

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

_____)	
J.R., Appellant)	
)	Docket No. 21-0358
and)	Issued: October 6, 2023
)	
U.S. POSTAL SERVICE, GRACIE STATION, New York, NY, Employer)	
_____)	

Appearances:
James D. Muirhead, Esq., for the appellant¹
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 January 4, 2021 appellant, through counsel, filed a timely appeal from an October 20, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP).² Pursuant to the Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² The Board notes that following the October 20, 2020 decision, the Board and 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.*

³ 5 U.S.C. § 8101 *et seq.*

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$14,454.02 for the period January 8, 2009 through August 17, 2019, for which he was without fault, because he received wage-loss compensation based on an incorrect pay rate; and (2) whether it properly denied waiver of recovery of the overpayment.

FACTUAL HISTORY

This case has previously been before the Board regarding different issues.⁴ The facts and circumstances as set forth in the Board's prior decision and prior orders are incorporated herein by reference. The relevant facts are as follows.

On October 16, 2008 appellant, then a 45-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that he sustained lower back pain when an empty cart he was pushing became stuck in an uneven elevator opening, causing him to walk into the cart while in the performance of duty.⁵ OWCP accepted the claim for sprains of the neck and back. Appellant stopped his previous light-duty work of four hours a day⁶ on October 16, 2008 and did not return.⁷

On January 28, 2009 OWCP determined that appellant was totally disabled and calculated his wage-loss compensation effective October 16, 2008 based on the formula set forth in *Albert C. Shadrick*.⁸ It calculated that his annual pay rate as of October 16, 2008 was \$50,328.00 or \$967.85 per 40-hour workweek or \$483.92 per 20-hour week. OWCP determined that appellant's weekly

⁴ *Order Remanding Case*, Docket No. 12-986 (issued November 13, 2012); Docket No. 11-285 (issued September 22, 2011); *Order Vacating Prior Board Order and Reinstating Appeal*, Docket No. 11-285 (issued June 29, 2011); *Order Remanding Case*, Docket No. 11-285 (issued May 25, 2011).

⁵ OWCP assigned the present claim OWCP File No. xxxxxx056. Appellant has a previously accepted August 12, 1995 traumatic injury claim for lumbosacral sprain, laceration left ankle, and injuries to the right thigh and chin under OWCP File No. xxxxxx007. He returned to limited duty on November 14, 1995. Appellant also has a previously-accepted September 16, 1999 traumatic injury for sprain of the lumbosacral spine by a ggra vation under OWCP File No. xxxxxx215. He stopped work on the date of injury and returned to light-duty work, four hours a day, on July 19, 2000. OWCP determined appellant's loss of wage-earning capacity (LWEC) and paid him this amount by the periodic rolls beginning November 2000. By decision dated January 16, 2020, it found that he had refused a suitable work position as a modified mailhandler working eight hours a day. OWCP File Nos. xxxxxx056 and xxxxxx215 have been administratively combined by OWCP with the latter serving as the master file.

⁶ Wage-loss compensation for four hours a day was authorized under OWCP File No. xxxxxx215 based on appellant's LWEC.

⁷ On December 30, 2008 appellant filed a claim for compensation (Form CA-7) alleging total disability from work for the period beginning December 8, 2008. The employing establishment noted that he had been working four hours a day and was claiming total disability due to his inability to work four hours a day.

⁸ *Albert C. Shadrick*, 5 ECAB 376 (1953); see also 20 C.F.R. §§ 10.402 and 403; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on Actual Earnings*, Chapter 2.815.3.b(1) and 4.b (June 2013) (The method for computing the compensation payable where an injured employee has actual earnings is called the *Shadrick* formula).

compensation rate was \$370.20 and that his four-week compensation amount was \$1,480.80.⁹ It continued to pay wage-loss compensation based on these calculations.

On August 21, 2019 OWCP determined that appellant's weekly pay rate was \$483.92, as his yearly salary on the date of injury was \$50,328.00, which was divided by two as he was working 20 hours a week or \$25,164.00, and divided again by 52. It further determined that he was entitled to wage-loss compensation at the augmented 75 percent rate. OWCP reduced appellant's wage-loss compensation rate to \$1,481.30 every 28 days effective August 18, 2019.

In an overpayment calculation memorandum dated August 30, 2019, OWCP determined that appellant was working four hours a day and receiving compensation in OWCP File No. xxxxxx215, until he became totally disabled effective October 16, 2008 due to a new traumatic injury. It found that beginning January 18, 2009 he was paid incorrectly in this claim through application of the formula found in *Albert C. Shadrick*,¹⁰ when he should have been paid based on a 20-hour workweek as his full-duty position when injured on October 16, 2018 was 20 hours a week. OWCP determined that appellant received \$176,507.41 in wage-loss compensation during the period January 8, 2009 through August 17, 2019 and should have received \$162,053.39 resulting in an overpayment of \$14,454.02.

In a letter dated September 3, 2019, OWCP informed appellant that he was working four hours a day and receiving compensation for the remaining four hours a day under Master File No. xxxxxx215 when he became totally disabled, effective October 16, 2008, in the present claim, OWCP File No. xxxxxx056, due to a new traumatic injury. It noted that beginning January 18, 2009 he was entitled to wage-loss compensation based on a 20-hour workweek. OWCP reduced appellant's wage-loss compensation to \$1,481.30 every 28 days.

On September 3, 2019 OWCP issued a preliminary overpayment determination finding that an overpayment of compensation in the amount of \$14,454.02 had been created for the period January 18, 2009 through August 17, 2019 because appellant was paid based on the formula of *Shadrick*,¹¹ when he should have been paid based on his date-of-injury 20-hour workweek. It determined that he was without fault in the creation of the overpayment. OWCP requested that appellant submit a completed overpayment recovery questionnaire (Form OWCP-20) to determine a reasonable payment method, and advised him that he could request waiver of recovery of the overpayment. It further requested that he provide supporting financial documentation, including copies of income tax returns, bank account statements, bills, canceled checks, pay slips, and any other records which supported income and expenses. Additionally, OWCP provided an overpayment action request form and further notified appellant that, within 30 days of the date of the letter, he could request a final decision based on the written evidence, or a precoupment hearing.

On September 23, 2019 appellant submitted an overpayment action request form. He requested a precoupment hearing and waiver of recovery of the overpayment. Appellant asserted that repayment of the overpayment as well as the reduction of his compensation benefits would

⁹ Appellant's actual weekly earnings were \$483.92, and his weekly compensation amount was \$362.94 based on the augmented rate of 75 percent or 3/4.

¹⁰ *Supra* note 8.

¹¹ *Supra* note 8.

result in financial hardship. He completed an overpayment recovery questionnaire and provided financial information. The prerecoupment hearing was held on January 16, 2020.

By decision dated April 8, 2020, OWCP's hearing representative set aside the September 3, 2019 preliminary overpayment determination finding that OWCP failed to provide sufficient details of how the overpayment was created and calculated and therefore remanded for further development.

On April 14, 2020 OWCP issued a preliminary overpayment determination finding that an overpayment of compensation in the amount of \$14,454.02 had been created for the period January 18, 2009 through August 17, 2019 because it erred in calculating appellant's weekly pay rate. It determined that he was without fault in the creation of the overpayment. OWCP noted that it had paid appellant based on calculations of the formula found in *Shadrick*¹² rather than a pay rate based his total disability for the applicable 20-hour workweek he was working at the time of injury on October 16, 2008. It further explained that based on his weekly pay rate of \$483.92 and his 75 percent augmented compensation rate, he should have received weekly compensation in the amount of \$362.94. OWCP found that appellant's appropriate net compensation for the period January 18, 2009 through August 17, 2019 was \$162,053.39, but that he instead received \$176,507.41 resulting in an overpayment of \$14,454.02. It requested that he submit a completed Form OWCP-20 to determine a reasonable payment method, and advised him that he could request waiver of recovery of the overpayment. OWCP further requested that appellant provide supporting financial documentation, including copies of income tax returns, bank account statements, bills, canceled checks, pay slips, and any other records which supported income and expenses. Additionally, it further notified him that, within 30 days of the date of the letter, he could request a final decision based on the written evidence, or a prerecoupment hearing.

On April 27, 2020 appellant, through counsel, requested a prerecoupment hearing and disagreed with the fact and amount of the overpayment and requested waiver.

In a February 16, 2020 Form OWCP-20, appellant reported that his total monthly income was \$5,155.30 including \$3,102.30 from OWCP. He reported expenses totaling \$6,887.63.

An oral hearing took place on August 6, 2020. On August 6, 2020 OWCP provided appellant with an additional Form OWCP-20 and requested that he update his financial information. On August 20, 2020 appellant completed an update Form OWCP-20 and listed his total monthly income as \$5,156.30 and his total monthly expenses as \$6,808.21. He indicated that he had \$50.00 in cash and \$1,100.00 in his bank accounts. Appellant provided his mortgage statement, food receipts, telephone, insurance, credit card, and internet bills.

By decision dated October 20, 2020, OWCP's hearing representative finalized the overpayment determination finding that appellant had received an overpayment in the amount of \$14,454.02 for which he was without fault, for the period January 8, 2009 through August 17, 2019. She denied waiver of recovery of the overpayment because he did not provide all of the requested information regarding income, expenses, debts, and assets necessary to determine whether recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience. The hearing representative noted that appellant failed to provide his current wages based on his return to full-time employment. She further indicated that, absent complete and current documentation of his expenses and assets, the evidence was insufficient to

¹² *Supra* note 8.

establish that recovery of the overpayment would defeat the purposes of FECA or be against equity and good conscience.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) 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 his or her federal employment.¹³ Section 8129(a) provides, in pertinent part: “When an overpayment has been made to an individual under this subchapter 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 an individual is entitled.”¹⁴ Section 8116 limits the right of an employee to receive compensation. While an employee is receiving compensation, he or she may not receive salary, pay, or remuneration of any type from the United States.¹⁵

Once the proper time period is determined, section 8114(d)(1)(A) provides a specific methodology for determining pay rate:

“(d) Average annual earnings are determined as follows--

(1) If the employee worked in the employment in which he was employed at the time of his injury during substantially the whole year immediately preceding the injury and the employment was in a position for which an annual rate of pay--

(A) was fixed, the average annual earnings are the annual rate of pay.”¹⁶

OWCP’s procedures provide that, if the employee did not stop work on the date of injury or immediately afterwards, defined as the next day, the record should indicate the pay rate for the date of injury and the date disability began. The greater of the two should be used in computing compensation and if they are the same, the pay rate should be effective on the date disability began.¹⁷ In computing the weekly pay rate for an employee who receives an annual salary, including postal workers, the annual salary is divided by 52.¹⁸ The procedures further indicate that administrative inclusions should be included in computing an employee’s pay rate, including night differential, shift differential, holiday pay, and premium pay for weekend work.¹⁹

¹³ 5 U.S.C. § 8102(a).

¹⁴ *Id.* at § 8129(a).

¹⁵ *Id.* at § 8116.

¹⁶ *Id.* at § 8114(d)(1)(A).

¹⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.5a(3) (September 2011).

¹⁸ *Id.* at Chapter 2.900.10a (March 2011).

¹⁹ *Id.* at Chapter 2.900.6b (March 2011).

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$14,454.02 for the period January 8, 2009 through August 17, 2019, for which he was without fault.

OWCP paid appellant wage-loss compensation for the period January 8, 2009 through August 17, 2019 based on a weekly compensation rate of \$370.20 per week based on utilization of the formula found in *Shadrick*²⁰ and his augmented compensation rate. In its April 14, 2020 preliminary overpayment determination, it explained that it had erred by paying him compensation based on the *Shadrick* formula, when he was entitled to weekly compensation in the amount of \$362.94 per week based on his 20-hour workweek and augmented compensation rate. OWCP calculated that appellant had been paid \$176,507.41 in compensation for the period at issue, but was entitled to only \$162,053.39.²¹ It, therefore, properly determined fact of overpayment.

The Board further finds that OWCP properly calculated the amount of the overpayment. OWCP properly determined appellant's weekly pay rate by dividing his annual base pay of \$50,328.00 by 52 to reach a weekly salary of \$978.54 per 40-hour workweek or \$483.92 per 20-hour week. It then determined that 75 percent of \$483.92 was \$362.94, his weekly compensation rate. As appellant received compensation based on an incorrect pay rate, he received an overpayment of compensation for the period January 8, 2009 through August 17, 2019 in the amount of \$14,454.02.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA provides that an overpayment of compensation shall be recovered by OWCP 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.²² Section 10.438 of OWCP's regulations provides 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.²³

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied waiver of recovery of the overpayment.

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.²⁴ Appellant,

²⁰ *Supra* note 8.

²¹ *S.H.*, Docket No. 20-1585 (issued August 4, 2021).

²² 5 U.S.C. § 8129.

²³ 20 C.F.R. § 10.438; *see D.M.*, Docket No. 19-1369 (issued June 30, 2020).

²⁴ *Id.* at § 10.436.

however, had the responsibility to provide supporting financial information and documentation to OWCP.²⁵

While appellant submitted a completed Form OWCP-20 dated August 20, 2020, he failed to furnish sufficient financial documentation to support his income and expenses. He did not provide all of the requested information regarding income, expenses, debts, and assets necessary to determine whether recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience. Absent complete documentation of appellant's expenses and assets the evidence is insufficient to establish that recovery of the overpayment would defeat the purposes of FECA or be against equity and good conscience.²⁶

As appellant did not submit sufficient financial documentation to OWCP as requested, the Board finds that there is no evidence of record to establish that OWCP erred in requiring recovery of the overpayment. He has thus failed to establish that recovery of the overpayment of compensation would either defeat the purpose of FECA or be against equity and good conscience. Accordingly, the Board finds that OWCP properly denied waiver of recovery.²⁷

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$14,454.02 for the period January 8, 2009 through August 17, 2019, which he was without fault. The Board further finds that OWCP properly denied waiver of recovery of the overpayment.²⁸

²⁵ *Supra* note 22.

²⁶ *M.A.*, Docket No. 21-0403 (issued December 17, 2021); *J.W.*, Docket No. 20-0857 (issued March 24, 2021).

²⁷ *Supra* note 24.

²⁸

ORDER

IT IS HEREBY ORDERED THAT the October 20, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 6, 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