

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

D.L., Appellant)

and)

DEPARTMENT OF HOMELAND SECURITY,)
IMMIGRATION & CUSTOMS)
ENFORCEMENT, Glenco, GA, Employer)

Docket No. 17-1432
Issued: November 20, 2017

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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 19, 2017 appellant filed a timely appeal from an April 19, 2017 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.²

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$7,453.43 for the period February 6 through March 4, 2017 for which he was not at fault; and (2) whether OWCP properly denied waiver of recovery the overpayment.

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that appellant submitted additional evidence after OWCP rendered its April 19, 2017 decision. The Board's jurisdiction is limited to reviewing the evidence that was before OWCP at the time of its final decision. Therefore, the Board lacks jurisdiction to review this additional evidence on appeal. 20 C.F.R. § 501.2(c)(1).

FACTUAL HISTORY

On August 26, 2014 appellant, then a 51-year-old criminal investigator, filed a traumatic injury claim (Form CA-1) alleging that on August 21, 2014 he injured his right shoulder while swimming in the performance of his federal employment duties. OWCP accepted his claim for sprain of the right shoulder rotator cuff and aggravation of osteoarthritis of the right shoulder region. On December 31, 2014 it authorized right shoulder surgery. Appellant stopped work on February 5, 2015 to undergo total right shoulder arthroplasty. OWCP authorized compensation benefits beginning February 5, 2015 and placed him on the periodic rolls on February 8, 2015. Appellant returned to full-time light-duty work without wage loss on April 6, 2015. He returned to full duty on June 3, 2015.

On September 28, 2015 appellant filed a claim for a schedule award (Form CA-7). By decision dated December 4, 2015, OWCP granted him a schedule award for 24 percent permanent impairment of his right arm. The period of the award was from September 1, 2015 to February 6, 2017 and a fraction of a day³ totalling 524.16 days. Appellant's four-week compensation rate was \$7,622.44.

In a check dated March 4, 2017, OWCP provided appellant compensation for his schedule award for the period February 5 through March 4, 2017 in the amount of \$7,775.56.

OWCP determined that appellant had been entitled to receive compensation for only 1.16 days, rather than for the entire period of February 5 through March 4, 2017. It noted that his overpayment of compensation for 27 days amounted to \$7,497.86. OWCP further noted that appellant's daily pay rate was \$277.70 and multiplied this amount by the additional 0.16 days to which he was entitled to receive compensation of \$44.43. It subtracted \$44.43 from \$7,497.86 to reach the final overpayment amount of \$7,453.43.

On March 15, 2017 OWCP provided appellant with a preliminary determination of an overpayment. It noted that he had received an overpayment of compensation in the amount of \$7,453.43 as his schedule award payments were inadvertently continued through March 4, 2017. OWCP determined that appellant was not at fault in the creation of the overpayment. It requested that he complete an overpayment recovery questionnaire (Form OWCP-20) to determine the issues of waiver and recoupment. OWCP provided appellant with his appeal rights to either request a telephone conference, a final decision based on the written evidence, or a prerecoupment hearing. It afforded him 30 days to respond. Appellant did not respond within the time allotted.

By decision dated April 19, 2017, OWCP found that appellant was not at fault in the creation of the overpayment in the amount of \$7,453.43 for the period February 6 through March 4, 2017. It noted that the overpayment arose because his schedule award was inadvertently paid through March 4, 2017. OWCP found that appellant had not responded to the

³ There is a typographical error in the December 4, 2015 decision which lists the period of the award through February 8, 2017. The schedule award calculations in the record provide that the period of the award was from September 1, 2015 through February 6, 2017 or 74.88 weeks in the amount of \$20,417.25.

preliminary determination of overpayment and without financial information the overpayment was not subject to waiver. It requested that he remit the overpayment amount within 30 days.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of FECA⁴ and its implementing regulations set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members or functions of the body. Section 20 C.F.R. § 10.404 states that compensation is provided for specified periods of time for the permanent loss or loss of use of certain members.⁵

OWCP procedures provide that an overpayment is created when a schedule award expires but compensation continues to be paid.⁶

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$7,453.43 for the period February 6 through March 4, 2017. The amount of the overpayment is not in dispute.

Appellant was granted a schedule award on December 4, 2015 for the period September 1, 2015 through February 6, 2017. The evidence of record establishes that he continued to receive schedule award payments from OWCP after February 6, 2017, the date the award was scheduled to expire, until March 4, 2017. Consequently, any payments appellant received from OWCP after February 6, 2017 constituted an overpayment of benefits. OWCP properly calculated the \$7,453.43 overpayment by reducing the amount of compensation he received, \$7,775.56 by the amount he was entitled to receive \$322.13, to reach the overpayment amount of \$7,453.43. The Board affirms the fact and amount of overpayment.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of FECA provides that when an overpayment of compensation occurs “because of an error of fact or law,” adjustment or recovery shall be made by decreasing later payment to which the individual is entitled.⁷ The only exception to this requirement that an overpayment must be recovered is set forth in section 8129(b):

“Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.404. Effective May 1, 2009, OWCP began using the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009). See *J.L.*, Docket No. 14-0898 (issued March 26, 2015).

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

⁷ 5 U.S.C. § 8129(a).

adjustment or recovery would defeat the purpose of [FECA] or would be against equity and good conscience.”

Thus, a finding that appellant was without fault is insufficient, in and of itself, for OWCP to waive the overpayment. OWCP must exercise its discretion to determine whether recovery of the overpayment would defeat the purpose of FECA or would be against equity and good conscience, pursuant to the guidelines provided in the implementing federal regulations.

Section 10.436 of the implementing regulations⁸ provides that recovery of an overpayment will defeat the purpose of FECA if recovery would cause hardship by depriving a presently or formerly entitled beneficiary of income and resources needed for ordinary and necessary living expenses and outlines the specific financial circumstances under which recovery may be considered to defeat the purpose of FECA.

Section 10.437 provides that 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 attempting to repay the debt and when an individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.⁹

Section 10.438(a) provides that the individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by OWCP, as this information is needed to determine whether or not recovery of an overpayment would defeat the purpose of FECA or be against equity and good conscience.¹⁰ This information would also be used to determine the repayment schedule, if necessary. Section 10.438(b) provides that failure to submit the requested information within 30 days of the request shall result in denial of waiver.¹¹

ANALYSIS -- ISSUE 2

As OWCP found appellant without fault in the creation of the overpayment, waiver must be considered, and repayment is still required unless adjustment or recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.¹²

In a March 15, 2017 preliminary notice of overpayment, OWCP advised appellant of its preliminary determination and instructed him to 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

⁸ 20 C.F.R. § 10.436.

⁹ *Id.* at § 10.437.

¹⁰ *Id.* at § 10.438(a).

¹¹ *Id.* at § 10.438(b).

¹² 5 U.S.C. § 8129.

based on the written evidence, or a prerecoupment hearing. Appellant failed to respond within the allotted time and did not submit the overpayment recovery questionnaire or supporting financial documents. Thus, OWCP did not have the necessary financial information to determine if recovery of the overpayment would defeat the purpose of FECA or if recovery would be against equity and good conscience such that it would cause a financial burden.

Consequently, as appellant did not submit the financial information OWCP had properly requested from him, as required under section 10.438 of its regulations,¹³ which was necessary to determine his eligibility for waiver, OWCP properly denied waiver of recovery of the overpayment in the amount of \$7,453.43 for the period February 6 through March 4, 2017.

On appeal, appellant asserts that he should not have to repay the overpayment as he was not at fault in creating the overpayment. The Board has held that, although a claimant was without fault in the matter of the overpayment, repayment is still required unless adjustment or recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.¹⁴ As noted, appellant is not eligible for waiver as he did not submit the requested financial information before issuance of OWCP's April 19, 2017 decision.

With respect to the manner of recovery of an overpayment, the Board's jurisdiction is limited to reviewing those cases when OWCP seeks recovery from continuing compensation benefits under FECA. Where appellant is no longer receiving wage-loss compensation, the Board does not have jurisdiction with respect to OWCP's recovery of an overpayment under the Debt Collection Act.¹⁵

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$7,453.43 for the period February 6 through March 4, 2017 for which he was not at fault; and that OWCP properly denied waiver of recovery of the overpayment.

¹³ 20 C.F.R. § 10.438; *R.L.*, Docket No. 16-1564 (issued January 4, 2017).

¹⁴ *K.K.*, Docket No. 09-0207 (issued October 2, 2009).

¹⁵ See *Lewis George*, 45 ECAB 144, 154 (1993).

ORDER

IT IS HEREBY ORDERED THAT the April 19, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 20, 2017
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