

ISSUES

The issues are: (1) whether appellant received an overpayment of wage-loss compensation in the amount of \$13,968.46 for the period November 9, 2015 through July 23, 2016; and (2) whether OWCP properly denied waiver of recovery of the overpayment.

FACTUAL HISTORY

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

On November 3, 2004 appellant, then a 38-year-old mail processing clerk, filed a notice of recurrence (Form CA-2a) on July 13, 2004 claiming disability causally related to a January 11, 2001 employment injury.⁴ OWCP converted the recurrence claim to a claim for a new traumatic injury, assigned OWCP File No. xxxxxx288, and accepted it for aggravation of dislocation of the lumbar vertebra. It paid appellant wage-loss compensation beginning July 2004.

By decision dated May 9, 2007, OWCP reduced appellant's wage-loss compensation based on its finding that her actual earnings working 20 hours per week as a modified manual clerk, effective January 22, 2006, fairly and reasonably represented her wage-earning capacity. It paid her compensation for partial disability beginning January 22, 2006 based on her loss of wage-earning capacity (LWEC).⁵

OWCP subsequently accepted appellant's May 20, 2008 occupational disease claim (Form CA-2) for other affections of the right shoulder region. It assigned OWCP File No. xxxxxx669. Appellant stopped work on May 20, 2008 and received wage-loss compensation on the supplemental rolls beginning May 21, 2008 and on the periodic rolls beginning April 12, 2009. OWCP noted that she received compensation for four hours per day based on an LWEC determination issued under File No. xxxxxx288.

By decision dated May 2, 2011, issued under OWCP File No. xxxxxx669, OWCP reduced appellant's wage-loss compensation, effective May 8, 2011, based on its finding that she had the capacity to earn wages as a surveillance system monitor working four hours per day.

In an August 13, 2015 work capacity evaluation (Form OWCP-5c) submitted under OWCP File No. xxxxxx288, Dr. George T. Cunningham, a chiropractor, found that appellant could return to work for six hours per day with sitting and walking limited to one hour per day, standing a half hour per day, pushing and pulling up to 10 pounds, and occasional reaching above the shoulder.

³ *Order Remanding Case*, Docket No. 17-1058 (issued February 8, 2018).

⁴ The claim was originally filed as a recurrence under OWCP File No. xxxxxx433. That claim, which involved a November 1, 2001 injury, has not been administratively combined with the present claim.

⁵ OWCP combined OWCP File Nos. xxxxxx699 and xxxxxx288, with OWCP File No. xxxxxx288 designated as the master file.

In a September 11, 2015 work capacity evaluation (Form OWCP-5c) submitted under OWCP File No. xxxxxx669, a nurse practitioner indicated that appellant had limitations due to right shoulder pain and reduced motion. She found that appellant could work four hours per day pushing, pulling, and lifting up to 10 pounds, performing repetitive movements under one hour, limiting reaching above the shoulder, and operating a motor vehicle over 30 minutes.

On October 21, 2015 the employing establishment offered appellant a position as a modified mail processing clerk for four hours per day. The duties included: sitting and walking intermittently for less than one hour at a time, standing intermittently for less than a half hour at a time, and repetitive reaching for less than a half hour at a time. The grade, step, and salary provided on the form is illegible. The employing establishment provided both OWCP file numbers and injury dates on its October 21, 2015 job offer.

In a return to work form dated November 4, 2015, the employing establishment indicated that appellant had accepted a job offer for four hours per day under OWCP File No. xxxxxx669. In a return to work form of even date, it asserted that she had returned to work under OWCP File No. xxxxxx288. The employing establishment noted that appellant received wage-loss compensation on the periodic rolls for both OWCP File No. xxxxxx288 and OWCP File No. xxxxxx699 and requested that it remove her from the periodic rolls on one of the claims.

On November 9, 2015 the employing establishment notified OWCP that appellant had returned to work on November 9, 2015.

On February 25, 2016 appellant telephoned OWCP and questioned the accuracy of her compensation payments, noting that she had resumed work for four hours per day on November 9, 2015. OWCP advised that it would either stop or adjust her continuing wage-loss compensation payments.

In a letter dated April 28, 2016, the employing establishment notified OWCP that appellant had returned to work foUr hours per day, but was still receiving wage-loss compensation for four hours per day under both OWCP File Nos. xxxxxx669 and xxxxxx288.⁶ It requested that OWCP remove her from the periodic rolls under OWCP File No. xxxxxx669 as of November 9, 2015.

On August 2, 2016 OWCP requested that the employing establishment provide the medical evidence that it used for the offered position.

In an August 4, 2016 letter, the employing establishment again advised OWCP that appellant was on the periodic rolls under both OWCP File Nos. xxxxxx669 and xxxxxx288. It requested that OWCP stop compensation payments on one of the claims as she had returned to work for four hours per day on November 9, 2015. The employing establishment indicated that it had reviewed an August 13, 2015 work capacity evaluation (Form OWCP-5c) under File No. xxxxxx288 and a similar form dated September 11, 2015 which had been completed by a nurse

⁶ The employing establishment submitted a return to work form (Form CA-3) to OWCP on April 27, 2016 requesting that it remove appellant from the periodic rolls under one of the claim numbers. It noted that she was receiving wage-loss compensation for four hours per day under both File No. xxxxxx288 and File No. xxxxxx699 following her return to part-time employment.

practitioner under File No. xxxxxx669. It advised that it had used the more restrictive limitations in its offer of employment.

On August 16, 2016 OWCP requested that the employing establishment provide pay rate information, including appellant's current base pay rate and the number of hours that she worked weekly.

On September 26, 2016 OWCP informed appellant of its preliminary determination that she had received an overpayment of wage-loss compensation in the amount of \$13,898.98 for the period November 9, 2015 through July 23, 2016 because she had returned to work four hours per day on November 9, 2015, but continued to receive compensation for a total of eight hours per day. It noted that she had received compensation for four hours per day following an LWEC determination based on her actual earnings under OWCP File No. xxxxxx288 and compensation for four hours per day for an LWEC determination based on a constructed position under OWCP File No. xxxxxx669. OWCP found that appellant had returned to work for four hours per day under OWCP File No. xxxxxx288, but had continued to receive compensation under OWCP File No. xxxxxx288 based on its LWEC determination until July 23, 2016. It calculated the overpayment by determining the amount she had received from November 9 through July 23, 2016 under File No xxxxxx288, which yielded an overpayment in the amount of \$13,989.98. OWCP further informed appellant of its preliminary determination that she was at fault in creating the overpayment as she knew or should have known that she was not entitled to wage-loss compensation for total disability after she resumed part-time employment. It requested that she complete the 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, she could request a telephone conference, a final decision based on the written evidence, or a precoupment hearing.

Appellant submitted a completed overpayment recovery questionnaire (Form OWCP-20) and requested a telephone conference on October 25, 2016. She listed monthly income of \$2,700.00 and monthly expenses of \$2,325.00. Appellant related that she telephoned OWCP in January 2016 about her return to work, but was informed that she did not owe anything as she was receiving reduced wages. She also maintained that she should receive continued payments under OWCP File No. xxxxxx288 instead of OWCP File No. xxxxxx669.

By decision dated October 27, 2016, OWCP found that appellant had received an overpayment of compensation in the amount of \$13,989.98 for the period November 9, 2015 through July 23, 2016 and that she was at fault in the creation of the overpayment. It indicated that she had failed to respond to its preliminary overpayment determination.

Appellant appealed to the Board. By order dated February 8, 2018, the Board set aside the October 27, 2016 decision.⁷ The Board found that OWCP had failed to conduct a telephone conference prior to issuing its final overpayment determination even though she had timely requested a telephone conference and had timely submitted a completed overpayment recovery

⁷ *Supra* note 2.

questionnaire. The Board remanded the case for OWCP to respond to appellant's request for a telephone conference.

In a memorandum of conference dated May 29, 2018, counsel questioned why OWCP had based the overpayment on the higher of the two LWEC payments appellant received during the period in question. OWCP's claims examiner advised that she had returned to work under File No. xxxxxx288, and thus it had terminated her wage-loss compensation under that claim. The claims examiner noted, "The representative stated that they would like the overpayment calculated for the lower payment case [xxxxxx]669. I advised that I was not authorized to switch the debt to the lower paying case file. I also advised that if it could be done, the claimant would owe a lot more money and for a longer period." Counsel further asserted that appellant was without fault in creating the overpayment as she had telephoned OWCP regarding her return to employment. Regarding repayment, he advised that she could repay \$50.00 per month.⁸

By decision dated August 27, 2018, OWCP found that appellant was without fault in the creation of the overpayment of wage-loss compensation in the amount of \$13,968.46 for the period November 9, 2015 through July 23, 2016. It denied waiver of recovery of the overpayment as she had not returned the money to OWCP. OWCP advised appellant to submit \$50.00 monthly as repayment of the overpayment.

On appeal counsel notes that medical providers had released appellant to resume part-time work with restrictions under both OWCP File Nos. xxxxxx669 and xxxxxx288.

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.⁹

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.¹⁰ 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.¹¹

⁸ Appellant remains in receipt of wage-loss compensation for partial disability under OWCP File No. xxxxxx669.

⁹ 5 U.S.C. § 8102.

¹⁰ *Id.* at § 8116(a); *see also* C.Y., Docket No. 18-0263 (issued September 14, 2018).

¹¹ 20 C.F.R. § 10.500.

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation, but that the case is not in posture for decision regarding the amount of the overpayment.

OWCP paid appellant wage-loss compensation for the period November 9, 2015 through July 23, 2016 for four hours per day under OWCP File No. xxxxxx288 based on her actual earnings working 20 hours per week as a modified mail clerk. It further paid her wage-loss compensation under OWCP File No. xxxxxx669 for that same period based on its finding that she could earn wages as a surveillance system monitor working four hours per day.

On October 21, 2015 the employing establishment offered appellant a position as a modified mail processing clerk for four hours per day. Appellant returned to work for four hours per day on November 9, 2015, but continued to receive wage-loss compensation based on LWEC determinations under both OWCP File No. xxxxxx288 and OWCP File No. xxxxxx699 without any offset for her actual earnings.¹² She consequently received an overpayment of compensation.¹³

The Board finds, however, that the case is not in posture for determination regarding the amount of the overpayment. OWCP found that appellant had returned to work under OWCP File No. xxxxxx288 and that, consequently, the amount of wage-loss compensation that it paid under that file number for the period November 9, 2015 through July 23, 2016 constituted an overpayment of compensation. In its August 27, 2018 decision, however, it did not provide an explanation for its determination that she had returned to work under OWCP File No. xxxxxx288, rather than OWCP File No. xxxxxx699. Such an explanation is particularly necessary given the conflicting information from the employing establishment regarding whether it offered the position under OWCP File No. xxxxxx288 or OWCP File No. xxxxxx699. The Board thus finds that OWCP has failed to provide adequate findings of fact regarding the amount of overpayment as required by statute and regulation.¹⁴

Additionally, the Board notes that OWCP determined that the entire amount that appellant received based on its LWEC under OWCP File No. xxxxxx288 for the period November 9, 2015 through July 23, 2016 constituted an overpayment of compensation. OWCP's procedures provide that if a claimant, after a formal LWEC rating, accepts a position with no loss of wages and returns to work, no wage-loss entitlement continues and compensation should be terminated.¹⁵ The salary and grade indicated on the job offer, however, are illegible. Prior to determining the amount of

¹² See *L.A.*, Docket No. 15-1213 (issued April 27, 2016).

¹³ See *J.L.*, Docket No. 18-1266 (issued February 15, 2019).

¹⁴ 5 U.S.C. § 8124(a) provides that OWCP shall determine and make findings of fact and make an award for or against payment of compensation. 20 C.F.R. §10.126 provides in pertinent part that the final decision of OWCP shall contain findings of fact and a statement of reasons. See also *D.S.*, Docket No. 16-0721 (issued October 13, 2017).

¹⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Loss of Wage-Earning Capacity Determinations*, Chapter 2.1501.3(b) (June 2013).

the overpayment, OWCP should determine whether appellant had a continuing LWEC under the applicable OWCP file number subsequent to her return to part-time employment.¹⁶

Accordingly, the case will be remanded to OWCP for further development regarding the amount of the overpayment. After such development as deemed necessary, it shall issue a *de novo* decision regarding the amount of overpayment and waiver of recovery of the overpayment.

CONCLUSION

The Board finds that appellant received an overpayment of compensation for the period November 9, 2015 through July 23, 2016. The Board further finds, however, that the case is not in posture for decision regarding the amount of the overpayment.¹⁷

ORDER

IT IS HEREBY ORDERED THAT the August 27, 2018 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 decision of the Board.

Issued: September 3, 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

¹⁶ Under such circumstances, OWCP offsets actual earnings pursuant to the formula set forth in *Albert C. Shadrick*, 5 ECAB 376 (1953); codified by regulation at 20 C.F.R. § 10.403.

¹⁷ In light of the Board's findings regarding the amount of overpayment, it is premature to address the issue of waiver of recovery of the overpayment of compensation.