

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

C.A., Appellant)

and)

DEPARTMENT OF HOMELAND SECURITY,)
TRANSPORTATION SECURITY)
ADMINISTRATION, FEDERAL AIR)
MARSHAL SERVICE, East Elmhurst, NY,)
Employer)

**Docket No. 18-0092
Issued: April 2, 2018**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On October 16, 2017 appellant filed a timely appeal from a September 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 over the merits of the case.

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$3,297.65 during the period June 15 through July 22, 2017 because she returned to work, but continued to receive FECA wage-loss compensation; and (2) whether appellant was at fault in the creation of the overpayment and thus precluded from waiver of recovery.

¹ 5 U.S.C. § 8101 *et seq.*

On appeal appellant challenges the findings of an overpayment, as she notes that she did not return to work until August 7, 2017. She also alleges that she completed the overpayment action papers and timely submitted them to OWCP. Appellant attached a copy of these documents to her appeal.²

FACTUAL HISTORY

On November 10, 2016 appellant, then a 33-year-old federal air marshal, filed a traumatic injury claim (Form CA-1) alleging that, on that date, she stepped back with her left leg when boxing with a classmate, heard her left knee pop, and fell. On December 8, 2016 OWCP accepted her claim for lateral dislocation of the left patella. On February 22, 2017 it expanded acceptance of the claim to include loose bodies in left knee. OWCP paid appellant wage-loss compensation on the periodic rolls, effective January 9, 2017.

At the time of her injury, appellant's Form CA-1 indicated that she was working in East Elmhurst, New York. However, appellant's mailing address was a post office box in Orlando, Florida. A note in OWCP's file, received on December 8, 2016, indicated that appellant was a new hire from Florida and was in New Jersey undergoing initial training. The note indicated that appellant would be cleared for full-time limited duty in Florida after undergoing knee surgery, scheduled for December 23, 2016.

Following her injury appellant received medical treatment in Orlando, Florida. In a June 12, 2017 work capacity evaluation, Dr. David M. Foulk, appellant's treating Board-certified orthopedic surgeon, stated that appellant could work in a sedentary position for four hours a day and should be able to return to work eight hours a day in six weeks. Appellant attended physical therapy appointments in Florida from July 5 through 12, 2017.

The record contains OWCP Form CA-110 memoranda, memorializing telephone conversations between OWCP's claims examiner and the field nurse assigned to appellant's care. In a memorandum dated June 30, 2017, the claims examiner related that the field nurse was concerned that appellant was stalling as she did not want to return to New Jersey where the air marshal school was located. The field nurse indicated that the employing establishment offered appellant a limited-duty position in New Jersey and that she was to report on August 1, 2017. A June 30, 2017 memorandum to the field nurse from the claims examiner indicated that a 120-day extension had been given to the field nurse regarding appellant's care, to provide appellant the opportunity to follow up on a new magnetic resonance imaging scan and to accept a job offer beginning August 1, 2017. In a progress note of June 30, 2017, the field nurse indicated that appellant had received a job offer with a start date of August 1, 2017 based on her most recent work status. Another Form CA-110 telephone memorandum of August 10, 2017 from the field nurse related that appellant had returned to work on August 7, 2017.

On August 16, 2017 OWCP issued a preliminary determination that appellant had been overpaid in the amount of \$3,297.65 because she had returned to part-time work with no wage loss on June 15, 2017 and received compensation for total wage loss through June 24, 2017. By

² Appellant submitted new evidence with her appeal. The Board's jurisdiction is limited to the evidence that was before OWCP at the time of its final decision. The Board is, therefore, precluded from considering this new evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c)(1).

a correction letter of even date, it corrected appellant's overpayment to run from June 15 through July 22, 2017. OWCP further made a preliminary determination that appellant was at fault in the creation of the overpayment, as she accepted a payment that she knew or reasonably should have known to be incorrect. It provided appellant with an overpayment action request form and overpayment recovery questionnaire (Form OWCP-20) for her completion. Appellant was given 30 days to respond.

By decision dated September 19, 2017, OWCP issued a final decision, finding that appellant received an overpayment of compensation in the amount of \$3,297.65. It further determined that the preliminary finding that appellant was at fault in the creation of the overpayment was correct and ordered recovery of the overpayment.

LEGAL PRECEDENT

Section 8102 of FECA provides that the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.³ Section 8116 of FECA defines the limitations on the right to receive compensation benefits. This section of FECA provides that, while an employee is receiving compensation, he or she may not receive salary, pay, or remuneration of any type from the United States, except in limited circumstances.⁴ A claimant is only entitled to receive wage-loss compensation due to disability for those periods during which his or her work-related medical condition prevents him or her from earning the wages earned before the work-related injury.⁵ OWCP procedures provide that an overpayment in compensation is created when a claimant returns to work, but continues to receive wage-loss compensation.⁶

ANALYSIS

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

OWCP determined that appellant received an overpayment of compensation in the amount of \$3,297.65 because she performed part-time work from June 15 through July 22, 2017 and she also received FECA compensation during this period. The record is devoid of evidence establishing where appellant was employed for the overpayment period and what type of duties she performed.

Dr. Foulk, appellant's treating physician, did release appellant to work limited duty four hours a day in his June 12, 2017 work capacity evaluation.⁷ However, there is no evidence in the

³ 5 U.S.C. § 8102.

⁴ *Id.* at § 8116(a).

⁵ 20 C.F.R. § 10.500.

⁶ *Danny E. Haley*, 56 ECAB 393 (2005); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Action*, Chapter 6.200.2(a) (May 2004).

⁷ There is no evidence of record that appellant was offered a modified job offer in writing, pursuant to Dr. Foulk's June 12, 2017 work restrictions, such that she would not be entitled to wage-loss benefits under 20 C.F.R. § 10.500(a).

record that appellant worked from June 15 through July 22, 2017, and there is considerable evidence indicating that appellant did not work during this period of time. The position that appellant was offered was in New York, but the record reflects that appellant received physical therapy in Florida on June 15, 21, and 23 and again from July 5 through 12, 2017. Furthermore, OWCP's memorandum indicate that appellant was not expected to return to work until August 1, 2017, and did not actually return to work until August 7, 2017. The evidence of record therefore requires further development as to whether appellant actually performed part-time work from June 15 through July 22, 2017 such that an overpayment of compensation was created.

On remand OWCP shall further develop the record to determine whether appellant had part-time earnings during the period June 15 through July 22, 2017.⁸

After such further development as necessary OWCP shall issue a *de novo* decision regarding the relevant overpayment issues.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the decision dated September 19, 2017 is set aside, and the case is remanded to OWCP for further consideration consistent with this opinion.

Issued: April 2, 2018
Washington, DC

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

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

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

⁸ In light of the disposition of this issue, the second issue, with regard to waiver of recovery of the overpayment, is moot.