

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

D.C., Appellant)	
)	
and)	Docket No. 23-0354
)	Issued: January 12, 2024
U.S. POSTAL SERVICE, POST OFFICE,)	
Walled Lake, MI, Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On January 12, 2023 appellant filed a timely appeal from a December 5, 2022 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 \$2,243.07 for the period April 8 through June 8, 2022, for which he was without fault, because he continued to receive wage-loss compensation for

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the December 5, 2022 decision, OWCP received additional evidence. 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.*

total disability following his return to work in the private sector; (2) whether OWCP properly denied waiver of recovery of the overpayment; and (3) whether OWCP properly required recovery of the overpayment by deducting \$527.25 from appellant's continuing compensation payments every 28 days.

FACTUAL HISTORY

On August 23, 2017 appellant, then a 49-year-old city carrier assistant, filed a traumatic injury claim (Form CA-1) alleging that on August 20, 2017 he developed a massive lump on his left side, severe pain in his left groin, and sharp pain in his back when he lifted a heavy parcel from his truck while in the performance of duty. He stopped work on August 21, 2017. OWCP accepted appellant's claim for bilateral inguinal hernia without obstruction or gangrene, not specified as recurrent. OWCP paid appellant wage-loss compensation on the supplemental rolls from October 5, 2017 to March 3, 2018, and on the periodic rolls commencing March 4, 2018.

OWCP received an October 17, 2017 pay history for the period August 13, 2016 through August 4, 2017, indicating that appellant earned a total pay of \$32,105.23 which, when divided by 52 weeks, equaled \$617.41 average weekly pay.

On October 17, 2017 appellant submitted a claim for compensation (Form CA-7) for disability from work for the period October 5 through 13, 2017. On page two of the form, the employing establishment indicated that his pay on the date of injury was \$16.06 per hour at Grade 1, Step BB.

On October 23, 2017 OWCP expanded its acceptance of the claim to include unilateral inguinal hernia without obstruction or gangrene.

Beginning in April 2018, OWCP requested that he complete an enclosed financial reporting form (Form EN-1032), which solicited information about his employment, volunteer work, dependent(s) status, receipt of other federal benefits, and third-party settlements. The EN-1032 form instructed him to report all employment for which he received a salary, wages, income, sales commissions, piecework, or payment of any kind. Appellant was also instructed to report all self-employment or involvement in business enterprises, including (but not limited to) farming, sales work, operating a business, and providing services in exchange for money, goods, or other services.

Appellant submitted an undated statement relating that he had been employed as a realtor since April 6, 2018, but was not actively working. He indicated that he had sold a house to his daughter, received a split portion of the commission check from the real estate agency, and gave a portion of his commission payment to his daughter.

An undated agent commission sheet indicated that appellant earned "agent net commissions" of \$3,080.20 before a \$154.01 deduction labeled "stock comp," resulting in an agent net payment of \$2,926.19 to appellant as the buyer's agent. He attached a statement to the commission sheet explaining that he received a check for \$2,926.19 because the real estate agency took almost half of the original \$5,242.00 commission amount. Appellant advised that he gave most of his earnings to his daughter for closing costs.

OWCP also received an undated notice of buyer agency relating to a property in Roseville, MI, as well as a 2019 Form 1099-MISC indicating that in 2019 appellant received \$1,962.82 in nonemployee compensation from a real estate agency.

Appellant submitted a series of EN-1032 forms, each covering the preceding 15 months from the date of his signature. In forms signed on May 2, 2018, May 12, 2019, August 4, 2020, May 1, 2021, and June 12, 2022, he reported that he was a volunteer reserve police officer for which he received no pay. In his August 4, 2020 Form EN-1032, appellant reported that in 2019 he earned a \$1,946.00 commission as a realtor for selling one house. In his June 12, 2022 Form EN-1032, he reported that, as of June 1, 2022, he had received a \$2,900.00 commission after selling one house.

In a September 21, 2020 statement, appellant explained that he was a part-time realtor, was not currently working, and that he sold one house to his sister last year for which he received a \$1,986.00 commission.

In a May 20, 2021 letter, the employing establishment noted that a city carrier assistant at Grade 01, Step BB earned an annual salary of \$38,501.00 with an average weekly pay of \$740.40, and related that appellant's current salary effective April 10, 2021 was \$43,200.00.

The employing establishment submitted payrate data covering the prior year through April 7, 2022, including the average pay history of other employees at Grade 01, Step BB. The data indicated total earnings for all listed similar employees of \$40,391.63 for 1,991.36 hours of work, not including night or holiday differential pay.

A buyer agency contract covering a term beginning April 8, 2022 and expiring June 8, 2022 designated appellant as the agent representing the real estate agency during the listed period for the purpose of assisting the buyer, A.C., in purchasing real estate.

Appellant submitted a copy of a May 24, 2022 real estate commission check payable to a real estate agency in the amount of \$5,242.00, as well as a May 25, 2022 receipt reflecting that he had received a payment of \$2,926.19 from the real estate agency.

E-mail correspondence dated May 25, 2022 between the real estate agency and appellant noted that the transaction for the sale of the home in Roseville, MI, had been settled.

In a September 27, 2022 letter, appellant related that he had submitted documents relating to the houses he sold in 2019 and 2022, including a tax form from the 2019 transaction. He indicated that the second home was purchased by his daughter on or around June 22, 2022 and closed 30 days later. Appellant explained that he only showed his daughter that single home and submitted one offer, which was accepted, and that completing the paperwork required approximately 20 minutes of his time using software provided by his realtor company. He noted that he had complied with information requests to the best of his ability and was unable to provide complete contracts due to client confidentiality rules.

In an October 21, 2022 memorandum, OWCP noted that the employing establishment indicated that the current hourly pay rate effective April 7, 2022 for a Grade 01, Step BB employee was \$18.92 per hour.

In an October 26, 2022 memorandum, OWCP determined that appellant's weekly pay rate when injured was \$617.41 based on the October 17, 2017 pay history. It determined that the current weekly pay for his date-of-injury position was \$727.28. OWCP computed this number by dividing \$32,105.23, appellant's earnings in the year prior to his injury, by \$16.06, the hourly pay rate reported on his October 17, 2017 Form CA-7, and dividing the result by 52 weeks, which equaled 38.44 hours per week. It then multiplied \$18.92 per hour, the current pay for his position when injured, by 38.44, the average hours worked in 2017, which resulted in \$727.28. OWCP then applied the *Shadrick* formula, as provided in section 10.403(d) of OWCP's regulations,³ and calculated his actual earnings per week based on his real estate commission.

In a November 2, 2022 note, OWCP recalculated appellant's current weekly pay and noted that it had utilized April 8 through June 8, 2022 as it was the period indicated on the buyer agency contract and used an earnings amount of \$3,080.20 based on the compensation that appellant received after realtor agency fees were deducted. It found that his federal pay rate when injured was \$617.41 per week and the current weekly pay rate for the date-of-injury position was \$727.36, which it calculated by dividing his actual annual earnings of \$32,105.23 by his hourly wage on the date of injury of \$16.06 to determine the average hours worked in the year prior to the injury, which OWCP then multiplied by the current hourly wage of \$18.92 and then divided by 52 weeks, which resulted in a current weekly pay for the position of \$727.36. OWCP also found that appellant had actual earnings as a realtor of \$3,080.20 over the 62-day period of the buyer agency contract, which equaled \$347.76 per week.

In a November 2, 2022 preliminary determination, OWCP notified appellant of its finding that he received an overpayment of compensation of \$2,243.07 for the period April 8 through June 8, 2022 because he received earnings as a realtor, but continued to receive wage-loss compensation for total disability. It found that he was without fault because he timely reported his earnings. OWCP calculated that appellant received \$4,669.93 in compensation by dividing \$2,109.00 (the amount he received per 28 days on the periodic rolls) by 28, and then multiplying by 62 days, the period of overpayment. It determined that he had outside earnings of \$3,080.20 or \$347.76 per week for the period. Using the *Shadrick* formula,⁴ OWCP divided appellant's weekly earnings of \$347.76 by \$727.36, the current weekly pay for the position, to find that he had 48 percent wage-earning capacity (WEC). Applying the WEC of 48 percent to his \$617.41 weekly pay when injured equaled \$296.36. OWCP then subtracted \$296.36 from \$617.41 to find the weekly loss of WEC amount of \$321.05 which, when multiplied by three-quarters because appellant had dependents, equaled \$240.79 per week. After adjusting for inflation based on the consumer price index (CPI), it determined that he should have been compensated \$274.00 per week, or \$2,426.86 for the 62-day period. The difference between the \$2,426.86 that appellant should have earned and the \$4,669.93 that he was paid was \$2,243.07, the amount of overpayment.

OWCP advised appellant that he could request waiver of recovery of the overpayment and requested that he submit a completed overpayment recovery questionnaire (Form OWCP-20) to determine a reasonable payment method. Additionally, it 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

³ 20 C.F.R. § 10.403 codified *Albert C. Shadrick*, 5 ECAB 376 (1953).

⁴ *Id.*

prerecoupment hearing. OWCP mailed the preliminary determination to appellant's last known address of record and afforded him 30 days to respond. No response was received.

By decision dated December 5, 2022, OWCP finalized its determination that appellant had received an overpayment in the amount of \$2,243.07 for the period April 8 through June 8, 2022, for which he was without fault. It denied waiver of recovery of the overpayment as he had not provided the necessary financial information in response to the preliminary overpayment determination. OWCP determined that the overpayment should be recovered by withholding \$527.25 every 28 days from appellant's continuing compensation benefits.

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.⁵

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.⁶ 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.⁷

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.⁸

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.⁹ Earnings of a sporadic or intermittent nature which do not fairly and reasonably represent the claimant's loss of wage-earning capacity should be deducted

⁵ 5 U.S.C. § 8102(a).

⁶ *Id.* at § 8116(a); *S.H.*, Docket No. 21-0334 (issued January 27, 2023); *C.Y.*, Docket No. 18-0263 (issued September 14, 2018); *Danny E. Haley*, 56 ECAB 393 (2005).

⁷ 20 C.F.R. § 10.500.

⁸ 5 U.S.C. § 8129(a).

⁹ 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 3.

from continuing compensation payments using the *Shadrick* formula (past earnings must be declared an overpayment).¹⁰

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation for the period April 8 through June 8, 2022, for which he was without fault, as he continued to receive wage-loss compensation for total disability while earning income as a realtor.

OWCP accepted appellant's claim and paid him wage-loss compensation on the periodic rolls as of March 4, 2018. The record establishes that he earned compensation as a realtor, which he timely reported. However, appellant continued to receive wage-loss compensation for total disability for the period April 8 through June 8, 2022, resulting in an overpayment of compensation.¹¹ Therefore, fact of overpayment is established.

To determine the amount of overpayment, OWCP found that appellant's gross compensation for the period April 8 to June 8, 2022 totaled \$4,669.93. It determined that he had outside earnings of \$3,080.20 or \$347.76 per week. Using the *Shadrick*¹² formula, OWCP divided \$347.76 by \$727.36, the current weekly pay for the position, to find that appellant had 48 percent WEC. Applying the WEC of 48 percent to his \$617.41 weekly pay when injured equals \$296.36. OWCP then subtracted \$296.36 from \$617.41 to find the weekly loss of WEC amount of \$321.05 which, when multiplied by three-quarters, equals \$240.79 per week. When adjusted for inflation based on the CPI, it determined that appellant should have been compensated \$274.00 per week, or \$2,426.86 per 62 days. The difference between the \$2,426.86 that he should have received and the \$4,669.93 that he was actually paid was \$2,243.07, the amount of overpayment.

The Board has reviewed OWCP's calculations and finds that it properly determined that appellant received an overpayment of compensation in the amount of \$2,243.07 for the period April 8 to June 8, 2022, as he had earnings as a realtor and concurrently received wage-loss compensation.¹³

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of FECA states: "Adjustment or recovery [of an overpayment] by the United States may not be made when incorrect payment has been made to an individual who is

¹⁰ *J.B.*, Docket No. 20-0328 (issued January 12, 2023); *J.S.*, Docket No. 17-0260 (issued December 28, 2017); *J.W.*, Docket No. 15-1163 (issued January 13, 2016).

¹¹ *J.B.*, *id.*; *C.Y.*, *supra* note 6.

¹² *Supra* note 3.

¹³ *P.B.*, Docket No. 19-0329 (issued December 31, 2019); *C.R.*, Docket No. 17-0117 (issued April 4, 2018); *S.K.*, Docket No. 08-0961 (issued April 7, 2009); *V.G.*, Docket No. 07-0916 (issued November 15, 2007).

without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience.”¹⁴

Recovery of an overpayment will defeat the purpose of FECA when such recovery would cause hardship to a currently or formerly entitled beneficiary 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 the beneficiary’s assets do not exceed a specified amount as determined by OWCP.¹⁵ An individual is deemed to need substantially all of his or her current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.¹⁶ Also, assets must not exceed a resource base of \$6,200.00 for an individual or \$10,300.00 for an individual with a spouse or dependent plus \$1,200.00 for each additional dependent.¹⁷ An individual’s liquid assets include, but are not limited to cash, the value of stocks, bonds, saving accounts, mutual funds, and certificate of deposits.¹⁸

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.¹⁹ OWCP’s procedures provide that, to establish that a valuable right has been relinquished, an individual must demonstrate that the right was in fact valuable, that he or she was unable to get the right back, and that his or her action was based primarily or solely on reliance on the payment(s) or on the notice of payment.²⁰

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 recovery of an overpayment would defeat the purpose of FECA or be against equity and good conscience. The information is also used to

¹⁴ 5 U.S.C. § 8129(b).

¹⁵ 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. *Supra* note 9 at Chapter 6.400.4(a)(2) (September 2020).

¹⁶ *Id.* at Chapter 6.400.4.a(3); *N.J.*, Docket No. 19-1170 (issued January 10, 2020); *M.A.*, Docket No. 18-1666 (issued April 26, 2019).

¹⁷ *Id.* at Chapter 6.400.4.a(2) (September 2020).

¹⁸ *Id.* at Chapter 6.400.4.b(3).

¹⁹ *Supra* note 15 at § 10.437; *R.L.*, Docket No. 23-0110 (issued July 28, 2023); *E.H.*, Docket No. 18-1009 (issued January 29, 2019).

²⁰ *Supra* note 9 at Chapter 6.400.4c(3) (September 2018).

determine the repayment schedule, if necessary.²¹ Failure to submit the requested information within 30 days of the request shall result in denial of waiver.²²

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.²³

In its preliminary determination dated November 2, 2022, OWCP explained the importance of appellant providing the completed Form OWCP-20 overpayment recovery questionnaire and supporting financial documentation. It advised him that it would deny waiver of recovery of the overpayment if he failed to furnish the requested financial information within 30 days. Appellant, however, did not submit a completed Form OWCP-20 or submit financial information necessary to determine if recovery of the overpayment would defeat the purpose of FECA or would be against equity and good conscience. As explained above, it was his responsibility to provide a completed Form OWCP-20 with supporting financial information.²⁴

Consequently, as appellant did not submit the information required under 20 C.F.R. § 10.438, which was necessary to determine his eligibility for waiver, the Board finds that OWCP properly denied waiver of recovery of the overpayment.²⁵

LEGAL PRECEDENT -- ISSUE 3

Section 10.441 of OWCP's regulations²⁶ provides that, when an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to OWCP the amount of the overpayment as the error is discovered or his or her attention is called to the same. If no refund is made, OWCP shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual, and any other relevant factors, so as to minimize any hardship.²⁷

When an individual fails to provide requested information on income, expenses, and assets, OWCP should follow minimum collection guidelines. OWCP's procedures provide that, in these

²¹ *Supra* note 15 at § 10.438(a); *M.S.*, Docket No. 18-0740 (issued February 4, 2019).

²² *Id.* at § 10.438; *D.L.*, Docket No. 20-1522 (issued July 27, 2023).

²³ *Id.* at § 10.436.

²⁴ *See M.M.*, Docket No. 23-0129 (issued May 19, 2023); *T.F.*, Docket No. 21-1104 (issued May 1, 2023).

²⁵ *R.R.*, Docket No. 22-1055 (issued January 17, 2023); *J.A.*, Docket No. 19-1946 (issued July 13, 2020); *T.E.*, Docket No. 19-0348 (issued December 11, 2019).

²⁶ 20 C.F.R. § 10.441(a).

²⁷ *Id.*; *C.M.*, Docket No. 19-1451 (issued March 4, 2020).

instances, it should set the rate of repayment at 25 percent of the 28-day net compensation amount until the balance of the overpayment is paid in full.²⁸

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly required recovery of the overpayment by deducting \$527.25 from appellant's continuing compensation every 28 days.

OWCP provided appellant a Form OWCP-20 with its November 2, 2022 preliminary determination. It afforded him the opportunity to provide appropriate financial information and documentation to OWCP.²⁹ Appellant, however, did not complete the Form OWCP-20 or otherwise provide the necessary financial information to determine a proper recovery method. The overpaid individual is responsible for providing information about income, expenses, and assets as specified by OWCP. When an individual fails to provide requested financial information, OWCP should follow minimum collection guidelines designed to collect the debt promptly and in full.³⁰ As appellant did not submit the required financial information to OWCP as requested, the Board finds that there is no evidence of record to establish that it erred in requiring recovery of the \$2,243.07 overpayment by deducting \$527.25 from his continuing compensation payments every 28 days.³¹

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$2,243.07 for the period April 8 through June 8, 2022, for which he was without fault. The Board further finds that OWCP properly denied waiver of recovery of the overpayment and properly required recovery of the overpayment by deducting \$527.25 from his continuing compensation payments every 28 days.

²⁸ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Final Overpayment Determinations*, Chapter 6.500.8(c)(1) (September 2020); *see P.G.*, Docket No. 22-1073 (issued December 28, 2022).

²⁹ 20 C.F.R. § 10.438.

³⁰ A.S., Docket No. 19-0171 (issued June 12, 2019); *Frederick Arters*, 53 ECAB 397 (2002); *supra* note 9 at Chapter 6.400.3 (September 2018).

³¹ *P.G.*, *supra* note 28; *E.K.*, Docket No. 18-0587 (issued October 1, 2018); *S.B.*, Docket No. 16-1795 (issued March 2, 2017).

ORDER

IT IS HEREBY ORDERED THAT the December 5, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 12, 2024
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

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

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