

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

A.D., Appellant)	
)	
and)	Docket No. 19-1411
)	Issued: March 2, 2020
U.S. POSTAL SERVICE, POST OFFICE,)	
Baton Rouge, LA, Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Deputy Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On June 17, 2019 appellant filed a timely appeal from a June 6, 2019 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, following the June 6, 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 appellant received an overpayment of compensation in the amount of \$1,556.64 for the period June 9 through November 23, 2018 for which she was without fault; and (2) whether OWCP properly denied waiver of recovery of the overpayment.

FACTUAL HISTORY

On March 29, 2017 appellant, then a 35-year-old city carrier assistant (irregular employee), filed a traumatic injury claim (Form CA-1) alleging that she fractured her left arm on March 27, 2017 when she fell from a top step of a residence after delivering a parcel in the performance of duty. She stopped work on March 27, 2017. OWCP accepted the claim for abrasion of left upper arm; displaced fracture of head of left radius, closed fracture; displaced fracture of left radial styloid process, closed fracture; laceration without foreign body of other part of head; and radial collateral ligament sprain of left elbow. Appellant received continuation of pay (COP) from March 30 to May 13, 2017 and OWCP paid wage-loss benefits on the supplemental roll from May 14 through June 24, 2017. She received compensation on the periodic rolls from June 25 until November 11, 2017. On October 28, 2017 appellant's appointment was converted to that of a full-time city carrier. She returned to full-time limited-duty work on November 14, 2017. OWCP paid appellant intermittent wage-loss compensation on the supplemental rolls from November 12, 2017 through March 29, 2019.

Appellant submitted claims for compensation (Form CA-7) for intermittent disability for the period June 9 through November 23, 2018. OWCP processed those claims.

The record contains overpayment worksheets and computer printouts describing appellant's entitlement to compensation for the period June 9 through November 23, 2018, during which she worked an intermittent work schedule. Appellant's weekly pay rate of her date-of-injury position was higher than her pay rate in her modified city carrier position. For the period June 9 through November 23, 2018, she received \$3,165.12 in compensation for intermittent time lost. However, appellant's entitlement to compensation for that period, utilizing the *Shadrick* formula, was \$1,608.48.³ This amounted to an overpayment of \$1,556.64.

On May 6, 2019 OWCP issued a preliminary determination that appellant was overpaid benefits in the amount of \$1,556.64 for the period June 9 through November 23, 2018 because it had paid compensation based on intermittent hours lost without utilizing the *Shadrick* formula to calculate wage loss. It noted that appellant did not work a regular schedule on the date of injury as she was an irregular employee. OWCP explained that, when an employee with an intermittent or irregular work schedule submits a claim for intermittent hours lost, entitlement for the claimed period must be computed using the *Shadrick* formula. It found that appellant was without fault in the creation of the overpayment. OWCP advised that she could submit evidence challenging the fact, amount, or finding of fault and that she could request waiver of recovery of the overpayment.

³ The formula for determining loss of wage-earning capacity based on actual earnings was developed in the *Albert C. Shadrick* decision, 5 ECAB 376 (1953) and codified at 20 C.F.R. § 10.403. OWCP calculates an employee's wage-earning capacity in terms of percentage by dividing the employee's earnings by the current pay rate for the date-of-injury job.

Additionally, it informed her that within 30 days she could request a telephone conference, a final decision based on the written evidence, or a precoupment hearing. OWCP requested that appellant complete the enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documentation. No evidence was received pertaining to appellant's financial circumstances.

By decision dated June 6, 2019, OWCP finalized its preliminary overpayment determination, finding that appellant had received an overpayment of compensation in the amount of \$1,556.64 for the period June 9 through November 23, 2018 because it failed to utilize the *Shadrick* formula to calculate wage loss based on intermittent hours lost. It determined that she was without fault in the creation of the overpayment, but denied waiver of recovery of the overpayment of compensation based on the financial information provided. OWCP required recovery in full within 30 days.

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.⁴

Title 20 of the Code of Federal Regulations, section 10.500 of OWCP regulations provide 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.⁵

Under OWCP's procedures, if a claimant with an intermittent or irregular work schedule submits a claim for intermittent hours lost, the claims examiner should compute entitlement for that period using the *Shadrick* formula.⁶

Section 8129(a) of FECA provides that when an overpayment 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.⁷

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$1,556.64 for the period June 9 through November 23, 2018 for which she was without fault.

⁴ 5 U.S.C. § 8102(a).

⁵ 20 C.F.R. § 10.500.

⁶ See *supra* note 3. See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Compensation Claims*, Chapter 2.901.7(c)(2) (March 2014).

⁷ 5 U.S.C. § 8129(a).

The record contains documentation regarding appellant's employment that establishes that appellant was an irregular employee and worked intermittent hours during the period in question. OWCP's procedures indicate that the *Shadrick* formula should be used in calculating compensation for claimants with intermittent or irregular hours.⁸ In applying the *Shadrick* formula to determine appellant's entitlement to intermittent compensation for the period June 9 through November 23, 2018, it properly calculated that appellant was entitled to \$1,608.48. However, she received \$3,165.12 for the above period without use of the *Shadrick* formula. This properly amounted to an overpayment of \$1,556.64. The Board further notes that appellant has not contested the fact or amount of the overpayment.

LEGAL PRECEDENT -- ISSUE 2

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.⁹ The waiver or refusal to waive recovery of an overpayment of compensation by OWCP is a matter that rests within OWCP's discretion pursuant to statutory guidelines.¹⁰

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.¹¹ 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.¹²

OWCP's implementing 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.¹³ Failure to submit

⁸ See *supra* note 6.

⁹ 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).

¹⁰ *A.C.*, Docket No. 18-1550 (issued February 21, 2019); see *Robert Atchison*, 41 ECAB 83, 87 (1989).

¹¹ 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).

¹² *Id.* at § 10.437(a)(b).

¹³ *Id.* at § 10.438(a); *M.S.*, Docket No. 18-0740 (issued February 4, 2019).

the requested information within 30 days of the request shall result in a denial of waiver of recovery, and no further request for waiver shall be considered until the requested information is furnished.¹⁴

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied waiver of recovery of the overpayment.

The fact that OWCP may have been negligent in the creation of the overpayment does not entitle appellant to waiver of recovery of the overpayment.¹⁵ As OWCP found appellant without fault in the creation of the overpayment, waiver must be considered, and repayment is still required unless recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.¹⁶ Appellant, however, did not provide the requisite financial documentation to OWCP.¹⁷

In its preliminary determination dated May 6, 2019, OWCP clearly explained the importance of providing the completed Form OWCP-20 and supporting financial documentation. It advised appellant that it would deny waiver of recovery if she failed to furnish the requested financial information within 30 days. Appellant did not submit a completed Form OWCP-20 or any necessary financial documentation supporting her income and expenses. As a result, OWCP did not have the necessary financial information to determine if recovery of the overpayment would defeat the purpose of FECA or if recovery would be against equity and good conscience. It was, therefore, required to deny waiver of recovery of the overpayment.¹⁸

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$1,556.64 for the period June 9 through November 23, 2018 for which she was without fault. The Board further finds that OWCP properly denied waiver of recovery of the overpayment.

¹⁴ *Id.* at § 10.438(b).

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

¹⁶ 5 U.S.C. § 8129.

¹⁷ 20 C.F.R. § 10.438.

¹⁸ *Id.* at § 10.438; *see E.M.*, Docket No. 19-0857 (issued December 31, 2019); *L.D.*, *supra* note 15.

ORDER

IT IS HEREBY ORDERED THAT the June 6, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 2, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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