

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

C.Y., Appellant	)	
	)	
and	)	<b>Docket No. 18-0263</b>
	)	<b>Issued: September 14, 2018</b>
<b>DEPARTMENT OF VETERANS AFFAIRS,</b>	)	
<b>SALT LAKE CITY HCS, Salt Lake City, UT,</b>	)	
<b>Employer</b>	)	
	)	

*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 November 20, 2017 appellant filed a timely appeal from an October 16, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.<sup>2</sup>

**ISSUES**

The issues are: (1) whether OWCP properly determined that appellant abandoned his request for a prerecoumpment hearing before an OWCP hearing representative; (2) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$10,985.00 for the period September 18, 2016 through February 4, 2017; and (3) whether OWCP

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> The record provided to the Board includes evidence received after OWCP issued its October 16, 2017 decision. The Board's jurisdiction is limited to the evidence that was before OWCP at the time of its 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).

properly determined that appellant was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment.

### **FACTUAL HISTORY**

On May 12, 2011 appellant, then a 37-year-old carpenter, filed a traumatic injury claim (Form CA-1) alleging that, on May 10, 2011, he twisted his back and experienced right leg pain while unloading a metal pipe from a truck in the performance of duty. He returned to modified-duty work. OWCP subsequently accepted the claim for bulging disc at L4-5. Appellant stopped work on May 1, 2013 and underwent an OWCP authorized L4-S1 spinal fusion with posterior decompression and posterior arthrodesis. He did not return to work. OWCP subsequently expanded acceptance of the claim to include lumbosacral radiculitis, L4-5 and L5-S1.

In a letter dated October 21, 2013, OWCP notified appellant that he would be receiving compensation payments on the periodic compensation rolls as of October 21, 2013. It advised him of his responsibility to return to work in connection with the accepted employment injury. To minimize the possibility of an overpayment of compensation, OWCP instructed appellant to notify it immediately when he returned to work. OWCP calculated appellant's weekly pay rate at the 75 percent augmented rate, to be \$765.37. For payments sent by electronic funds transfer (EFT), a notification of the date and amount of payment appeared on the statement from his financial institution. Appellant was expected to monitor his EFT deposits carefully, at least every two weeks. 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. OWCP noted that appellant's first regular payment would be for the period November 17 to December 14, 2013 in the net amount of \$2,296.11.<sup>3</sup>

Following a period of vocational rehabilitation services, appellant returned to work in the private sector on September 18, 2016.

By decision dated February 14, 2017, OWCP noted that, effective September 18, 2016, appellant returned to work in the private sector employed as a 3D Modeler/Steel Retailer (Drafter) working full-time (40 hours per week) with wages of \$750.38 per week. It determined that the position fairly and reasonably represented his wage-earning capacity and reduced his monetary compensation benefits, effective September 18, 2016, based on his actual earnings. Using the *Shadrick* formula, as provided in section 10.403(d) of OWCP's regulations,<sup>4</sup> OWCP found that

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<sup>3</sup> Appellant was paid a net amount of \$2,214.11 for the period October 21 to November 16, 2013. Thereafter, he received regular compensation payments every 28 days in the net amount of \$2,296.11. As appellant's term at the employing establishment had ended, he was not eligible for benefits and the employing establishment was unable to accommodate him.

<sup>4</sup> 20 C.F.R. § 10.403 codified *Albert C. Shadrick*, 5 ECAB 376 (1953).

appellant's net compensation entitlement every 28 days was \$116.81.<sup>5</sup> Appellant received wage-loss benefits based upon his new loss of wage-earning capacity as of February 5, 2017.

By letter dated April 20, 2017, OWCP advised appellant of its preliminary determination that an overpayment of compensation in the amount of \$10,985.00 had been created during the period September 18, 2016 through February 4, 2017, as he was paid temporary total wage-loss compensation after his return to work in the private sector on September 18, 2016. It found that he was at fault in the creation of the overpayment as he knew or should have known that he was not entitled to receive wage-loss compensation for temporary total disability after returning to work. OWCP informed appellant that he had a right to a preresoupment hearing before an OWCP hearing representative. Appellant was also advised to complete the enclosed overpayment recovery questionnaire (Form OWCP-20), and submit supporting financial documentation, as this was necessary information on the issues of waiver and recovery of the overpayment.

OWCP calculated the total amount of overpayment as follows: It found that appellant received \$2,312.00 in wage-loss compensation for each periodic rolls payment cycle of 28 days. As there were five periodic rolls payment cycles during the period September 28, 2016 through February 4, 2017, appellant was paid \$11,560.00 (\$2,312.00 times 5). Appellant's weekly pay rate when injured was \$765.37 and, based on his new position, he was capable of earning \$727.10 weekly. This weekly difference amounted to \$38.27 (\$765.37 - \$727.10). As appellant received augmented compensation based on eligible dependents, the weekly compensation rate was \$28.70 (\$38.27 times 75 percent). Thus, the amount owed appellant in a single periodic rolls payment cycle was \$114.80 (\$28.70 divided by 7 days times 28 days). Additionally, during the period September 18, 2016 through February 4, 2017, OWCP noted that the Consumer Price Index adjusted the 28-day compensation rate from \$114.80 to \$115.00. Thus, for the period September 18, 2016 through February 4, 2017, appellant was due \$575.00 (\$115.00 times five periodic roll payment cycles). OWCP subtracted the wage-loss compensation due of \$575.00 from the \$11,560.00 wage-loss compensation paid, for a total overpayment amount of \$10,985.00. A *Shadrick* formula documentation memorandum and compensation payment history were provided showing OWCP's overpayment calculations.

On May 5, 2017 OWCP received appellant's April 26, 2017 overpayment recovery questionnaire (Form OWCP-20), which listed monthly income, monthly expenses, and additional funds along with some supporting documentation. Appellant requested a preresoupment hearing on the issues of fault and possible waiver of recovery of the overpayment with OWCP's Branch of Hearings and Review. He disagreed that the overpayment had occurred, the amount of the overpayment, and that he was at fault in the creation of the overpayment. Appellant indicated that he had sent in CA-7 forms and pay stubs. He also stated that OWCP told him that he would receive benefits for permanent disability for spinal fusion. On May 5, 2017 OWCP acknowledged receipt of the hearing request.

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<sup>5</sup> It noted that, in his new position, appellant was earning \$750.38 per week. On the date of injury, he was a carpenter, employed under contract in a "Purchase and Hire" program, which no longer exists. As a result, the current pay rate for this position was established at \$789.89, effective September 18, 2016, by applying annual increases under the General Schedule applicable in his region.

On July 10, 2017 OWCP received a change of address from appellant listing a Brigham City, UT address.

In an August 9, 2017 letter, a representative of OWCP's Branch of Hearings and Review advised appellant that a telephonic hearing was scheduled for October 5, 2017 at 1:30 p.m. Eastern Standard Time (EST).<sup>6</sup> The hearing notice included a toll-free number and pass code to enable access to the telephonic hearing. OWCP's hearing representative advised appellant that postponement of the hearing would be permitted only upon receipt showing that his nonelective hospitalization or the death of a spouse, parent, or child prevented his attendance. It mailed the hearing notice to appellant's Brigham City, UT address.

Appellant did not call at the appointed time of the scheduled telephonic hearing, nor did appellant contact OWCP's Branch of Hearings and Review within the requisite 10 days thereafter.

By decision dated October 16, 2017, an OWCP hearing representative found that appellant abandoned his request for a hearing which had been scheduled for October 5, 2017. The hearing representative noted that appellant had been afforded notice 30 days prior to the scheduled hearing, which he failed to attend. The hearing representative further noted that there was no indication that appellant contacted the Branch of Hearings and Review either before or after the scheduled hearing to explain his absence.

The hearing representative also finalized the preliminary overpayment determination that an overpayment of compensation in the amount of \$10,985.00 was created for the period September 18, 2016 through February 4, 2017, for which appellant was with fault. Specifically, the hearing representative found that he had accepted compensation payments he knew or reasonably should have known he was not entitled. It requested that he repay the full amount of \$10,985.00 within 30 days.

### **LEGAL PRECEDENT -- ISSUE 1**

A claimant dissatisfied with a decision on his or her claim is entitled, upon timely request, to a hearing before an OWCP representative.<sup>7</sup> Unless otherwise directed in writing by the claimant, the hearing representative will mail a notice of the time, place, and method of the oral hearing to the claimant and to any representative at least 30 days before the scheduled hearing date.<sup>8</sup>

A hearing before OWCP's Branch of Hearings and Review can be considered abandoned only under very limited circumstances.<sup>9</sup> With respect to abandonment of hearing requests, Chapter

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<sup>6</sup> As appellant resided in the Mountain Standard Time zone, OWCP advised him to make certain that his local time was adjusted accordingly.

<sup>7</sup> 5 U.S.C. § 8124(b).

<sup>8</sup> 20 C.F.R. § 10.617(b).

<sup>9</sup> *Claudia J. Whitten*, 52 ECAB 483 (2001).

2.1601(g) of OWCP's procedures<sup>10</sup> and section 10.622(f) of its regulations<sup>11</sup> provide in relevant part that failure of the claimant to appear at the scheduled hearing, failure to request a postponement, and failure to request in writing within 10 days after the date set for the hearing that another hearing be scheduled shall constitute abandonment of the request for a hearing. Under these circumstances, the Branch of Hearings and Review will issue a formal decision finding that the claimant has abandoned his or her request for a hearing and return the case to the district office.<sup>12</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that OWCP properly determined that appellant abandoned his request for a preresoupment hearing.

OWCP's Branch of Hearings and Review received appellant's April 26, 2017 timely request for an oral hearing which it acknowledged by letter dated May 5, 2017. By letter dated August 9, 2017, the hearing representative provided appellant 30 days written notice of the hearing, which was scheduled for October 5, 2017 at 1:30 p.m. EST. OWCP mailed the August 9, 2017 notice of hearing to appellant's last known address, and it was not returned as undeliverable. Absent evidence to the contrary, a notice mailed in the ordinary course of business is presumed to have been received by the intended recipient.<sup>13</sup> The presumption is commonly referred to as the "mailbox rule."<sup>14</sup> It arises when the record reflects that the notice was properly addressed and duly mailed.<sup>15</sup> The current record is devoid of evidence to rebut the presumption that appellant received the Branch of Hearings and Review's August 9, 2017 notice of hearing.

The hearing notice was properly addressed to appellant's last known address.<sup>16</sup> Appellant did not call-in as instructed for the October 5, 2017 scheduled telephonic hearing and there is no indication that he requested postponement of same.<sup>17</sup> Moreover, he did not submit a written request within the 10 days after the date set for the hearing and request that another hearing be scheduled. Under the circumstances, OWCP's hearing representative properly found that appellant abandoned his hearing request.<sup>18</sup>

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<sup>10</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Review of the Written Record*, Chapter 2.1601.6(g) (October 2011).

<sup>11</sup> 20 C.F.R. § 10.622(f).

<sup>12</sup> *Id.*

<sup>13</sup> *Kenneth E. Harris*, 54 ECAB 502, 505 (2003).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *See K.F.*, Docket No. 17-1035 (issued August 24, 2017).

<sup>17</sup> *See* 20 C.F.R. § 10.622(c).

<sup>18</sup> *See M.V.*, Docket No. 17-1795 (issued March 1, 2018).

## LEGAL PRECEDENT -- ISSUE 2

Section 8102 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.<sup>19</sup>

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.<sup>20</sup> Section 10.500 of OWCP's regulations provides that compensation for wage loss due to disability is available only for any periods during which an employee's work-related medical condition prevents him or her from earning the wages earned before the work-related injury.<sup>21</sup>

Section 8129(a) of FECA provides that when an overpayment of compensation 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.<sup>22</sup>

If the claimant is entitled to compensation for partial wage loss after return to work, the claims examiner should compute entitlement using the *Shadrick* formula and authorize compensation on a 28-day payment cycle. The claims examiner should make every effort to avoid interruption of income to the claimant.<sup>23</sup> Earnings of a sporadic or intermittent nature which do not fairly and reasonably represent the claimant's loss of wage-earning capacity should be deducted from continuing compensation payments using the *Shadrick* formula (past earnings must be declared an overpayment).

## ANALYSIS -- ISSUE 2

The Board finds that an overpayment of compensation was created in the amount of \$10,985.00 for the period September 18, 2016 through February 4, 2017, because appellant continued to receive temporary total disability compensation after he returned to work in the private sector.

OWCP accepted appellant's claim and paid wage-loss compensation on the periodic compensation rolls as of October 21, 2013. The record establishes that appellant returned to full-time work on September 18, 2016 in the private sector. However appellant continued to receive

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<sup>19</sup> 5 U.S.C. § 8102(a).

<sup>20</sup> *Id.* at § 8116(a); see *Danny E. Haley*, 56 ECAB 393 (2005).

<sup>21</sup> 20 C.F.R. § 10.500.

<sup>22</sup> 5 U.S.C. § 8129(a).

<sup>23</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on Actual Earnings*, Chapter 2.815.3(b) (June 2013). See *Albert C. Shadrick*, *supra* note 4.

temporary total wage-loss compensation from September 18, 2016 through February 4, 2017, resulting in an overpayment of compensation.<sup>24</sup>

During the period September 18, 2016 through February 4, 2017, appellant received wage-loss compensation by direct deposit payment. In a compensation termination worksheet and in its preliminary overpayment determination, OWCP noted that appellant's gross compensation for the period September 18, 2016 through February 4, 2017 totaled \$11,560.00. Utilizing the *Shadrick* formula,<sup>25</sup> OWCP took appellant's actual weekly earning capacity of \$750.38 and divided it by the current weekly pay rate for the job and step when injured effective September 18, 2016 of \$789.89 to find that he had 95 percent wage-earning capacity or \$727.10. It then determined appellant's weekly pay rate when injured of \$765.37 and subtracted the weekly amount of \$727.10 he was earning to find that the wage-earning capacity amount was \$38.27. Since he was receiving augmented compensation, the weekly compensation pay rate was \$28.70.

OWCP reported that, had proper adjustments been made to his disability compensation to reflect his actual employment, he would have received \$575.00 for this time period. It properly calculated that, for each periodic roll cycle of 28 days, appellant should have been paid \$114.80, which when adjusted for the Consumer Price Index, amounted to \$115.00. As he was paid wage-loss compensation for five periodic roll payment cycles of 28 days (\$115.00 times 5), OWCP properly calculated that he was due \$575.00 for the period September 18, 2016 through February 4, 2017. However, appellant received compensation for this period in the amount of \$11,560.00. The difference between these two amounts, \$10,985.00, is the amount of the overpayment of compensation, as calculated by OWCP.<sup>26</sup>

Accordingly, the Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$10,985.00 from September 18, 2016 through February 4, 2017 as he had actual earnings from private-sector employment and was not entitled to compensation for temporary total disability wage-loss compensation.<sup>27</sup>

### **LEGAL PRECEDENT -- ISSUE 3**

5 U.S.C. § 8129(b) provides: 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 adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.<sup>28</sup> A claimant who is at fault in the creation of the overpayment is not entitled to

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<sup>24</sup> See *J.S.*, Docket No. 17-0260 (issued December 28, 2017); see also *J.W.*, Docket No. 15-1163 (issued January 13, 2016).

<sup>25</sup> See *Albert C. Shadrick*, *supra* note 4.

<sup>26</sup> See *J.S.*, *id.*; *C.F.*, Docket No. 16-1718 (issued August 21, 2017).

<sup>27</sup> See *C.R.*, Docket No. 17-0117 (issued April 4, 2018); *S.K.*, Docket No. 08-0961 (issued April 7, 2009); *V.G.*, Docket No. 07-0916 (issued November 15, 2007).

<sup>28</sup> 5 U.S.C. § 8129(b).

waiver.<sup>29</sup> On the issue of fault, 20 C.F.R. § 10.433(a) provides that an individual will be found at fault if he or she has done any of the following: (1) made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; (2) failed to provide information which he or she knew or should have known to be material; or (3) accepted a payment which he or she knew or should have known was incorrect.

With respect to whether an individual is without fault, section 10.433(b) of OWCP's regulations provide that whether or not OWCP determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid.<sup>30</sup>

### **ANALYSIS -- ISSUE 3**

The Board finds that appellant was without fault with regard to OWCP's first direct deposit following his return to work, but he was at fault in the creation of the overpayment resulting from the subsequent deposits.

OWCP paid appellant compensation by EFT every 28 days. Appellant returned to work on September 18, 2016. The record reflects that on October 15, 2016, OWCP paid him compensation for the period September 18 to October 15, 2016 in the amount \$2,312.00. There is no documentation or other evidence to demonstrate that appellant had clear knowledge at the time the bank received the October 15, 2016 EFT that the payment was incorrect.<sup>31</sup> The Board thus finds that appellant was without fault in accepting the initial direct deposit covering the period of the overpayment September 18 to October 15, 2016.

The Board finds that the case is not in posture for decision regarding the issue of waiver of recovery of the overpayment for the period September 18 to October 15, 2016. The Board will set aside the October 16, 2017 decision regarding the issue of fault for that period and remand the case for OWCP to determine whether appellant is entitled to waiver of recovery of the overpayment covering the period September 18 to October 15, 2016.

The Board further finds that appellant was at fault in the creation of the overpayment resulting from the remaining EFT payments for the period October 16, 2016 to February 4, 2017.<sup>32</sup>

In an October 21, 2013 letter, appellant was notified that, to avoid an overpayment of compensation, he must immediately notify OWCP of his return to work. He was required to return any check to OWCP which included a period during which he worked. Although OWCP may have been negligent in making incorrect payments, this does not excuse a claimant from accepting

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<sup>29</sup> See *Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

<sup>30</sup> 20 C.F.R. § 10.433(b).

<sup>31</sup> See *M.M.*, Docket No. 15-0265 (issued May 27, 2015); *Danny E. Haley*, 56 ECAB 393 (2005); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(a) (May 2004).

<sup>32</sup> *D.W.*, Docket No. 14-0229 (issued April 17, 2014).



payments he knew or should have known to be incorrect.<sup>33</sup> In cases involving a series of incorrect payments, where the requisite knowledge is established by documentation from OWCP or simply with the passage of time and opportunity for discovery, the claimant will be at fault for accepting the payments subsequently deposited. By the time of the second payment, appellant should have known that he was not entitled to the same amount of wage-loss compensation as he had received prior to his return to work on September 18, 2016.<sup>34</sup> After his receipt of the first direct deposit following his return to work, he was on notice that OWCP began to make payments to him in error and knew or should have known that he was not entitled to the benefit of the subsequent direct deposit.

Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payment appellant receives from OWCP is proper.<sup>35</sup> The fact that OWCP may have been negligent in issuing the payments does not mitigate this finding.<sup>36</sup> In light of OWCP's clear mandate to provide notification of a return to work and to return any payment received, which included a period during which appellant worked, a reasonable person would have known that an overpayment had occurred.<sup>37</sup> As appellant was at fault in creating the overpayment of compensation for the period October 16, 2016 to February 4, 2017, he is not eligible for waiver of recovery with respect to the portion of the overpayment for this period.

The Board finds that this case is not in posture for decision regarding the issue of waiver of the recovery of the overpayment for the period September 18 to October 15, 2016. The Board will remand the case for OWCP to determine whether appellant is entitled to waiver of recovery of the overpayment created for this period.<sup>38</sup> The Board finds that OWCP properly determined that he was at fault for the remaining period of overpayment, October 16, 2016 through February 4, 2017. As appellant was at fault under the third fault standard outlined above, recovery of the remaining overpayment of compensation may not be waived.<sup>39</sup>

Finally, as appellant's eligibility for waiver for a portion of the overpayment cannot yet be determined, the issue of recovery will not be considered in the present appeal. On remand he will have an opportunity to submit and have OWCP consider relevant financial evidence on this issue. Following this and all other development deemed necessary, OWCP shall issue a *de novo* decision in the case.<sup>40</sup>

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<sup>33</sup> See *C.G.*, Docket No. 15-0701 (issued December 9, 2015).

<sup>34</sup> *Id.*

<sup>35</sup> *K.M.*, Docket No. 16-0802 (issued November 23, 2016).

<sup>36</sup> *C.F.*, Docket No. 16-1718 (issued August 21, 2017).

<sup>37</sup> See *V.G.*, Docket No. 07-0916 (issued November 15, 2007).

<sup>38</sup> See *D.W.*, *supra* note 32.

<sup>39</sup> No waiver of an overpayment is possible if the claimant is at fault in creating the overpayment. *L.J.*, 59 ECAB 264 (2007).

<sup>40</sup> *P.L.*, Docket No. 16-0127 (issued May 3, 2016).

### **CONCLUSION**

The Board finds that OWCP properly determined that appellant abandoned his request for a prerecoupment hearing before an OWCP representative. The Board also finds that OWCP properly determined that appellant received an overpayment of compensation during the period September 18, 2016 through February 4, 2017 in the amount of \$10,985.00. The Board further finds that he was without fault in the creation of the overpayment for the period September 18 to October 15, 2016, but that he was at fault in the creation of the overpayment for the period October 16, 2016 to February 4, 2017. The case will be remanded for OWCP to consider waiver of recovery of the overpayment from September 18 to October 15, 2016.<sup>41</sup>

### **ORDER**

**IT IS HEREBY ORDERED THAT** the October 16, 2017 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part. The case is remanded for further proceedings consistent with this opinion of the Board.

Issued: September 14, 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

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<sup>41</sup> On appeal appellant contends that he was paid at the incorrect pay rate from October 2013 through September 18, 2016. The Board notes that the period predates the overpayment period in this claim, which is from September 18, 2016 through February 4, 2017.