

FACTUAL HISTORY

This case has previously been before the Board.² 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 October 13, 1994 appellant, then a 47-year-old part-time flexible distribution clerk filed a traumatic injury claim (Form CA-1) alleging that on October 1, 1994 she injured her low back while picking up a tray of mail while in the performance of duty. OWCP accepted the claim for lumbar sprain and degenerative lumbar disc disease. It authorized an L3-4 and L5 microdiscectomy and an L3-4 decompressive hemilaminectomy with associated foraminalotomy, which were performed on July 27, 1995. Appellant received wage-loss benefits on the periodic rolls commencing June 23, 1995.³

By decision dated November 23, 1998, OWCP retroactively reduced appellant's wage-loss compensation based on her actual earnings in the position of distribution/window clerk in which she had been reemployed since September 20, 1996.

On October 13, 2010 OWCP issued a formal retroactive loss of wage-earning capacity (LWEC) determination based upon appellant's actual earnings working four hours per day in the position of distribution clerk. It noted that on the date of injury appellant worked 33.3 hours per week and that effective April 14, 1997 she had a 60 percent wage-earning capacity based upon her current earnings of \$368.60 per week.

On October 27, 2010 OWCP issued a preliminary notice of overpayment finding that appellant had been overpaid \$245,017.69 because she received compensation for total disability for the period "April 14 to June 21, 1997" while reemployed in a modified-duty position and because an LWEC had been retroactively issued. It found her at fault in the creation of the overpayment as she should have been aware that the compensation payments she received were incorrect.

In a November 12, 2010 letter, appellant disagreed with OWCP's finding that she was at fault in the creation of the overpayment. She questioned the calculation and amount of the overpayment. Appellant informed OWCP that she was reserving her right to request a telephone conference.

On November 18, 2010 OWCP issued an amendment to the preliminary notice of overpayment finding that appellant had been overpaid \$226,151.36 for the period June 22, 1997 to September 25, 2010 because she had been working 33.3 hours per week and a loss of wage-earning capacity decision should have been issued effective June 22, 1997. It found that she was at fault in the creation of the overpayment noting she had been advised in correspondence dated "June 23, 1955" that she was to notify OWCP when she returned to work.

² Docket No. 13-1337 (issued November 1, 2013).

³ Appellant elected to receive retirement benefits from the Office of Personnel Management (OPM) in lieu of FECA benefits effective January 2, 2014.

In correspondence dated November 23, 2010, appellant disagreed with OWCP's preliminary overpayment findings. She also requested a preresoupment hearing a telephone conference, and review of the written record by an OWCP hearing representative.

By decision dated July 16, 2012, OWCP finalized its preliminary determination that an overpayment in the amount of \$226,151.36 had been created due to appellant receiving compensation for total disability when she returned to her date-of-injury position working 33.3 hours per week effective June 22, 1997. It found that she was at fault in the creation of the overpayment and that waiver of the recovery of the overpayment was therefore precluded.

On August 14, 2012 appellant requested reconsideration. She asserted that OWCP erred in issuing a final overpayment decision prior to providing her with either a hearing or telephone conference as requested. Appellant also asserted that OWCP erred in basing the overpayment on her working 33.3 hours per week when she only worked a 20 hour work week. She submitted evidence supporting her contention that she had worked 20 hours per week instead of the 33.3 hours per week found by OWCP.

By decision dated November 9, 2012, OWCP denied reconsideration.

On May 7, 2013 appellant appealed to the Board. By decision dated November 1, 2013, the Board set aside the November 9, 2012 nonmerit decision. The Board found that OWCP had improperly denied merit review as appellant had submitted new evidence showing that she had not worked more than 20 hours upon her return to work and had requested a telephone conference or a preresoupment hearing. The Board remanded the case for OWCP to provide either a telephone conference or preresoupment hearing.

In a letter dated October 6, 2016, OWCP noted the Board's findings in its November 1, 2013 decision and requested that appellant advise whether she wished to pursue a telephone conference or a preresoupment hearing. In a letter dated October 18, 2016, appellant's counsel responded that she requested a preresoupment hearing.

By decision dated January 3, 2018, the Branch of Hearings and Review determined that the case was not in posture for a hearing. It found that it was unable to determine whether the overpayment amount and period identified by OWCP was correct. On remand, OWCP was instructed to clarify the date appellant returned to modified duty and accurately establish and document the overpayment compensation. It was instructed to make specific findings regarding the amount of FECA wage-loss compensation appellant received and the amount of compensation she should have received during the relevant period pursuant to the LWEC determination, utilizing the *Shadrick* formula.⁴ It was further ordered that OWCP address all legal arguments set forth by appellant in any subsequent overpayment action.

In letters dated January 31, March 13, and November 1, 2018, OWCP requested clarification from the employing establishment as to exactly when appellant returned to modified duty and how many hours she worked. It noted that it had previously requested detailed information from the employing establishment in the form of a day-to-day leave analysis. OWCP

⁴ *Albert C. Shadrick*, 5 ECAB 376 (1953).

noted that it needed this information as the information then of record was previously determined to be insufficient to establish the amount of overpayment.

On July 3, 2019 the employing establishment submitted documentation of appellant's work hours beginning pay period 13 in the year 1997 to pay period 26 in year 2009. It submitted another document which set forth her work hours and earnings for the period January 1 to September 25, 2010. The employing establishment noted, however, for the period June 22, 1997 to January 1, 2010 that it could not provide the requested data on a day-by-day basis to include total earnings.

In a July 11, 2019 preliminary determination, OWCP advised appellant that she had received an overpayment of compensation in the amount of \$186,927.89 for the period June 22, 1997 through September 25, 2010, while reemployed in a modified-duty position. It noted that she received varying amounts from \$1,818.00 to \$2,493.00 every 28 days during the period June 22, 1997 through September 25, 2010, following her return to work on June 22, 1997. During this period, OWCP noted that appellant worked from 16 to 24 hours per week, for a total of 14,007.73 hours. It determined that she had been paid \$367,291.14 when she was only entitled to receive \$180,363.25 in wage-loss compensation, resulting in an overpayment of \$189,927.89. OWCP also made a preliminary determination that appellant was at fault in the creation of the overpayment because she had accepted payments that she knew, or reasonably should have known, to be incorrect, 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. No response or additional evidence concerning her preliminary overpayment determination was received.

By decision dated August 15, 2019, OWCP found that appellant had received an overpayment of compensation in the amount of \$186,927.89 for the period June 22, 1997 through September 25, 2010 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.

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.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 Section 10.500 of OWCP's regulations provides that compensation for wage loss

⁵ *Supra* note 1 at § 8102.

⁶ *Id.* at § 8116(a).

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.⁷

Section 8129(a) of FECA provides that when an overpayment of compensation 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.⁸

If the claimant is entitled to compensation for partial wage loss after return to work, the claims examiner should compute entitlement using the *Shadrick* formula and authorize compensation on a 28-day payment cycle.⁹

ANALYSIS -- ISSUE 1

The Board finds that this case is not in posture for decision.

OWCP found that appellant received an overpayment of compensation because she received wage-loss compensation for total disability from June 22, 1997 through September 25, 2010 after she returned to part-time, limited duty. The record reflects that OWCP issued a retroactive LWEC determination effective April 14, 1997 and that appellant did in fact receive wage-loss compensation to which she was not entitled following her return to work. Therefore, the Board affirms OWCP's finding of fact of overpayment.

However, by decision dated January 3, 2018, an OWCP hearing representative remanded the case for further development as to the amount of overpayment, instructing that prior to further overpayment action that all factual discrepancies in the record must be clarified and resolved. It was ordered that the dates worked and supporting earnings data should be obtained from the employing establishment and thereafter all legal arguments of appellant must be addressed in new preliminary overpayment determination with a detailed explanation to support how the figure was calculated. The Board finds, however, that the development as ordered in the January 3, 2019 remand did not occur and that the final overpayment decision is insufficient to set forth a basis for appellant to understand how and why she received an overpayment in compensation in the amount of \$186,927.89. Due to the lack of financial information and adequate explanation as to how the overpayment was calculated on the record as presented, the Board is unable to adequately review this aspect of the case.

5 U.S.C. § 8124(a) provides that OWCP shall determine and make a finding of facts and make an award for or against payment of compensation.” Also, 20 C.F.R. § 10.126 provides in

⁷ 20 C.F.R. § 10.500(a).

⁸ 5 U.S.C. § 8129(a).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on Actual Earnings*, Chapter 2.815.3(b) (June 2013). See *Albert C. Shadrick*, *supra* note 4; *P.B.*, Docket No. 19-0329 (issued December 31, 2019); *C.Y.*, Docket No. 18-0263 (issued September 14, 2018).

pertinent part that the final decision of OWCP shall contain findings of fact and a statement of reasons. It has a responsibility to set forth findings of fact and a clear statement of reasons explaining the disposition so that the claimant can understand the basis for the decision, as well as the precise defect and the evidence needed to overcome the denial of his traumatic injury claim.¹⁰

A claimant is entitled to an overpayment decision that clearly explains how the amount was calculated.¹¹ The Board finds that the overpayment decision in this case does not provide such an explanation. Therefore, the amount of overpayment has not been established. On remand OWCP shall confirm from the employing establishment the exact date that appellant returned to part-time work and document from her employment records the actual earnings per pay period from her work during the period of the overpayment. Once it obtains this necessary information, it shall then prepare detailed calculations setting forth the exact amounts per pay period which appellant earned and the amount of wage-loss compensation to which she had been entitled. Following those calculations it should subtract from the amount of wage-loss compensation that she was paid during the applicable period the amount to which she was actually entitled to receive. For periods which the employing establishment cannot document actual earnings from her employment, no amount of overpayment shall be found. Only following these actions should OWCP issue a new preliminary overpayment determination incorporating its factual basis for finding an overpayment with the detailed calculations as to the amount of overpayment.¹²

CONCLUSION

The Board finds that this case is not in posture for decision.

¹⁰ See *O.M.*, Docket No. 19-0342 (issued November 15, 2019); *S.B.*, Docket No. 19-0634 (issued September 19, 2019).

¹¹ See *A.J.*, Docket No. 18-1152 (issued April 1, 2019); *J.W.*, Docket No. 15-1163 (issued January 13, 2016); see also *O.R.*, 59 ECAB 432 (2008) with respect to overpayment decisions, OWCP must provide clear reasoning showing how the overpayment was calculated); see *Jenny M. Drost*, 56 ECAB 587 (2005) (to comply with OWCP's overpayment procedures, an overpayment decision must contain a clearly written explanation indicating how the overpayment was calculated).

¹² Due to the outcome as to issue 1, the issue of fault is rendered moot. See *S.F.*, Docket No. 18-0003 (issued April 19, 2018); see also *R.L.*, Docket No. 11-1251 (issued January 27, 2012).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 15, 2019 is affirmed in part and set aside in part and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: October 22, 2020
Washington, DC

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

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board