

³ The Board notes that, following the April 14, 2021 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 \$7,782.95 during the period April 1, 2018 through September 25, 2020, as she continued to receive wage-loss compensation while a third-party surplus was outstanding; (2) whether it properly determined that appellant was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment; (3) and whether OWCP properly required recovery of the overpayment by deduction of \$500.00 every 28 days from appellant's continuing compensation benefits.

FACTUAL HISTORY

On June 6, 2002 appellant, then a 47-year-old rural carrier associate, filed a traumatic injury claim (Form CA-1) alleging that on June 3, 2002 she sustained nine puncture wounds on her legs from a dog attack while in the performance of duty. OWCP accepted the claim for bilateral open wounds of the ankles, knees, and legs, and a lumbar sprain under OWCP File No. xxxxxx657. Appellant returned to limited-duty work on June 10, 2002. OWCP paid her intermittent wage-loss compensation on the supplemental rolls from February 2, 2003 through October 12, 2007.

On January 2, 2004 appellant accepted a modified rural carrier associate position. By decision dated April 28, 2004, OWCP found that the modified rural carrier associate position fairly and reasonably represented her wage-earning capacity with no loss in earning capacity.⁴ By decision dated January 29, 2020, it modified the April 28, 2004 loss of wage-earning capacity (LWEC) determination, and found that the LWEC had been issued in error. OWCP paid appellant wage-loss compensation on its supplemental compensation rolls as of April 1, 2018 and on its periodic rolls as of January 3, 2021.

The record reflects that on March 23, 2007 appellant's then-counsel in the civil lawsuit against the dog owner, acknowledged OWCP's subrogation lien in the amount of \$56,728.52. In letters dated March 30, 2007 and January 25, 2008, then-counsel indicated that appellant's surplus was higher than it should be and noted disputed amounts for travel expenses, which he noted could not be collected from the third party, and other questionable/unrelated charges.

On May 18, 2007 OWCP received a Long Form Statement of Recovery (Form EN-1108) from appellant's then-counsel. The form noted a gross recovery of \$150,000.00, with the Federal Government's statutory right to a refund in the amount of \$23,572.70 and a surplus credit against future FECA benefits in the amount of \$26,815.51. The record reflects that on May 18, 2007 OWCP received a check in the amount of \$23,572.70 in refund of compensation benefits paid.

In a March 2, 2010 letter, OWCP informed appellant that original Form EN-1108 statement of recovery was recalculated. It advised that its disbursement was actually \$59,098.36. OWCP noted that erroneous travel charges totaled \$8,254.83 and other erroneous charges totaled \$1,443.17, which were removed from the charge back on the case. It noted that additional wage-loss compensation, which totaled \$2,105.08, had been deducted from the surplus amount. Worksheets and a March 21, 2008 letter noting OWCP's disbursement of \$59,098.36 was

⁴ Under OWCP File No. xxxxxx472, OWCP accepted a March 21, 2014 employment injury for right radial head fracture, right lunate fracture, left knee contusion, rib contusion, and left shoulder strain. It has administratively combined this file and OWCP File No. xxxxxx657, with OWCP File No. xxxxxx472 serving as the master file.

provided.⁵ OWCP advised that the credit against future FECA benefits was \$7,782.95. It noted that it was due a refund of \$33,912.43 and as it had recovered \$23,572.70, an additional refund of \$10,339.73 was due. An updated EN-1108 form labeled Exhibit 5, with handwritten figures, was provided. This indicated OWCP disbursements of \$50,843.33, government allowance for attorney's fee of \$16,930.90 for a balance of \$33,912.43. The remaining \$11,331.23 surplus was reduced by \$3,548.25 for a new surplus of \$7,782.98.⁶

By decision dated March 28, 2018, OWCP terminated appellant's wage-loss compensation and medical benefits, effective January 7, 2018, with regard to her March 21, 2014 employment injury.⁷ By decision dated January 29, 2020, it modified her April 28, 2004 LWEC determination as it was issued in error. OWCP resumed payment of appellant's claims for compensation effective April 1, 2018.

On October 27, 2020 OWCP issued a preliminary overpayment determination of an overpayment of compensation in the amount of \$7,782.95 for the period April 1, 2018 through September 25, 2020 because appellant received wage-loss compensation during a period of a third-party surplus. It noted that on March 2, 2010 she was advised that her third-party surplus balance was \$7,782.95. OWCP indicated that appellant received wage-loss compensation from April 1, 2018 through September 25, 2020 in the amount of \$46,830.14 and that there was no indication on file from March 3, 2010 through April 1, 2018 when the wage-loss compensation resumed or on January 30, 2020 when it keyed in the wage-loss compensation, that there was any evidence of payment for medical treatment she paid out of pocket related to the accepted conditions to show that the third-party surplus balance of \$7,782.95 had been absorbed. It found that she was at fault in the creation of the overpayment because she knowingly accepted payments which she knew or reasonably should have known were incorrect. Copies of OWCP's letters and worksheets pertaining to the third-party surplus of \$7,782.95 were included. OWCP requested that appellant complete the enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documentation. Additionally, it provided her with an overpayment action request form and notified her 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 prerecoupment hearing.

In an October 27, 2020 memorandum to file, OWCP noted that appellant had \$7,782.95 credit against future benefits. It indicated that it paid \$46,830.14 in wage-loss compensation to her for the period April 1, 2018 through September 25, 2020 without exhaustion of the \$7,782.95 surplus. Copies of OWCP's letters and worksheets pertaining to the third-party surplus of \$7,782.95 were included.

⁵ In a March 21, 2008 letter, OWCP advised appellant that OWCP's disbursements were \$59,098.36, which included wage-loss compensation of \$10,301.95 and bills of \$48,796.41. It noted that compensation due her for the October 22 through November 23, 2007, which totaled \$1,194.48, could be used to reduce the credit against future benefits and that a bill specialist will be reviewing the disputed charges of her surplus. OWCP further advised no further benefits could be paid until appellant's third-party surplus was reduced to zero.

⁶ The statement of recovery indicated that the total was \$7,782.95. However, this appears to be a minor error as the correct calculation equals \$7,782.98.

⁷ See *supra* note 4.

On November 4, 2020 appellant requested a prerecoupment hearing before a representative of OWCP's Branch of Hearings and Review regarding possible waiver as she believed that the overpayment occurred through no fault of her own.

On November 18, 2020 appellant submitted a completed Form OWCP-20, noting \$55,000.00 in assets. She indicated that she had no recollection of OWCP's 2010 letter regarding the surplus as over 10 years had passed. Appellant also contended that recovery of the overpayment would delete her retirement savings to almost half.

An oral hearing was held on February 19, 2021.

On March 16, 2021 OWCP received from appellant copies of cancelled checks payable to her physician from 2015, 2016, and 2017 and a listing of checks from her ledger from 2010 to 2013 as the bank no longer had copies. Appellant also included copies of an insurance profile of prescriptions from one pharmacy from January 1, 2008 through March 11, 2019, a medical expense summary from another pharmacy for the period January 1, 2010 through March 2, 2021, and bills from a medical provider noting services for workers' compensation from 2002.

By decision dated April 14, 2021, OWCP's hearing representative finalized the preliminary overpayment determination that appellant had received an overpayment of compensation in the amount of \$7,782.95 for the period April 1, 2018 through September 25, 2020 because she accepted wage-loss compensation when a third-party surplus was outstanding. The hearing representative found that appellant was at fault in the creation of the overpayment because she knew or reasonably should have known that appellant was not entitled to compensation benefits until the surplus was exhausted. Consequently, she found that waiver of recovery of the overpayment was precluded. The hearing representative determined that the overpayment be recovered by deducting \$500.00 from appellant's continuing compensation payments every 28 days.

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.⁸ Section 8132 of FECA outlines that where an injury or death for which compensation is payable is caused under circumstances creating a legal liability in a person other than the United States to pay damages and a beneficiary entitled to compensation from the United States for that injury or death receives money or other property in satisfaction of that liability as a result of suit or settlement by him or her in his or her behalf, the beneficiary, after deducting there from the costs of suit and a reasonable attorney's fee, shall refund to the United States the amount of compensation paid by the United States and credit any surplus on future payments of compensation to him or her for the same injury.⁹ The applicable regulations reiterate that, after the refund owed to the United States is calculated, FECA beneficiary retains any surplus remaining and this amount is credited, dollar for dollar, against future compensation for the same injury.¹⁰ OWCP will resume

⁸ 5 U.S.C. § 8102.

⁹ *Id.* at § 8132. See *R.M.*, Docket No. 20-0686 (issued May 20, 2020); *E.K.*, Docket No. 18-0599 (issued February 26, 2020); see also *T.D.*, Docket No. 16-0565 (issued May 5, 2016).

¹⁰ 20 C.F.R. § 10.712.

the payment of compensation only after FECA beneficiary has been awarded compensation, which exceeds the amount of the surplus.¹¹ Where a beneficiary who has received a third-party recovery has made the required refund, but subsequent events result in payment of compensation benefits, including medical benefits, this may result in an overpayment of compensation.¹² Such an overpayment of compensation should be adjudicated and processed by OWCP according to the usual overpayment procedures.¹³

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation during the period April 1, 2018 through September 25, 2020 as she continued to receive wage-loss compensation while a third-party surplus was outstanding.

Appellant received a third-party recovery of \$150,000.00. A Form EN-1108 received by OWCP on May 18, 2007 provided the calculations regarding offsets and disbursements previously made. It found a remaining surplus of \$26,815.51. On May 2, 2010 OWCP amended Form EN-1108. It found a remaining surplus of \$11,331.23. Additional handwritten notes indicated that the surplus was further reduced by \$3,548.25, leaving a surplus credit against future benefits in the amount of \$7,782.95.

The case record, however, establishes that OWCP paid appellant wage-loss compensation from April 1, 2018 through September 25, 2020 in the amount of \$46,830.14. As noted above, OWCP's regulations provide that future compensation payments are to be charged against a surplus until it has been exhausted.¹⁴ Thus, the Board finds that an overpayment of compensation during the period April 1, 2018 through September 25, 2020 was created.

The Board further finds, however, that the case is not in posture for decision with regard to the amount of the overpayment.

In its October 27, 2020 preliminary overpayment determination, OWCP found that there was no indication that appellant had paid out of pocket for medical treatment related to the accepted conditions, to support that the third-party surplus balance of \$7,782.95 had been absorbed. Appellant, however, subsequently submitted copies of cancelled checks paid to her physician during the relevant time frame, copies of an insurance profile of prescriptions from one pharmacy from January 1, 2008 through March 11, 2019; a medical expense summary from another pharmacy for the period January 1, 2010 through March 2, 2021; and bills from a medical provider noting services for workers' compensation since 2002. She claimed that those out-of-pocket expenses for her employment injury should have been deducted from her surplus. In finalizing the overpayment determination, OWCP's hearing representative did not discuss or consider this evidence or its effect, if any, on the surplus balance amount.

¹¹ *Id.*

¹² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Third-Party Subrogation Guidelines*, Chapter 2.1100.10 (March 2006).

¹³ *Id.*; see *S.M.*, Docket No. 21-0449 (issued October 25, 2021).

¹⁴ 20 C.F.R. § 10.712; *S.M.*, *supra* note 13; *E.K.*, Docket No. 18-0599 (issued February 26, 2020).

The Board has held that, in overpayment cases, it is essential that OWCP provide the recipient of compensation with a clear statement showing how the overpayment was calculated.¹⁵ As it remains unclear whether OWCP correctly calculated the overpayment for the period April 1, 2018 through September 25, 2020, the Board finds that this case must be remanded to OWCP.

On remand, OWCP shall clarify whether appellant is entitled to any deduction from the surplus in light of the newly submitted evidence. It shall then recalculate the amount of the overpayment of compensation and issue a new preliminary overpayment determination, with an overpayment action request form, a new Form OWCP-20, and instructions for her to provide updated supporting documentation. Following this, and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.¹⁶

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation during the period April 1, 2018 through September 25, 2020 as she continued to receive wage-loss compensation while a third-party surplus was outstanding. However, the case is not in posture for decision with regard to the amount of the overpayment.¹⁷

¹⁵ *C.T.*, Docket No. 21-1299 (issued May 13, 2022).

¹⁶ *G.R., id.; S.H.*, Docket No. 20-1189 (issued January 27, 2021).

¹⁷ In light of the Board's disposition of Issue 1, Issues 2 and 3 are rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the April 14, 2021 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part. This case is remanded for further proceedings consistent with this decision of the Board.

Issued: June 6, 2022
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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