

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

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**J.B., Appellant** )  
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**and** )  
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**U.S. POSTAL SERVICE, POST OFFICE,** )  
**Chicago Heights, IL, Employer** )

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**Docket No. 20-0328**  
**Issued: January 12, 2023**

*Appearances:*  
*Appellant, pro se*  
*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  
JAMES D. MCGINLEY, Alternate Judge

**JURISDICTION**

On November 26, 2019 appellant filed a timely appeal from a September 6, 2019 merit decision and an October 10, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).<sup>1</sup> Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUES**

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$30,074.13, for the period July 24, 2016 through June 22, 2018 for which she was without fault, as she continued to receive wage-loss compensation

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<sup>1</sup> The Board notes that, following the October 10, 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.*

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

following her return to work in the private sector; (2) whether OWCP properly denied waiver of recovery of the overpayment; (3) whether OWCP properly required recovery of the overpayment by deducting \$400.00 from appellant's continuing compensation payments every 28 days beginning September 15, 2019; and (4) whether OWCP properly denied appellant's request for an oral hearing.

### **FACTUAL HISTORY**

On November 3, 2014 appellant then a 46-year-old casual carrier associate, filed a traumatic injury claim (Form CA-1) alleging that on November 1, 2014 she sprained her left knee when she stepped in a divot in the grass and twisted her knee while in the performance of duty. On December 4, 2014 OWCP accepted her claim for left knee sprain. It subsequently expanded the acceptance of appellant's claim to include incomplete left tibia fracture. OWCP subsequently paid her wage-loss compensation from November 17, 2014 through May 17, 2015.<sup>3</sup> Appellant returned to work on May 18, 2015, but stopped work again on June 1, 2015 as the employing establishment could no longer provide work within her restrictions. Thereafter, she filed a series of claims for compensation (Form CA-7) for disability from work. OWCP paid appellant wage-loss compensation on the periodic rolls commencing February 6, 2016.<sup>4</sup>

OWCP subsequently expanded the acceptance of the claim to include chondromalacia left knee and meniscal tear.

The employing establishment informed appellant on May 9, 2016 that there was no work available for her within her restrictions.

On December 17, 2016 appellant indicated on completed a Form EN-1032 that beginning July 21, 2016 she performed private sector work earning \$10.50 an hour or approximately \$711.53 biweekly.

On November 14, 2017 OWCP further expanded the acceptance of appellant's claim to include bilateral primary knee osteoarthritis.

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<sup>3</sup> The employing establishment informed OWCP on January 23, 2015 that, despite indications to the contrary, appellant had not worked 11 months prior to the date of injury, as her career in service date began in July 2014. It noted that it had paid continuation of pay from November 17 through 22, 2014. On January 29, 2015 the employing establishment indicated that appellant should be compensated based on a yearly salary of \$31,824.00 or a weekly base pay of \$612.00. On March 2, 2015 it indicated that she had a temporary appointment with an intermittent tour of duty. The employing establishment had provided the actual earnings of another employee with the same type of appointment with similar duties, working the greatest number of hours in the amount of \$32,615.00. It indicated that the similarly situated employee worked 40 hours a week and that the earnings represented the period November 2013 through November 2014.

<sup>4</sup> In a letter dated January 19, 2016, OWCP notified appellant that she would be receiving compensation payments on the periodic rolls based on a weekly pay rate in the amount of \$612.00 with gross weekly compensation of \$459.00. It informed her that her regular net wage-loss compensation payment of \$1,825.80 every 28 days would begin February 6, 2016. OWCP advised appellant of her responsibility to return to work and that, to minimize the possibility of an overpayment of compensation, she should notify it immediately when she returned to work. She signed and returned the accompanying instructions on the seeking employment form on January 26, 2016.

On December 18, 2017 appellant advised OWCP that she had worked in the private sector as of June 2016 earning \$10.00 per hour.

In a February 28, 2018 e-mail, the employing establishment advised that appellant had worked in the private sector from July 24, 2016 through December 24, 2017, earning a total of \$31,789.20.

On March 29, 2018 OWCP determined that appellant's weekly pay rate when injured was \$612.00 and that the current pay rate for her date-of-injury position was \$627.20. It applied the *Shadrick* formula, as provided in section 10.403(d) of OWCP's regulations,<sup>5</sup> and determined that her actual earnings were \$428.75 per week and that she had a loss of wage-earning capacity in the amount of \$195.84 per week or \$11,064.21 from July 24, 2016 through December 24, 2017. OWCP calculated that appellant was entitled to wage-loss compensation in the amount of \$34,556.42 for the above period.

On June 16, 2018 the employing establishment offered appellant a light-duty position. Appellant accepted the position on June 23, 2018.

In a letter dated July 25, 2018, OWCP requested that appellant verify her private-sector earnings for the period December 25, 2017 through June 24, 2018. On August 1, 2018 appellant provided earnings statements from her private-sector employment for the period December 14, 2017 through June 14, 2018.

On September 7, 2018 OWCP again calculated appellant's wage-earning capacity through the *Shadrick* formula<sup>6</sup> and found that her pay rate when injured was \$612.00 per week and that the current weekly pay rate for the date-of-injury position was \$627.00. It found that she had actual earnings in the amount of \$434.84 per week and that her loss of wage-earning capacity compensation was \$142.29 per week and \$595.00 every four weeks. OWCP found that appellant had received wage-loss compensation in the amount of \$46,690.55 for the period July 24, 2016 through June 24, 2018.

In an October 30, 2018 letter, OWCP noted that appellant was currently earning more than her date-of-injury position which it calculated was \$31,824.00 per year or \$612.00 per week. It found that her current earnings were \$816.53 per week.

The employing establishment indicated that the pay rate for appellant's date-of-injury position were \$16.91 per hour on November 26, 2016 and \$17.28 per hour on November 25, 2017.

On April 25, 2019 OWCP determined that appellant had received wage-loss compensation in the amount of \$46,809.06 for the period July 24, 2016 through June 22, 2018.

In a May 14, 2019 OWCP preliminary overpayment determination, OWCP notified appellant that she had received an overpayment of compensation in the amount of \$30,137.26 for the period July 24, 2016 through June 22, 2018, because she received wage-loss compensation for

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<sup>5</sup> 20 C.F.R. § 10.403 codified *Albert C. Shadrick*, 5 ECAB 376 (1953).

<sup>6</sup> *Id.*

total disability while working in the private sector. It found that she had private sector earnings in the amount of \$43,543.58 for the period in question and, based on her loss of wage-earning capacity using the *Shadrick* formula,<sup>7</sup> was therefore entitled to only \$16,671.90 rather the \$46,809.06 in wage-loss compensation that she had received. OWCP provided appellant with her appeal rights and an overpayment recovery questionnaire (Form OWCP-20). It afforded her 30 days to respond.

On May 24, 2019 appellant contested the fact and amount of the overpayment, and requested waiver of recovery.

By decision dated July 29, 2019, OWCP's hearing representative found that OWCP had not properly calculated appellant's wage-earning capacity as there was conflicting information regarding the date-of-injury pay rate. He noted that the employing establishment provided both a yearly salary of \$31,824.00 as if she worked 40 hours a week with a weekly base pay of \$612.00 and yearly salary of \$32,615.00 based on the highest paid similarly situated employee. OWCP's hearing representative further found that OWCP failed to properly average appellant's private sector earnings to the pay rate of the date of injury at the end of the period of her actual earnings.

On August 1, 2019 OWCP made a preliminary overpayment determination finding that appellant had received an overpayment of wage-loss compensation in the amount of \$30,074.13 for the period July 24, 2016 through June 22, 2018 because she received compensation for total disability while working in the private sector. It found that she was without fault in the creation of the overpayment because it had erred in not calculating her wage-earning capacity while she was working in the private sector, noting that she had reported her private sector earnings. OWCP provided appellant with a calculation of the amount of the overpayment based on the *Shadrick* formula.<sup>8</sup> It noted that she began working in the private sector on July 21, 2016 and reported her employment on a Form EN-1032. OWCP calculated appellant's private sector earnings for the period in question as \$43,543.58, averaging \$436.06 per week. It noted that she received compensation for total disability in the amount of \$46,809.06 during the period July 24, 2016 through June 22, 2018. OWCP determined that appellant's date-of-injury pay rate at \$607.45 per week based on the earnings of the employee most similar to her who had the greatest number of hours as she had not worked at the employing establishment for a full year prior to her injury. It further found that her date-of-injury position paid \$686.06 per week at the time she ended her private sector employment. OWCP determined that appellant was entitled to receive wage-loss compensation in the amount of \$16,734.93 resulting in an overpayment of \$30,074.13. It also provided her with an overpayment recovery questionnaire (OWCP-20) and with her appeal rights. OWCP afforded appellant 30 days to respond. No response was received.

By decision dated September 6, 2019, OWCP finalized its determination that appellant had received an overpayment in the amount of \$30,074.13 for the period July 24, 2016 through June 22, 2018 for which she was not at fault. It further determined that the overpayment was not

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

subject to waiver, and that the overpayment should be recovered by withholding \$400.00 every 28 days from her continuing compensation benefits.

On September 10, 2019 appellant requested an oral hearing by OWCP's Branch of Hearings and Review and also requested waiver.

By decision dated October 10, 2019, OWCP's Branch of Hearings and Review denied appellant's request for an oral hearing. It noted that OWCP made its preliminary determination of overpayment on August 1, 2019 and that it did not receive a request for hearing within 30 days of the preliminary determination. Further, OWCP in its September 6, 2019 final overpayment decision, noted that a final decision concerning an overpayment is not subject to an oral hearing and the only right of appeal is to the Board.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8102 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.<sup>9</sup>

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.<sup>10</sup> Section 10.500 of OWCP's regulations provides that 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.<sup>11</sup>

Section 8129(a) of FECA provides that when an overpayment of compensation 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.<sup>12</sup>

If the claimant is entitled to compensation for partial wage loss after return to work, the claims examiner should compute entitlement using the *Shadrick* formula and authorize compensation on a 28-day payment cycle. The claims examiner should make every effort to avoid interruption of income to the claimant.<sup>13</sup> Earnings of a sporadic or intermittent nature which do not fairly and reasonably represent the claimant's loss of wage-earning capacity should be

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<sup>9</sup> 5 U.S.C. § 8102(a).

<sup>10</sup> *Id.* at § 8116(a); *C.Y.*, Docket No. 18-0263 (issued September 14, 2018); *Danny E. Haley*, 56 ECAB 393 (2005).

<sup>11</sup> 20 C.F.R. § 10.500.

<sup>12</sup> 5 U.S.C. § 8129(a).

<sup>13</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on Actual Earnings*, Chapter 2.815.3(b) (June 2013). *Albert C. Shadrick*, *supra* note 5.

deducted from continuing compensation payments using the *Shadrick* formula (past earnings must be declared an overpayment).<sup>14</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that OWCP properly determined that appellant received an overpayment of compensation for the period July 24, 2016 through June 22, 2018, for which she was without fault, as she continued to receive wage-loss compensation following her return to work in the private sector.

OWCP accepted appellant's claim and paid her wage-loss compensation on the periodic rolls as of February 6, 2016. The record establishes that she returned to full-time work on July 21, 2016 in the private sector. However, appellant continued to receive wage-loss compensation from July 24, 2016 through June 22, 2018, resulting in an overpayment of compensation.<sup>15</sup> Therefore, fact of overpayment is established.

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

OWCP reported that, had proper adjustments been made to appellant's disability compensation to reflect her actual employment, she would have received \$16,734.93 for the time period July 24, 2016 through June 22, 2018. However, appellant received compensation for this period in the amount of \$46,809.06. The difference between these two amounts, \$30,074.13, is the amount of the overpayment of compensation, as calculated by OWCP.<sup>16</sup> OWCP correctly subtracted what they believed was the correct amount of compensation actually received (\$46,809.06) from the amount they believed she was entitled to (\$16,671.90) (\$46,809.06 - \$16,671.90 = the overpayment amount of \$30,137.16). However, it remains unclear how OWCP arrived at those numbers.

The record indicates that, on September 7, 2018, OWCP found that appellant had received wage-loss compensation in the amount of \$46,690.55 for the period July 24, 2016 through June 24, 2018. However, on April 25, 2019 OWCP determined that she had received wage-loss compensation in the amount of \$46,809.06 for the period July 24, 2016 through June 22, 2018. With regard to the amount that OWCP believes that appellant was entitled to (\$16,671.90), OWCP's calculations are not found in the case record. A claimant is entitled to an overpayment decision that clearly explains how the amount was calculated.<sup>17</sup> The Board will therefore remand the case for OWCP to further explain its calculation of the amount of the overpayment.

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<sup>14</sup> *J.S.*, Docket No. 17-0260 (issued December 28, 2017); *J.W.*, Docket No. 15-1163 (issued January 13, 2016).

<sup>15</sup> *C.Y.*, *supra* note 10. *Id.*

<sup>16</sup> *C.Y.*, *supra* note 10; *J.S.*, *supra* note 14; *C.F.*, Docket No. 16-1718 (issued August 21, 2017).

<sup>17</sup> *D.K.*, Docket No. 22-0736 (issued December 6, 2022); *R.B.*, Docket No. 20-0022 (issued October 28, 2020); *O.R.*, 59 ECAB 432 (2008).

On remand, OWCP shall clarify the amount of the overpayment of compensation thoroughly explain its calculations. It shall then issue a new preliminary overpayment determination, with an overpayment action request form, a Form OWCP-20, and instructions for appellant to provide the necessary financial information and supporting documentation.<sup>18</sup> After this, and other such further development as deemed necessary, it shall issue a *de novo* decision.<sup>19</sup>

### **CONCLUSION**

The Board finds that OWCP properly determined that appellant received an overpayment of compensation for the period July 24, 2016 through June 22, 2018 for which she was without fault. However, the Board further finds that the case is not in posture for decision with regard to the amount of the overpayment.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the September 6, 2019 decision of the Office of Workers' Compensation Programs is affirmed. The October 10, 2019 decision of the Office of Workers' Compensation Programs is set aside as moot.

Issued: January 12, 2023  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

James D. McGinley, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>18</sup> See *D.K., id.; L.K.*, Docket No. 20-0416 (issued November 12, 2020).

<sup>19</sup> In light of the Board's disposition of Issue 1, Issues 2, 3, and 4 are rendered moot.