

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

K.L., Appellant)

and)

DEPARTMENT OF HOMELAND SECURITY,)
U.S. CUSTOMS AND BORDER PROTECTION,)
Glynco, GA, Employer)

**Docket No. 23-0149
Issued: July 13, 2023**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On November 9, 2022 appellant filed a timely appeal from November 3 and 7, 2022 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 \$1,078.68 for the period August 29 through September 10, 2022, for which she was without fault, as she continued to receive total disability compensation following her return to full-time modified-duty work; (2) whether OWCP properly denied waiver of recovery of the

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the issuance of the November 7, 2022 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 that was before OWCP at the time of its final decision. Evidence not before the 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 new evidence for the first time on appeal. *Id.*

overpayment; and (3) whether appellant has met her burden of proof to establish disability from work for the period September 8 through 12, 2022, causally related to her accepted October 20, 2021 employment injury.

FACTUAL HISTORY

On October 26, 2021 appellant, then a 25-year-old customs and border protection officer, filed a traumatic injury claim (Form CA-1) alleging that on October 20, 2021 her left knee popped when she performed frog jumps during a training session while in the performance of duty. She did not stop work.

On March 2, 2022 OWCP accepted the claim for buckle handle tear of the medial meniscus of the left knee. It advised appellant that:

“If you receive a compensation check which includes payment for a period you have worked, return it to us immediately to prevent an overpayment of compensation. Checks may be returned to the following address: US Department of Treasury, 13000 Townsend Road, Philadelphia, PA 19154.”

OWCP subsequently paid appellant wage-loss compensation on the supplemental rolls for disability from work for the periods December 27, 2021 through March 18, 2022 and March 22 through April 14, 2022.

On April 28, 2022 OWCP expanded the acceptance of appellant’s claim to include left knee effusion. It paid her wage-loss compensation on the supplemental rolls for the period April 15 through May 7, 2022.

On June 22, 2022 appellant underwent OWCP-authorized left knee arthroscopy with partial medial and lateral meniscectomy with synovectomy.

OWCP thereafter paid appellant on the supplemental rolls from June 17 through 18, 2022, and on the periodic rolls as of June 19, 2022.

On August 25, 2022 appellant’s treating physician, Dr. Jonathan J. Meyer, a Board-certified orthopedic surgeon, released appellant to return to sedentary work as of August 25, 2022, for the next six weeks. Appellant returned to full-time modified-duty work with restrictions on August 29, 2022. In an August 25, 2022 progress note, Dr. Myer noted a history of the October 20, 2021 employment injury and appellant’s medical treatment. He reported his findings on physical examination and reviewed diagnostic test results of the left knee. Dr. Myer provided an assessment of the accepted condition of bucket handle tear of the medial meniscus of the left knee. He also provided an assessment of left knee pain. Dr. Myer indicated that appellant experienced left knee pain after a reported patella dislocation in October 2021. He advised that she was status post her October 2021 work-related injury.

OWCP subsequently received a September 9, 2022 certificate of injury and/or return to work from Dr. Myer. Dr. Myer noted that appellant was unable to return to work from September 8 through 12, 2022 due to an injury.

On September 12, 2022 appellant filed a claim for wage-loss compensation (Form CA-7) due to disability from work for the period September 8 through 12, 2022.

OWCP, by development letter dated September 19, 2022, advised appellant that the medical evidence submitted was insufficient to establish disability for the period September 8 through 12, 2022. It requested that she submit additional medical evidence to establish that she was unable to work during the period claimed due to her October 20, 2021 employment injury. OWCP afforded appellant 30 days to submit the necessary evidence.

In a preliminary overpayment determination dated September 30, 2022, OWCP notified appellant that she had received an overpayment of compensation in the amount of \$1,078.68 for the period August 29 through September 10, 2022 because she received compensation for total disability after she returned to full-time work on August 29, 2022. It explained that appellant received \$2,323.32 every 28 days at a daily rate of \$82.9757. OWCP further noted that appellant had received compensation for 13 days following her medical release and return to work for a total of \$1,078.68. It further advised her of its preliminary determination that she was without fault in the creation of the overpayment. OWCP requested that appellant complete an overpayment action request form and an overpayment recovery questionnaire (Form OWCP-20). Additionally, it notified her that within 30 days of the date of the letter, she could request a final decision based on the written evidence, or a preresoupment hearing.

On November 2, 2022 OWCP received appellant's request for OWCP's review of the written evidence regarding possible waiver of the overpayment. Appellant also submitted a Form OWCP-20 dated October 20, 2022, in which she requested waiver of the overpayment as she had fallen behind on her monthly bills. She listed monthly income of \$2,934.00 and monthly expenses totaling \$3,627.00, and assets in the amount of \$200.00. Appellant also submitted supporting documentation including Internal Revenue Service forms and credit card statements.

By decision dated November 3, 2022, OWCP finalized the September 30, 2022 preliminary overpayment determination that appellant had received an overpayment of compensation in the amount of \$1,078.68 for the period August 29 through September 10, 2022 because she continued to receive FECA wage-loss compensation after her return to full-time work on August 29, 2022. It determined that she was without fault in the creation of the overpayment but, denied waiver of recovery of the overpayment as she had not responded to the September 30, 2022 preliminary overpayment determination. OWCP directed recovery of the overpayment in full within 30 days.

By decision dated November 7, 2022, OWCP denied appellant's claim for compensation for disability from work for the period September 8 through 12, 2022, finding that the medical evidence of record was insufficient to establish disability during the claimed period due to her October 20, 2021 employment injury.

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 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

³ 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.⁴

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.⁵ Section 10.500 of OWCP's regulations provides that compensation for wage loss due to disability is available only for 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 (TTD) benefits and actual earnings for the same time period.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 for TTD.⁸

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$1,078.68 for the period August 29 through September 10, 2022, for which she was without fault, as she continued to receive total disability compensation following her return to full-time modified-duty work.

Based on Dr. Myer's August 25, 2022 release to sedentary work, appellant resumed full-time modified-duty employment on August 29, 2022. OWCP, however, continued to pay her wage-loss compensation for TTD following her return to work through September 10, 2022, which resulted in an overpayment of compensation. Therefore, an overpayment of compensation was created in this case.

OWCP calculated appellant's net compensation paid for the period August 29 through September 10, 2022 as \$1,078.68. The Board finds that she received an overpayment of compensation in the amount of \$1,078.68 for the period August 29 through September 10, 2022.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA provides that an individual who is without fault in creating or accepting an overpayment is still subject to recovery of the overpayment unless adjustment or

⁴ *Id.* at § 8129(a).

⁵ *Id.* at § 8116(a).

⁶ 20 C.F.R. § 10.500(a).

⁷ *See S.S.*, Docket No. 20-0776 (issued March 15, 2021); *L.T.*, Docket No. 19-1389 (issued March 27, 2020); *K.P.*, Docket No. 19-1151 (issued March 18, 2020); *C.H.*, Docket No. 19-1470 (issued January 24, 2020); *L.S.*, 59 ECAB 350, 352-53 (2008).

⁸ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Identifying and Calculating an Overpayment*, Chapter 6.200.1(a) (September 2018); *see also S.S., id.; L.T., id.; K.P., id.; C.H., id.*

recovery would defeat the purpose of FECA or would be against equity and good conscience.⁹ Thus, a finding that appellant was without fault does not automatically result in waiver of the overpayment, OWCP must then exercise its discretion to determine whether recovery of the overpayment would defeat the purpose of FECA or would be against equity and good conscience.¹⁰

Recovery of an overpayment would defeat the purpose of FECA if such recovery would cause hardship because the beneficiary from whom OWCP seeks recovery needs substantially all of his or her current 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.¹¹ Additionally, 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 in attempting to repay the debt or when an individual, in reliance on such payment or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.¹²

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. The information is also used to determine the repayment schedule, if necessary.¹³ Failure to submit the requested information within 30 days of the request will result in a denial of waiver of recovery, and no further request for waiver shall be considered until the requested information is furnished.¹⁴

ANALYSIS -- ISSUE 2

The Board finds that this case is not in posture for decision.

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.¹⁵ Appellant had the responsibility to provide the appropriate financial information to OWCP.¹⁶ OWCP found that she had not responded to the preliminary overpayment determination dated September 30, 2022.

⁹ 5 U.S.C. § 8129(a)-(b).

¹⁰ See *D.B.*, Docket No. 21-0009 (issued June 7, 2021); *R.Q.*, Docket No. 18-0964 (issued October 8, 2019); *S.J.*, Docket No. 09-370 (issued August 18, 2009).

¹¹ 20 C.F.R. § 10.436(a)(b). For an individual with no eligible dependents the asset base is \$6,200.00. The base increases to \$10,300.00 for an individual with a spouse or one dependent, plus \$1,200.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Final Overpayment Determinations*, Chapter 6.400.4a(2) (September 2020).

¹² *Id.* at § 10.437(a)(b).

¹³ *Id.* at § 10.438(a).

¹⁴ *Id.* at § 10.438(b).

¹⁵ *Id.*; see also *supra* note 11.

¹⁶ *Id.*

However, on November 2, 2022, it did receive appellant's October 20, 2022 request for waiver of the overpayment, and the OWCP-20 form wherein she listed her monthly income, expenses, and assets. Appellant also attached supporting documentation.

In the case of *William A. Couch*,¹⁷ the Board held that when adjudicating a claim, OWCP is obligated to consider and address all evidence properly submitted by a claimant and received by OWCP before the final decision is issued. OWCP, however, did not consider and address this additional evidence in its November 3, 2022 decision. It, thus, failed to follow its procedures by not considering and addressing all of the relevant evidence of record.¹⁸

As Board decisions are final with regard to the subject matter appealed, it is crucial that OWCP consider and address all relevant evidence received prior to the issuance of its final decision.¹⁹ The Board finds that this case is not in posture for decision, as OWCP did not consider and address the above-noted evidence in its November 3, 2022 decision.²⁰ On remand, following any such other further development as deemed necessary, OWCP shall issue a *de novo* decision on the issue of waiver of recovery of the overpayment.

LEGAL PRECEDENT -- ISSUE 3

An employee seeking benefits under FECA²¹ has the burden of proof to establish the essential elements of his or her claim, including that any disability or specific condition for which compensation is claimed is causally related to the employment injury.²² Under FECA, the term disability means incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.²³ For each period of disability claimed, the employee has the burden of proof to establish that he or she was disabled from work as a result of the accepted employment injury.²⁴

Whether a particular injury causes an employee to become disabled from work and the duration of that disability, are medical issues that must be proven by a preponderance of the

¹⁷ 41 ECAB 548 (1990); *see K.B.*, Docket No. 20-1320 (issued February 8, 2021); *see also R.D.*, Docket No. 17-1818 (issued April 3, 2018).

¹⁸ OWCP's procedures provide that all evidence submitted should be reviewed and discussed in the decision. Evidence received following development that lacks probative value also should be acknowledged. Whenever possible, the evidence should be referenced by author and date. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Initial Denials*, Chapter 2.1401.5b(2) (November 2012).

¹⁹ *E.D.*, Docket No. 20-0620 (issued November 18, 2020); *see C.S.*, Docket No. 18-1760 (issued November 25, 2019); *Yvette N. Davis*, 55 ECAB 475 (2004); *see also William A. Couch*, *supra* note 17.

²⁰ *D.S.*, Docket No. 20-0589 (issued November 10, 2020); *see V.C.*, Docket No. 16-0694 (issued August 19, 2016).

²¹ *Supra* note 1.

²² *See C.B.*, Docket No. 20-0629 (issued May 26, 2021); *D.S.*, Docket No. 20-0638 (issued November 17, 2020); *F.H.*, Docket No. 18-0160 (issued August 23, 2019); *C.R.*, Docket No. 18-1805 (issued May 10, 2019); *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

²³ 20 C.F.R. § 10.5(f); *J.S.*, Docket No. 19-1035 (issued January 24, 2020).

²⁴ *T.W.*, Docket No. 19-1286 (issued January 13, 2020).

reliable, probative, and substantial medical evidence.²⁵ The medical evidence required to establish causal relationship between a claimed period of disability and an employment injury is rationalized medical opinion evidence. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the claimed disability and the specific employment factors identified by the claimant.²⁶

The Board will not require OWCP to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so, would essentially allow an employee to self-certify his or her disability and entitlement to compensation.²⁷

ANALYSIS -- ISSUE 3

The Board finds that appellant has not met her burden of proof to establish disability from work for the period September 8 through 12, 2022, causally related to her accepted October 20, 2021 employment injury.

In support of her claim for compensation, appellant submitted medical evidence from her attending physician, Dr. Myer. Dr. Myer had released her to return to sedentary work as of August 25, 2022 and she did return to work on August 29, 2022. In a September 9, 2022 certificate of injury and/or return to work, he advised that appellant was unable to return to work from September 8 through 12, 2022 due to an injury. Although Dr. Myer opined that she was disabled during the claimed period, he failed to provide a diagnosis and objective medical findings in support of her claimed disability.²⁸ He failed to explain how the October 20, 2021 employment injury was responsible for her disability, and why she was unable to perform the duties of her position during the period claimed. The Board has held that a report is of limited probative value regarding causal relationship if it does not contain medical rationale explaining how a given medical condition/period of disability has an employment-related cause.²⁹ For these reasons, Dr. Myer's disability certificate is insufficient to establish appellant's disability claim.

As was noted above, for each period of disability claimed, the employee has the burden of proof to establish that he or she was disabled from work during the claimed period due to the accepted employment injury.³⁰ Because appellant has not submitted rationalized medical opinion

²⁵ *A.S.*, Docket No. 20-0406 (issued August 18, 2021); *Amelia S. Jefferson*, 57 ECAB 183 (2005).

²⁶ *T.L.*, Docket No. 20-0978 (issued August 2, 2021); *V.A.*, Docket No. 19-1123 (issued October 29, 2019).

²⁷ *See C.T.*, Docket No. 20-0786 (issued August 20, 2021); *M.J.*, Docket No. 19-1287 (issued January 13, 2020); *William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

²⁸ *E.B.*, Docket No. 19-1390 (issued May 7, 2020); *K.D.*, Docket No. 19-0628 (issued November 5, 2019); *A.T.*, Docket No. 19-0410 (issued August 13, 2019); *see Terry R. Hedman*, 38 ECAB 222 (1986).

²⁹ *See R.H.*, Docket No. 22-0140 (issued August 12, 2022); *T.S.*, Docket No. 20-1229 (issued August 6, 2021); *S.K.*, Docket No. 19-0272 (issued July 21, 2020); *T.T.*, Docket No. 18-1054 (issued April 8, 2020); *Y.D.*, Docket No. 16-1896 (issued February 10, 2017).

³⁰ *Supra* note 28.

evidence to establish employment-related total disability during the claimed period due to her accepted conditions, the Board finds that she has not met her burden of proof to establish her claim.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$1,078.68 for the period August 29 through September 10, 2022, for which she was without fault, as she continued to receive total disability compensation following her return to full-time modified-duty work. The Board further finds that the case is not in posture for decision regarding waiver of recovery of the overpayment. Lastly, the Board finds that appellant has not met her burden of proof to establish disability from work for the period September 8 through 12, 2022, causally related to her accepted October 20, 2021 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the November 3, 2022 decision is affirmed in part and set aside in part. The case is remanded for further proceedings consistent with this decision of the Board. The November 7, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 13, 2023
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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