

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

P.C., Appellant)	
)	
and)	Docket No. 20-1216
)	Issued: June 25, 2021
U.S. POSTAL SERVICE, NORTH RICHLAND)	
HILLS POST OFFICE,)	
North Richland Hills, TX, Employer)	
)	

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 May 12, 2020 appellant filed a timely appeal from a March 9, 2020 merit decision and a March 27, 2020 nonmerit 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

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$2,317.20 for the period December 14, 2019 to January 4, 2020 for which he was without fault because he continued to receive wage-loss compensation after he returned to work;

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the March 27, 2020 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 evidence for the first time on appeal. *Id.*

(2) whether OWCP properly denied waiver of recovery of the overpayment; and (3) whether OWCP properly denied appellant's request for a preresoupment hearing as untimely filed.

FACTUAL HISTORY

On June 27, 2018 appellant, then a 49-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that on June 22, 2018 he injured his left shoulder when he fell while in the performance of duty. On the reverse side of the claim form the employing establishment indicated that appellant stopped work on June 22, 2018. On December 28, 2018 OWCP accepted the claim for a strain of the muscle(s) and tendon(s) of the left shoulder rotator cuff, a superior glenoid labrum lesion of the left shoulder, and bicipital tendinitis of the left shoulder. On January 23, 2019 appellant underwent left shoulder surgery. OWCP paid appellant wage-loss compensation for total disability on the supplemental rolls commencing January 1, 2019 and on the periodic rolls commencing February 3, 2019.

A January 3, 2020 return-to-work form (Form CA-3) completed by the employing establishment indicated that appellant returned to full-time modified-duty work with restrictions on December 14, 2019.

In a January 6, 2020 compensation termination sheet, OWCP calculated that appellant was overpaid in the amount of \$2,317.20 on January 4, 2020 for the period December 14, 2019 to January 4, 2020.

On January 6, 2020 OWCP advised appellant that it had terminated his compensation, effective December 14, 2019, because he had returned to work full time on December 14, 2019 and his actual wages met or exceeded the wages of the job he held at the time of his injury. It stated that a final 28-day payment that partially covered a period following his return to work had been issued or would be issued shortly, resulting in an overpayment of \$2,317.20. OWCP further stated that appellant may send a check or money order for \$2,317.20 to return the overpayment, and it noted that appellant's case would be reviewed to determine if a formal decision should be issued.

A January 17, 2020 memorandum of telephone call (Form CA-110) indicated that appellant wanted to start making payments toward his overpayment.

On February 3, 2020 OWCP issued a preliminary overpayment determination that appellant had received an overpayment of compensation in the amount of \$2,317.20 for the period December 14, 2019 through January 4, 2020, for which he was without fault, because he returned to full-time employment on December 14, 2019, but received wage-loss compensation for total disability through January 4, 2020. It explained that appellant had received \$2,949.17 in net compensation during the period December 8, 2019 through January 4, 2020. However, since appellant returned to work on December 14, 2019, he was not entitled to the \$2,317.20 he received during the 22-calendar days from December 14, 2019 through January 4, 2020. OWCP determined that appellant was without fault in creation of the overpayment. Additionally, it informed him that, within 30 days, he could request a telephonic conference, a final decision based on the written evidence, or a preresoupment hearing. OWCP requested that appellant complete an enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documentation.

On March 9, 2020 OWCP received an overpayment action request form, postmarked March 5, 2020, wherein appellant requested a prerecoumment hearing. Appellant indicated that he contested the overpayment and was requesting waiver of recovery because he was found to be without fault in the creation of the overpayment. He explained that he was not aware of the overpayment until after the fact.

OWCP also received on March 9, 2020 a completed Form OWCP-20 overpayment recovery questionnaire dated February 29, 2020. Appellant related that his total monthly income was \$3,300.00 and that he supported his wife. He listed monthly household expenses totaling \$3,400.00. Appellant also listed his available funds as \$300.00 in a checking account and \$50.00 in a savings account. He stated that he was unaware of the overpayment and indicated that his claim was not accepted until January 2019 and he had no income in December 2018 because he could not work. Appellant did not submit any supporting financial documentation.

By decision dated March 9, 2020, OWCP finalized its preliminary overpayment determination, finding that appellant received an overpayment of compensation in the amount of \$2,317.20 for the period December 14, 2019 through January 4, 2020 because he returned to full-time employment on December 14, 2019, but received wage-loss compensation for total disability through January 4, 2020. It determined that appellant was without fault in the creation of the overpayment; however, it denied waiver of recovery of the overpayment, finding that recovery would not defeat the purpose of FECA or be against equity and good conscience. OWCP indicated that the evidence it reviewed to make this determination included appellant's telephone calls on January 17 and February 27, 2020. It required recovery of the overpayment in full within 30 days.

Also on March 9, 2020, OWCP received appellant's request for a prerecoumment hearing, which was dated February 29, 2020 and postmarked March 5, 2020.

By decision dated March 27, 2020, OWCP denied appellant's request for a prerecoumment hearing, finding that he had not timely requested a hearing on the preliminary overpayment determination, and that the final overpayment determination was not subject to a hearing pursuant to 5 U.S.C. § 8124(b).

LEGAL PRECEDENT -- ISSUE 1

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 duty.³ Section 8129(a) of FECA provides, in pertinent part, that 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

Section 8116(a) of FECA provides that, while an employee is receiving compensation or if he or she has been paid a lump sum in commutation of installment payments until the expiration of the period during which the installment payments would have continued, the employee may not receive salary, pay, or remuneration of any type from the United States, except in limited specified

³ 5 U.S.C. § 8102(a).

⁴ *Id.* at § 8129(a).

instances.⁵ OWCP's procedures provide that an overpayment of compensation is created when a claimant returns to work, but continues to receive wage-loss compensation.⁶

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$2,317.20 for the period December 14, 2019 to January 4, 2020.

The record establishes that appellant returned to work full time at the employing establishment on December 14, 2019. Appellant, however, continued to receive wage-loss compensation for temporary total disability from December 14, 2019 through January 4, 2020. As noted above, appellant is not entitled to receive wage-loss compensation for disability after he has returned to work, with no loss of wages.⁷ Thus, an overpayment of compensation was created.

The Board also finds that OWCP properly calculated that appellant's net compensation paid for the period December 14, 2019 through January 4, 2020 totaled \$2,317.20. OWCP calculated the overpayment by taking the amount of total disability compensation appellant received during the period December 8, 2019 through January 4, 2020 and subtracting the amount he was entitled to receive during that time period. It explained that appellant had received \$2,949.17 in net compensation during the period December 8, 2019 through January 4, 2020. However, since appellant returned to work on December 14, 2019, he was not entitled to the \$2,317.20 he received during the 22-calendar days from December 14, 2019 through January 4, 2020. Thus, the Board finds that appellant received an overpayment of compensation in the amount of \$2,317.20 during the time period in question.⁸

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA provides that an overpayment in compensation shall be recovered by OWCP unless incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.⁹ Section 10.438 of OWCP's regulations provides 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. Failure to submit the requested information within 30 days of the request shall result in denial of waiver.¹⁰

⁵ *Id.* at § 8116(a).

⁶ *K.K.*, Docket No. 19-0978 (issued October 21, 2019); *B.H.*, Docket No. 09-0292 (issued September 1, 2009); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Determinations in an Overpayment*, Chapter 6.300.4(g) (September 2018).

⁷ *Id.*

⁸ *See L.T.*, Docket No. 19-1989 (issued March 27, 2020).

⁹ 5 U.S.C. § 8129.

¹⁰ 20 C.F.R. § 10.438.

The guidelines for determining whether recovery of an overpayment would defeat the purpose of FECA or would be against equity and good conscience are set forth in sections 10.434 to 10.437 of OWCP's regulations.¹¹ Section 10.436 provides that recovery of an overpayment would defeat the purpose of FECA if recovery would cause hardship because the beneficiary needs substantially all of his or her income (including compensation benefits) to meet current ordinary and necessary living expense, and, also, if the beneficiary's assets do not exceed a specified amount as determined by OWCP from data provided by the Bureau of Labor Statistics.¹² For waiver of recovery of the overpayment under the defeat the purpose of FECA standard, appellant must show that he or she needs substantially all of his or her current income to meet current ordinary and necessary living expenses, and that assets do not exceed the resource base.¹³ An individual is deemed to need substantially all of his or her current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.¹⁴

ANALYSIS -- ISSUE 2

The Board finds that this case is not in posture for decision regarding waiver of recovery of the overpayment.

In the case of *William A. Couch*,¹⁵ the Board held that, when adjudicating a claim, OWCP is obligated to consider all evidence properly submitted by a claimant and received by OWCP before the final decision is issued.

Appellant submitted a completed Form OWCP-20, which OWCP received on March 9, 2020. However, OWCP failed to review that evidence in its March 9, 2020 decision. OWCP, thus, failed to follow its procedures by properly discussing all of the relevant evidence of record.¹⁶

It is crucial that OWCP address all relevant evidence received prior to the issuance of its final decision, as the Board's decisions are final with regard to the subject matter appealed.¹⁷ The

¹¹ *Id.* at §§ 10.434-10.437.

¹² *Id.* at § 10.436. OWCP's procedures provide that a claimant is deemed to need substantially all of his or her current net income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Determinations*, Chapter 6.400.4a(3) (September 2018). OWCP's procedures further provide that assets must not exceed a resource base of \$6,200.00 for an individual or \$10,300.00 for an individual with a spouse or dependent, plus \$1,200.00 for each additional dependent. *Id.* at Chapter 6.400.4a(2).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ 41 ECAB 548 (1990); *see also R.D.*, Docket No. 17-1818 (issued April 3, 2018).

¹⁶ OWCP's procedures provide that all evidence submitted should be reviewed and discussed in the decision. Evidence received following development that lacks probative value should also be acknowledged. Whenever possible, the evidence should be referenced by author and date. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Initial Denials*, Chapter 2.1401.5(b)(2) (November 2012).

¹⁷ *See C.S.*, Docket No. 18-1760 (issued November 25, 2019); *Yvette N. Davis*, 55 ECAB 475 (2004); *see also William A. Couch*, *supra* note 15.

Couch principle applies with regard to evidence received by OWCP the same day a final decision is issued.¹⁸ The Board finds that, as OWCP did not address the Form OWCP-20 in its March 9, 2020 decision, this case is not in posture for decision.¹⁹ On remand OWCP shall review all of the evidence of record and, following any further development deemed necessary, issue a *de novo* decision regarding waiver of the recovery of the overpayment.

LEGAL PRECEDENT -- ISSUE 3

OWCP's regulations provide that a claimant may request a prerecoumment hearing with respect to an overpayment.²⁰ The date of the request is determined by the postmark or other carrier's date marking.²¹ Failure to request the prerecoumment hearing within 30 days shall constitute a waiver of the right to a hearing.²² The only right to a review of a final overpayment decision is with the Board.²³ The hearing provisions of section 8124(b) of FECA do not apply to final overpayment decisions.²⁴

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly denied appellant's request for a prerecoumment hearing as untimely filed.

OWCP issued a preliminary overpayment determination on February 3, 2020. It advised appellant that he had 30 days to request a prerecoumment hearing. On March 9, 2020 OWCP received appellant's request for a prerecoumment hearing, which was postmarked March 5, 2020. The timeliness of the request for a prerecoumment hearing is determined by the postmark date or other carrier's marking.²⁵ The 30th day following February 3, 2020 was Wednesday, March 4, 2020. As the request was postmarked on March 5, 2020, more than 30 days after the

¹⁸ See *S.S.*, Docket No. 19-1737 (issued April 7, 2020); *J.S.*, Docket No. 16-0505 (issued July 18, 2016); *Linda Johnson*, 45 ECAB 439 (1994) (evidence received the same day as the issuance of OWCP's decision).

¹⁹ See *V.C.*, Docket No. 16-0694 (issued August 19, 2016).

²⁰ 20 C.F.R. § 10.432.

²¹ See *E.G.*, Docket No. 19-0176 (issued February 23, 2021); *P.Y.*, Docket No. 20-0824 (issued May 24, 2021); *C.R.*, Docket No. 15-0525 (issued July 20, 2015).

²² *Id.*; see also *Willie C. Howard*, 55 ECAB 564 (2004).

²³ 20 C.F.R. § 10.440(b).

²⁴ *Id.*

²⁵ See *C.W.*, Docket No. 15-0554 (issued May 27, 2015).

February 3, 2020 overpayment determination, it was untimely filed. OWCP thus properly denied the request.²⁶

CONCLUSION

The Board finds that OWCP has established that appellant received an overpayment of compensation in the amount of \$2,317.20 during the period December 14, 2019 through January 4, 2020, for which he was without fault. The Board further finds that the case is not in posture for decision with regard to waiver of recovery of the overpayment. The Board also finds that OWCP properly denied appellant's request for a precoupment hearing as untimely filed.

ORDER

IT IS HEREBY ORDERED THAT the March 9, 2020 decision is affirmed in part, set aside in part, and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: June 25, 2021
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

²⁶ See *E.V.*, Docket No. 17-1328 (issued December 11, 2017); see also *R.U.*, Docket No. 16-0027 (issued March 24, 2017).