

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

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C.S., Appellant)	
)	
and)	Docket No. 18-0450
)	Issued: July 31, 2020
DEPARTMENT OF THE ARMY,)	
INSTALLATION MANAGEMENT)	
COMMAND, Fort Shafter, HI, Employer)	
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Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
CHRISTOPHER J. GODFREY, Deputy Chief Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On December 26, 2017 appellant filed a timely appeal from an August 8, 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

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$1,407.54 for the period March 22 to April 1, 2017 for which he was not at fault because

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the August 8, 2017 decision, OWCP received additional evidence. 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.*

he continued to receive compensation following his return to work; and (2) whether OWCP properly denied waiver of recovery of the overpayment.

FACTUAL HISTORY

On May 5, 2016 appellant, then a 32-year-old fire fighter/emergency medical technician, filed a traumatic injury claim (Form CA-1) alleging that he sustained a left elbow injury on March 30, 2016 when he lost his grip as he was carrying a wall locker while in the performance of duty. He stopped work on March 31, 2016. By decision dated July 29, 2016, OWCP accepted the claim for left elbow lateral epicondylitis. It paid appellant wage-loss compensation benefits on the periodic rolls as of February 5, 2017.

On March 22, 2017 Dr. Benjamin Martinez, a family medicine specialist, noted that appellant was released from care and could return to full-duty work.³

On April 5, 2017 OWCP contacted the employing establishment and verified that appellant had returned to full-duty work on April 5, 2017. It noted that appellant was released to full duty on March 22, 2017, and he took leave without pay (LWOP) for the period March 22 to April 5, 2017. The record reflects, however, that OWCP continued to pay wage-loss compensation benefits for the period March 22 to April 1, 2017 in the amount of \$1,407.54.

On May 18, 2017 OWCP notified appellant that a preliminary determination was made that he had received an overpayment of compensation in the amount of \$1,407.54 for the period March 22 through April 1, 2017 because he continued to receive wage-loss compensation for total disability after he was released to return to full-duty work, effective March 22, 2017, but took leave without pay until April 5, 2017. It further found that he was not at fault in the creation of the overpayment because he was not aware, nor could he reasonably have been expected to be aware, that OWCP had paid compensation incorrectly. An attached OWCP memorandum and fiscal worksheet noted that appellant was on the periodic rolls and received gross compensation every 28-days. OWCP explained that, since appellant was released to return to work by his physician on March 22, 2017, he had been overpaid compensation through April 1, 2017. It calculated that appellant received net compensation in the amount of \$1,407.54 for the period March 22 to April 1, 2017. OWCP informed him of his appeal rights and instructed him to complete an enclosed overpayment recovery questionnaire form (Form OWCP-20) and submit supporting documentation within 30 days. No response was received.

³ Also on March 22, 2017 an OWCP vocational rehabilitation counselor advised that the employing establishment was holding appellant's position open for him once he was released to full duty, following a work hardening program. On that same date appellant had advised the counselor that he was awaiting a release to full duty following his work hardening program. The counselor noted short-term goals of continued follow up following the work hardening program, if authorized, and coordination of return to work, if released by physician following the work hardening program. In a rehabilitation action report (OWCP Form 44) dated April 4, 2017, the rehabilitation counselor noted that appellant had advised him that his physician had released him to return to work and that he was scheduled to return to work on April 5, 2017. He further noted that he did not have a copy of Dr. Martinez' medical report, nor did he have details regarding appellant's return to work.

By decision dated August 8, 2017, OWCP finalized its determination that appellant received an overpayment of compensation in the amount of \$1,407.54 for the period March 22 through April 1, 2017, based upon his receipt of compensation for disability after he had been released to unrestricted, full-duty work on March 22, 2017. It found that appellant was not at fault in the creation of the overpayment, but denied waiver of recovery of the overpayment as he had not responded to the May 18, 2017 preliminary overpayment determination. OWCP required recovery of the overpayment by directing appellant to submit repayment for the full amount of the \$1,407.54 overpayment within 30 days.

LEGAL PRECEDENT -- ISSUE 1

Section 8102 of FECA⁴ 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.⁵

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.⁶ OWCP's procedures provide that an overpayment in compensation is created when a claimant returns to work, but continues to receive wage-loss compensation.⁷

ANALYSIS -- ISSUE 1

The Board finds that OWCP improperly found that appellant received an overpayment of compensation in the amount of \$1,407.54.

The record establishes that appellant was released to full-duty work on March 22, 2017, by Dr. Martinez. He continued to receive wage-loss compensation on the periodic rolls through April 1, 2017. However, he return to work until April 5, 2017 when a position was made available.

OWCP's procedures provide that injured workers who are medically able to return to work are expected to return to gainful employment when work is made available.⁸ While the employing establishment advised OWCP and the vocational counselor that appellant's position would remain available to him, the employing establishment did not submit any evidence to the record substantiating that he was advised that he was to return to work in his full-duty work assignment

⁴ 5 U.S.C. § 8102

⁵ ~~*Id.* at § 8102.~~

⁶ *Id.* at § 8116(a).

⁷ *C.A.*, Docket No. 18-0092 (issued April 2, 2018); *Danny E. Haley*, 56 ECAB 393 (2005); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Action*, Chapter 6.200.2(a) (May 2004).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.1(June 2013).

on March 22, 2017. The record indicates that appellant took leave without pay from March 22 until April 5, 2017.

OWCP procedures further provide:

“If a claimant returns to work while in receipt of compensation, benefits should be terminated as soon as notification of the return to work is received. No formal disallowance is required in this instance. However, if the claimant received overlapping dates of compensation from the OWCP and wages from the employing agency, an overpayment may need to be declared.”⁹

The Board finds that appellant did not receive an overpayment of compensation during the period March 22 to April 1, 2017.¹⁰

The Board therefore finds that, under the facts of this case, appellant was not entitled to receive wage-loss compensation after he returned to work on April 5, 2017. No overpayment was created for the period March 22 to April 1, 2017.¹¹

CONCLUSION

The Board finds that OWCP improperly determined that appellant received an overpayment in the amount of \$1,407.54.¹²

⁹ *Id.* at Chapter 2.1400.4(a)(2) (February 2013).

¹⁰ *K.K.*, Docket No. 19-0978 (issued October 21, 2019)

¹¹ The Board notes that OWCP terminated appellant’s periodic roll compensation on April 1, 2017, although the record establishes that he did not return to work until April 5, 2017.

¹² Given the disposition of the first issue, the second issue concerning waiver of recovery of the overpayment is rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the August 8, 2017 decision of the Office of Workers' Compensation Programs is reversed.

Issued: July 31, 2020
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

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

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board