

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

C.I., Appellant)	
)	
and)	Docket No. 19-1614
)	Issued: January 29, 2021
U.S. POSTAL SERVICE, NORTH TEXAS)	
PROCESSING & DISTRIBUTION CENTER,)	
Coppell, TX, Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Deputy Chief Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 25, 2019 appellant filed a timely appeal from a June 10, 2019 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 appellant received an overpayment of compensation in the amount of \$12,329.15 for the period May 7 through November 14, 2015 for which she was without

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the June 10, 2019 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 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.*

fault, as she continued to receive total disability compensation following her return to work in the private sector; and (2) whether OWCP properly denied waiver of recovery of the overpayment.

FACTUAL HISTORY

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

On May 15, 2008 appellant, then a 36-year-old mail processing clerk, filed a traumatic injury claim (Form CA-1) alleging that she fell on her left knee and hand that day while in the performance of duty. OWCP initially accepted the claim for left knee and lower leg contusion, left wrist contusion, left wrist sprain, and left knee and leg sprain of unspecified sites. Later, it expanded the acceptance of the claim to include reflex sympathetic dystrophy (RSD) of the upper extremity and left chronic pain syndrome. OWCP also authorized an August 23, 2010 left wrist arthroscopy. Appellant worked intermittently and OWCP paid her wage-loss compensation on the supplemental rolls. In a letter dated October 14, 2011, OWCP notified her that she was to receive wage-loss compensation on the periodic rolls and, in order to avoid an overpayment, it advised appellant to, "Notify this office immediately when you return to work." It subsequently placed appellant on the periodic rolls, effective October 23, 2011.⁴

On March 23, 2015 OWCP received a completed Form EN1032 dated February 26, 2015. Appellant noted that she worked from January 6 to April 16, 2015, in a temporary data input job with an outside employer. On March 15, 2016 she advised OWCP that she worked for a private sector employer as a contractor from April 13, 2015 through April 15, 2016. OWCP received a completed Form EN1032 dated April 5, 2016. Appellant indicated that she had returned to work on January 6, 2015 and continued to be employed.

On December 6, 2018 OWCP identified an overpayment of compensation. In a manual adjustment form, it explained that appellant was paid compensation on the periodic rolls for temporary total disability from May 7 through November 14, 2015, but she earned wages following a return to work in the private sector on April 13, 2015. OWCP noted that appellant was entitled to compensation for loss of wage-earning capacity (LWEC), not temporary total disability from work.

³ Docket No. 15-0285 (issued August 7, 2015).

⁴ By decision dated July 28, 2014, OWCP granted appellant a schedule award for 13 percent permanent impairment of the left upper extremity. The period of the award was from July 27, 2014 to May 6, 2015. Appellant appealed the July 28, 2014 decision to the Board. Following the schedule award, OWCP resumed paying appellant wage-loss compensation for temporary total disability on the periodic rolls effective May 7, 2015. By decision dated August 7, 2015, the Board found that the schedule award claim was not in posture for decision due to a conflict in medical opinion evidence regarding the degree of appellant's permanent impairment. *See supra* note 3. Upon further development of the claim, on December 9, 2015, OWCP issued a schedule award for an additional 10 percent permanent impairment of the left upper extremity and 0 percent for the left lower extremity. The period of the increased schedule award was from November 15, 2015 to June 20, 2016.

OWCP determined that during the period from May 7 through November 14, 2015, appellant was entitled to \$7,888.71 for LWEC using the formula set forth in *Albert C. Shadrick*.⁵ It determined that appellant's actual earnings during the overpayment period were \$570.66 per week. OWCP calculated the weekly earnings amount by averaging appellant's earnings during the period. Appellant submitted pay stubs, which revealed that she had actual earnings as follows: for the period May 4 to 10, 2015, \$640.00; for the period May 11 to 17, 2015, \$640.00; for the period May 18 to 24, 2015, \$760.00; for the period May 25 to 31, 2015, \$512.00; for the period June 1 to 7, 2015, \$636.00; for the period June 8 to 14, 2015, \$385.60; for the period June 22 to 26, 2015, \$640.00; for the period June 29 to July 3, 2015, \$504.96; for the period July 6 to 10, 2015, \$640.00; for the period July 13 to 19, 2015, \$640.00; for the period July 20 to 26, 2015, \$790.00; for the period July 27 to August 2, 2015, \$584.00; for the period August 3 to 9, 2015, \$640.00; for the period August 10 to 16, 2015, \$640.00; for the period August 17 to 23, 2015, \$512.00; for the period August 24 to 30, 2015, \$621.28; for the period August 31 to September 6, 2015, \$440.00; for the period September 7 to 13, 2015, \$512.00; for the period September 14 to 20, 2015, \$640.00; for the period September 21 to 27, 2015, \$609.28; for the period September 28 to October 4, 2015, \$536.00; for the period October 5 to 11, 2015, \$640.00; for the period October 12 to 18, 2015, \$496.00; for the period October 19 to 25, 2015, \$456.00; for the period October 26 to November 1, 2015, \$650.08; for the period November 2 to 8, 2015, \$640.00; and for the period November 9 to 15, 2015, \$573.92. The sum total of wages during this 28-week period was \$15,978.52, which resulted in average actual earnings per week of \$570.66.

Pursuant to the *Shadrick* formula, OWCP determined that the current weekly pay rate for appellant's job when injured was \$934.79. Dividing appellant's current weekly earnings of \$570.66 by the current pay rate for her job when injured of \$934.79 revealed that appellant had a wage-earning capacity (WEC) of 61 percent. OWCP determined that appellant's pay rate when her disability began was \$920.00. Applying the WEC of 61 percent to her pay rate when the disability began revealed that appellant had a WEC of \$561.20, and subtracting this amount from the weekly pay rate of \$920.00 revealed that appellant had a weekly earnings loss of \$358.80. Because appellant had dependents, OWCP applied the 75 percent compensation pay rate to the weekly earnings loss of \$358.80, which resulted in a weekly compensation rate of \$269.10. This amount was adjusted to a weekly compensation amount of \$301.00 based on the consumer price index (CPI) and this weekly rate resulted in a four-week compensation amount of \$1,204.00.

In a January 17, 2019 preliminary determination, OWCP notified appellant that she was overpaid compensation benefits for the period May 7 through November 14, 2015, in the amount of \$12,329.15, after she had returned to work with a private sector employer and received total disability compensation for the same period. It explained that appellant received total disability compensation in the amount of \$20,214.86 and should have received partial wage-loss compensation in the amount of \$7,885.71, which resulted in the overpayment of \$12,329.15. OWCP further found that she was without fault in the creation of the overpayment. It advised appellant that if she disagreed with the fact or amount of the overpayment, she had the right to submit new evidence and to request a precoupment hearing before a representative of OWCP's Branch of Hearings and Review. OWCP further advised that she should submit supporting

⁵ 5 ECAB 376 (1953), codified at 20 C.F.R. § 10.403.

documentation along with a completed overpayment action request and overpayment recovery questionnaire (Form OWCP-20) within 30 days from the date of the preliminary determination.

On February 9, 2019 appellant completed the Form OWCP-20. She listed her income as \$3,200.00 per month and her expenses as approximately \$3,369.00. Appellant provided a copy of a tax return and an account history. She argued that she did not know that an incorrect payment was made to her, that she always reported her income, and that she was not at fault in the creation of the overpayment.

On June 10, 2019 OWCP finalized the preliminary determination that appellant had received an overpayment of compensation in the amount of \$12,329.15 for the period May 7 through November 14, 2015.⁶ It found that appellant was without fault in the creation of the overpayment, but denied waiver of recovery of the overpayment. OWCP required recovery of the overpayment by paying \$250.00 per month.

LEGAL PRECEDENT -- ISSUE 1

Section 8102 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 duty.⁷ Section 8129(a) of FECA 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.⁸

OWCP's regulations provide in pertinent part: "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."⁹ A claimant is not entitled to receive temporary total disability benefits and actual earnings for the same period.¹⁰ OWCP's procedures also provide that an overpayment of compensation is created when a claimant returns to work, but continues to receive wage-loss compensation.¹¹

⁶ OWCP indicated that a worksheet was provided to show its calculation of the partial wage-loss compensation for the period May 7 through November 14, 2015. However, such a worksheet is not found in the case record.

⁷ *Supra* note 1 at § 8102.

⁸ *Id.* at § 8129(a).

⁹ 20 C.F.R. § 10.500.

¹⁰ *See J.L.*, Docket No. 18-1266 (issued February 15, 2019); *K.E.*, Docket No. 18-0687 (issued October 25, 2018); *M.S.*, Docket No. 16-0289 (issued April 21, 2016); *L.S.*, 59 ECAB 350, 352-53 (2008).

¹¹ *See J.S.*, Docket No. 17-0260 (issued December 28, 2017); *B.H.*, Docket No. 09-0292 (issued September 1, 2009); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.1 (September 2018).

If the claimant is entitled to compensation for partial wage loss after returning to work, the claims examiner should compute entitlement using the *Shadrick* formula and authorize compensation on a 28-day payment cycle.¹²

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation for the period May 7 through November 14, 2015 for which she was without fault, as she continued to receive total disability compensation following her return to work in the private sector. Thus, OWCP has established fact of overpayment.

However, the Board further finds that the case is not in posture for decision with regard to the amount of the overpayment as OWCP did not explain how it calculated that appellant was entitled to partial wage-loss compensation in the amount of \$7,885.71.

The Board notes that OWCP applied the *Shadrick* formula and determined that appellant's average weekly earnings were \$570.66, the current weekly pay rate for appellant's job when injured was \$934.79 and, therefore, appellant had a WEC of 61 percent. OWCP applied the WEC of 61 percent to appellant's pay rate when her disability began of \$920.00 and determined that appellant had WEC of \$561.20, and subtracting this amount from the weekly pay rate of \$920.00, determined that appellant had a weekly earnings loss of \$358.80. Applying the 75 percent compensation pay rate to the earnings loss of \$358.80, OWCP determined a weekly LWEC compensation rate of \$269.10, which it adjusted to \$301.00 based on the CPI, and OWCP indicated that this weekly rate resulted in a four-week compensation rate of \$1,204.00. However, it did not explain how it calculated that appellant was entitled to total LWEC compensation of \$7,885.71 for the 28-week period in question, since the weekly rate of \$301.00 times 28 weeks results in total compensation of \$8,428.00, as does the four-week rate of \$1,204.00 times (28 weeks divided by 4 equals 7 four-week periods times \$1,204.00 equals \$8,428.00). Since OWCP failed to explain how it calculated that appellant was entitled to LWEC compensation of \$7,885.71, it also failed to explain how it calculated the overpayment amount of \$12,329.15. Due to an inadequate explanation as to how the overpayment was calculated, the Board is unable to adequately review this aspect of the case.

A claimant is entitled to an overpayment decision that clearly explains how the amount was calculated.¹³ OWCP's overpayment finding does not set forth an explanation as to how it calculated the overpayment, as there is a discrepancy between both the weekly compensation amount and the four-week compensation amount, as compared to the total amount of \$7,885.71 for the 28 weeks in question. Therefore, the amount of overpayment has not been established.

¹² Id. at Part 2 -- Claims, *Determining Wage-Earning Capacity Based on Actual Earnings*, Chapter 2.815.3(b) (June 2013). See *Albert C. Shadrick*, *supra* note 5; *P.B.*, Docket No. 19-0329 (issued December 31, 2019); *C.Y.*, Docket No. 18-0263 (issued September 14, 2018).

¹³ *G.H.*, Docket No. 19-0770 (issued March 5, 2020); *E.R.*, Docket No. 19-1365 (issued December 23, 2019); see *M.M.*, Docket No. 17-0560 (issued August 23, 2017); *R.H.*, Docket No. 08-2025 (issued July 20, 2009); see also *O.R.*, 59 ECAB 432 (2008).

On remand OWCP shall prepare detailed calculations setting forth how it determined the overpayment. It should then issue a new preliminary overpayment determination, along with an overpayment action request, Form OWCP-20, and instructions for appellant to provide supporting financial information. After this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.¹⁴

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation for the period May 7 through November 14, 2015 for which she was without fault, as she continued to receive total disability compensation following her return to work in the private sector. The Board further finds, however, that this case is not in posture for decision with regard to the amount of overpayment.

ORDER

IT IS HEREBY ORDERED THAT the June 10, 2019 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part. The case is remanded for further proceedings consistent with this decision of the Board.¹⁵

Issued: January 29, 2021
Washington, DC

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

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

¹⁴ In light of the Board's disposition of Issue 1, Issue 2 is rendered moot.

¹⁵ Christopher J. Godfrey, Deputy Chief Judge, who participated in the preparation of the decision, was no longer a member of the Board after January 20, 2021.