

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

M.B., Appellant)	
)	
and)	Docket No. 20-1130
)	Issued: June 28, 2021
U.S. POSTAL SERVICE, PALOS VERDES)	
PENINSULA POST OFFICE, Palos Verdes, CA,)	
Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 4, 2020 appellant filed a timely appeal from a November 20, 2019 merit decision 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¹ Following the November 20, 2019 decision, OWCP issued a February 12, 2020 overpayment decision, which it rescinded on March 16, 2020 as appellant had timely requested a prerecoupment hearing on February 7, 2020. The hearing was scheduled on April 29, 2020 for June 15, 2020. Thus, this issue is in an interlocutory posture and not reviewable by the Board on this appeal. *See T.C.*, Docket No. 18-0435 (issued July 10, 2018); *see also* 20 C.F.R. § 501.2(c)(2).

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the November 20, 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 determined that appellant received an overpayment of compensation in the amount of \$5,700.69 for the period July 18 through November 21, 2016 for which he was not at fault, as he was inadvertently paid intermittent wage-loss compensation for days he either worked or was scheduled off; (2) whether it properly denied waiver of recovery of the overpayment; and (3) whether OWCP properly required recovery of the overpayment by deducting \$798.25 from appellant's continuing schedule award payments every 28 days.

FACTUAL HISTORY

On June 29, 2016 appellant, then a 68-year-old postal carrier, filed an occupational disease claim (Form CA-2) alleging that he was unable to lift his left arm and had severe pain in the rotator cuff and muscle due to factors of his federal employment. He indicated that he first became aware of his condition and its relation to his federal employment on May 30, 2016. On the reverse side of the claim form the employing establishment indicated that appellant stopped work on June 2, 2016 and returned to work on June 8, 2016. On June 29, 2016 appellant's attending physician released him to return to modified duty with restrictions of limited use of the left shoulder, no overhead work, no pushing, pulling, or lifting over 20 pounds. On October 11, 2016 OWCP accepted his claim for left shoulder girdle sprain and bursitis of the left shoulder.

On October 28 and December 5, 2016 appellant filed claims for intermittent compensation (Form CA-7) for leave without pay (LWOP) for the periods May 30 through October 28, 2016 and June 29 through November 21, 2016. He also submitted a series of time analysis forms (Form CA-7a) indicating that he used 88 hours of LWOP for each of the periods claimed. On October 28, 2016 the employing establishment approved appellant's request for LWOP, excluding only the days in which he was scheduled off or had performed work consecutively from June 30 through July 6, 2016.. Appellant further requested consecutive days of LWOP from July 8 through 14, 2016 and intermittently beginning July 18 through October 28, 2016.

On November 2, 2016 the employing establishment notated on the October 28, 2016 CA-7a that appellant used 54.45 hours of LWOP rather than 88 hours claimed from June 3 through July 6, 2016, as he had been scheduled off for work June 3, 4, 13, and 21, 2016, and he worked 1.55 hours on June 24, 2016, warranting only 6.45 hours of LWOP. For the relevant period of June 30 through July 6, 2016, it indicated that appellant used 8 hours of LWOP on each of the 6 days or 48 hours of LWOP. For the period July 7 through 20, 2016, the employing establishment indicated that appellant used 69.93 hours of LWOP as July 7 and 15, 2016 were scheduled days off and he worked 2.07 hours on July 20, 2016, using only 5.93 hours of LWOP. From July 25 through August 13, 2016, the employing establishment found that appellant used 72 hours of LWOP as July 25 and August 10, 2016 were scheduled days off. For the period August 15 through 27, 2016, the employing establishment reported that appellant used 64 hours of LWOP as August 18, 26, and 27, 2016 were scheduled days off. From August 29 through September 9, 2016, the employing establishment found that he used 75.19 hours of LWOP as September 5, 2016 was a scheduled day off, and he worked 2.74 hours on September 7, 2016 using 5.25 hours of LWOP. Appellant also worked 2.05 hours on September 9, 2016 using 5.94 hours of LWOP. From September 10 through 22, 2016, the employing establishment found that he used 72 hours of LWOP as September 13 and 21, 2016 were scheduled days off. For the period September 23

through October 5, 2016, the employing establishment found that appellant used 80 hours of LWOP as September 29, 2016 was a scheduled day off. During the period October 6 through 18, 2016, the employing establishment reported that appellant used 64 hours of LWOP as October 7, 8, and 17, 2016 were scheduled days off. For the period October 19 through 28, 2016, the employing establishment found that appellant used 64 hours of LWOP as October 25, 2016 was a scheduled day off. The total number of LWOP hours supported by the employing establishment for the period June 30 through October 28, 2016 was 609.12.

On his December 5, 2016 Form CA-7a, appellant claimed, and the employing establishment approved, intermittent LWOP for the period July 18 through November 21, 2016. Based on the employing establishment's calculations, appellant used 56.18 of LWOP from July 18 through August 1, 2016 rather than 88 hours claimed, as he had three scheduled days off on June 29 July 7 and 25, 2016, and he performed work on July 20, 21, 22, and 27, 2016 using only 5.93 hours of LWOP on July 20, 6.28 hours on July 21, 5.99 hours on July 22, and 5.97 hours on July 27, 2016. From August 3 through 31, 2016, the employing establishment found appellant used only 72 hours of LWOP as August 18 and 24, were scheduled days off. During the period September 1 through 22, 2016, the employing establishment found appellant used 67.19 rather than 88 hours of LWOP as September 13 and 21, 2016 were scheduled days off. Appellant also worked on September 7 and 9, 2016, using 5.25 and 5.94 hours of LWOP, respectively, on those dates. For the period September 27 through October 19, 2016, the employing establishment reported that appellant used 80 hours of LWOP as September 29, 2016 was a scheduled day off. During the period October 20 through November 21, 2016 the employing establishment reported that appellant used 48 hours of LWOP as October 25, November 2 and 18, 2016 were scheduled days off. The total number of LWOP hours supported by the employing establishment for the period June 29 through November 21, 2016 was 323.37.⁴

The employing establishment also provided leave reports indicating that appellant began using LWOP on June 30, 2016 and noting his work and scheduled days off. In a memorandum of telephone call (Form CA-110) dated December 15, 2016, the employing establishment informed OWCP that appellant had included eight hours of LWOP on scheduled days off as well as when he worked part of the day. It noted that it had corrected the CA-7a forms, providing the actual hours worked and the scheduled days off identified by slash marks.

On December 27, 2016 OWCP paid LWOP compensation for the period June 30 through November 21, 2016 for a total of 712.46 hours in the amount of \$11,904.71. The attached calculation indicated that OWCP reduced appellant's compensation by the appropriate hours that he worked from June 30 to September 9, 2016. OWCP found that there were 91 days on which he was entitled to 8 hours of LWOP from June 30 through November 21, 2016.⁵ In a letter dated

⁴ The October 28 and December 5, 2016 Form CA-7s requested compensation for distinct and consistent dates. On the October 28, 2016 Form CA-7, appellant requested intermittent LWOP for the period June 30 through October 28, 2016. He did not claim these same dates on the December 5, 2016 Form CA-7, requesting intermittent LWOP for the period August 3 through November 21, 2016. Appellant claimed intermittent LWOP for the period July 18 through October 27, 2016 on both CA-7 forms and the accompanying CA-7a forms.

⁵ In combining the dates accepted from both CA-7a forms, the Board reaches a total of 85 days on which appellant is entitled to eight hours of LWOP.

June 2, 2017, it informed appellant had that he would be compensated every 28 days on the periodic rolls.

By decision dated December 27, 2016, OWCP denied appellant's claims for compensation for disability for the period May 30 through June 28, 2016.

In a letter dated June 2, 2017, OWCP informed appellant had that he would be compensated every 28 days on the periodic rolls.

On October 26, 2018 appellant filed a schedule award claim (Form CA-7). He filed an additional schedule award claim on May 20, 2019.

By decision dated August 7, 2019, OWCP granted appellant a schedule award for 13 percent permanent impairment of the left upper extremity.

In a manual adjustment form dated September 23, 2019, OWCP noted that appellant had received compensation for intermittent hours as no work was available beginning on June 3, 2016. It found that the claim for compensation received on December 9, 2016 had incorrect hours and that on December 21, 2016 the employing establishment clarified appellant's LWOP hours. OWCP noted that LWOP compensation was issued for the period for a total of 712.46 hours, but that correct total was 323.37 hours based on the Form CA-7a. It found that appellant had received compensation in the amount of \$11,904.71, that he was entitled to compensation in the amount of \$6,204.02 and, thus, an overpayment of \$5,700.69 resulted.

In an October 7, 2019 letter, OWCP issued a preliminary overpayment determination, finding that appellant received an overpayment of compensation benefits for the period July 18, through November 21, 2016 in the amount of \$5,700.69 as he was paid for more intermittent hours than he was due for this period. It listed the dates that he was overpaid as he either worked or was scheduled off work. OWCP provided a calculation of the overpayment and found that appellant was without fault in the creation of the overpayment. It requested that he complete an enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documentation. Additionally, OWCP provided an overpayment action request form and notified appellant that, within 30 days of the date of the letter, he could request a final decision based on the written record or request a prerecruitment hearing. No response was received.

By decision dated November 20, 2019, OWCP finalized the October 7, 2019 preliminary overpayment determination.⁶ It found that appellant had received an overpayment of compensation in the amount of \$5,700.69 for the period from July 18 through November 21, 2016 for which he was not at fault. OWCP further found that the overpayment was not subject to waiver as appellant had not provided requested financial documentation to establish that recovery of an overpayment would defeat the purpose of FECA or would be against equity and good conscience. It determined to recover the overpayment by withholding \$798.25 every 28 days from appellant's continuing schedule award payments beginning on December 7, 2019.

⁶ See *supra* note 1.

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.⁷

Section 8116 of FECA defines the limitations on the right to receive compensation benefits.⁸ 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.⁹ OWCP's regulations provide in pertinent part that compensation for wage loss due to disability is available only for periods during which an employee's work-related medical condition prevents him or her from earning the wages earned before the work-related injury.¹⁰ A claimant is not entitled to receive temporary total disability and actual earnings for the same period.¹¹

ANALYSIS -- ISSUE 1

The Board finds that OWCP improperly determined that appellant received an overpayment of compensation in the amount of \$5,700.69 for the period July 18 through November 21, 2016.

Appellant provided two CA-7s forms, claiming intermittent compensation for disability. The first was dated October 28, 2016 and requested intermittent LWOP for the period June 3 through October 28, 2016 and the second was dated December 5, 2016 requesting intermittent LWOP for the period June 29 through November 21, 2016. Appellant initially requested 88 hours of LWOP for each period submitted. The employing establishment edited the attached CA-7a forms and on October 28, 2016 indicated that appellant was entitled to 609.12 hours of LWOP for the period June 30 through October 28, 2016, while on December 5, 2016 it indicated that appellant was entitled to 323.37 hours for the period June 29 through November 21, 2016.¹² In a December 15, 2016 Form CA-110, the employing establishment requested OWCP base appellant's LWOP compensation on the information it provided on the edited Form CA-7a's.

On December 27, 2016 OWCP paid appellant wage-loss compensation for the period June 30 through November 21, 2016 for a total of 712.46 hours in the amount of \$11,904.71. However, it found that he was only entitled to compensation in the amount of \$6,204.02.

⁷ 5 U.S.C. § 8102.

⁸ *Id.* at § 8116(a).

⁹ *Id.*

¹⁰ 20 C.F.R. § 10.500.

¹¹ *G.R.*, Docket No. 19-0940 (issued December 20, 2019); *J.H.*, Docket No. 17-0592 (issued May 1, 2018).

¹² The November 2, 2016 Form CA-7a does not include August 3, 4, and 16, 2016 as noted on the December 9, 2016 form, as well as November 1, 3, 15, and 21, 2016. There are 48 dates from June 30 through October 28, 2016 that are included on the November 2, 2016 Form CA-7a, which are not listed on the December 9, 2016 CA-7a.

In its preliminary overpayment determination dated October 7, 2019, OWCP found that appellant received an overpayment of compensation from July 18 through November 21, 2016 in the amount of \$5,700.69. The Board finds that OWCP has not adequately explained how it determined the amount of the overpayment based on its calculation of 323.37 hours of LWOP.¹³ The records from the employing establishment support both that appellant was entitled to 541.12 hours of LWOP from June 30 through October 28, 2016 and that he was entitled to additional hours of intermittent LWOP through November 21, 2016. Based upon the current record, the Board is unable to verify the fact and amount of the overpayment due to the conflicting evidence regarding appellant's intermittent periods of disability.¹⁴ OWCP has the burden of proof to establish fact and amount of an overpayment.¹⁵ As there is conflicting evidence¹⁶ regarding the specific dates that appellant was entitled to work, but no work was available for him, the Board finds that OWCP has improperly determined the fact and amount of overpayment, therefore, the overpayment is reversed.

CONCLUSION

The Board finds that OWCP improperly determined that appellant received an overpayment of compensation in the amount of \$5,700.69 for the period July 18 through November 21, 2016.

¹³ *But see Mary A. Corricelli*, Docket No. 93-1920 (issued February 24, 1995) (finding that OWCP properly calculated the number of lost work days during the period in question).

¹⁴ *C.S.*, Docket No. 18-0450 (issued July 31, 2020); *M.M.*, Docket No. 19-1782 (issued April 2, 2020).

¹⁵ *See D.R.*, Docket No. 19-1675 (issued October 8, 2020); *T.W.*, Docket No. 19-1266 (issued September 25, 2020); *C.P.*, Docket No. 19-0317 (issued July 1, 2019) (finding that OWCP did not meet its burden of proof to establish an overpayment when it failed to document whether and when a claimant elected life insurance coverage after separation from federal service or retirement in order to establish fact of overpayment of compensation.)

¹⁶ *See Gloria H. Kulik*, 40 ECAB 628 (issued February 28, 1989) (the Board remanded the case for further development due to the discrepancies with respect to the amount of compensation due appellant).

ORDER

IT IS HEREBY ORDERED THAT the November 20, 2019 decision of the Office of Workers' Compensation Programs is reversed.

Issued: June 28, 2021
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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