

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

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R.H., Appellant)	
)	
and)	Docket No. 17-1933
)	Issued: February 15, 2018
DEPARTMENT OF THE NAVY, U.S. MARINE)	
CORPS, Barstow, CA, Employer)	
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<i>Appearances:</i>	<i>Case Submitted on the Record</i>
<i>Appellant, pro se</i>	
<i>Office of Solicitor, for the Director</i>	

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On September 13, 2017 appellant filed a timely appeal from a July 27, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP).¹ Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.³

¹ Appellant specifically challenged OWCP's July 27, 2017 overpayment determination. The record also contains a prior June 2, 2017 decision denying wage-loss compensation for the period December 2 to 14, 2016. However, appellant has not appealed OWCP's June 2, 2017 decision to the Board and therefore that issue is not a subject of this appeal.

² 5 U.S.C. § 8101 *et seq.*

³ The record provided the Board includes evidence received after OWCP issued its July 27, 2017 decision. The Board's jurisdiction is limited to a review of the evidence that was in the case record at the time of OWCP's final decision. Therefore, the Board is precluded from reviewing this additional evidence for the first time on appeal. 20 C.F.R. § 501.2(c)(1).

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received a \$4,208.21 overpayment of compensation for the period October 29 through December 12, 2015; and (2) whether OWCP properly determined that appellant was at fault in the creation of the overpayment of compensation, thereby precluding waiver of recovery of the overpayment.

FACTUAL HISTORY

On February 24, 2014 appellant, then a 39-year-old welder, filed an occupational disease claim (Form CA-2) alleging that he sustained bilateral carpal tunnel syndrome due to performing his repetitive work duties over a period of time. He indicated that he first became aware of his claimed condition on January 16, 2013 and first realized on December 7, 2013 that it was caused or aggravated by factors of his federal employment. Appellant did not stop work around the time he filed his claim.

In May 2014 OWCP accepted appellant's claim for bilateral wrist sprain. On September 6, 2014 appellant stopped work and on September 9, 2014, he underwent OWCP-authorized right carpal tunnel release surgery. He received wage-loss compensation on the daily rolls beginning September 6, 2014.

In late-September 2014, OWCP expanded the accepted conditions to include the bilateral conditions of carpal tunnel syndrome, radial styloid tenosynovitis, and other tenosynovitis of hand/wrist.

On November 18, 2014 appellant underwent OWCP-approved left carpal tunnel release surgery. On March 3, 2015 he returned to modified duty on a full-time basis for the employing establishment.

On August 3, 2015 appellant stopped work and, on August 4, 2015, he underwent OWCP-approved repeat right carpal tunnel release surgery with excision of contracture/scar tissue mass, ulnar nerve decompression, and flexor tenosynovectomy of his right wrist. He received wage-loss compensation on the daily rolls beginning August 3, 2015.

In an August 20, 2015 letter, OWCP advised appellant that, to minimize the possibility of an overpayment of compensation, he should immediately provide notification when he returned to work. It indicated that, if he received his compensation payments by paper check and had worked for any portion of the period covered by a given check, he should return the payment to OWCP, even if he had already advised OWCP that he was working. For payments sent by electronic funds transfer, appellant was expected to monitor his deposits carefully (at least every two weeks) and, if he worked for any portion of the period for which a deposit was made, he was to advise OWCP immediately so that the overpayment could be collected.

Appellant was placed on the periodic rolls for wage-loss compensation beginning August 23, 2015. He returned to full-time modified work without wage loss for the employing establishment on October 29, 2015.

Appellant filed Form CA-7 claims for compensation, alleging entitlement to wage-loss compensation for 48 hours (between November 4 and 30, 2015) spent attending medical appointments related to his accepted conditions.

On December 10, 2015 appellant informed an OWCP official by telephone that he had returned to work for the employing establishment on October 29, 2015.

In a July 1, 2016 notice, OWCP advised appellant of its preliminary determination that he received a \$5,227.55 overpayment of compensation for the period October 29 to December 12, 2015.⁴ It explained that he impermissibly received wage-loss compensation for temporary total disability following his October 29, 2015 return to work.⁵ OWCP also made a preliminary determination that appellant was at fault in the creation of the overpayment because he accepted payments that he was aware or should have been aware were incorrect. It advised him that he could submit evidence challenging the fact, amount, or finding of fault, and request waiver of recovery of the overpayment. OWCP informed appellant that he could submit additional evidence in writing, at a telephone conference with the district office of OWCP, or at a precoupment hearing with OWCP's Branch of Hearings and Review, but that a conference or hearing must be requested within 30 days of the date of the written notice of the overpayment. It requested that he complete and return an enclosed financial information questionnaire (OWCP-20) within 30 days even if he was not requesting waiver of recovery of the overpayment.

Appellant asserted that he was without fault in the creation of the claimed overpayment of compensation and, on July 29, 2016, he requested a telephone conference with the district office of OWCP. On August 4, 2016 OWCP received a financial information questionnaire in which he indicated that he had \$7,000.00 in monthly income, \$5,675.00 in monthly expenses, and \$2,600.00 in assets.

During a July 27, 2017 telephone conference with the district office of OWCP, appellant asserted that he reported his October 29, 2015 return to work in several telephone calls made to OWCP between October 27 and 29, 2015. He acknowledged that by December 10, 2015 he knew that he could not accept the compensation monies he had received for periods after October 28, 2015.

By decision dated July 27, 2017, OWCP finalized its preliminary overpayment determination. It again found that appellant was at fault for creating the \$5,227.55 overpayment of compensation for the period October 29 through December 12, 2015. However, OWCP reduced the outstanding balance to \$4,208.21 because he was entitled to \$1,019.34 for 48 hours of intermittent wage loss due to his attendance at various medical appointments during the period

⁴ The July 1, 2016 notice corrected a March 17, 2016 notice which contained a different overpayment calculation (\$5,460.75) for the period October 29 to December 12, 2015.

⁵ The record contains a payment document showing that on November 14, 2015 appellant received \$3,252.70 in wage-loss compensation for the period October 18 to November 14, 2015 through electronic transfer into his bank account. A worksheet shows that for the period October 29 to November 14, 2015 he received \$1,974.85 in wage-loss compensation. The record also contains a payment document showing that on December 12, 2015 appellant received \$3,252.70 in wage-loss compensation for the period November 15 to December 12, 2015 through electronic transfer into his bank account. These payments totaled \$5,227.55.

November 4 through 30, 2015. Because appellant was at fault in creating the overpayment, it denied waiver of recovery of the overpayment.

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 his duty.⁶ Section 8116(a) of FECA provides that, while an employee is receiving compensation or if he or she has been paid a lump sum in commutation of installment payments until the expiration of the period during which the installment payments would have continued, the employee may not receive salary, pay, or remuneration of any type from the United States, except in limited specified instances.⁷

A claimant is not entitled to receive temporary total disability (TTD) benefits and actual earnings for the same time period.⁸ An overpayment of compensation is created when a claimant returns to work, but continues to receive wage-loss compensation for TTD.⁹

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation as he was paid total disability compensation for the period October 29 to December 12, 2015 after his return to work at the employing establishment on October 29, 2015.¹⁰ However, the Board further finds that OWCP has not properly determined the amount of the overpayment of compensation.

OWCP determined that appellant received an overpayment of compensation in the amount of \$5,227.55 for the period October 29 to December 12, 2015. However, it offset this amount with compensation that was owed for 48 hours of wage-loss compensation due to his attendance at various medical appointments during the period November 4 through 30, 2015. OWCP calculated the amount owed for the period November 4 through 30, 2015 as \$1,019.34, which was subtracted from \$5,227.55 and thus reduced the amount of overpayment to \$4,208.21.

Although such an offset appears administratively straightforward, the Board has held that it may circumvent established legal procedures and protections if the claimant is entitled to

⁶ 5 U.S.C. § 8102(a).

⁷ *Id.* at § 8116(a).

⁸ *L.S.*, 59 ECAB 350, 352-53 (2008).

⁹ *Id.*; Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2a (May 2004).

¹⁰ The record contains documents showing that appellant received \$1,974.85 in wage-loss compensation for the period October 29 to November 14, 2015 through electronic transfer into his bank account, and that he received \$3,252.70 in wage-loss compensation for the period November 15 to December 12, 2015 through electronic transfer into his bank account. Therefore, he received \$5,227.55 in wage-loss compensation for temporary total disability for the period October 29 to December 12, 2015.

consideration of waiver.¹¹ Such offsets are not allowed, as they permit an unrestricted recovery of the offset portion of the overpayment without regard to the relevant factors set forth in 20 C.F.R. § 10.441(a)¹² which denies administrative due process with respect to the amounts offset.¹³

The case will, therefore, be remanded for OWCP to properly calculate the entire amount of the overpayment of compensation and to consider waiver of the entire amount of the overpayment. After conducting such further development as is deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that appellant received an overpayment of compensation for the period October 29 to December 12, 2015 as he received total disability compensation from OWCP after he returned to full-time work on October 29, 2015.¹⁴ However, the Board finds that the case is not in posture for determining the amount of the overpayment.¹⁵

¹¹ *Michael A. Grossman*, 51 ECAB 673, 678 (2000); *T.W.*, Docket No. 09-2039 (issued April 6, 2010); *R.O.*, Docket No. 17-0894 (issued January 26, 2018).

¹² This section states that in collecting an overpayment of compensation OWCP shall decrease later payment of compensation by taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize any hardship.

¹³ *Diana L. Booth*, 52 ECAB 370, 373 (2001) (finding that OWCP's offset practice denied administrative due process rights with respect to the amount offset); *Michael A. Grossman*, *supra* note 11; *B.T.*, Docket No. 13-1619 (issued February 24, 2014).

¹⁴ As of July 27, 2017, the outstanding overpayment balance has been reduced to \$4,208.21.

¹⁵ As OWCP has not established the amount of overpayment, it is not necessary for the Board to address the issues of fault and waiver.

ORDER

IT IS HEREBY ORDERED THAT the July 27, 2017 decision of the Office of Workers' Compensation Programs is affirmed as to fact of the overpayment. The decision is set aside as to the amount of the overpayment and remanded for further action consistent with this decision of the Board.

Issued: February 15, 2018
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