

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

D.L., Appellant)	
)	
and)	Docket No. 20-1522
)	Issued: July 27, 2023
DEPARTMENT OF JUSTICE, BUREAU OF)	
PRISONS, FEDERAL TRANSFER CENTER,)	
Oklahoma City, OK, Employer)	
)	

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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 18, 2020 appellant filed a timely appeal from May 11 and July 21, 2020 merit decisions 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 \$1,157.48 for the period March 18 through 30, 2019, for which she was without fault

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that following the July 21, 2020 decision and on appeal, 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.*

because she continued to receive wage-loss compensation for total disability following her return to full-time, limited-duty work; (2) whether OWCP properly denied waiver of recovery of the overpayment; and (3) whether OWCP properly reduced appellant's wage-loss compensation benefits, effective March 18, 2019, based on her actual earnings as a psychology services secretary.

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances as set forth in the Board's prior order, are incorporated herein by reference. The relevant facts are as follows.

On June 2, 2017 appellant, then a 52-year-old psychology secretary, filed an occupational disease claim (Form CA-2) alleging that she developed bilateral hand and neck conditions due to factors of her federal employment. She noted that she first became aware of her claimed conditions and their relation to her federal employment on March 9, 2008. On August 3, 2017 OWCP accepted appellant's claim for right hip strain of muscle, fascia, and tendon; right carpal tunnel syndrome; right ulnar nerve lesion; and cervical radiculopathy. It subsequently expanded the acceptance of the claim to include left carpal tunnel syndrome and left lesion of the ulnar nerve. OWCP paid appellant wage-loss compensation on the supplemental rolls from October 10 to November 11, 2017, and on the periodic rolls as of November 12, 2017.

In a letter dated December 4, 2017, OWCP advised appellant that, "[i]f your physician advises you that you are able to perform some type of work, you are also expected to report this to OWCP." On an attached Form EN-1049, OWCP further indicated: "To minimize the possibility of an overpayment of compensation, NOTIFY THIS OFFICE IMMEDIATELY WHEN YOU GO BACK TO WORK. If you receive your compensation payments *via* paper check, the payment shows the period for which payment is made. If you have worked for any portion of this period, return the payment to this office, even if you have already advised OWCP that you are working. For payments sent by electronic funds transfer (EFT), a notification of the date and amount of payment appears on the statement from your financial institution. You are expected to monitor your EFT deposits carefully, at least every two weeks. If you have worked for any portion of the period for which a deposit was made, advise OWCP immediately so that the overpayment can be collected." (Emphasis in the original.)

Appellant returned to full-time, limited-duty work on March 18, 2019. On March 30, 2019 OWCP paid appellant, *via* direct deposit, the net amount of \$2,493.04 in wage-loss compensation for the period March 3 through 30, 2019.

On April 29, 2019 OWCP notified appellant of its preliminary overpayment determination that she had received an overpayment of compensation in the amount of \$1,157.48 for the period March 18 through 30, 2019, because she continued to receive wage-loss compensation for total disability following her return to full-time, limited-duty work. It found that she was without fault in the creation of the overpayment because she did not know, nor could she reasonably have been expected to know, that her compensation was paid incorrectly. OWCP informed appellant of her appeal rights and afforded her 30 days to complete an enclosed overpayment recovery

³ *Order Remanding Case*, Docket No. 19-1400 (issued January 29, 2020).

questionnaire (Form OWCP-20) and submit supporting financial documentation. A computation of overpayment worksheet showed that for the period March 3 through 30, 2019, appellant received \$2,493.04 in net wage-loss compensation. OWCP explained that this payment included \$1,157.48 for the period March 18 through 30, 2019, which resulted in the overpayment amount of \$1,157.48.

On May 28, 2019 OWCP received appellant's completed Form OWCP-20. Appellant requested waiver of recovery of the overpayment and indicated that she relied on misinformation given to her by OWCP. She listed monthly income of \$2,079.72 and usual monthly expenses of \$2,018.58. Appellant also listed other monthly payments for loans totaling \$120.39. She listed \$0 dollars cash on hand, \$550.00 in checking, and \$300.00 in savings, for a total of \$850.00, and denied owning valuable property or real estate. Appellant submitted financial documentation showing other debts being paid in monthly installments. Her federal income tax returns showed that in 2018 she claimed \$4,582.00 in gifts by cash or check and \$459.00 in gifts other than by cash or check, and in 2017 she claimed \$3,878.00 in gifts by cash or check, \$471.00 in gifts other than by cash or check, \$1,953.00 in unreimbursed employee expenses business expenses, and in \$3,500.00 other expenses. Appellant also claimed \$3,249.00 for an Individual Retirement Account (IRA) deduction. She also claimed \$5,041.00 in gifts to charity on a state income tax form.

By decision dated May 30, 2019, OWCP finalized its preliminary overpayment determination that appellant had received an overpayment of compensation in the amount of \$1,157.48 for the period March 18 through 30, 2019, and that that she was without fault in the creation of the overpayment. It denied waiver of recovery, however, finding that appellant had not submitted a completed overpayment recovery questionnaire.

On June 13, 2019 appellant filed a timely appeal to the Board. In a January 29, 2020 order, the Board found that the case was not in posture for decision.⁴ The Board noted that OWCP had failed to consider the Form OWCP-20 overpayment recovery questionnaire and supporting documentation submitted by appellant. The Board remanded the case to OWCP for a review of the evidence and issuance of a *de novo* decision.

On April 23, 2020 OWCP expanded the acceptance of appellant's claim to include the additional conditions of right medial epicondylitis, right lateral epicondylitis, left medial epicondylitis, left lateral epicondylitis, synovitis right hand, and left thumb trigger finger.

In a May 11, 2020 *de novo* decision, OWCP finalized the April 29, 2019 preliminary overpayment determination. It determined that an overpayment of compensation in the amount of \$1,157.48 was created. OWCP reviewed the information provided by appellant in her Form OWCP-20 and determined that appellant listed monthly income as \$2,079.72 and total monthly expenses of \$2,158.89, which resulted in a negative amount of \$79.89. However, it explained that on her Federal income tax returns appellant claimed \$4,582.00 in gifts by cash or check and \$459.00 in gifts other than by cash or check in 2018, and \$3,878.00 in gifts by cash or check, \$471.00 in gifts other than by cash or check, \$1,953.00 in unreimbursed employee expenses, and \$3,500.00 in other expenses in 2017. OWCP also noted that she claimed educator expenses with no explanation and \$3,249.00 for an IRA deduction without documentation. It further noted that

⁴ *Supra* note 3.

on her state income tax form, appellant claimed \$5,041.00 in gifts to charity. OWCP found that appellant had not demonstrated that she needed all of her income for ordinary and necessary living expenses. It also considered whether recovery of the overpayment would be against equity and good conscience and determined that the evidence failed to establish financial hardship. OWCP concluded that appellant was able to make monthly payments of \$50.00 until the debt was resolved.

In a letter and e-mail correspondence dated July 9, 2020, OWCP requested that the employing establishment provide information regarding appellant's work schedule, rate of pay, and the current pay rate for her date-of-injury position as of March 18, 2019.

In a July 15, 2020 response, the employing establishment noted that appellant's work schedule was Monday to Friday from 8:00 a.m. to 4:00 p.m. The rate of pay for the position was \$57,086.00, and the current pay rate for a GS-6/step 10 as of March 18, 2019 was \$55,510.00.

By decision dated July 21, 2020, OWCP found that appellant was recently employed as a psychology services secretary, working 40 hours per week with wages of \$1,097.81 per week. It explained that the employment was effective March 18, 2019 and the position fairly and reasonably represented her wage-earning capacity. OWCP also noted that evidence had been received on March 15, 2019, indicating a formal job title, established work schedule, and written position description with duties and physical limitations as established by the employing establishment. It noted that the physical requirements did not exceed her physical limitations. OWCP found that, as appellant had demonstrated the ability to perform the duties of the position for 60 days or more, the position was considered suitable to her partially disabling condition. It further found that her actual earnings met or exceeded the current wages of the job held when injured, her entitlement to compensation ended on the date she was reemployed with no loss of earning capacity, and her compensation payments were terminated. OWCP noted that the decision did not affect her medical benefits.

A computation of compensation work sheet established a zero loss of wage-earning capacity (LWEC). It revealed that the weekly pay rate when the disability occurred was \$1,049.73, effective October 24, 2018. The current weekly pay rate for the job and step when injured was \$1,067.50, effective March 18, 2019. OWCP determined that appellant had current actual earnings of \$1,097.81 and found the current rate of pay was equal to or greater than the current pay of the job held at the time of injury, \$1,067.50; therefore, there was no loss of wage-earning capacity.

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.⁵ 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

⁵ 5 U.S.C. § 8102(a).

law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.⁶

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 instances.⁷ OWCP's procedures provide that an overpayment of compensation is created when a claimant returns to work, but continues to receive wage-loss compensation.⁸

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$1,157.48 for the period March 18 through 30, 2019, for which she was without fault because she continued to receive wage-loss compensation for total disability following her return to full-time, limited-duty work.

OWCP accepted appellant's claim and paid wage-loss compensation on the periodic compensation rolls. The evidence of record established that she returned to full-time work at the employing establishment on March 18, 2019.

However, appellant continued to receive wage-loss compensation for total disability through March 30, 2019. As noted above, she is not entitled to receive compensation for total disability after her return to work.⁹ Therefore, an overpayment of compensation was created in this case.

With regard to the amount of the overpayment, the Board finds that OWCP properly calculated appellant's compensation for the period March 18 through 30, 2019. It explained that during the period March 3 through 30, 2019, appellant received \$2,493.04 in net wage-loss compensation, which divided by 28 days was equal to \$89.0371 per day. This amount multiplied by 13 days for the period March 18 through 30, 2019, resulted in the overpayment amount of \$1,157.48. As she was not entitled to compensation upon her return to work, the Board finds that appellant received an overpayment of compensation in the amount of \$1,157.48.

⁶ *Id.* at § 8129(a).

⁷ *Id.* at § 8116(a).

⁸ See *K.P.*, Docket No. 19-1151 (issued March 18, 2020); *S.H.*, Docket No. 19-0509 (issued August 23, 2019); *K.E.*, Docket No. 18-0687 (issued October 25, 2018); *B.H.*, Docket No. 09-0292 (issued September 1, 2009); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Identifying and Calculating an Overpayment*, Chapter 6.200.1(a) (September 2018).

⁹ *K.K.*, Docket No. 19-0978 (issued October 21, 2019); *E.V.*, Docket No. 17-1328 (issued December 11, 2017); Federal (FECA) Procedure Manual, *id.*

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA provides that an overpayment must be recovered 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.”¹⁰

According to 20 C.F.R. § 10.436, recovery of an overpayment would defeat the purpose of FECA if recovery would cause hardship because the beneficiary needs substantially all of his income (including compensation benefits) to meet current ordinary and necessary living expenses, 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.¹¹

Section 10.437 provides that recovery of an overpayment is considered to be against equity and good conscience when an individual who received an overpayment would experience severe financial hardship attempting to repay the debt; and when an individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.¹²

Section 10.438 of OWCP’s regulations provide 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.¹³

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied waiver of recovery of the \$1,157.48 overpayment of compensation.

As OWCP found appellant without fault in the creation of the overpayment, waiver must be considered, and repayment is still required unless adjustment or recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.¹⁴

¹⁰ 5 U.S.C. § 8129(a)-(b); *see R.Q.*, Docket No. 18-0964 (issued October 8, 2019); *D.C.*, Docket No. 17-0559 (issued June 21, 2018).

¹¹ 20 C.F.R. § 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. *Supra* note 8 at 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 a n individual with a spouse or dependent, plus \$1,200.00 for each additional dependent. *Id.* at Chapter 6.400.4a(2).

¹² 20 C.F.R. § 10.437.

¹³ *Id.* at § 10.438.

¹⁴ *Id.*; *see also O.B.*, Docket No. 19-0034 (issued April 22, 2019).

In its preliminary overpayment determination dated April 29, 2019, OWCP requested that appellant provide a completed overpayment recovery questionnaire and supporting financial information. It advised her that waiver of recovery would be denied if she failed to furnish the requested financial information within 30 days. Appellant returned the Form OWCP-20 overpayment recovery questionnaire and reported total monthly income of \$2,079.72 and total monthly expenses of \$2,018.58. As her income exceeded her expenses by more than \$50.00, OWCP properly determined that appellant had not demonstrated that she needed all of her income for ordinary and necessary living expenses.¹⁵

OWCP also considered whether repayment would be against equity and good conscience and properly determined that the evidence failed to establish financial hardship. The Board finds that OWCP properly denied waiver of recovery of the \$1,157.48 overpayment of compensation.

LEGAL PRECEDENT -- ISSUE 3

Once OWCP accepts a claim, it has the burden of proof to establish that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.¹⁶

A wage-earning capacity determination is a finding that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn wages.¹⁷ Compensation payments are based on the wage-earning capacity determination, and it remains undisturbed until properly modified.¹⁸

Under section 8115(a) of FECA wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his or her wage-earning capacity.¹⁹ If the actual earnings do not fairly and reasonably represent wage-earning capacity, or if the employee has no actual earnings, the wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, the usual employment, age, qualifications for other employment, the availability of suitable employment, and other factors and circumstances which may affect the wage-earning capacity in his or her disabled condition.²⁰ Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions. OWCP applies the principles set forth in *Albert C.*

¹⁵ *Supra* note 11.

¹⁶ *See R.L.*, Docket No. 19-1786 (issued July 6, 2020); *C.H.*, Docket No. 19-0136 (issued May 23, 2019).

¹⁷ 5 U.S.C. § 8115(a); *see Mary Jo Colvert*, 45 ECAB 575 (1994); *Keith Hanselman*, 42 ECAB 680 (1991).

¹⁸ *See M.F.*, Docket No. 18-0323 (issued June 25, 2019).

¹⁹ 5 U.S.C. § 8115(a).

²⁰ *Id.*; *see also Z.W.*, Docket No. 18-1000 (issued June 24, 2019).

*Shadrick*²¹ as codified in section 10.403 of its implementing regulations,²² to determine the percentage of the employee's LWEC.²³

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was, in fact, erroneous.²⁴ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.²⁵

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly determined appellant's LWEC, effective March 18, 2019, based on her actual earnings as a psychology services secretary.

By decision dated July 21, 2020, OWCP found that appellant had the capacity to earn wages as a psychology services secretary with wages of \$1,097.81 per week, effective March 18, 2019.²⁶ Appellant successfully performed the duties as a psychology services secretary from March 18, 2019 to July 21, 2020, and continuing. As such, she successfully performed the psychology services secretary position for at least 60 days. The Board further notes that the record does not establish that the psychology services secretary position constituted part-time, sporadic, seasonal, or temporary work.²⁷ Moreover, the record indicates that the position was not a make-shift position designed for appellant's particular needs.²⁸

The wages appellant earned beginning March 18, 2019 were greater than the current wages of her date-of-injury job which supports that the position fairly and reasonably represented her wage-earning capacity.²⁹ OWCP noted the current wages of the job she held when injured and provided a computation of compensation work sheet which established a zero LWEC. It explained that the weekly pay rate when the disability occurred was \$1,049.73, effective October 24, 2018. The current pay rate for the job and step when injured was \$1,067.50, effective March 18, 2019. OWCP determined that appellant had actual earnings of \$1,097.81 and found the current rate of

²¹ 5 ECAB 376 (1953).

²² 20 C.F.R. § 10.403.

²³ See *J.H.*, Docket No. 18-1319 (issued June 26, 2019).

²⁴ See *S.C.*, Docket No. 18-0517 (issued February 25, 2020); *J.A.*, Docket No. 17-0236 (issued July 17, 2018); *Katherine T. Kreger*, 55 ECAB 633 (2004); *Sue A. Sedgwick*, 45 ECAB 211 (1993).

²⁵ See *S.C.*, *id.*; *O.H.*, Docket No. 17-0255 (issued January 23, 2018); *Selden H. Swartz*, 55 ECAB 272, 278 (2004).

²⁶ The position had an annual salary of \$57,086.

²⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on Actual Wages*, Chapter 2.815.5 (June 2013).

²⁸ *Id.*

²⁹ See *R.L.*, *supra* note 16; *S.C.*, *supra* note 24; *J.A.*, *supra* note 24.

pay was equal to or greater than the current pay of the job held at the time of injury, therefore, there was no loss in wage-earning capacity.

Accordingly, the Board finds that OWCP properly determined that appellant's earnings as a psychology services secretary fairly and reasonably represented her wage-earning capacity and they met or exceeded the current wages of the job she held when injured.

Appellant may request modification of the LWEC determination, supported by new evidence or argument, at any time before OWCP.

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$1,157.48 for the period March 18 through 30, 2019. The Board finds that OWCP properly denied waiver of recovery of the overpayment. The Board further finds that OWCP properly reduced appellant's wage-loss compensation benefits, effective March 18, 2019, based on her actual earnings as a psychology services secretary.

ORDER

IT IS HEREBY ORDERED THAT the May 11 and July 21, 2020 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: July 27, 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