

FACTUAL HISTORY

This case has previously been before the Board.² The facts and circumstances as set forth in the Board's prior decisions are incorporated herein by reference.

On May 26, 1999 appellant, then a 40-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that she sustained bilateral knee conditions due to walking and standing while in the performance of duty. She did not immediately stop work. On July 19, 1999 OWCP accepted the claim for left knee patellofemoral stress syndrome. The record reflects that OWCP paid appellant wage-loss compensation on the supplemental rolls commencing January 27, 2006 and on the periodic rolls commencing June 28, 2015.

Following vocational rehabilitation, by preliminary notice dated December 23, 2016, OWCP proposed to reduce appellant's compensation on the basis that she had the capacity to earn wages as a call-out operator, Department of Labor, *Dictionary of Occupational Titles*, #237.367-014, at the rate of \$642.40 per week. It afforded appellant 30 days to respond. No response was received.

In a February 2, 2017 decision, OWCP finalized the proposed reduction of compensation dated December 23, 2016. It found that appellant had the capacity to earn wages as a call-out operator at the rate of \$642.40 per week. OWCP indicated that her compensation was being reduced effective February 5, 2017.

On September 6, 2017 appellant elected Office of Personnel Management benefits.

In a November 28, 2017 preliminary determination, OWCP notified appellant that she was overpaid benefits in the amount of \$1,898.43 because she had received \$3,254.01 for temporary total disability for the period February 5 to March 4, 2017 after her compensation was reduced, effective February 5, 2017, based upon her capacity to earn wages. It further found that appellant was without fault in creating the overpayment. Appellant was advised that if she disagreed with the fact or the amount of the overpayment, she had a right to submit new evidence in support of her belief. Regarding actions appellant could take, she was advised of her rights, which included a right to request a preresoupment hearing before a representative of the Branch of Hearings and Review. Appellant was advised that she should submit any supporting documentation along with a completed OWCP-20 form within 30 days from the date of the preliminary decision.

OWCP provided a memorandum describing how the overpayment was calculated. It explained that a compensation worksheet dated March 15, 2017 reflected that for the period February 5 to March 4, 2017 appellant received \$3,254.01. An April 21, 2017 worksheet revealed that with a constructed earning capacity in the amount of \$642.00 per week, after deductions for insurance, appellant was entitled to \$1,355.58 for the period February 5 to March 4, 2017.

On December 20, 2017 OWCP received appellant's overpayment recovery questionnaire. Appellant explained that she lived with her daughter and received social security benefits in the amount of \$1,704.90 and "Medicare" in the amount of \$104.00. She listed her monthly expenses

² Docket No. 14-1344 (issued December 4, 2014); Docket No. 12-1297 (issued June 18, 2013).

as: rent, \$300.00; food, \$200.00; clothing, \$100.00; telephone, \$55.00; gas, \$80.00; and car insurance, \$171.00; credit card, \$35.00; and storage, \$81.00. Appellant further noted that she had a total of \$71.00 in checking and savings accounts.

On January 29, 2018 OWCP finalized the overpayment finding. It found that she was without fault in the creation of the overpayment; however, the circumstances of her case did not warrant waiver of recovery of the overpayment. OWCP demanded that appellant forward payment for the full amount of \$1,898.43 within 30 days, or contact OWCP to make appropriate payment arrangements.

In a separate memorandum, OWCP concluded that the information provided was insufficient to justify waiving recovery of the overpayment. It found that appellant had not provided sufficient information to support a finding that the adjustment or recovery would defeat the purpose of FECA or be against equity and good conscience.

On February 13, 2018 OWCP received appellant's February 8, 2018 request for a telephonic hearing. In a separate letter also dated February 8, 2018, she indicated that she was no longer receiving social security benefits.

By decision dated March 23, 2018, OWCP denied appellant's request for a prerecoupment hearing, finding that a final decision concerning an overpayment was not subject to the hearing provision of 5 U.S.C. § 8124(b).

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.³ Section 8129(a) of FECA provides, in pertinent part, when an overpayment has been made to an individual under this subchapter 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 an individual is entitled.⁴

OWCP's procedures provide that, once an overpayment is identified, it is responsible for determining whether the claimant was with fault or without fault, issuing a preliminary finding, and unless a hearing is requested, OWCP is responsible for issuing a final decision.⁵ These procedures note that, if the claimant is determined to be without fault, a Form CA-2202 (preliminary finding notice) must be released (along with a Form OWCP-20) within 30 days of the date the overpayment is identified. Both the reason that the overpayment occurred and the reason for the finding of without fault must be clearly stated. A Form CA-2202 informs the claimant of the right to submit evidence and the right to a prerecoupment hearing on the issues of: (a) fact and amount of overpayment; and (b) waiver of recovery of the overpayment. Along with

³ 5 U.S.C. § 8102.

⁴ *Id.* at § 8129(a).

⁵ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.4(a)(2) (May 2004).

the Form CA-2202, OWCP should provide a clearly written statement explaining how the overpayment was created.⁶

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$1,898.43. The record supports, and appellant has not disputed, that she continued to receive compensation after OWCP reduced her compensation, effective February 5, 2017, based upon her capacity to earn wages in the constructed position of a call-out operator.

The record documents that appellant was paid \$3,254.01 in compensation from February 5 to March 4, 2017 after her compensation was reduced. The evidence further shows that, due to the February 2, 2017 wage-earning capacity decision, she was only entitled to receive \$1,355.58 for this period. The difference between what she received and what she should have received represents an overpayment of \$1,898.43. The record therefore establishes that appellant received an overpayment of compensation in the amount of \$1,898.43.

The Board finds, however, that OWCP failed to follow its own procedures in issuing the January 29, 2018 overpayment decision.⁷ As noted-above, OWCP's procedures provide that a Form CA-2202 preliminary finding notice must be released along with a Form OWCP-20 overpayment recovery questionnaire within 30 days of the date the overpayment is identified.⁸

OWCP finalized appellant's loss of wage-earning capacity determination on February 2, 2017. A March 15, 2017 worksheet reflected that appellant received \$3,254.01 during the period February 5 to March 4, 2017. An April 21 2017 worksheet reflected that based on the LWEC determination appellant was only entitled to \$1,355.58 during the period February 5 to March 4, 2017, therefore an overpayment in the amount of \$1,898.43 had been created. The Board finds that these documents that OWCP generated in March and April 2017 establish that the overpayment was identified by April 21, 2017. However, OWCP did not issue a preliminary notice of overpayment until November 28, 2017, more than 30 days following April 21, 2017.

The Board thus finds that OWCP did not follow its own procedures as it did not issue a preliminary notice of overpayment within 30 days of identifying the overpayment.⁹

⁶ *Id.*; see also *P.H.*, Docket No. 18-1539 (issued August 2, 2019).

⁷ *Id.*

⁸ *Supra* note 5.

⁹ In light of the Board's disposition in issue 1, issues 2, and 3 are rendered moot.

CONCLUSION

The Board finds that OWCP improperly determined that appellant received an overpayment of compensation in the amount of \$1,898.43 for the period February 5 to March 4, 2017.

ORDER

IT IS HEREBY ORDERED THAT the January 29, 2018 decision of the Office of Workers' Compensation Programs is reversed.

Issued: March 12, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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