP must inform the individual of his right to challenge the fact or amount of the overpayment, the right to contest the preliminary finding of fault in the creation of the overpayment, if applicable, and the right to request a waiver of recovery of the overpayment.⁶ OWCP's procedures provide that a preliminary finding of overpayment must be provided within 30 days and must clearly identify the reason that the overpayment occurred and the basis for any fault finding.⁷

OWCP's procedures provide, "*If the claimant is determined to be without fault, Form CA-2202 must be released (along with an OWCP-20) within 30 days of the date the overpayment is identified.*"⁸ (Emphasis in the original).

OWCP's procedures further specify, "Form CA-2202 also informs the claimant of the right to submit additional evidence and argument, if the claimant disagrees with the fact or amount of the overpayment and if the claimant feels the overpayment should be waived. Additional evidence and arguments must be submitted by the claimant within 30 days of the date of the letter."⁹

ANALYSIS -- ISSUE 1

On prior appeal, the Board set aside OWCP's finding that appellant was at fault in the creation of the overpayment of compensation for the period April 23 to May 2, 2015. The Board remanded the case for OWCP to consider waiver of recovery of the overpayment.

On remand, OWCP reviewed the previously submitted overpayment recovery questionnaire submitted after its initial preliminary overpayment determination of August 17, 2015. It did not provide appellant with a Form CA-2202 advising him of the overpayment for which he was without fault or a Form OWCP-20 overpayment recovery questionnaire to obtain updated evidence of his financial status as required by its procedures.¹⁰ Additionally, the Board has held that, if a case is remanded to OWCP for additional development regarding waiver of recovery of an overpayment, OWCP should issue a new preliminary finding regarding fault, providing appellant with new appeal rights, including the right to a precoupment hearing, and the opportunity to submit current financial information which

⁴ 20 C.F.R. § 10.431(a).

⁵ *Id.* at § 10.431(b).

⁶ *Id.* at § 10.431(d).

⁷ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.4(a)(1) (May 2004).

⁸ *Id.*

⁹ *Id.* at Chapter 6.200.4(a)(2) (May 2004).

¹⁰ *See supra* note 7.

OWCP will evaluate to properly determine whether the overpayment should be waived.¹¹ OWCP must rely on current financial evidence when determining eligibility for waiver of an overpayment.¹² Consequently, as OWCP did not comply with its procedures or Board case law, the case will be remanded for OWCP to provide appellant with a new preliminary determination of overpayment and overpayment recovery questionnaire. Following such further development as deemed necessary, it shall issue a *de novo* decision.¹³

CONCLUSION

The Board finds that the case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the August 31, 2016 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: May 23, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹¹ See *C.G.*, Docket No. 15-0891 (issued August 9, 2016); *J.R.*, Docket No. 12-0986 (issued November 13, 2012).

¹² See *C.S.*, Docket No. 12-0313 (issued October 23, 2012).

¹³ In view of the Board's disposition of the issue of waiver, it is premature to address recovery of the overpayment.