

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

R.L., Appellant

and

**DEPARTMENT OF THE ARMY, U.S. ARMY
MEDICAL COMMAND, Fort Bragg, NC,
Employer**

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**Docket No. 19-1786
Issued: July 6, 2020**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 21, 2019 appellant filed a timely appeal from February 22 and May 21, 2019 merit decisions of the Office of Workers' Compensation Programs (OWCP).¹ Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.³

¹ Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of issuance of an OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. *See* 20 C.F.R. § 501.3(e)-(f). One hundred eighty days from February 22, 2019, the date of OWCP's last decision, was August 21, 2019. Because using August 27, 2019, the date the appeal was received by the Clerk of the Appellate Boards, would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is August 21, 2019, rendering the appeal timely filed. *See* 20 C.F.R. § 501.3(f)(1).

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that following the May 21, 2019 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.*

ISSUES

The issues are: (1) whether OWCP properly reduced appellant's wage-loss compensation benefits, effective May 29, 2016, based on his actual earnings as a nurse consultant; (2) whether appellant received an overpayment of compensation in the amount of \$12,401.44, for which he was not at fault, as he concurrently received Social Security Administration (SSA) age-related retirement benefits and FECA wage-loss compensation for the period July 1, 2018 through March 30, 2019; and (3) whether OWCP properly denied waiver of recovery of the \$12,401.44 overpayment of compensation.

FACTUAL HISTORY

On October 4, 2011 appellant, then a 59-year-old clinical/medical-surgical nurse, filed a traumatic injury claim (Form CA-1) alleging that, on October 3, 2011, he injured his left wrist and right thigh when he slipped and fell on a wet floor while in the performance of duty. OWCP accepted the claim for sprains of the right hip, thigh, knee, and leg. Appellant worked intermittently and stopped work on October 24, 2011. He underwent an OWCP-approved surgical repair of the right knee quadriceps tendon rupture on October 26, 2011. OWCP paid appellant wage-loss compensation on the supplemental rolls commencing November 20, 2011. Appellant returned to work in September 2012.⁴

On May 19, 2016 appellant accepted a permanent job offer as a GS-6 step 10 nurse consultant. The salary was listed as \$97,069.00 which included night differential, and Saturday and Sunday premium pay. The position was defined as sedentary, with lifting and carrying limited to less than 10 pounds. Frequent use of a keyboard and telephone was required.

By decision dated January 20, 2017, OWCP finalized a loss of wage-earning capacity (LWEC) determination finding that appellant had the capacity to earn wages as a nurse consultant with wages of \$1,866.71 per week effective May 29, 2016. It found that the position fairly and reasonably represented appellant's wage-earning capacity and the position was suitable for appellant's partially disabling condition. A computation of compensation worksheet was included which documented the required application of the *Shadrick*⁵ formula used to determine appellant's wage-earning capacity. OWCP noted that, as of May 29, 2016, appellant's current pay rate as nurse (clinical/medical-surgical) was \$1,904.38. It determined that he had a wage-earning capacity of 98 percent and that his net compensation rate was \$117.00 every four weeks.

In a November 14, 2018 letter, the employing establishment indicated that there was an error in the May 13, 2016 permanent job offer. It noted that the salary on the job offer should have been \$84,171.00 annually and should not have included premium pay. However, the employing establishment also noted that appellant's loss of premium pay should have been included as part of the LWEC determination. It requested that the LWEC decision be modified based on the correct salary and adjusted effective September 2, 2018. An attached September 2, 2018 Notification of Personnel Action (Standard Form 50-B), noted appellant's annual salary as \$86,203.00.

⁴ By decision dated December 17, 2012, OWCP granted appellant a schedule award for 13 percent permanent impairment of the right lower extremity. The award ran 37.44 weeks for the period October 16 through July 5, 2013.

⁵ *Albert C. Shadrick*, 5 ECAB 376 (1953); 20 C.F.R. § 10.403(d).

Due to the discrepancies in appellant's salary, OWCP, in a December 12, 2018 letter, sought clarification of appellant's salary commencing May 19, 2016. On January 18, 2019 the employing establishment advised that, effective May 29, 2016, appellant's actual earnings should have been \$84,171.00.⁶ It also noted the amounts of Saturday, Sunday, and Holiday premium pay, and night differential pay that appellant earned one year prior to the date of injury as: \$5,852.72, \$2,278.24, \$3,770.88, and \$7,543.64, respectively.

By decision dated February 13, 2019, OWCP modified the January 20, 2017 LWEC determination. It found that the LWEC determination was issued in error as the May 13, 2016 permanent job offer was based on incorrect salary information.

By decision dated February 22, 2019, OWCP issued an LWEC determination finding that appellant had the capacity to earn wages as a nurse consultant with wages of \$1,618.67 per week, effective May 29, 2016.⁷ It found that the position fairly and reasonably represented his wage-earning capacity and the May 13, 2016 permanent light-duty position was suitable for his partially disabling condition. A computation of compensation worksheet was included which documented the required application of the *Shadrick*⁸ formula used to determine appellant's wage-earning capacity.⁹ Based on the LWEC, appellant received net compensation of \$1,202.00 every four weeks.

On EN1032 form dated March 8, 2019, appellant reported that he was in receipt of benefits from SSA as part of an annuity for federal service, which he had received since August 2018.

On March 21, 2019 SSA forwarded a Federal Employees Retirement System (FERS)/SSA dual benefits calculation form to OWCP. The form set forth the SSA compensation based upon his rate without FERS and with FERS from July 2018 through January 2019. The form indicated that beginning July 1, 2018, appellant's SSA rate with FERS was \$2,551.90 and without FERS \$1,215.70; beginning December 1, 2018, his SSA rate with FERS was \$2,623.30 and without FERS was \$1,249.70; and beginning January 1, 2019, his SSA rate with FERS was \$2,750.80 and without FERS was \$1,299.60. An accompanying FERS Offset Calculation Worksheet calculated the overpayment for the period July 1 to November 30, 2018 as \$6,739.73; for the period December 1 to 31, 2018 as \$1,403.79; and for the period January 1 to March 30, 2019 as \$4,257.92; for a total overpayment of \$12,401.44.

In an April 10, 2019 letter, OWCP advised appellant that the SSA had confirmed that a portion of his SSA benefits were attributed to his years of federal service as an employee under the FERS retirement program, which required an offset of his FECA compensation benefits. It advised that \$1,451.20 was calculated as the amount which must be offset against his compensation benefits. OWCP indicated that since Social Security benefits were paid monthly,

⁶ The employing establishment advised, in a February 11, 2019 letter, that appellant was not required to pay any of the overpayment back to the employing establishment from May 29, 2016 through August 31, 2018 caused by the salary error.

⁷ This was based on a base pay of \$84,171.00 annually, effective May 29, 2016.

⁸ See *supra* note 5.

⁹ OWCP noted that, as of May 29, 2016, appellant's current pay rate as nurse (clinical/medical-surgical) was \$2,003.95 and that he was capable of earning \$1,618.67.

and compensation benefits were paid every 28 days, the monthly offset amount of \$1,451.20 adjusted to a 28-day payment cycle amounted to \$1,339.57. It noted that the offset amount of \$1,339.57 would begin on March 31, 2019. OWCP also advised that since the FERS offset was \$1,339.57, which was more than the wage-earning capacity entitlement of \$1,224.00, the gross amount of compensation had been deducted and applied to the FERS offset, which resulted in a new net compensation payment of zero.

In a preliminary determination dated April 10, 2019, OWCP informed appellant that he received an overpayment of compensation in the amount of \$12,401.44 because the SSA/FERS offset was not applied to payments for the period July 1, 2018 through March 30, 2019. It determined that he was without fault in the creation of the overpayment, because he was not aware, nor could he reasonably be expected to know, that it had paid him compensation incorrectly. OWCP requested that appellant submit a completed overpayment recovery questionnaire (Form OWCP-20) to determine a fair repayment method, and advised him that he could request a waiver of recovery of the overpayment. It also requested that he provide supporting financial documentation, including copies of income tax returns, bank account statements, bills, pay slips, and any other records to support reported income and expenses. OWCP advised appellant that it would deny waiver of recovery of the overpayment if he failed to furnish the requested financial information within 30 days. It further notified him 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 prerecoupment hearing.

Appellant responded to the preliminary overpayment determination by submitting the following evidence: a May 7, 2019 letter from American Federation Government Employees (AFGE) advising of appellant's appointment with SSA; a May 8, 2019 letter from the SSA noting that appellant was not receiving a Social Security disability benefit and that he began receipt of his retirement benefit after his full retirement age; and a May 14, 2019 letter from AFGE which attached the policy from SSA regarding Social Security benefits and OWCP benefits offset.

By decision dated May 21, 2019, OWCP finalized the preliminary determination that appellant received an overpayment of compensation in the amount of \$12,401.44, for which he was not at fault, as he concurrently received SSA age-related retirement benefits while receiving FECA wage-loss compensation benefits for the period July 1, 2018 through March 30, 2019. It denied waiver of recovery of the overpayment as he had not provided any financial information regarding his income and expenses. OWCP requested that the overpayment be recovered in full within 30 days.¹⁰

¹⁰ OWCP further noted that since appellant's FERS offset amount of \$1,339.57 is more than his wage-earning capacity entitlement of \$1,224.00, the gross amount of compensation has been deducted and applied to the FERS offset.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim, it has the burden of proof to establish that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.¹¹

A wage-earning capacity determination is a finding that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn wages.¹² Compensation payments are based on the wage-earning capacity determination, and it remains undisturbed until properly modified.¹³

Under section 8115(a) of FECA wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his or her wage-earning capacity.¹⁴ If the actual earnings do not fairly and reasonably represent wage-earning capacity, or if the employee has no actual earnings, the wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, the usual employment, age, qualifications for other employment, the availability of suitable employment, and other factors and circumstances which may affect the wage-earning capacity in his or her disabled condition.¹⁵ Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions. OWCP applies the principles set forth in *Albert C. Shadrick*¹⁶ as codified in section 10.403 of its implementing regulations,¹⁷ to determine the percentage of the employee's LWEC.¹⁸

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally

¹¹ See *C.H.*, Docket No. 19-0136 (issued May 23, 2019).

¹² 5 U.S.C. § 8115(a); see *Mary Jo Colvert*, 45 ECAB 575 (1994); *Keith Hanselman*, 42 ECAB 680 (1991).

¹³ See *M.F.*, Docket No. 18-0323 (issued June 25, 2019).

¹⁴ 5 U.S.C. § 8115(a).

¹⁵ *Id.*; see also *Z.W.*, Docket No. 18-1000 (issued June 24, 2019).

¹⁶ 5 ECAB 376 (1953).

¹⁷ 20 C.F.R. § 10.403.

¹⁸ See *J.H.*, Docket No. 18-1319 (issued June 26, 2019).

rehabilitated, or the original determination was, in fact, erroneous.¹⁹ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.²⁰

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined appellant's LWEC, effective May 29, 2016, based on his actual earnings as a nurse consultant.

By decision dated February 22, 2019, OWCP finalized a modified LWEC determination finding that appellant had the capacity to earn wages as nurse consultant with wages of \$1,618.67 per week effective May 29, 2016.²¹ The Board finds that appellant successfully performed the duties as a nurse consultant for over two years (May 29, 2016 to February 22, 2019), which supports that the position fairly and reasonably represented his wage-earning capacity.²² The Board further notes that the record does not establish that the nurse consultant position constituted part-time, sporadic, seasonal, or temporary work.²³ Moreover, the record indicates that the position was not a make-shift position designed for appellant's particular needs.²⁴ Appellant successfully performed the nurse consultant position for at least 60 days and the wages appellant earned beginning May 29, 2016 were less than the current wages of his date-of-injury job. Based upon the information provided by the employing establishment regarding an incorrect pay rate, OWCP modified the January 20, 2017 LWEC determination as the May 13, 2016 permanent job offer was based on incorrect salary information. It properly determined that appellant did not receive pay for night differential or premium pay as a nurse consultant, therefore, appellant had a greater loss of earnings. In a revised computation of compensation worksheet, OWCP properly applied the *Shadrick*²⁵ formula and found that appellant was entitled to a net compensation of \$1,202.00 every four weeks. The Board thus finds that the February 22, 2019 LWEC determination was properly issued based upon its calculations.²⁶

Accordingly, the Board finds that OWCP properly determined that appellant's earnings as a nurse consultant fairly and reasonably represented his wage-earning capacity and he was entitled to a net compensation of \$1,202.00 every four weeks.

¹⁹ See *S.C.*, Docket No. 18-0517 (issued February 25, 2020); *J.A.*, Docket No. 17-0236 (issued July 17, 2018); *Katherine T. Kreger*, 55 ECAB 633 (2004); *Sue A. Sedgwick*, 45 ECAB 211 (1993).

²⁰ See *S.C.*, *id.*; *O.H.*, Docket No. 17-0255 (issued January 23, 2018); *Selden H. Swartz*, 55 ECAB 272, 278 (2004).

²¹ The position had an annual salary of \$84,171.00 annually effective May 29, 2016.

²² See *S.C.*, *supra* note 20; *J.A.*, Docket No. 17-0236 (issued July 17, 2018).

²³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on Actual Wages*, Chapter 2.815.5 (June 2013).

²⁴ *Id.*

²⁵ *Supra* note 5; 20 C.F.R. § 10.403(d).

²⁶ OWCP noted that, as of May 29, 2016, appellant's current pay rate as nurse (clinical/medical-surgical) was \$2,003.95. It determined that appellant had an LWEC of \$369.56 every four weeks.

Appellant may request modification of the LWEC determination, supported by new evidence or argument, at any time before OWCP.

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 his or her duty.²⁷ Section 8116 limits the right of an employee to receive compensation. While an employee is receiving compensation, he or she may not receive salary, pay, or remuneration of any type from the United States.²⁸

Section 10.421(d) of OWCP's implementing regulations requires OWCP to reduce the amount of compensation by the amount of any SSA age-related benefits that are attributable to the employee's federal service.²⁹ FECA Bulletin No. 97-09 states that FECA benefits have to be adjusted for the FERS portion of SSA benefits because the portion of the SSA benefit earned as a federal employee is part of the FERS retirement package, and the receipt of FECA benefits and federal retirement concurrently is a prohibited dual benefit.³⁰

ANALYSIS -- ISSUE 2

The Board finds that appellant had received an overpayment of compensation in the amount of \$12,401.44, for which he was not at fault, as he concurrently received SSA age-related retirement benefits and FECA wage-loss compensation for the period July 1, 2018 through March 30, 2019.

As noted, a claimant cannot receive concurrent FECA compensation for wage loss and SSA age-related retirement benefits attributable to federal service for the same period.³¹ The information provided by SSA accurately indicated that appellant had received SSA age-related retirement benefits that were attributable to his federal service from July 1, 2018. This continued through March 30, 2019, after which OWCP adjusted his compensation. Thus, the record establishes that appellant received an overpayment of FECA wage-loss compensation.³²

To determine the amount of overpayment, the SSA provided the rate with FERS, and without FERS, for specific periods in question commencing July 1, 2018 through March 30, 2019. OWCP provided its calculations for each relevant period based on an SSA Dual Benefit worksheet and in its April 10, 2019 preliminary overpayment determination. This amount differed for each period beginning July 1, 2018 through March 30, 2019. OWCP calculated the lack of offset from

²⁷ 5 U.S.C. § 8102(a).

²⁸ *Id.* at § 8116.

²⁹ 20 C.F.R. § 10.421(d); *see L.W.*, Docket No. 19-0787 (issued October 23, 2019); *S.M.*, Docket No. 17-1802 (issued August 20, 2018).

³⁰ FECA Bulletin No. 97-09 (February 3, 1997); *see also M.D.*, Docket No. 19-1500 (issued February 24, 2020); *N.B.*, Docket No. 18-0795 (issued January 4, 2019).

³¹ 20 C.F.R. § 10.421(d); *see also N.B., id.*; *A.C.*, Docket No. 18-1550 (issued February 21, 2019).

³² *See R.R.*, Docket No. 19-0104 (issued March 9, 2020).

July 1, 2018 through March 30, 2019 resulted in an overpayment of compensation in the amount of \$12,401.44. No contrary evidence was provided, and appellant has not contested that an overpayment occurred.

The Board has reviewed OWCP's calculations and finds that it properly determined that appellant received prohibited dual benefits totaling \$12,401.44, thus creating an overpayment of compensation in that amount, for the period July 1, 2018 through March 30, 2019.

LEGAL PRECEDENT -- ISSUE 3

Section 8129 of FECA provides that an individual who is without fault in creating or accepting an overpayment is still subject to recovery of the overpayment unless adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.³³ The waiver or refusal to waive an overpayment of compensation by OWCP is a matter that rests within OWCP's discretion pursuant to statutory guidelines.³⁴

Recovery of an overpayment will defeat the purpose of FECA if such recovery would cause hardship to a currently or formerly entitled beneficiary because the beneficiary from whom OWCP seeks recovery needs substantially all of his or her current income, including compensation benefits, to meet current ordinary and necessary living expenses, and the beneficiary's assets do not exceed a specified amount as determined by OWCP.³⁵ Additionally, 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 in attempting to repay the debt or when an individual, in reliance on such payment or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.³⁶

OWCP's regulations provide that the individual who received the overpayment is responsible for providing information about income, expenses, and assets as specified by OWCP. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of FECA or be against equity and good conscience. The information is also used to determine the repayment schedule, if necessary.³⁷ Failure to submit the requested information within 30 days of the request will result in a denial of waiver of recovery, and no further request for waiver shall be considered until the requested information is furnished.³⁸

³³ 5 U.S.C. § 8129; 20 C.F.R. §§ 10.433, 10.434, 10.436, and 10.437; *see A.F.*, Docket No. 19-0054 (issued June 12, 2019).

³⁴ *A.C.*, Docket No. 18-1550 (issued February 21, 2019); *see Robert Atchison*, 41 ECAB 83, 87 (1989).

³⁵ 20 C.F.R. § 10.436(a)(b). For an individual with no eligible dependents the asset base is \$6,200.00. The base increases to \$10,300.00 for an individual with a spouse or one dependent, plus \$1,200.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Final Overpayment Determinations*, Chapter 6.400.4(a)(2) (September 2018).

³⁶ *Id.* at § 10.437(a)(b).

³⁷ *Id.* at § 10.438(a); *M.S.*, Docket No. 18-0740 (issued February 4, 2019).

³⁸ *Id.* at § 10.438(b).

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly denied waiver of recovery of the \$12,401.44 overpayment of compensation.

OWCP found that appellant was without fault in the creation of the overpayment of compensation. The fact that a claimant is without fault in creating an overpayment does not preclude OWCP from recovering the overpayment.³⁹ Waiver is only possible if recovery would defeat the purpose of FECA or be against equity and good conscience.⁴⁰ Appellant, however, did provide the requisite financial documentation to OWCP.⁴¹

In its preliminary determination dated April 10, 2019, OWCP clearly explained the importance of providing the completed overpayment recovery questionnaire (Form OWCP-20) and supporting financial documentation. It advised appellant that it would deny waiver of recovery if he failed to furnish the requested financial information within 30 days. Appellant, however, failed to provide a completed overpayment recovery questionnaire or any financial documentation supporting his income and expenses. As a result, OWCP did not have the necessary financial information to determine whether waiver of recovery of the overpayment would defeat the purpose of FECA or would be against equity and good conscience.⁴² It was, therefore, required to deny waiver of recovery of the overpayment.⁴³

On appeal appellant contends that he is entitled to waiver of recovery as he was without fault in the creation of the overpayment. However, the fact that he was not at fault does not relieve him from liability for repayment of the overpayment of compensation.⁴⁴

CONCLUSION

The Board finds that OWCP properly determined appellant's LWEC, effective May 29, 2016, based on his actual earnings as a nurse consultant. The Board also finds that appellant received an overpayment of compensation in the amount of \$12,401.44, for which he was not at fault, as he concurrently received SSA age-related retirement benefits and FECA wage-loss compensation for the period July 1, 2018 through March 30, 2019. The Board further finds that OWCP properly denied waiver of recovery of the \$12,401.44 overpayment of compensation.

³⁹ See *L.D.*, Docket No. 19-0606 (issued November 21, 2019); *R.B.*, Docket No. 15-0808 (issued October 26, 2015).

⁴⁰ 20 C.F.R § 10.436; *J.C.*, Docket No. 19-0122 (issued June 11, 2019).

⁴¹ *Id.* at § 10.438(b); *M.D.*, Docket No. 19-1500 (issued February 24, 2020); *T.J.*, Docket No. 19-1242 (issued January 13, 2020).

⁴² See *E.M.*, Docket No. 19-0857 (issued December 31, 2019).

⁴³ *Supra* note 40.

⁴⁴ See *M.G.*, Docket No. 19-0424 (issued July 1, 2019).

ORDER

IT IS HEREBY ORDERED THAT the May 21 and February 22, 2019 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: July 6, 2020
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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