

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

N.C., Appellant)

and)

DEPARTMENT OF HOMELAND SECURITY,)
TRANSPORTATION SECURITY)
ADMINISTRATION, Los Angeles, CA, Employer)

**Docket No. 18-1070
Issued: January 9, 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
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 1, 2018 appellant filed a timely appeal from a December 22, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that appellant submitted additional evidence on appeal. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$73,961.51; and (2) whether OWCP properly denied waiver of recovery of the overpayment of compensation.

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances set forth in the prior Board decisions are incorporated herein by reference. The relevant facts are as follows.

On August 9, 2004 appellant, then a 50-year-old screener, filed a traumatic injury claim (Form CA-1) alleging that on August 3, 2004 he strained a muscle in his shoulder and arm lifting a bag while in the performance of duty. OWCP accepted the claim for right shoulder strain, cervical strain, acromioclavicular joint arthritis and tendinitis of the right shoulder, cervical discogenic disc disease at C5-6, reflex sympathetic dystrophy of the right upper extremity, causalgia, and psychogenic pain. Appellant stopped work on August 7, 2004 and received wage-loss compensation from OWCP beginning September 21, 2004. OWCP used a date-of-injury (DOI) pay rate of \$538.14 per week.⁴

The employing establishment promoted appellant on October 3, 2004 from the “D” band pay rate to the “F” band pay rate, with an increase in his base salary from \$30,146.00 to \$37,336.00, including locality pay. Appellant returned to modified employment on December 13, 2004, but experienced a recurrence of disability on March 26, 2005.

On April 13, 2005 the employing establishment offered appellant a position as a modified lead transportation security screener with an “F” band annual salary of \$39,158.00. Appellant began working in the position on May 7, 2005, but stopped on September 4, 2005 as there was no longer work available within his restrictions.⁵ OWCP paid him compensation beginning October 30, 2005 using a recurrent pay rate date of September 4, 2005 to find a weekly base pay rate of \$753.04 and night differential of \$4.71, for a total weekly pay rate of \$757.75.⁶

By decision dated December 18, 2008, OWCP reduced appellant’s compensation pursuant to 5 U.S.C. § 8113(b) as he failed without good cause to participate in vocational rehabilitation. It found that if he had undergone vocational rehabilitation he would have had the capacity to perform

³ Docket No. 16-0441 (issued October 21, 2016) and Docket No. 16-1152 (issued October 19, 2016).

⁴ OWCP calculated appellant’s weekly pay rate by multiplying his hourly rate of \$14.44 by 2087 hours per year and dividing by 52 weeks to find a weekly base pay rate of \$579.54. It added \$3.60 per week in night differential, (\$1.44 multiplied by 2.5 hours per week), to find a total weekly pay rate of \$583.14.

⁵ By decision dated May 9, 2005, OWCP found that appellant received an overpayment of compensation in the amount of \$471.74 because he returned to work on December 17, 2004, but received compensation through December 25, 2004. It determined that he was at fault in creating the overpayment.

⁶ By decision dated January 16, 2009, OWCP granted appellant a schedule award for 17 percent permanent impairment of the right upper extremity. The period of the award ran for 53.04 weeks from January 18, 2009 to January 24, 2010.

the duties of a surveillance system monitor. OWCP determined appellant's loss of wage-earning capacity (LWEC) using the formula set forth in *Albert C. Shadrick*,⁷ and a pay rate date of September 4, 2005. It calculated that he was entitled to net compensation of \$786.78 each four weeks.⁸

By decision dated June 20, 2014, OWCP modified its December 18, 2008 LWEC determination as it incorrectly calculated appellant's pay rate.⁹ It found that it had failed to include 8 hours of Sunday premium pay and 25 hours of night differential in his recurrent pay rate and had failed to properly calculate his weekly compensation rate using the formula applicable for performance-based pay systems. OWCP determined that appellant had not shown good cause for his failure to undergo vocational rehabilitation, pursuant to 5 U.S.C. § 8113(b).¹⁰

Appellant requested reconsideration on June 19, 2015. By decision dated September 10, 2015, OWCP denied modification of its June 20, 2014 decision. It found that appellant had not demonstrated cooperation with vocational rehabilitation such that it would remove the sanction of section 8113(b).

Appellant subsequently appealed to the Board. By decision dated October 19, 2016, the Board affirmed in part and set aside in part the September 10, 2015 decision.¹¹ The Board found that OWCP properly reduced appellant's compensation under section 8113(b) as he failed to participate in vocational rehabilitation. The Board determined, however, that OWCP erred in using a recurrent pay rate date of September 4, 2005 in reducing his benefits effective December 18, 2008 and in its subsequent modification of the December 18, 2007 decision to include Sunday premium pay and night differential in appellant's pay rate as he had not resumed his usual employment subsequent to his August 3, 2004 work injury, but instead returned to modified employment on December 13, 2004 and May 7, 2005 before stopping work on September 4, 2005. The Board thus determined that OWCP should have used the greater of either August 3, 2004, the DOI, or August 7, 2004, the date disability began, as the applicable pay rate date. The Board further found that, on remand, OWCP should utilize the appropriate pay band and include any applicable Sunday premium pay and night differential in calculating appellant's

⁷ 5 ECAB 376 (1953); codified by regulation at 20 C.F.R. § 10.403.

⁸ By decision dated February 1, 2010, an OWCP hearing representative affirmed the December 18, 2008 decision. Appellant subsequently requested reconsideration, but by decisions dated April 25, 2011 and August 13, 2012, OWCP denied modification of its reduction of his compensation for failure to participate with vocational rehabilitation.

⁹ In a letter dated April 16, 2013, the employing establishment advised that appellant sustained an injury on August 3, 2004, at which time he earned \$14.44 per hour and 2.5 hours per week of night differential. It noted that he was not entitled to a recurrent pay rate and that calculation of the LWEC should be based on pay banding. The employing establishment indicated that effective October 31, 2005 appellant earned a salary including locality pay of \$14.44 per week with night differential of 25 hours per week and eight hours of Sunday premium pay.

¹⁰ In another decision dated June 20, 2014, OWCP vacated in part and affirmed in part the August 2012 decision denying modification of the LWEC determination as it used an inaccurate pay rate in its LWEC.

¹¹ Docket No. 16-1152 (issued October 19, 2016).

pay rate for partial disability based on its reduction of his compensation for failing to participate in vocational rehabilitation.¹²

Following further development, by decision dated May 9, 2017, OWCP modified its December 18, 2008 reduction of appellant's compensation for failure to undergo vocational rehabilitation. It found that the applicable pay rate was the date disability began, August 7, 2004, noting that there was no evidence that the pay rate on that date differed from the pay rate on the DOI. OWCP determined that appellant's weekly pay rate on the date disability began was \$583.34 including night differential. It noted that his locality pay, according to OPM pay tables, was 20.5 percent in 2004 and 25.26 percent in 2008, and that the base pay rate was \$23,600.00 to \$35,400.00 in 2004 and \$24,432.00 to \$36,648.00 in 2008. OWCP calculated the updated DOI pay rate as \$630.69 including night differential of a half hour per day for five days per week. It applied the *Shadrick* formula in computing the loss of wage-earning capacity.

OWCP, on May 12, 2017, advised appellant of its preliminary determination that he received an overpayment of wage-loss compensation in the amount of \$74,141.30 because it paid him at an inaccurate pay rate from October 30, 2005 through April 29, 2017. It calculated the overpayment by subtracting the amount that it should have paid him using the date disability began pay rate from the amount that it paid him using a date of recurrence date of recurrence pay rate. OWCP found that from October 30, 2005 to December 20, 2008 it paid him \$86,629.54 in wage-loss compensation for total disability using a date of recurrence pay rate when it should have paid him \$67,031.66 using a date disability began pay rate, for a difference of \$19,597.88. From December 21, 2008 through January 17, 2009, it paid him \$786.78 based on its LWEC determination when it should have paid him \$126.49, a difference of \$660.29. For the period January 18, 2009 to part of a day on January 24, 2010, OWCP paid him schedule award compensation using a date of recurrence pay rate of \$28,830.26 when it should have paid him \$22,313.89, a difference of \$6,516.37, and from January 25, 2010 through April 29, 2017 it paid him \$56,707.04 based on its LWEC determination using a date of recurrence pay rate when it should have paid him \$9,340.28, a difference of \$47,366.76. It added the amounts that it overpaid appellant for each period to find a total overpayment of \$74,141.30.

OWCP further notified appellant of its preliminary determination that he was without fault in creation of the overpayment of compensation. It requested that he complete an enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documents. Additionally, OWCP notified appellant that, within 30 days of the date of the letter, he could request a telephone conference, a final decision based on the written evidence, or a prerecoumment hearing.

¹² In a decision dated July 6, 2015, an OWCP hearing representative found that appellant received an overpayment of compensation in the amount of \$16,955.80 for the period October 30, 2005 to June 28, 2014 because he received compensation at an incorrect rate. He further found that appellant was not at fault in the creation of the overpayment but denied waiver as he failed to provide the required financial information. By decision dated October 21, 2016, the Board set aside the July 6, 2015 OWCP decision after finding that the case was not in posture for decision regarding whether appellant received an overpayment of compensation and the amount of any overpayment. Docket No. 16-0441 (issued October 21, 2016). The Board found that OWCP used an incorrect pay rate date in determining his pay rate for compensation purposes from October 30, 2005 to July 28, 2014.

Appellant, on June 6, 2017, disagreed that he had received an overpayment of compensation. He maintained that he was entitled to a date of recurrence pay rate as he resumed full-time work in December 2004 and that at the time of his recurrence of disability he earned \$39,158.00 at the “F” Band. Appellant submitted earnings and leave statements.

OWCP scheduled a telephone hearing on the overpayment of compensation for November 8, 2017. Appellant did not appear for the scheduled hearing. On November 9, 2017 OWCP denied his request to reschedule the telephone hearing, indicating that an OWCP hearing representative would conduct a review of the written record in lieu of a telephone hearing. It afforded appellant 15 days to provide additional evidence.

By decision dated December 22, 2017, OWCP’s hearing representative found that appellant received an overpayment of compensation in the amount of \$73,961.51. He determined that OWCP had mistakenly found that appellant was entitled to \$22,313.89 for the period January 18, 2009 to January 24, 2010 instead of \$22,363.22, a difference of \$49.33, and thus modified the amount of the overpayment of compensation to \$74,091.97. The hearing representative further found that his weekly pay rate was \$583.36 per week instead of \$579.73 per week. He adjusted the overpayment for each period based on a pay rate of \$583.36 to find a total of \$130.46, which he subtracted from \$74,091.97 to find a \$73,961.51 overpayment of compensation. The hearing representative further found that appellant was without fault in the creation of the overpayment of compensation, but denied waiver of recovery of the overpayment, noting that he had not submitted supporting financial information. He determined that the entire amount of the overpayment was due in full.

LEGAL PRECEDENT -- ISSUE 1

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.¹³ Pay rate for compensation purposes is defined in section 8101(4) as the monthly pay at the time of injury, the time disability begins, or the time disability recurs, if the recurrence is more than six months after returning to full-time work, whichever is greater.¹⁴

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.¹⁵

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.¹⁶ OWCP’s procedures note that some agencies have

¹³ 5 U.S.C. § 8102(a).

¹⁴ *Id.* at § 8101(4).

¹⁵ *Id.* at § 8129(a).

¹⁶ *See C.Y.*, Docket No. 18-0263 (issued September 14, 2018).

performance-based pay systems, and provide specific procedures for loss of wage-earning capacity under such a system.¹⁷

ANALYSIS -- ISSUE 1

OWCP found that appellant received an overpayment of compensation because he received wage-loss compensation at an inaccurate pay rate from October 30, 2005 through April 29, 2017. It paid him wage-loss compensation beginning October 30, 2005 using a date of recurrence pay rate date of September 4, 2005. As appellant received compensation based on a date of recurrence of September 4, 2005 instead of his pay rate on the date disability began, August 7, 2014, he received an overpayment of compensation.¹⁸

OWCP determined the amount that it should have paid appellant using his pay rate on the date disability began, August 7, 2004. It calculated that it should have paid him \$67,031.66 in wage-loss compensation from October 30, 2005 through December 20, 2008, \$126.49 from December 21, 2008 through January 17, 2009 based on his LWEC, \$22,313.89 from January 18, 2009 through January 24, 2010 in schedule award compensation, and \$9,340.28 from January 24, 2010 through April 29, 2017 for his LWEC, for a total of \$98,812.32. OWCP subtracted this amount from the amount that it paid him using a date of recurrence pay rate, \$172,953.62, to find an overpayment of \$74,141.30. OWCP's hearing representative found that the amount OWCP should have paid appellant from January 18, 2009 to January 24, 2010 was \$22,363.22 instead of \$22,313.89, and thus modified the overpayment down to \$74,091.97. He further subtracted \$130.46 from the overpayment of wage-loss compensation after finding a weekly pay rate of \$583.36 per week instead of \$579.73 per week, which reduced the overpayment to \$73,961.51. The Board finds that appellant received an overpayment of compensation in the amount of \$73,961.51 for the period from October 30, 2005 through April 29, 2017.

On appeal appellant asserts that OWCP owes him money for night differential and Sunday premium pay that has not been deducted from his overpayment. As explained above, the Board finds that OWCP properly determined the fact and amount of the overpayment.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA¹⁹ provides that an overpayment must be recovered unless "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." (Emphasis added.) Thus, a finding that appellant was without fault does not automatically result in waiver of recovery of the overpayment. OWCP must then exercise its discretion to determine whether

¹⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on Actual Earnings*, Chapter 2.815.4(e) (June 2013).

¹⁸ See *E.E.*, Docket No. 14-1908 (issued April 22, 2015).

¹⁹ 5 U.S.C. § 8129(1)-(b); see *D.C.*, Docket No. 17-0559 (issued June 21, 2018).

recovery of the overpayment would defeat the purpose of FECA or would be against equity and good conscience.²⁰

According to 20 C.F.R. § 10.436, recovery of an overpayment would defeat the purpose of FECA if recovery would cause hardship because the beneficiary needs substantially all of his or her income (including compensation benefits) to meet current ordinary and necessary living expenses, and also, if the beneficiary's assets do not exceed a specified amount as determined by OWCP from data provided by the Bureau of Labor Statistics.²¹ An individual's liquid assets include, but are not limited to cash, the value of stocks, bonds, savings accounts, mutual funds, and certificates of deposits.²² Nonliquid assets include, but are not limited to, the fair market value of an owner's equity in property such as a camper, boat, second home and furnishings, and supplies.²³

20 C.F.R. § 10.437 provides that recovery of an overpayment is considered to be against equity and good conscience when an individual who received an overpayment would experience severe financial hardship attempting to repay the debt; and when an individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.²⁴ To establish that a valuable right has been relinquished, it must be shown that the right was in fact valuable, that it cannot be regained, and that the action was based chiefly or solely in reliance on the payments or on the notice of payment.²⁵

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied waiver of recovery of the \$73,961.51 overpayment of compensation.

OWCP determined that appellant was without fault in the creation of the overpayment. It may, therefore, only require recovery of the overpayment if it would not defeat the purpose of FECA or be against equity and good conscience.²⁶

OWCP, on May 12, 2017, provided appellant with a preliminary overpayment determination, an OWCP-20 form, and an overpayment action request form advising him that he could request either a prerecoupment hearing, a telephone conference, or a decision based on the

²⁰ See *V.T.*, Docket No. 18-0628 (issued October 24, 2018).

²¹ 20 C.F.R. § 10.436. OWCP procedures provide that assets must not exceed a resource base of \$4,800.00 for an individual or \$8,000.00 for an individual with a spouse or dependent plus \$960.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a) (June 2009).

²² *Id.*

²³ *Id.*

²⁴ 20 C.F.R. § 10.437.

²⁵ *Id.* at § 10.437(b)(1).

²⁶ See *supra* note 19; see also *S.M.*, Docket No. 17-1802 (issued August 20, 2018).

written evidence. In response, he requested a telephone hearing, but he did not appear for the scheduled hearing. OWCP thus conducted a review of the written record. Appellant did not submit the OWCP-20 form or provide supporting financial information. As a result, OWCP did not have the necessary financial information necessary to determine whether recovery of the overpayment would defeat the purpose of FECA or if recovery would be against equity and good conscience.²⁷

In requesting waiver, the overpaid individual has the responsibility for submitting financial information.²⁸ Appellant failed to provide the requested information, as required by 20 C.F.R. § 10.438 of its regulations, and thus was not entitled to waiver.²⁹ The Board, consequently, finds that OWCP properly denied waiver of recovery of the overpayment of compensation.³⁰

With respect to recovery of the overpayment of compensation, the Board's jurisdiction is limited to reviewing those cases where OWCP seeks recovery from continuing compensation benefits under FECA.³¹ As appellant was not receiving continuing compensation at the time of the December 2017 decision, the Board lacks jurisdiction with respect to recovery of the overpayment.

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$73,961.51. The Board further finds that OWCP properly denied waiver of recovery of the overpayment of compensation.

²⁷ 20 C.F.R. § 10.438; *see also* *L.K.*, Docket No. 17-1393 (issued March 20, 2018).

²⁸ *Id.*; *see also* *A.R.*, Docket No. 14-1681 (issued March 3, 2016).

²⁹ *Id.*; *see also* *L.B.*, Docket No. 09-1327 (issued April 6, 2010).

³⁰ *See* *P.D.*, Docket No. 15-0032 (issued March 11, 2016).

³¹ *See* *R.E.*, Docket No. 17-1625 (issued July 18, 2018).

ORDER

IT IS HEREBY ORDERED THAT the December 22, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 9, 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