

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish a recurrence of disability beginning August 1, 2016 causally related to his April 8, 2015 employment injury; (2) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$5,416.41 for the period July 28 to September 17, 2016 because he continued to receive wage-loss compensation for total disability after his return to work; and (3) whether OWCP properly found appellant at fault in the creation of the overpayment, thereby denying waiver of recovery.

FACTUAL HISTORY

On April 9, 2015 appellant, then a 53-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that, on April 8, 2015, he sustained a swollen right knee when he tripped on stairs in the performance of duty. The claim form did not indicate whether he stopped work. OWCP accepted appellant's claim for right knee arthritis and right knee and leg sprain. On April 29, 2015 appellant began working part-time limited duty.

Appellant stopped work on June 17, 2015 and filed various claims for wage-loss compensation (Form CA-7). OWCP paid wage-loss compensation and medical benefits on the supplemental rolls commencing May 27, 2015.

On September 8, 2015 appellant underwent authorized right knee surgery.

Appellant received compensation on the periodic rolls as of October 18, 2015.

By letter dated March 28, 2016, OWCP advised appellant that he would be paid compensation every 28 days commencing February 7, 2016 in the amount of \$2,970.81. In an enclosed Form EN1049, it advised him that he must immediately notify OWCP upon his return to work. OWCP informed appellant that, if he worked for any portion of the period for which payment was made, he must return the payment in order to avoid an overpayment of compensation. On April 17, 2016 appellant signed a certification form indicating that he read the information contained in the Form EN1049.

OWCP referred appellant to Dr. Stuart Gordon, a Board-certified orthopedic surgeon, for a second opinion examination to determine whether appellant had residuals and remained disabled from work due to his April 8, 2015 employment injury. In a June 20, 2016 report, Dr. Gordon reviewed appellant's history and provided examination findings. He opined that appellant still suffered residuals from his employment injury. Dr. Gordon indicated that appellant could work with restrictions.

On July 6, 2016 OWCP expanded acceptance of appellant's claim to include right knee medial meniscus tear, arthritis of the right knee, and strain of the right knee and leg.

In a July 27, 2016 Form CA-20, Dr. Michael Wallace, a Board-certified orthopedic surgeon specializing in sports medicine, noted a date of injury of April 8, 2015 and history of injury that appellant had fallen at work. He reported findings of meniscus tear of appellant's right knee. Dr. Wallace checked a box marked "yes" indicating that appellant's condition was

aggravated or caused by the described employment activity of “fall at work.” He noted that appellant was able to resume regular duty on July 27, 2016.

OWCP received a work activity status report dated July 26, 2016 from Alisa M. Pravdo, a physical therapist. Ms. Pravdo noted a diagnosis of right knee lateral meniscus tear and indicated that appellant could return to regular duty on July 27, 2016.

On July 28, 2016 appellant returned to full duty.

Appellant filed various Form CA-7 claims for wage-loss compensation for intermittent periods of partial disability beginning August 1, 2016.

On a Form CA-7a dated August 29, 2016, appellant claimed wage-loss compensation for partial disability on the following dates: .19 hours on August 1; 2.17 hours on August 3; 2.00 hours on August 5; 1.49 hours on August 8; 2.01 hours on August 10; 1.54 hours on August 12; 1.22 hours on August 15; 1.85 hours on August 17; and 1.44 hours on August 19, 2016.

In various CA-7a forms, appellant claimed wage-loss compensation for approximately two hours on the following dates: August 22, 24, 26, 29 and 31; September 1, 2, 3, 7, 8, 9, 10, 12, 14, 15, 16, 17, 19, 21, 22, 23, 24, 26, 27, 28, 29 and 30; and October 1, 3, 5, 6 and 7, 2016. He noted that his reasoning for use of leave was due to “Limited Duty.”

OWCP also received physical therapy treatment notes indicating that appellant underwent physical therapy for right knee meniscus tear. The treatment notes were dated August 1, 3, 5, 8, 10, 12, 15, 17, 19, 22, 24, 26, 29 and 31, and September 2, 2016.

The record indicates that on August 20, 2016 appellant received a direct deposit in the amount of \$2,499.88, representing his wage-loss compensation from July 28 to August 20, 2016. He received another payment on September 17, 2016 in the amount of \$2,916.53, representing his wage-loss compensation for the period August 21 to September 17, 2016.

In an August 25, 2016 return to work note, Dr. Wallace indicated that appellant could return to work for six hours per day, during the period August 29 to October 7, 2016.

On September 22, 2016 OWCP terminated appellant’s periodic rolls payments effective that date. In a compensation termination sheet, it indicated that he received an overpayment of compensation in the amount of \$5,416.41 for the period July 28 to September 17, 2016.

By letter dated September 22, 2016, OWCP advised appellant that it received his claims for compensation for intermittent periods of partial disability. It reported that the medical evidence of record was insufficient to support his claims for disability compensation. OWCP requested that appellant submit a claim for recurrence of disability. It also requested that he respond to an attached development questionnaire and provide medical evidence to establish that he was unable to work on the claimed dates as a result of the April 8, 2015 employment injury. Appellant was afforded 30 days to submit the additional evidence.

On October 3, 2016 appellant filed a recurrence of disability claim (Form CA-2a) alleging that he experienced a recurrence of disability due to his April 8, 2015 employment

injury. He indicated that he never stopped work, but reduced his work hours to 4 ½ hours a day. Appellant explained that after he returned to work on July 28, 2016 he experienced discomfort. He noted that, after working eight-hour days for almost four weeks, the pain became unbearable.

On October 20, 2016 OWCP received appellant's response to its development letter. Appellant explained that he returned to full duty on July 28, 2016, but continued with six weeks of physical therapy. He related that, after working for four weeks, he informed a physician that working eight-hour days caused a lot of discomfort. Appellant described his work duties as delivering mail and parcels for six and a half hours and filing for one and a half hours. He believed that his current disability was related to his original injury because the pain and discomfort persisted at the time of his release and throughout therapy. Appellant related that his symptoms were continuously present and that walking and stairs made long days unbearable.

In a decision dated November 10, 2016, OWCP denied appellant's recurrence of disability claim for wage-loss compensation beginning August 1, 2016. It determined that the medical evidence of record failed to establish that his April 8, 2015 employment injury had worsened to the extent that he was unable to work for intermittent periods beginning August 1, 2016.

On November 17, 2016 OWCP issued a preliminary determination that appellant received an overpayment of compensation in the amount of \$5,416.41 for the period July 28 through September 17, 2016 because he returned to work full time on July 28, 2016, but continued to receive wage-loss compensation for total disability until September 17, 2016. It found that he was at fault in the creation of the overpayment because he knowingly accepted payments which he knew or should have known were incorrect. The preliminary determination provided an explanation of the calculation of the overpayment. OWCP requested that appellant respond and complete an attached overpayment action request and an overpayment recovery questionnaire form (OWCP Form 20) within 30 days. Appellant was informed of the required financial documentation and the actions he could take.

In an overpayment calculation worksheet, OWCP indicated that appellant received a compensation payment of \$2,916.53 every 28 days, which equaled a daily rate of \$104.1617. It multiplied this daily rate by 52, the number of calendar days that he was overpaid, for a total overpayment amount of \$5,416.41.

Appellant submitted various physical therapy reports dated June 29 to September 2, 2016.

OWCP also received a November 10, 2016 medical report from Dr. Wallace, wherein he related appellant's complaints of right knee pain with walking and climbing stairs. Dr. Wallace reported no tenderness and no crepitation of appellant's right knee upon examination. He indicated that appellant's right knee pain was due to his arthritis. Dr. Wallace provided a duty status report (Form CA-17) indicating that appellant could return to limited duty.

By decision dated December 20, 2016, OWCP finalized the preliminary overpayment determination, finding an overpayment of compensation in the amount of \$5,416.41 for the period July 28 through September 17, 2016. It also found that appellant was at fault in the

creation of the overpayment because he knowingly accepted payments he knew or should have known were incorrect.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA⁴ has the burden of proof to establish the essential elements of his or her claim by the weight of the reliable, probative, and substantial evidence.⁵ For each period of disability claimed, an employee has the burden of proof to establish causal relationship between his or her recurrence of disability and his or her accepted employment injury.⁶

OWCP's implementing regulations define a recurrence of disability as an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition, which resulted from a previous injury or illness without an intervening injury or new exposure to the work environment.⁷ This term also means an inability to work when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn (except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force) or when the physical requirements of such an assignment are altered such that they exceed the employee's physical limitations.⁸

OWCP's procedures require that, in cases where recurrent disability from work is claimed within 90 days or less from the first return to duty, the attending physician should describe the duties which the employee cannot perform and the demonstrated objective medical findings that form the basis for the renewed disability from work.⁹

For each period of disability claimed, an employee must establish that he or she was disabled from work as a result of the accepted employment injury. The Board will not require OWCP to pay compensation for disability for which compensation is claimed. To do so would essentially allow an employee to self-certify his or her disability and entitlement to compensation.¹⁰

⁴ *Supra* note 2.

⁵ *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 58 (1968).

⁶ *Dominic M. Descaled*, 37 ECAB 369, 372 (1986); *Bobby Melton*, 33 ECAB 1305, 1308-09 (1982).

⁷ 20 C.F.R. § 10.5(x).

⁸ *Id.*

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.5 (June 2013).

¹⁰ *Amelia S. Jefferson*, 57 ECAB 183 (2005).

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained right knee arthritis, sprain, and meniscus tear as a result of his April 8, 2015 employment injury. Appellant stopped work on June 17, 2015 and received wage-loss compensation. He returned to full duty on July 28, 2016. Appellant stopped work again and filed various claims for intermittent periods of partial disability beginning August 1, 2016. OWCP denied his recurrence of disability claim, finding that the evidence of record failed to establish that he was unable to work as a result of his April 8, 2015 employment injury. The Board finds that appellant has not met his burden of proof to establish a recurrence of disability beginning August 1, 2016.

Because appellant has claimed a recurrence of disability less than 90 days from his first return to duty, he must submit medical evidence which describes the duties which he cannot perform and the demonstrated objective medical findings that form the basis for the renewed disability from work. In cases where recurring disability from work is claimed within 90 days of the first return to duty, the focus is on disability rather than causal relationship of the accepted condition(s) to the work injury.¹¹

The only medical evidence addressing appellant's claimed intermittent periods of partial disability beginning August 1, 2016 was an August 25, 2016 return to work note from Dr. Wallace. Dr. Wallace indicated that appellant could return to work with restrictions of working only six hours per day for the period August 29 to October 7, 2016. Although he recommended that appellant reduce his work hours to six hours per day, Dr. Wallace did not provide any explanation or specify any objective medical findings to support his conclusion that appellant was unable to work full duty as of August 1, 2016. He did not provide objective evidence and medical rationale that explained why appellant was no longer able to work for eight hours beginning August 1, 2016. As such, Dr. Wallace's opinion regarding appellant's inability to work full duty is of diminished probative value.¹² Appellant has failed to meet her burden of proof to establish a recurrence of disability beginning August 1, 2016 causally related to his April 8, 2015 employment injury.

The Board finds however that the case is not in posture for decision regarding whether appellant is entitled to some wage-loss compensation on August 1, 3, 5, 8, 10, 12, 15, 17, 19, 22, 24, 26, 29, and 31, and September 2, 2016 for medical treatment. OWCP procedures provide that wages lost for compensable medical examination or treatment may be reimbursed.¹³ A claimant who has returned to work following an accepted injury or illness may need to undergo examination or treatment and such employee may be paid compensation for wage loss while obtaining medical services and for a reasonable time spent traveling to and from the medical provider's location.¹⁴ As a rule, no more than four hours of compensation or continuation of pay should be allowed for routine medical appointments. Longer periods of time may be allowed

¹¹ *Supra* note 9.

¹² *See S.B.*, Docket No. 13-1162 (issued December 12, 2013).

¹³ *Supra* note 9, *Computing Compensation*, Chapter 2.901.19 (February 2013).

¹⁴ *Daniel Hollars*, 51 ECAB 355 (2000); *Jeffrey R. Davis*, 35 ECAB 950 (1984).

when required by the nature of the medical procedure and/or the need to travel a substantial distance to obtain the medical care.¹⁵

The case record contains physical therapy treatment notes that established that appellant received medical treatment for his right knee injury on August 1, 3, 5, 8, 10, 12, 15, 17, 19, 22, 24, 26, 29, and 31, and September 2, 2016. The case therefore will be remanded for OWCP to determine whether he is entitled to up to four hours of wage-loss compensation for these dates. On remand, OWCP shall issue a *de novo* decision on this issue.

LEGAL PRECEDENT -- ISSUE 2

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.¹⁶ 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.¹⁷ 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.¹⁸ OWCP procedures provide that an overpayment in compensation is created when a claimant returns to work, but continues to receive wage-loss compensation.¹⁹

ANALYSIS -- ISSUE 2

Appellant stopped work and began receiving wage-loss compensation for total disability commencing June 17, 2015. OWCP placed him on the periodic compensation rolls, effective February 7, 2016. Appellant received compensation for total disability every 28 days, through September 17, 2016. The record indicates however that he had returned to full-time, modified duty on July 28, 2016.

As noted above, a claimant is only entitled to receive disability compensation when his or her work-related medical condition prevents him or her from earning wages. He or she is not entitled to receive compensation for total disability during a period that he or she had actual earnings.²⁰ Accordingly, the Board finds that an overpayment of compensation was created in this case for the period July 28 through September 17, 2016.

¹⁵ *Supra* note 9 at Part 3 -- Medical, *Administrative Matters*, Chapter 3.900.8 (November 1998).

¹⁶ 5 U.S.C. § 8102.

¹⁷ *Id.* at § 8116(a).

¹⁸ 20 C.F.R. § 10.500.

¹⁹ *Danny E. Haley*, 56 ECAB 393 (2005); *supra* note 9 at Part 6 -- Debt Management, *Initial Overpayment Action*, Chapter 6.200.2(a) (May 2004).

²⁰ *Supra* note 18.

The Board finds however that the case is not in posture for decision regarding the amount of the overpayment. The overpayment compensation worksheet indicated that appellant received \$2,916.53 in compensation on the periodic rolls every 28 calendar days. It noted that he was overpaid for 52 calendar days from July 28 through September 17, 2016. OWCP calculated that \$2,916.53 divided by 28 days, multiplied by 52 calendar days totaled \$5,416.41.

This case will however be remanded to OWCP to determine whether appellant was entitled to wage-loss compensation for medical appointments during the period in question. If appellant is found to be entitled to wage-loss compensation for medical appointments related to his accepted conditions, OWCP shall recalculate the amount of overpayment during this time period.

The Board finds that OWCP properly determined that appellant received an overpayment of compensation as he returned to work, but continued to receive disability compensation for total disability during the period July 29 to September 17, 2016. The Board also finds that the case is not in posture for decision regarding the amount of the overpayment.²¹ After such development of the evidence as necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that the case is not in posture for decision as to whether appellant has established entitlement to wage-loss benefits beginning August 1, 2016 during days he received medical treatment for his accepted conditions. The Board also finds that OWCP has established fact of overpayment as he received compensation for total disability during the period July 28 to September 17, 2016 after he returned to work. However, the amount of the overpayment is not in posture for decision.

²¹ Given the disposition of the issue concerning the amount of the overpayment, OWCP shall issue a *de novo* decision upon return of the case record. The third issue of fault is therefore currently moot. See *K.L.*, Docket No. 16-1490 (issued May 26, 2017).

ORDER

IT IS HEREBY ORDERED THAT the December 20 and November 10, 2016 decisions of the Office of Workers' Compensation Programs are affirmed in part and set aside in part, and the case is remanded for action consistent with this decision.

Issued: January 11, 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