



## **FACTUAL HISTORY**

On November 5, 2015 appellant, then a 54-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that she injured her neck, shoulders, and the left side of her arm causally related to factors of her federal employment. OWCP accepted the claim for bicipital tendinitis of the left shoulder and an aggravation of cervical disc degeneration at the mid-cervical region. Appellant worked in a limited-duty capacity beginning June 23, 2016.

On February 27, 2017 appellant underwent a left shoulder subacromial decompression and debridement of the glenohumeral joint. OWCP paid her wage-loss compensation for total disability beginning February 27, 2017. It, by letter dated March 30, 2017, informed appellant that it was placing her on the periodic rolls, effective February 27, 2017. OWCP instructed her to immediately notify it when she returned to work to avoid an overpayment of compensation.

On September 13, 2017 a nurse assigned by OWCP to appellant's case advised that she had returned to full-time limited-duty employment on September 11, 2017.

OWCP, by check dated September 16, 2017, issued appellant net wage-loss compensation of \$640.78 for the period September 11 to 16, 2017. By check dated October 14, 2017, it paid her net wage-loss compensation of \$2,990.30 for the period September 17 to October 14, 2017.

Appellant, on September 19, 2017, filed a claim for compensation (Form CA-7) requesting intermittent wage-loss compensation from September 9 to 15, 2017. On October 3, 2017 she filed a CA-7 form requesting intermittent wage-loss compensation from September 16 to 29, 2017. Appellant submitted a time analysis form indicating the hours that she took leave without pay (LWOP) because there was no work available.

The employing establishment, in a September 19, 2017 e-mail, notified OWCP that appellant had resumed work on September 12, 2017. On October 17, 2017 it advised OWCP of the hours that appellant intermittently used LWOP from September 30 to October 13, 2017.

In an October 25, 2017 memorandum, OWCP found that appellant had returned to limited-duty employment on September 11, 2017, but had received wage-loss compensation for total disability through October 14, 2017. It indicated that it had paid her \$3,661.08 in wage-loss compensation for the 34 days from September 11 through October 14, 2017. OWCP determined that it should have paid appellant \$618.84 in wage-loss compensation for 28.67 hours of LWOP from September 11 through October 14, 2017. It subtracted \$618.84 from \$3,661.08 to find a total overpayment of compensation in the amount of \$3,042.24.

By preliminary determination dated October 25, 2017, OWCP notified appellant that she had received a \$3,042.24 overpayment of compensation from September 11 through October 14, 2017 because it had paid her compensation for total disability after she returned to modified employment. It further informed her of its preliminary determination that she was at fault in the creation of the overpayment. OWCP requested that appellant complete the enclosed overpayment recovery questionnaire (OWCP-20) and submit supporting financial documentation. Additionally, it notified her that, within 30 days of the date of the preliminary determination, she could request a telephone conference, a final decision based on the written evidence, or a precoupment hearing.

In a November 8, 2017 response, appellant requested a prerecoument hearing before an OWCP hearing representative. She challenged the finding that she was at fault in the creation of the overpayment of compensation, noting that she had advised the employing establishment and OWCP of her return to work. Appellant indicated that she had used LWOP for seven months before OWCP had approved her claim and that the employing establishment had not provided her with eight hours of daily work since her return.

During the telephone hearing, held on March 21, 2018, appellant related that she had not worked full time since she had returned to work on September 11, 2017. She had submitted CA-7 forms and believed that the compensation that she had received was for time lost from work. Appellant advised that she had notified OWCP of her return to work. She asserted that she was unable to pay back the overpayment due to her financial circumstances. The hearing representative requested that appellant complete an overpayment recovery questionnaire and submit supporting financial documentation.

Thereafter, appellant submitted a completed overpayment recovery questionnaire (Form OWCP-20). She noted her monthly income as \$2,600.00 and listed monthly expenses. Appellant also submitted earnings and leave statements from her work at the employing establishment and a copy of a bank statement showing a balance of \$7,653.01.

By decision dated July 2, 2018, OWCP's hearing representative found that appellant had received a \$3,042.24 overpayment of compensation for the period September 11 through October 14, 2017. She determined that appellant was at fault in the creation of the overpayment of compensation as she accepted a payment that she knew or should have known was inaccurate and thus was ineligible for waiver of recovery of the overpayment. The hearing representative directed her to make payment of \$100.00 per month to OWCP for recovery of the overpayment of compensation.

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

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.<sup>3</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 specified instances.<sup>4</sup> OWCP's regulations provide 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>5</sup> A

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<sup>3</sup> *Id.* at § 8102.

<sup>4</sup> *Id.* at § 8116(a).

<sup>5</sup> 20 C.F.R. § 10.500(a).

claimant is not entitled to receive temporary total disability (TTD) benefits and actual earnings for the same time period.<sup>6</sup>

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

The Board finds that appellant received an overpayment of compensation as she resumed work on September 11, 2017 and received TTD compensation for the period September 11 through October 14, 2017.<sup>7</sup> The Board finds, however, that OWCP failed to properly determine the amount of the overpayment of compensation.

OWCP found that appellant received an overpayment of compensation in the amount of \$3,661.08 for the period September 11 through October 14, 2017. However, it offset this amount with wage-loss compensation that was owed for 28.67 hours of LWOP during this period. OWCP calculated the amount that it owed appellant for the period September 11 through October 14, 2017 as \$618.84, which it subtracted from \$3,661.08 to find an overpayment of \$3,042.24.

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 consideration of waiver.<sup>8</sup> 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)<sup>9</sup> which denies administrative due process with respect to the amount offset.<sup>10</sup>

The case will, therefore, be remanded for OWCP to properly calculate the entire amount of the overpayment of compensation. 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 September 11 through October 14, 2017, but that the case is not in posture for decision regarding the amount of the overpayment.<sup>11</sup>

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<sup>6</sup> *K.E.*, Docket No. 18-0687 (issued October 25, 2018).

<sup>7</sup> *Id.*; see also *L.W.*, Docket No. 17-0356 (issued June 22, 2018).

<sup>8</sup> See *S.P.*, Docket No. 17-1888 (issued July 18, 2018).

<sup>9</sup> 20 C.F.R. § 10.441(a). 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 hardship.

<sup>10</sup> *R.H.*, Docket No. 17-1933 (issued February 15, 2018); *R.O.*, Docket No. 17-0894 (issued January 26, 2018).

<sup>11</sup> As OWCP has not established the amount of overpayment, it is premature for the Board to address the issues of fault and recovery. *Id.*

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 2, 2018 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part, and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: February 1, 2019  
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