

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

R.O., Appellant

and

**DEPARTMENT OF JUSTICE, LA TUNA
FEDERAL CORRECTIONAL INSTITUTION,
El Paso, TX, Employer**

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**Docket No. 17-0894
Issued: January 26, 2018**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 16, 2017 appellant filed a timely appeal from a September 23, 2016 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 to consider the merits of the case.

ISSUES

The issues are: (1) whether appellant received an overpayment in the amount of \$4,837.77 for the period July 28 through September 19, 2015 as she continued to receive wage-loss compensation after she returned to full-duty work; and (2) whether appellant was at fault in the creation of this overpayment such that it was not subject to waiver.

On appeal appellant contends that she notified OWCP of her return to work and that she was not at fault in the creation of the overpayment.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On November 29, 2012 appellant, then a 48-year-old unit secretary, filed a traumatic injury claim (Form CA-1) alleging that she injured her right elbow on November 29, 2012 opening the central file safe drawer. She continued to work without restrictions. On February 7, 2013 OWCP accepted appellant's claim for sprain of the right elbow, forearm, and radial collateral ligament. Appellant completed a direct deposit sign-up form on January 29, 2014. She underwent a magnetic resonance imaging (MRI) scan on February 3, 2014 which demonstrated cubital tunnel syndrome. Appellant underwent lateral epicondylar debridement and ulnar nerve decompression at the right elbow on October 3, 2014. She stopped work on October 3, 2014 and OWCP placed her on the periodic rolls on January 26, 2015 retroactive to October 3, 2014.

On July 21, 2015 appellant's physician Dr. Barry Cromer, a Board-certified orthopedic surgeon, opined that she was capable of performing her date-of-injury position.

Appellant filed a claim for compensation (Form CA-7) on September 9, 2015 requesting compensation for four hours leave without pay on September 8, 2015. She filed an additional Form CA-7 on September 10, 2015 requesting compensation for four hours of leave without pay on that date.

On September 17, 2015 appellant telephoned OWCP and stated that she had returned to full-time work on July 28, 2015 with no restrictions.

On November 5, 2015 OWCP issued a preliminary determination that appellant was overpaid in the amount of \$8,365.06 for the period October 3, 2014 through July 27, 2015 as she was paid at the augmented rate, but had no dependent;² and for the period July 28 through September 19, 2015 as she had returned to work on July 28, 2015 and continued to receive wage-loss compensation for total disability. It found that appellant was at fault in the creation of the overpayment. OWCP requested that appellant provide financial information including an overpayment recovery questionnaire (Form OWCP-20). It also provided appellant with her appeal rights and afforded her 30 days to respond.

OWCP noted that appellant received compensation for the period July 26 through September 19, 2015 in the amount of \$5,154.42 by direct deposit, as she received two deposits of \$2,577.21 each. Appellant returned to work on July 28, 2015 and received payment *via* direct deposit in the amount of \$2,577.21 on August 22, 2015 for the period July 26 to August 22, 2015 and in the amount of \$2,577.21 on September 19, 2015 for the period August 23 through September 19, 2015. OWCP noted that appellant received payment for wage-loss compensation for 56 days, but was only entitled to wage-loss compensation for two days. It divided \$2,577.21 by 28 days and determined that appellant was entitled to compensation for \$92.04 for each of the two days or \$184.08. Subtracting \$184.08 from the total payment of \$5,154.42, OWCP found that this resulted in an overpayment of \$4,970.34. It also found that appellant was entitled to an

² The issue of the appropriate rate of compensation prior to July 28, 2015 is in an interlocutory status and not before the Board in this appeal. *See* 20 C.F.R. § 501.2(c)(2)

additional eight hours of compensation for four hours of wage-loss each on September 8 and 10, 2015 or \$132.57³ and used this sum to further reduce the overpayment to \$4,837.77.

On November 10, 2015 appellant informed OWCP of her change of address.

In a letter postmarked December 5, 2015, but received by OWCP on December 10, 2015, appellant submitted financial information and requested a preresoupment hearing with OWCP's Branch of Hearings and Review on the issues of fault and waiver of the overpayment. She disagreed with fact and amount of the overpayment, and requested waiver of the overpayment. Appellant provided a completed overpayment recovery questionnaire (Form OWCP-20). She provided a benefits statement noting that she had already received a payment of \$2,577.21, from July 26 through August 22, 2015. Appellant received a similar benefit statement regarding issuance of \$2,577.21 on September 19, 2015. She provided her wage-loss compensation payment history which indicated that she received wage-loss compensation for the period July 26 through August 22, 2015 *via* direct deposit on August 22, 2015. Appellant received wage-loss compensation from August 23 through September 19, 2015 through direct deposit on September 19, 2015. She received bank statements on July 31, 2015 and August 31, 2015. Appellant submitted a copy of her most recent tax return.

On January 11, 2016 OWCP accepted the additional condition of lateral epicondylitis.

Appellant and her union representative appeared at the preresoupment hearing on July 26, 2016. OWCP's hearing representative explained how the overpayment in the amount of \$4,837.77 was calculated for the period July 26 through August 22, 2015 including the offset of wage-loss compensation owed on September 8 and 10, 2015 due to doctors' visits. Appellant testified that she received a check on July 25, 2015 which covered the period before she returned to work. She then received a deposit at the end of August and attempted to contact OWCP.

Following the preresoupment hearing, appellant's representative disagreed with the way the hearing was conducted. Appellant also provided additional financial information including her bank statement from July 12 through August 11, 2016. Appellant listed her monthly expenses in the amount of \$3,429.31 and opined that her future rent would be \$695.00.

By decision dated September 23, 2016, OWCP's hearing representative found that appellant received an overpayment when she had returned to full-duty work on July 28, 2015, but continued to receive wage-loss compensation. She also found that appellant was at fault in creating the overpayment because she returned to work and continued to receive wage-loss compensation. OWCP's hearing representative explained that appellant was aware of the August 22, 2015 overpayment as soon as she received her OWCP benefit statements and therefore was at fault such that the overpayment was not subject to waiver. The hearing representative determined, based on the financial information that appellant had provided, that repayment of \$75.00 per month was reasonable.

³ OWCP based the amount due on four hours each day on September 8 and 10, 2015. It was also based on appellant's gross, rather than net, compensation.

OWCP's hearing representative remanded the case to OWCP for further development of the augmented compensation payment as it had not addressed whether or not appellant was at fault in the creation of this overpayment.⁴

LEGAL PRECEDENT -- ISSUE 1

Section 8102 of FECA⁵ provides that the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.⁶

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 for limited circumstances.⁷ OWCP regulations provide 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.⁸ An employee is not entitled to compensation for total disability after returning to full-time work.⁹

ANALYSIS -- ISSUE 1

The Board finds that appellant has received an overpayment of compensation as she was paid total disability compensation for the period July 28 to September 19, 2015 after her return to work at the employing establishment effective July 28, 2015.¹⁰ However, the Board further finds that OWCP has not properly determined the amount of the overpayment.

OWCP determined that appellant received an overpayment of compensation in the amount of \$4,970.34 for the period July 28 through September 29, 2015. However, it offset this amount with compensation that appellant was due for four hours of wage-loss compensation on September 8 and 10, 2015 in the amount which OWCP calculated as \$132.57¹¹ which reduced

⁴ As the overpayment issues based on augmented rate compensation are currently interlocutory in nature, the Board lacks jurisdiction to review this matter. See 20 C.F.R. § 501.2(c)(2) (providing that there will be no appeal with respect to any interlocutory matter decided (or not decided) during the pendency of a case). OWCP issued a preliminary determination on this issue on December 22, 2016, but there is no final decision in the record at the time of the March 16, 2017 appeal to the Board.

⁵ 5 U.S.C. §§ 8101-8193, 8102.

⁶ *Id.*

⁷ 5 U.S.C. § 8116(a)

⁸ 20 C.F.R. § 10.500.

⁹ *B.T.*, Docket No. 13-1619 (issued February 24, 2014).

¹⁰ 5 U.S.C. § 8116(a); 20 C.F.R. § 10.500.

¹¹ OWCP based the amount due on for four hours each on September 8 and 10, 2015 on appellant's gross rather than net compensation.

the asserted overpayment amount to \$4,837.77. Although such an offset appears administratively straightforward, the Board has held that it may circumvent established legal procedures and protections if the claimant is entitled to consideration of waiver.¹² Such offsets are not allowed, as they permit an unrestricted recovery of the offset portion of the overpayment without regard to the relevant factors set forth in 20 C.F.R. § 10.441(a),¹³ which denies administrative due process with respect to the amounts offset.¹⁴

The case will, therefore, be remanded for OWCP to properly calculate the entire amount of the overpayment of compensation and to consider waiver of the entire amount of the overpayment. After conducting such further development as is deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that appellant received an overpayment of compensation from July 28 to September 19, 2015 as she received compensation for total disability after she returned to work. However, the Board finds that the case is not in posture for determining the amount of overpayment.¹⁵

¹² *Michael A. Grossman*, 51 ECAB 673, 678 (2000); *T.W.*, Docket No. 09-2039 (issued April 6, 2010).

¹³ This section states that in collecting an overpayment of compensation OWCP shall decrease later payment of compensation by 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.

¹⁴ *Diana L. Booth*, 52 ECAB 370, 373 (2001) (finding that OWCP's offset practice denied administrative due process rights with respect to the amount offset); *Michael A. Grossman*, *supra* note 12; *B.T.*, Docket No. 13-1619 (issued February 24, 2014).

¹⁵ As OWCP has not established the amount of overpayment, it is not necessary for the Board to address the issues of fault and waiver.

ORDER

IT IS HEREBY ORDERED THAT the September 23, 2016 decision of the Office of Workers' Compensation Programs is affirmed as to the fact of the overpayment. The decision is set aside as to the amount of the overpayment and remanded for further action consistent with this decision of the Board.¹⁶

Issued: January 26, 2018
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

¹⁶ Colleen Duffy Kiko, Judge, participated in the original decision, but was no longer a member of the Board effective December 11, 2017.