

determination after returning to work, for which she was without fault; and (2) whether OWCP properly denied waiver of recovery of the overpayment.

FACTUAL HISTORY

On December 7, 2007 appellant, then a 24-year-old full-time city carrier, filed a traumatic injury claim (Form CA-1) alleging that on December 5, 2007 she injured her neck and back when she slipped and fell on an icy porch while in the performance of duty. She stopped work on the date of injury. OWCP accepted the claim for a lumbar sprain. It paid appellant wage-loss compensation on the supplemental rolls, effective January 21, 2008, and then on the periodic rolls, effective November 18, 2008.

In a November 18, 2008 letter, OWCP advised appellant that it had placed her on the periodic compensation rolls and outlined her entitlement to compensation benefits and her responsibility to return to work in connection with the accepted employment injury. It informed her that, if she worked for any portion of the period she received disability compensation, she must return checks received to OWCP or an overpayment of compensation might result. For payments sent by electronic funds transfer (EFT), she was advised to notify OWCP immediately if she worked for a portion of the period for which a deposit was made so that the overpayment could be collected.

In a completed Form EN1032 dated January 14, 2013, appellant reported part-time private sector employment as a home health aide beginning August 20, 2012, with wages of \$10.00 per hour.

In an LWEC determination dated March 15, 2013, OWCP found that appellant's part-time employment as a home health aide in the private sector, effective August 20, 2012, fairly and reasonably represented her wage-earning capacity. It noted that her current pay rate for her job when injured was \$1,020.42, effective January 1, 2013, and calculated that she earned \$370.00 a week as a private sector home health aide. OWCP reduced appellant's wage-loss compensation, accordingly, effective December 16, 2012. Appellant continued working as a private sector home health aide through April 2013.

In a completed Form EN1032 received by OWCP on September 18, 2014, appellant reported that she had returned to work at the employing establishment in July 2013 as a letter carrier. Appellant noted on a completed Form EN1032 dated August 8, 2015 that permanent medical restrictions limited her to working six hours a day, with actual earnings of \$30.00 an hour or \$1,100.00 a week. OWCP continued to pay appellant wage-loss compensation under the March 15, 2013 LWEC determination.

By notice of proposed termination dated March 22, 2016 and finalized June 14, 2016, OWCP terminated appellant's wage-loss and medical compensation benefits, effective June 26, 2016, as the medical evidence of record established that the accepted conditions had ceased without residuals.

In a September 19, 2016 e-mail, the employing establishment confirmed that appellant had returned to duty on July 15, 2013. It provided timekeeping records demonstrating that appellant worked six hours a day for the period July 15, 2013 through December 31, 2014.

In letter dated January 19, 2018, OWCP made a preliminary determination that appellant received an overpayment of compensation in the amount of \$47,664.83 for the period July 15, 2013 through June 25, 2016, because she received wage-loss compensation benefits pursuant to the March 15, 2013 LWEC determination through June 25, 2016 although she no longer had a loss of her wage-earning capacity after she returned to work at the employing establishment on July 15, 2013. It found her at fault in creation of the overpayment, as she should have been reasonably expected to realize that she was no longer entitled to the full amount of wage-loss compensation after she had returned to work. OWCP calculated that appellant was paid compensation as follows: \$239.87 for the period July 26 to 29, 2015; \$1,449.52 from July 30 to August 22, 2015; \$10,146.60 from August 23, 2015 to February 6, 2016; \$1,389.12 from February 7 to 29, 2016; \$303.23 from March 1 to 5, 2016; and \$6,792.40 for the period March 6 to June 25, 2016. It totaled these amounts to equal \$64,446.38 in compensation received by appellant. OWCP calculated that she was entitled to 1,019.47 hours of compensation for the period July 15, 2013 to June 25, 2016, as she only worked six hours a day and was entitled to compensation for the remaining two hours a day, totaling \$16,781.55. It deducted appellant's \$16,781.55 entitlement from the \$64,446.38 of compensation paid to determine that a \$47,664.83 overpayment of compensation had been made. OWCP informed appellant of her appeal rights and instructed her to complete an enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting documentation, including tax returns, bank account statements, pay slips, and applicable financial records to support her income and expenses within 30 days.

On February 21, 2018 OWCP received appellant's January 27, 2018 request for a telephonic hearing before a representative of OWCP's Branch of Hearings and Review on the issues of fault and possible waiver. Appellant indicated that she had notified OWCP of her employment and had done everything required of her. With the request she provided a partially completed Form OWCP-20, noting monthly household expenses of \$1,758.00 for mortgage, \$300.00 for food, \$200.00 for clothing, \$400.00 for utilities, and \$550.00 for a car payment. Appellant further noted that she lived with her minor daughter and had no sources of income other than her federal salary. During the hearing, held on July 9, 2018, she contended that she had not knowingly accepted payments to which she was not entitled.

By decision dated August 29, 2018, OWCP finalized the determination that appellant received an overpayment of compensation in the amount of \$47,664.83 for the period July 15, 2013 through June 25, 2016, because she continued to receive compensation benefits based on the March 15, 2013 LWEC determination, predicated on her actual earnings as a home health aide, after she returned to work at the employing establishment. It found that she was without fault in creation of the overpayment. OWCP directed appellant to repay the \$47,664.83 in the amount of \$450.00 a month, based on reported monthly expenses of \$4,269.00 and monthly income of \$4,790.00, a difference of \$521.00 a month. It noted that she had not submitted sufficient financial information for consideration of waiver of recovery of the overpayment. OWCP found that recovery of the overpayment would not be against good conscience as appellant did not relinquish a valuable right or change her position for the worse in reliance on her compensation payments.

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, 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 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.⁵ OWCP's regulations provide in pertinent part: 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.⁶ A claimant is not entitled to receive temporary total disability benefits and actual earnings for the same period.⁷ OWCP's procedures also provide that an overpayment in compensation is created when a claimant returns to work, but continues to receive wage-loss compensation.⁸

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.⁹ These procedures note that, if the claimant is determined to be without fault, a preliminary overpayment determination 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 preliminary overpayment determination informs the claimant of the right to submit evidence and the right to a precoupment hearing on the issues of: (a) fact and amount of overpayment; and (b) waiver of recovery of the overpayment. Along with the preliminary overpayment determination, OWCP should provide a clearly written statement explaining how the overpayment was created.¹⁰

³ 5 U.S.C. § 8102.

⁴ *Id.* at § 8129(a).

⁵ *Id.* at § 8116(a).

⁶ 20 C.F.R. § 10.500.

⁷ *See J.L.*, Docket No. 18-1266 (issued February 15, 2019); *K.E.*, Docket No. 18-0687 (issued October 25, 2018); *M.S.*, Docket No. 16-0289 (issued April 21, 2016); *L.S.*, 59 ECAB 350, 352-53 (2008).

⁸ *See J.S.*, Docket No. 17-0260 (issued December 28, 2017); *B.H.*, Docket No. 09-0292 (issued September 1, 2009); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.1 (September 2018).

⁹ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.4(a)(2) (May 2004).

¹⁰ *Id.*; *see also L.P.*, Docket No. 18-0095 (issued March 12, 2020).

ANALYSIS -- ISSUE 1

The Board finds that OWCP improperly determined that appellant received an overpayment of compensation in the amount of \$47,664.83 for the period July 15, 2013 through June 25, 2016 as she received compensation based on an LWEC determination after returning to work.

An overpayment of compensation was identified when on September 19, 2016, OWCP received an e-mail from the employing establishment which confirmed that appellant had returned to duty on July 15, 2013. It was not until January 19, 2018, however, that OWCP issued a preliminary determination finding an overpayment in the amount of \$47,664.83 had been created for the period July 15, 2013 through June 25, 2016.

By decision dated August 29, 2018, OWCP's hearing representative finalized the preliminary overpayment determination and found appellant without fault in the creation of the \$47,664.83 overpayment for the period July 15, 2013 through June 25, 2016, because she continued to receive compensation benefits based on the March 15, 2013 LWEC determination, predicated on her actual earnings as a home health aide, after she returned to work at the employing establishment. The hearing representative found that she was without fault in creation of the overpayment. OWCP directed appellant to repay the \$47,664.83 in the amount of \$450.00 per month.

The Board finds that OWCP failed to follow its procedures in issuing the January 19, 2018 overpayment decision. As noted, OWCP's procedures provide that a preliminary overpayment determination must be released along with a Form OWCP-20 within 30 days of the date the overpayment is identified.¹¹ In this case, OWCP first identified the overpayment of compensation on September 19, 2016, but it did not, however, issue a preliminary notice regarding the overpayment until January 19, 2018, more than 30 days later.

The Board thus finds that OWCP failed to follow its established procedures in determining that appellant received an overpayment of compensation in the amount of \$47,664.83 for the period July 15, 2013 through June 25, 2016.¹²

CONCLUSION

The Board finds that OWCP improperly determined that appellant received an overpayment of compensation in the amount of \$47,664.83 for the period July 15, 2013 through June 25, 2016.

¹¹ *See id.*

¹² In light of the Board's disposition of Issue 1, Issue 2 is rendered moot.

ORDER

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

Issued: March 23, 2021
Washington, DC

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

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

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