

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount \$18,366.83 for the period April 29 through November 28, 2014 because she was not entitled to wage-loss compensation for that period; and (2) whether OWCP properly found appellant at fault and thus not entitled to waiver.

On appeal counsel asserts that OWCP improperly issued the July 26, 2016 overpayment decision because on December 5, 2014 appellant timely requested reconsideration of a December 17, 2013 OWCP merit decision that denied modification of OWCP's March 18, 2013 suitable work termination. He asserts that, as OWCP based its conclusions in the overpayment decision on its March 18, 2013 suitable work termination, the July 26, 2016 decision was improperly issued. Counsel further asserts that he timely submitted additional evidence following the preliminary overpayment finding, including a request for a preresoupment hearing.

FACTUAL HISTORY

On December 7, 2011 OWCP accepted appellant's traumatic injury claim (Form CA-1) for a left sprain of shoulder and rotator cuff, which occurred on November 15, 2011. Dr. Donald P. Douglas, a Board-certified orthopedic surgeon, performed arthroscopic debridement of the left shoulder on May 22, 2012. Appellant did not return to work following the surgery.

On January 15, 2013 the employing establishment offered appellant a secretary (automation) position, based on the restrictions provided by Dr. Robert Ungerer, a Board-certified orthopedic surgeon and OWCP referral physician who examined her on February 15 and December 19, 2012.

By letter dated January 15, 2013, OWCP advised appellant that the position offered was suitable. Appellant was notified that if she failed to report to work or failed to demonstrate that the failure was justified, pursuant to section 8106(c)(2) of FECA, her right to compensation for wage loss or a schedule award would be terminated. She was given 30 days to respond.

Appellant refused the offered position on January 28, 2013, stating that she was disabled from work due to the accepted employment injury. On February 1, 2013 she disagreed with the proposed termination. By letter dated February 19, 2013, OWCP advised appellant that her reasons for refusing the offered position were not valid. Appellant was given an additional 15 days to accept. In medical reports dated February 25, 2013, Dr. Douglas noted that she continued to have left shoulder pain and limited motion. He advised that appellant was totally disabled. Appellant did not accept the position.

By decision dated March 18, 2013, OWCP terminated appellant's wage-loss compensation and schedule award benefits pursuant to section 8106(c) of FECA, effective March 15, 2013. Appellant requested reconsideration on October 24, 2013. She submitted additional reports from Dr. Douglas dated April 8 to October 16, 2013 in which he diagnosed chronic left shoulder pain and adhesive capsulitis and advised that she was totally disabled. On June 10, 2013 Dr. Douglas requested authorization for additional surgery.

In a merit decision dated December 17, 2013, OWCP denied modification of its March 18, 2013 decision.

OWCP authorized additional surgery, and on April 29, 2014 Dr. Douglas performed arthroscopic manipulation of left shoulder for adhesive capsulitis. On July 26, 2014 appellant filed a claim for recurrence of disability (Form CA-2a). On July 31, 2014 OWCP accepted appellant's claim for a recurrence beginning April 29, 2014. Appellant was paid wage-loss compensation beginning that day.

On December 5, 2014 appellant, through counsel, timely requested reconsideration of the December 17, 2013 decision that denied modification of the March 18, 2013 suitable work termination. He asserted that the position offered to appellant was not suitable, based on the medical evidence, and that OWCP had not accepted all compensable injuries caused by the November 15, 2011 employment injury. Counsel also submitted a February 21, 2014 report in which Dr. Douglas reiterated his request for surgery due to arthrofibrosis/scarring of the shoulder.

Following inquiries by the employing establishment in August and September 2014 and January 2015,⁴ by decision dated February 9, 2015, OWCP found that appellant was not entitled to wage-loss compensation for the period December 1, 2014 and continuing. It noted that the March 18, 2013 termination decision remained in effect and she had erroneously been paid compensation for the period April 29 through November 28, 2014. In separate correspondence dated February 9, 2015, OWCP issued a preliminary finding that an overpayment of compensation in the amount of \$18,366.83 had been created because appellant received compensation for the period April 29 through November 28, 2014 to which she was not entitled because her entitlement to wage-loss benefits had been terminated in March 2013. Appellant requested a preresoupment hearing with OWCP's Branch of Hearings and Review and by decision dated September 4, 2015, an OWCP hearing representative remanded the case to OWCP because it had not properly rescinded acceptance of the recurrence of disability which formed the basis of the overpayment.

On December 8, 2015 OWCP issued a notice of proposed rescission of acceptance of the recurrence of disability for which appellant was paid compensation for the period April 29 through November 28, 2014. It found that the July 31, 2014 decision had been issued in error because her entitlement to wage-loss and schedule award compensation benefits had been terminated by decision dated March 18, 2013 based on her refusal to accept suitable employment. OWCP finalized the rescission on January 20, 2016. In a separate January 20, 2016 decision, it denied appellant's claim for a recurrence of disability beginning April 29, 2014 and continuing through November 28, 2014.⁵

⁴ The employing establishment noted that appellant had not worked since May 2012, and that OWCP had issued a March 17, 2013 decision terminating her entitlement to monetary compensation because she refused an offer of suitable work.

⁵ Appellant, through counsel, filed an appeal with the Board from both January 20, 2016 decisions. The Board assigned Docket No. 16-1467 to this appeal, which will be adjudicated separately.

In correspondence dated May 10, 2016 and received by OWCP on May 16, 2016, appellant, through counsel, requested reconsideration of the February 9, 2015 decision in which OWCP found that appellant was not entitled to wage-loss compensation for the period December 1, 2014 and continuing.

On June 20, 2016 OWCP again issued a preliminary finding that an overpayment of compensation in the amount of \$18,366.83 had been created because appellant received compensation for the period April 29 through November 28, 2014 to which she was not entitled because her entitlement to wage-loss benefits had been terminated in March 2013. It found her at fault because she accepted payments that she knew or reasonably should have known was incorrect. The preliminary decision provided an explanation of the calculation of the overpayment. Appellant was provided an overpayment action request and an overpayment questionnaire (Form CA-20). She was informed of the actions that she could take and was allotted 30 days to respond. An overpayment worksheet indicated that appellant received FECA compensation totaling \$18,366.83 for the period April 29 through November 28, 2014.

By decision dated July 26, 2016, OWCP finalized the preliminary finding that appellant was at fault in the creation of an overpayment of \$18,366.83 from April 29 through November 28, 2014. It noted that no response was received following the preliminary finding. OWCP directed that appellant repay the overpayment in full or contact it to make appropriate arrangements.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of FECA 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 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.⁷

Section 8106(c)(2) of FECA states that a partially disabled employee who refuses to seek suitable work or refuses or neglects to work after suitable work is offered to, procured by or secured for her is not entitled to compensation.⁸ The implementing regulations provide that a partially disabled employee who refuses to seek suitable work, or refuses to or neglects to work after suitable work is offered to or arranged for him or her, is not entitled to compensation, including compensation for a schedule award under section 8107 of FECA.⁹

ANALYSIS -- ISSUE 1

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

⁶ 5 U.S.C. § 8102(a).

⁷ *Id.* at § 8129(a).

⁸ *Id.* at § 8106(c)(2).

⁹ 20 C.F.R. § 10.517.

The basis for each OWCP decision issued by OWCP subsequent to its acceptance of the April 29, 2014 recurrence of disability flows from its March 18, 2013 decision in which appellant's entitlement to wage-loss and schedule award compensation was terminated in accordance with section 8106(c) of FECA because she failed to accept suitable employment. As noted by counsel in this appeal, in a merit decision dated December 17, 2013, OWCP denied modification of the March 18, 2013 decision. The record before the Board in this case indicates that appellant, through counsel, timely filed a request for reconsideration of the December 17, 2013 decision with OWCP on December 5, 2014. The record before the Board does not contain an OWCP decision responsive to this request.

The next OWCP decision of record is the February 9, 2015 merit decision in which OWCP found that appellant was not entitled to wage-loss compensation for the period December 1, 2014 and continuing. On that date OWCP also issued a preliminary overpayment finding that an overpayment of compensation had been created because appellant received \$18,366.83 in FECA compensation in error for the period April 29 through November 28, 2014, after her entitlement to wage-loss compensation had been terminated. The preliminary overpayment decision was remanded to OWCP by its Branch of Hearings and Review on September 4, 2015. The hearing representative noted that OWCP had not properly rescinded acceptance of the April 29, 2014 recurrence of disability which formed the basis of the overpayment. On December 8, 2015 OWCP then issued a notice of proposed rescission of acceptance of the April 29, 2014 recurrence of disability, and finalized the rescission by decision dated January 20, 2016. In a separate January 20, 2016 decision, it denied appellant's claim for a recurrence of disability beginning on April 29, 2014.

On June 20, 2016 OWCP again issued a preliminary finding that appellant was at fault in the creation of an overpayment of compensation in the amount of \$18,366.83 for the period April 29 through November 28, 2014 because her entitlement to wage-loss benefits had been terminated in March 2013. By decision dated July 26, 2016, OWCP finalized the preliminary overpayment finding and directed that appellant repay the overpayment in full or contact it to make appropriate arrangements.

Proceedings under FECA are not adversarial in nature. OWCP shares in the responsibility to develop the evidence and has an obligation to see that justice is done.¹⁰ The July 26, 2016 overpayment decision at issue in this case flowed from OWCP's March 18, 2013 suitable work termination decision that was affirmed in a merit decision dated December 17, 2013. Appellant, through counsel, timely filed a reconsideration request from the December 17, 2013 decision. In the December 5, 2014 reconsideration request, counsel made cogent arguments and submitted an additional medical report.

The Board has long held that OWCP shall review all evidence submitted by a claimant and received by OWCP prior to issuance of its decision.¹¹ OWCP procedures also provide that a

¹⁰ *P.K.*, Docket No. 08-2551 (issued June 2, 2009).

¹¹ See *Kenneth R. Love*, 50 ECAB 193 (1998).

final decision on a reconsideration request must be issued, and the goal for issuing such decision is 90 days from receipt of the request.¹²

In the case *Kenneth E. Harris*, the Board held that OWCP issued a decision in error, as there was an outstanding request for reconsideration which remained unadjudicated.¹³ In the case at hand, it was improper for OWCP to issue further decisions, including the January 20, 2016 decisions before the Board in the present appeal, without addressing the arguments and evidence submitted with appellant's December 5, 2014 reconsideration request.¹⁴ Thus, this case must be remanded to OWCP to issue an appropriate decision on her December 5, 2014 reconsideration request before addressing whether an overpayment of compensation was created.

In light of the Board's disposition regarding Issue 1, Issue 2 is rendered moot.

CONCLUSION

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

¹² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.2.b (October 2011).

¹³ 54 ECAB 502 (2003).

¹⁴ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the July 26, 2016 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for further proceedings consistent with this order of the Board.

Issued: October 4, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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