

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

_____)	
L.G., Appellant)	
)	
and)	Docket No. 20-1260
)	Issued: April 21, 2023
U.S. POSTAL SERVICE, LOS ANGELES BULK)	
MAIL CENTER, Bell, CA, Employer)	
_____)	

Appearances:
Daniel Goodkin, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 5, 2020 appellant filed a timely appeal from a June 1, 2020 merit 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 OWCP properly determined that appellant received an overpayment of compensation in the amount of \$68,680.41 during the period May 28, 2017 through December 7, 2019 because she continued to receive wage-loss compensation following

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that following the June 1, 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.*

her return to full-time work in the private sector; and (2) whether OWCP properly found appellant at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment.

FACTUAL HISTORY

On June 15, 2000 appellant, then a 24-year-old mail handler, filed an occupational disease claim (Form CA-2) alleging that she sustained carpal tunnel syndrome due to factors of her federal employment. On the reverse side of the claim form, the employing establishment indicated that she did not stop work, but was currently working light duty. OWCP accepted the claim for bilateral carpal tunnel syndrome and lesion of the right ulnar nerve. It paid appellant FECA wage-loss compensation on the supplemental rolls commencing December 13, 2002; on January 20, 2005 granted appellant a schedule award for four percent permanent impairment of her right arm and four percent permanent impairment of her left arm; and paid her on the periodic rolls commencing August 1, 2009.

On November 7, 2011 OWCP notified appellant that it proposed to reduce her entitlement to wage-loss compensation based on her capacity to earn wages in the constructed position of receptionist, Department of Labor, *Dictionary of Occupational Titles* (DOT) #237.367-038, at the weekly pay rate of \$400.00, and calculated her new compensation rate.

By decision dated February 23, 2012, OWCP reduced appellant's wage-loss compensation, effective on that date, consistent with its finding that the constructed position of a receptionist with weekly earnings of \$400.00 per week represented her wage-earning capacity. It stated that appellant was required to report her employment status whenever OWCP requested that she do so, and that if she obtained new employment, she was required to report the type of work, dates of employment, and weekly rate of pay.

In a letter dated February 13, 2018, the employing establishment requested a modification of appellant's LWEC determination, as she had obtained new employment. It contended that she was earning 25 percent more than the current pay of the job that her LWEC was based upon. The employing establishment reported that the current pay rate of a mail handler at level 4 step P was \$28.01 per hour. It attached a November 25, 2017 notification of personnel action PS Form-50 indicating that the annual salary of the mail handler position at level 4 step P was currently \$58,252.00.

In a May 3, 2018 letter, OWCP acknowledged receipt of the employing establishment's request to modify appellant's LWEC. It noted that on February 23, 2012 it issued an LWEC determination, finding that the position of a receptionist represented appellant's wage-earning capacity, and that the information provided indicated that she may have been vocationally rehabilitated and employed at a new job. OWCP requested that appellant submit additional information regarding her employment, including her pay rate, job title, start date, hours per day and week, job duties, whether she underwent additional training or schooling for the position, and copies of available pay stubs. It afforded 30 days for her to submit the requested information.

In a letter dated May 15, 2018, appellant indicated that her current job title was computerized tomography (CT) technologist, and she related that she started her full-time position

on May 28, 2017. She stated that she was currently earning \$41.40 per hour and was working eight hours a day. Appellant stated that she pursued additional job training at her own expense to become a radiology/CT technologist, and she provided her diplomas and certifications. She additionally provided a CT technologist job description from her private sector employer.

The employing establishment again noted, in letters dated June 4 and August 5, 2019, that appellant's current salary was higher than her previous wages at the employing establishment, and requested modification of her LWEC determination.

In an August 29, 2019 letter, OWCP noted that a formal LWEC determination was previously issued on February 23, 2012, which determined that the position of receptionist fairly and reasonably represented appellant's wage-earning capacity. It indicated that it had received information that she may have been vocationally rehabilitated and employed at a new job. OWCP again requested that appellant submit additional information regarding her employment, including her pay rate, job title, start date, hours per day and week, job duties, whether she underwent additional training or schooling for the position, and copies of available pay stubs. It afforded her 30 days to submit the requested information.

Appellant indicated in letters dated June 4 and August 5, 2019, that her current job title was CT technologist, and she related that she started her full-time position on May 28, 2017. She stated that she was currently earning \$45.61 per hour and was working eight hours a day. Appellant again stated that she pursued additional job training at her own expense to become a radiology/CT technologist, and she again provided her diplomas and a CT technologist job description from her employer. She attached a pay stub from August 4 to 17, 2019 indicating that she worked 80.20 hours at the rate of \$45.60 per hour. Appellant also attached a pay stub from August 18 to 31, 2019 indicating that she worked 80.60 hours at the rate of \$45.60 per hour.

A December 10, 2019 compensation termination worksheet indicated that appellant's compensation had been terminated retroactive to May 28, 2017 and related that she had been overpaid \$68,680.41.

In a December 16, 2019 letter, OWCP informed appellant that it had terminated her compensation, effective December 7, 2019, because her "actual wages met or exceeded the wages of the job held when injured." It related that she had been employed as a CT technologist at a medical center since May 28, 2017 and had worked 40 hours per week and earned \$41.40 per hour.

A December 16, 2019 OWCP memorandum indicated that appellant started her full-time position earning \$41.40 per hour, and her wages have since increased. It concluded that as her wages far exceeded her compensation, her compensation should have been terminated on May 28, 2017, and an overpayment of \$68,680.41 for the period May 28, 2017 through December 7, 2019 was created.

On January 6, 2020 OWCP issued a preliminary determination that appellant had received an overpayment of compensation in the amount of \$68,680.41 for the period May 28, 2017 through December 7, 2019 because she returned to full-time employment at a medical center on May 28, 2017 where her actual wages "either met or exceeded" the wages she earned "when [she was] originally injured," but continued to receive wage-loss compensation through December 7, 2019.

It further notified her of its preliminary finding that she was at fault in the creation of the overpayment. Additionally, OWCP provided an overpayment action request form and informed appellant that, within 30 days, she could request a final decision based on the written evidence or a precoupment hearing. It requested that she complete an enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documentation.

On January 30, 2020 appellant requested that OWCP make a decision based on the written evidence. She stated that she wished to contest the overpayment and requested waiver because she was not at fault.

In a Form OWCP-20 dated January 22, 2020, appellant listed her monthly income as \$8,000.00 and indicated that she supported two daughters, ages 16 and 18. She listed her monthly expenses totaling \$7,996.00. Appellant also listed her available funds as totaling \$53,200.00. In an attached statement, she reiterated that she was not at fault in the creation of the overpayment. Consequently, appellant requested waiver of recovery of the overpayment.

By decision dated June 1, 2020, OWCP finalized its preliminary determination that appellant had received an overpayment of compensation in the amount of \$68,680.41 for the period May 28, 2017 through December 7, 2019 because she continued to receive compensation following her return to work in the private sector. It determined that she was at fault in the creation of the overpayment. OWCP required appellant to pay \$1,907.79 per month for recovery of the overpayment.

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 However, it also places limitations on an employee's right to receive compensation benefits. Section 8116 provides that, while an employee is receiving benefits, he or she may not receive salary, pay, or remuneration of any type from the United States, except in limited circumstances.⁴ OWCP regulations further provide that compensation for wage loss due to disability is available only for the period when an employee's work-related medical condition prevents him or her from earning the wages earned before the work-related injury.⁵

Section 8129(a) of FECA provides that when an overpayment 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.⁶

³ *Supra* note 1 at § 8102(a).

⁴ *Id.* at § 8116(a).

⁵ 20 C.F.R. § 10.500(a).

⁶ 5 U.S.C. § 8129(a); *J.S.*, Docket No. 17-0260 (issued December 28, 2017).

ANALYSIS -- ISSUE 1

The Board finds that OWCP improperly determined that appellant received an overpayment of compensation in the amount of \$68,680.41 during the period May 28, 2017 through December 7, 2019 because she continued to receive wage-loss compensation following her return to full-time work in the private sector. On May 28, 2017 appellant returned to full-time employment in the private sector earning \$41.40 an hour as a CT technologist, but continued to receive compensation based on a February 23, 2012 LWEC determination, which found that the constructed position of receptionist represented her wage-earning capacity. On February 13, 2018 the employing establishment requested modification of the February 23, 2012 LWEC determination.

OWCP's procedures at 2.1501.3b(3)(b) provide the criteria for LWEC modification in pertinent part as follows:

“If the prior WEC cannot be modified based on a change in the medical condition, the CE should evaluate the circumstances of the case after the claimant has worked the new position for 60 days to determine whether the prior LWEC can be modified because the claimant has been **vocationally rehabilitated**. If so, the CE should issue a proposed notice to modify the underlying LWEC on this basis. Then, after 30 days has passed for the submission of evidence in response to the proposed decision, a final decision formally modifying the prior LWEC can be issued in conjunction with a new LWEC decision based on the new position....”⁷ (Emphasis in the original.)

Following initial development of the request for modification, OWCP, on December 10, 2019, terminated appellant's compensation retroactive to May 28, 2017 and advised that appellant had been overpaid \$68,680.41. It, however, neither issued a proposed notice to modify the February 23, 2012 LWEC in order to allow appellant the opportunity to submit evidence in response, nor a final decision formally modifying the prior LWEC based on appellant's new position as a CT technologist prior to determining whether an overpayment was created.⁸ Therefore, the Board finds that OWCP's overpayment determination was premature and improper.⁹ As such, OWCP has failed to establish fact of overpayment.¹⁰

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Loss of Wage-Earning Capacity Determinations*, Chapter 2.1501.3b(3)(b) (June 2013).

⁸ See *J.C.*, Docket No. 16-1217 (issued October 11, 2017).

⁹ See *E.G.*, Docket No. 19-1081 (issued September 24, 2020) (As OWCP did not issue a final decision on appellant's claim for an increased schedule award for the left lower extremity, it was premature and improper for OWCP to declare and issue a decision finding an overpayment of compensation on the basis that he was not entitled to a schedule award for a left lower extremity impairment).

¹⁰ In light of the disposition of Issue 1, Issue 2 is rendered moot.

CONCLUSION

The Board finds that OWCP improperly determined that appellant received an overpayment of compensation in the amount of \$68,680.41 during the period May 28, 2017 through December 7, 2019 because she continued to receive wage-loss compensation following her return to full-time work in the private sector.

ORDER

IT IS HEREBY ORDERED THAT the June 1, 2020 decision of the Office of Workers' Compensation Programs is reversed.

Issued: April 21, 2023
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