

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

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Z.D., Appellant

and

DEPARTMENT OF HOMELAND SECURITY,  
TRANSPORTATION SECURITY  
ADMINISTRATION, McCARREN AIRPORT,  
Las Vegas, NV, Employer

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**Docket No. 19-0662  
Issued: December 5, 2019**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

CHRISTOPHER J. GODFREY, Chief Judge  
JANICE B. ASKIN, Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On February 1, 2019 appellant filed a timely appeal from August 28, 2018 and January 2, 2019 merit decisions 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 this case.

**ISSUES**

The issues are: (1) whether OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective January 25, 2018; (2) whether appellant received an overpayment of compensation in the amount of \$57,950.53 for the period December 4, 2013 through January 24, 2018; and (2) whether appellant was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment.

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

## **FACTUAL HISTORY**

On August 16, 2013 appellant, then a 34-year-old transportation security officer, filed a traumatic injury claim (Form CA-1) alleging that on August 3, 2013 he injured the heels of his feet due to standing while in the performance of duty. On September 30, 2013 he clarified that his claim was for an occupational disease due to standing while performing his federal job duties.

On January 10, 2014 appellant's attending physician, Dr. Tomman Kuruvilla, a podiatrist, performed right endoscopic plantar fasciotomy and right open gastrocnemius recession. He performed left endoscopic plantar fasciotomy and left open gastrocnemius recession on March 12, 2014.

On August 4, 2014 OWCP accepted appellant's claim for bilateral plantar fibromatosis.

In a note dated November 18, 2014, Dr. Kuruvilla indicated that appellant could work, but with restrictions. He subsequently released appellant to return to full-duty work on February 19, 2015. On March 9, 2015 appellant reported that he was being separated from the employing establishment. On March 10, 2015 Dr. Kuruvilla provided additional work limitations restricting appellant's lifting of heavy objects, as well as climbing of ladders and finding that he needed to sit down every hour for 15 minutes to rest. On April 7, 2015 he found that appellant had reached maximum medical improvement.

On April 16, 2015 appellant filed a notice of recurrence (Form CA-2a) alleging that on March 11, 2015 he sustained a recurrence of disability causally related to his accepted August 3, 2013 employment injury. On April 16, 2015 he began filing claims for compensation (Form CA-7) requesting compensation for leave without pay (LWOP) for the periods December 4, 2013 through April 24, 2014 and from March 11 through May 2, 2015. Appellant reported that he performed full-time modified-duty work from April 25, 2014 through March 10, 2015. He provided a copy of his résumé in which he described himself as an "architecture and real estate professional" turned security officer for the employing establishment. OWCP authorized wage-loss compensation for the periods claimed.

In a letter dated May 6, 2015, OWCP referred appellant for vocational rehabilitation services. On May 5, 2015 Dr. Kuruvilla reported that appellant's plantar fascia appeared to be normal. He further reported that appellant's examination was positive for pain on the bilateral plantar medial heel and mild edema. Dr. Kuruvilla released appellant from care.

On May 7, 2015 OWCP placed appellant on the periodic rolls effective March 11, 2015 for wage-loss compensation due to total disability. It notified appellant that in order to avoid an overpayment of compensation, he must notify it immediately if he returned to work.

On May 21, 2015 appellant advised OWCP that he had found work with a new employer working as a realtor and receptionist and that he would be paid on commission. He noted that he

was just beginning the licensing process and was not currently being paid. OWCP informed him that he was expected to continue to participate in vocational rehabilitation.<sup>2</sup>

In a work restriction evaluation (Form OWCP-5c) dated July 9, 2015, Dr. Kuruvilla indicated that appellant was capable of working 8 hours a day walking, standing, pushing, pulling, lifting, squatting, kneeling, and climbing each for 6 hours with a 15-minute break every hour. He reported that appellant needed to be able to sit for two hours during an eight-hour shift.

On July 16, 2015 appellant completed a Form EN1032 and indicated that during the previous 15 months he had worked for the employing establishment from December 6, 2007 through May 16, 2015 and for the realty company beginning in June 2015. He noted that he had started paperwork, but had not performed any transactions and that he would receive remuneration through commission.

On August 21, 2015 appellant informed his vocational rehabilitation counselor that he was presently performing receptionist work and a sale on commission basis for a real estate company. On September 17, 2015 he again informed OWCP that he had started paperwork for realtor work, but had not performed any transactions. On September 30, 2015 appellant declined to sign his vocational rehabilitation plan. In a letter dated October 23, 2015, OWCP advised him of his obligations to cooperate with vocational rehabilitation services, or face a possible reduction in his compensation benefits. Appellant did not report to vocational rehabilitation training on November 2, 2015.

Appellant completed a Form EN1032 on November 17, 2015 and indicated that he had received commission in the amount of \$11,872.00 for the period June through November 17, 2015 from his work as a realtor. On December 7, 2015 he again reported that he had received a commission check.

In a letter dated May 2, 2016, OWCP requested information from the realty company regarding appellant's work hours and rate of pay. In a letter of even date, it asserted that the November 17, 2015 Form EN1032 was the first notification it had received that appellant had returned to work. OWCP requested that appellant provide his work hours and pay rate.

By decision dated May 16, 2016, OWCP issued a loss of wage-earning capacity (LWEC) determination based on the constructed position of receptionist/reception clerk finding that appellant had failed to participate in vocational rehabilitation.

On May 23, 2016 appellant responded to OWCP's May 2, 2016 request for information and provided a record of his commissions from the realty company for the period July 28, 2015 through February 26, 2016 in the amount of \$55,502.36.

On May 23, 2016 appellant, through counsel, requested an oral hearing before an OWCP hearing representative regarding the May 16, 2016 LWEC decision.

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<sup>2</sup> On May 26, 2015 appellant filed a schedule award claim (Form CA-7). In a June 15, 2015 development letter, OWCP requested additional medical evidence in support of his claim and afforded him 30 days to respond.

In a note dated November 28, 2016, Dr. Kuruvilla reported that the long axis of appellant's plantar fascia was intact, but was thickened to five millimeters with significant bursal fluid. He reported that appellant had positive plantar medial heel pain that was exacerbated on deep palpation bilaterally. Dr. Kuruvilla diagnosed foot pain and plantar fasciitis. On January 10, 2017 he repeated his findings and conclusions.

On February 8, 2017 appellant testified before an OWCP hearing representative regarding the LWEC determination and reported that he received his real estate license in the summer of 2015. He reported his gross income for 2016 as approximately \$45,000.00. Appellant indicated that, while he worked as a real estate agent before his employment with the employing establishment, he had not performed the positions concurrently.

By decision dated April 4, 2017, OWCP's hearing representative found that appellant failed to cooperate with the vocational rehabilitation process and that OWCP had properly issued an LWEC determination based upon his constructed earnings as a receptionist. OWCP's hearing representative affirmed the May 16, 2016 OWCP LWEC determination.

In a note dated April 24, 2017, Dr. Kuruvilla noted that appellant reported decreased pain. He found that appellant walked with a normal gait, that he had normal reflexes and distal sensation, and that his range of motion was normal and pain free. Dr. Kuruvilla diagnosed plantar fascial fibromatosis. He released appellant from his care. On May 19, 2017 Dr. Kuruvilla found that he had reached maximum medical improvement.

On February 28, 2017 appellant completed an EN1032 form and indicated that he continued to sell real estate and that his annual earnings from commissions were \$65,000.00.

In a form report dated August 30, 2017, Dr. Kuruvilla indicated that appellant could return to his date-of-injury position with no restrictions.

On December 16, 2017 appellant completed a Form EN1032 and reported that he worked in real estate sales with actual earnings of \$37,500.00 in commissions.

In a letter dated December 21, 2017, OWCP provided appellant with a notice of proposed termination of his wage-loss compensation and medical benefits. It afforded him 30 days to submit, in writing, additional evidence or argument if he disagreed with the proposal. OWCP found that Dr. Kuruvilla's reports established that appellant had no disability or medical residuals causally related to his August 3, 2013 employment injury. Appellant did not respond.

By decision dated January 25, 2018, OWCP terminated appellant's wage-loss compensation and medical benefits effective that date.

In a letter dated February 5, 2018, OWCP informed appellant that an overpayment may have been created as he was working on commission as a realtor while receiving wage-loss compensation from OWCP for the period May 11, 2015 through January 24, 2018. It requested pay stubs with proof of commissions during the period May 11, 2015 through January 24, 2018. OWCP afforded appellant 14 days for a response.

On February 6, 2018 appellant, through counsel, requested an oral hearing before an OWCP hearing representative regarding the January 25, 2018 termination decision.

On March 22, 2018 OWCP again requested appellant's pay stubs or proof of commissions from June 2015 through January 24, 2018. It again afforded him 14 days for a response.

In a letter dated April 23, 2018, OWCP made a preliminary determination that appellant received an overpayment of compensation in the amount of \$57,950.53 as he had not advised it of his earnings as a realtor while receiving wage-loss compensation. It found that appellant was at fault in the creation of the overpayment. OWCP provided appellant with appeal rights and an overpayment recovery questionnaire (OWCP-20). It noted that appellant had not provided pay stubs in order to calculate the amount of the overpayment, and that it must declare appellant's entire compensation history as an overpayment.

On May 11, 2018 appellant requested a precoupment hearing. He indicated that he disagreed that the overpayment occurred, with the amount of the overpayment, and that he was at fault in the creation of the overpayment. Appellant requested waiver of recovery of the overpayment. He further noted that once he had acquired employment he had reported it on his Form EN1032. Appellant disagreed with the period of the overpayment and the amount. He provided an overpayment recovery questionnaire dated May 9, 2018 and listed his monthly income as \$3,000.00 and total monthly expenses as \$5,817.00. Appellant indicated that he had assets in the amount of \$15,444.00.

On May 21, 2018 appellant provided his 1099 miscellaneous income forms from the realty company. The forms noted 2015 reporting earnings of \$26,602.36, 2016 earnings of \$63,775.00, and for 2017 earnings of \$44,237.50.

On July 5, 2018 appellant appeared before an OWCP hearing representative regarding the January 25, 2018 termination decision. He requested an additional 30 days to submit medical evidence. No additional evidence was submitted.

By decision dated August 28, 2018, OWCP's hearing representative affirmed the termination of appellant's wage-loss compensation and medical benefits. She noted that there was no medical evidence supporting appellant's continued disability for work or need for additional medical treatment due to his accepted condition of bilateral plantar fibromatosis.

On October 17, 2018 appellant appeared before an OWCP hearing representative regarding the April 23, 2018 preliminary determination of overpayment and disagreed with the amount and period of the overpayment.

By decision dated January 2, 2019, OWCP's hearing representative found that appellant received an overpayment of compensation in the amount of \$57,950.53 for the period December 4, 2013 through January 24, 2018 and that he was at fault in the creation of the overpayment.

## LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim and pays compensation, it has the burden of proof to justify termination or modification of an employee's benefits.<sup>3</sup> Having determined that an employee has a disability causally related to his or her employment, OWCP may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.<sup>4</sup> Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>5</sup>

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.<sup>6</sup> To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.<sup>7</sup>

## ANALYSIS -- ISSUE 1

The Board finds that OWCP has met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective January 25, 2018.

On April 24, 2017 Dr. Kuruvilla, appellant's attending physician, found that he walked with a normal gait, had normal reflexes and distal sensation, and that his range of motion was normal and pain free. He released appellant from care. In his August 30, 2017 form report, Dr. Kuruvilla indicated that appellant could return to his date-of-injury position with no restrictions.

The Board finds that OWCP properly accorded the weight of the medical evidence with the opinion of Dr. Kuruvilla, appellant's attending physician, who reported that appellant no longer had residuals or disability as a result of his accepted employment injury. Furthermore, appellant has not submitted medical evidence supporting continuing disability or need for continued medical treatment.<sup>8</sup>

The Board finds, therefore, that OWCP has met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective January 25, 2018.

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<sup>3</sup> See *R.P.*, Docket No. 17-1133 (issued January 18, 2018); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

<sup>4</sup> See *R.P.*, *id.*; *Jason C. Armstrong*, 40 ECAB 907 (1989); *Charles E. Minnis*, 40 ECAB 708 (1989); *Vivien L. Minor*, 37 ECAB 541 (1986).

<sup>5</sup> See *R.P.*, *id.*; *Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

<sup>6</sup> See *R.P.*, *id.*; *T.P.*, 58 ECAB 524 (2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005); *A.P.*, Docket No. 08-1822 (issued August 5, 2009). *Furman G. Peake*, 41 ECAB 361, 364 (1990).

<sup>7</sup> See *R.P.*, *id.*; *James F. Weikel*, 54 ECAB 660 (2003); *Pamela K. Guesford*, 53 ECAB 727 (2002); *Furman G. Peake*, *id.*

<sup>8</sup> *C.M.*, Docket No. 13-2178 (issued March 6, 2014).

## LEGAL PRECEDENT -- ISSUE 2

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.<sup>9</sup> However, it also places limitations on an employee's right to receive compensation benefits. Section 8116 provides that, while an employee is receiving benefits, he or she may not receive salary, pay, or remuneration of any type from the United States, except in limited circumstances.<sup>10</sup>

OWCP regulations further provide that compensation for wage loss due to disability is available only for the period when an employee's work-related medical condition prevents him or her from earning the wages earned before the work-related injury.<sup>11</sup> A claimant is not entitled to receive temporary total disability and actual earnings for the same period.<sup>12</sup> An overpayment of compensation is created when a claimant has actual earnings, but continues to receive wage-loss compensation.<sup>13</sup>

Section 8129(a) of FECA provides that 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.<sup>14</sup>

When a claimant has actual earnings that span a lengthy period of time (*e.g.* several months or more) the proper compensation should be determined by averaging the earnings for the entire period, determining the average pay rate, and applying the *Shadrick* formula (comparing the average pay rate for the entire period to the pay rate of the date-of-injury position in effect at the end of the period of actual earnings).<sup>15</sup> The wage-earning capacity in terms of percentage is determined by dividing the employee's earnings by the current pay rate of the job held at the time of injury. The computation in dollars is computed by multiplying the pay rate for compensation purposes by the percentage of wage-earning capacity and the resulting dollar amount is subtracted from the pay rate for compensation purposes to obtain the loss of wage-earning capacity.<sup>16</sup>

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<sup>9</sup> *Supra* note 1 at § 8102(a).

<sup>10</sup> *Id.* at § 8116(a).

<sup>11</sup> 20 C.F.R. § 10.500(a).

<sup>12</sup> *L.A.*, Docket No. 15-1213 (issued April 27, 2016).

<sup>13</sup> *Id.*

<sup>14</sup> 5 U.S.C. § 8129(a); *J.S.*, Docket No. 17-0260 (issued December 28, 2017).

<sup>15</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on Actual Earnings*, Chapter 2.815.3(b)(4) (June 2013).

<sup>16</sup> *Albert C. Shadrick*, 5 ECAB 379 (1953). 20 C.F.R. § 10.403.

## ANALYSIS -- ISSUE 2

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

The Board finds that appellant has received an overpayment of compensation from July 28, 2015 through January 24, 2018. Appellant received wage-loss compensation based on total disability through May 16, 2016 while he also received earnings, in the form of commissions, from the realty company for which he worked. After May 16, 2016, appellant continued to receive wage-loss compensation based on his constructed LWEC and continued to receive earnings from the realty company. He was not entitled to actual earnings as well as to receive compensation for either total or partial disability without an appropriate reduction of those compensation benefits.<sup>17</sup>

On May 23, 2016 appellant provided OWCP with documentation that he received his first commission from his work with the realty company on July 28, 2015. Therefore the period of the overpayment began on that date. There is no evidence that appellant had actual earnings prior to July 28, 2015. This documentation was in the record at the time of the preliminary determination of overpayment as well as the January 2, 2019 final overpayment decision and should have been considered by OWCP in calculating the amount of the overpayment. On May 21, 2018 appellant provided his 1099 miscellaneous income forms reporting his earnings from the realty company from 2015 through 2017. These forms are sufficient to allow OWCP to follow the appropriate method for determining appellant's proper wage-loss compensation entitlement for the period July 29, 2015 through January 24, 2018. As noted above, when a claimant has actual earnings that span a lengthy period of time (*e.g.*, several months or more) the proper compensation should be determined by averaging the earnings for the entire period, determining the average pay rate, and applying the *Shadrick* formula. The Board finds that OWCP failed to follow these procedures when determining the amount of overpayment that appellant received from July 28, 2015 through January 24, 2018.

On remand OWCP shall determine the exact amount of the overpayment of compensation for the period July 28, 2015 through January 24, 2018. It should then issue a new preliminary overpayment determination, with an appropriate overpayment action request form, an overpayment recovery questionnaire, and instructions for appellant to provide supporting financial information. After OWCP has further development the case records, a *de novo* decision shall be issued.<sup>18</sup>

## CONCLUSION

The Board finds that OWCP has met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective January 25, 2018. The Board further finds that the case is not in posture for a decision regarding the amount of the overpayment for the period July 28, 2015 through January 24, 2018.

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<sup>17</sup> *Supra* note 15 at Chapter 2.0815.5.e.

<sup>18</sup> As the case is not in posture for decision regarding the amount of the overpayment, the issues of fault and waiver are moot. *C.G.*, Docket No. 18-1655 (issued June 14, 2019).



**ORDER**

**IT IS HEREBY ORDERED THAT** the August 28, 2018 decision of the Office of Workers' Compensation Programs is affirmed. It is further ordered that the January 2, 2019 decision is set aside and remanded for further actions consistent with this decision of the Board.

Issued: December 5, 2019  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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