

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

J.P., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,)
OVERTON BROOKS VA MEDICAL CENTER,)
Shreveport, LA, Employer)

**Docket No. 23-0975
Issued: April 25, 2024**

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 July 7, 2023 appellant filed a timely appeal from March 29 and 31, 2023 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 OWCP properly determined that appellant received an overpayment of compensation in the amount of \$2,151.35, for which he was without fault, because he concurrently received FECA wage-loss compensation and Social Security Administration (SSA) age-related retirement benefits for the periods January 3 through March 31, 2018 and

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the March 31, 2023 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.*

August 6, 2018 through August 5, 2019, without an appropriate offset; (2) whether OWCP properly denied waiver of recovery of the overpayment; and (3) whether appellant has met his burden of proof to expand the acceptance of his claim to include an injury to the left arm, back, and/or neck, resulting in a recurrence of disability, as causally related or consequential to his accepted employment injury..

FACTUAL HISTORY

On November 3, 2017 appellant, then a 68-year-old housekeeping aide, filed an occupational disease claim (Form CA-2) alleging that he injured his right shoulder due to factors of his federal employment, including throwing trash overhead.³ He noted that he first became aware of his condition on November 22, 2016 and realized its relationship to his federal employment on January 12, 2017. OWCP accepted the claim for incomplete rotator cuff tear or rupture of right shoulder. It initially paid appellant wage-loss compensation on the supplemental rolls, effective April 10, 2017, and on the periodic rolls, effective June 24, 2018.

Appellant received treatment following his right shoulder injury from Dr. Joseph I. Hoffman, Jr., a Board-certified orthopedic surgeon. In a progress report dated May 23, 2017, Dr. Hoffman noted that appellant complained of left shoulder pain when using his right upper extremity overhead or lifting weight from his body.

On February 2, 2018 OWCP requested information from SSA regarding potential Federal Employees Retirement System (FERS)/SSA dual benefits.

OWCP thereafter received a completed FERS/SSA dual benefits form from SSA dated February 16, 2018. The form indicated that appellant received SSA age-related retirement benefits as of April 2016 and provided SSA age-related benefit rates with FERS offset. Beginning April 2016, the SSA rate with FERS was \$1,143.20 and without FERS was \$805.70. Beginning December 2016, the SSA rate with FERS was \$1,446.60 and without FERS was \$808.00. Beginning December 2017, the SSA rate with FERS was \$1,192.00 and without FERS was \$823.80. Beginning December 2018, the SSA rate with FERS was \$1,215.80 and without FERS was \$840.20.

Beginning June 24, 2018, OWCP adjusted appellant's wage-loss compensation to \$1,226.30 per 28-day pay period to include the offset of his SSA age-related retirement benefits attributable to his federal service. It advised him that the amount of the offset was \$364.15 per 28-day pay period and notified him of this change on July 5, 2018.

On August 6, 2018 appellant returned to work in a light-duty linen/uniform distribution position. OWCP paid him wage-loss compensation based on an informal loss of wage-earning capacity determination beginning August 6, 2018. It did not offset appellant's SSA age-related retirement benefits from his wage-loss compensation.

³ OWCP assigned the present case OWCP File No. xxxxxx094. The record reflects that appellant has a previous January 12, 2017 traumatic injury claim (Form CA-1) for a right shoulder injury, which OWCP denied under OWCP File No. xxxxxx652. OWCP administratively combined OWCP File Nos. xxxxxx094 and xxxxxx652, with the latter serving as the master file.

On March 15, 2019 Dr. Hoffman noted that appellant had experienced nine months of left shoulder pain, and that a magnetic resonance imaging (MRI) scan of the left shoulder had revealed mild arthritis of the acromioclavicular (AC) joint and chronic tendinitis of the supraspinatus, infraspinatus, and subscapularis tendons. In a work capacity evaluation (Form OWCP-5c) of even date, he diagnosed a right rotator cuff tear and left shoulder osteoarthritis of the AC joint.

On December 13, 2021 appellant filed a claim for compensation (Form CA-7) seeking compensation for loss of night differential, commencing August 6, 2018.

In an April 22, 2022 memorandum, OWCP updated appellant's previously established pay rate to include night shift differential. It determined that he was underpaid during the period August 6, 2018 through August 5, 2019 based upon loss of night shift differential and issued a check to him in the amount of \$1,083.17 for the pay rate adjustment.

On December 21, 2022 appellant filed a notice of recurrence (Form CA-2a) of the need for medical treatment on July 2, 2019 causally related to his accepted April 10, 2017 employment injury. He advised that both his right and left shoulders, back, and neck hurt from performing repetitive work. Appellant attributed the pain to compensating for his accepted right shoulder condition.

In a development letter dated January 6, 2023, OWCP advised appellant of the definition of a recurrence of disability and requested that he submit supporting factual and medical evidence. It afforded him 30 days to submit the requested information.

Subsequently, OWCP received an August 3, 2022 functional capacity evaluation (FCE) providing the diagnoses of chronic right shoulder pain with residual capsular stiffness and rotator cuff weakness, right shoulder impingement syndrome, and a partial thickness rotator cuff tear of the right shoulder with advanced arthrosis of the AC joint. The FCE indicated that appellant could work in a light physical demand category.

Appellant also submitted an August 17, 2022 impairment evaluation from Dr. Clinton McAlister, a Board-certified orthopedic surgeon. Dr. McAlister provided the same diagnoses set forth in the August 3, 2022 FCE and found that appellant had 12 percent permanent impairment of the right upper extremity.

In a January 17, 2023 preliminary overpayment determination, OWCP notified appellant that he had received an overpayment of compensation in the amount of \$2,151.35 because it had failed to reduce his wage-loss compensation payments for the periods January 3 through March 31, 2018 and August 6, 2018 through August 5, 2019 by the portion of his SSA age-related retirement benefits attributable to his federal service. It provided a FERS offset overpayment calculation, in which it used the information provided by SSA on February 16, 2018 to calculate the 28-day FERS offset for the relevant periods. OWCP found that from January 3 through March 31, 2018 appellant received an overpayment in the amount of \$1,068.18 and from August 6, 2018 through August 5, 2019 he received an overpayment in the amount of \$1,083.17.⁴ It further advised him

⁴ OWCP calculated a potential overpayment of \$1,420.20 for the period August 6 through November 30, 2018 and a potential overpayment of \$3,070.84 for the period December 1, 2018 through August 5, 2019. However, since the SSA offset amount was more than the actual compensation paid, OWCP determined that the overpayment amount equaled the amount paid, and calculated a total overpayment for the period August 6, 2018 through August 5, 2019 of \$1,083.17.

of its preliminary determination that he was without fault in the creation of the overpayment and requested that he complete an overpayment action request form and an overpayment recovery questionnaire (Form OWCP-20), and submit supporting financial documentation, including copies of income tax returns, bank account statements, bills, canceled checks, pay slips, and any other records to support income and expenses. Additionally, OWCP notified appellant that he could request a final decision based on the written evidence or a prerecouplement hearing within 30 days.

Appellant did not complete the Form OWCP-20 or provide further financial documentation.

By decision dated March 29, 2023, OWCP finalized its preliminary overpayment determination that appellant had received an overpayment of compensation in the amount of \$2,151.35 during the periods January 3 through March 31, 2018 and August 6, 2018 through August 5, 2019. It further found that he was without fault in the creation of the overpayment, but denied waiver of recovery of the overpayment, noting that he had not submitted a completed OWCP-20 form or provided any financial documentation. OWCP determined that appellant was required to repay the full amount of the overpayment, \$2,151.35, within 30 days.

By decision dated March 31, 2023, OWCP found that appellant had not established a recurrence of disability due to his accepted employment injury. It found that the medical evidence failed to establish a consequential injury due to his accepted right shoulder injury. OWCP advised appellant that the decision did not affect his entitlement to medical benefits for his accepted employment-related conditions.

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 his or her duty.⁵ 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.⁶

Section 10.421(d) of OWCP's implementing regulations requires that OWCP reduce the amount of compensation by the amount of any SSA age-related retirement benefits that are attributable to the employee's federal service.⁷ FECA Bulletin No. 97-09 states that FECA benefits have to be adjusted for the FERS portion of SSA benefits because the portion of the SSA benefit earned as a federal employee is part of the FERS retirement package, and the receipt of FECA benefits and federal retirement concurrently is a prohibited dual benefit.⁸

⁵ 5 U.S.C. § 8102(a).

⁶ *Id.* at § 8116.

⁷ 20 C.F.R. § 10.421(d); *see S.M.*, Docket No. 17-1802 (issued August 20, 2018); *L.J.*, 59 ECAB 264 (2007).

⁸ FECA Bulletin No. 97-09 (issued February 3, 1997); *see also N.B.*, Docket No. 18-0795 (issued January 4, 2019).

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$2,151.35, for which he was without fault, because he concurrently received FECA wage-loss compensation payments and SSA age-related retirement benefits for the periods January 3 through March 31, 2018, and August 6, 2018 through August 5, 2019, without an appropriate offset.⁹

The evidence of record indicates that, while appellant was receiving compensation for wage-loss compensation benefits under FECA, he was also receiving SSA age-related retirement benefits based upon his federal service. A claimant cannot receive both compensation for wage-loss compensation benefits under FECA and SSA age-related retirement benefits attributable to federal service for the same period.¹⁰ The information provided by SSA established that appellant received SSA age-related retirement benefits that were attributable to his federal service during the periods January 3 through March 31, 2018, and August 6, 2018 through August 5, 2019. Consequently, the fact of overpayment has been established.

To determine the amount of the overpayment, the portion of SSA's benefits that were attributable to federal service must be calculated. OWCP received documentation from SSA with respect to the specific amount of SSA age-related retirement benefits that were attributable to federal service. SSA provided its rate with FERS and without FERS for specific periods April 2016 through December 2018. OWCP provided its calculations for each relevant period based on SSA's worksheet and determined that appellant received an overpayment of compensation in the amount of \$2,151.35.

The Board has reviewed OWCP's calculation of benefits received by appellant for the periods January 3 through March 31, 2018 and August 6, 2018 through August 5, 2019, and finds that an overpayment of compensation in the amount of \$2,151.25 was created.¹¹

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 recovery would defeat the purpose of FECA or would be against equity and good conscience.¹² 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.¹³

Section 10.436 of OWCP's implementing regulations provides that recovery of an overpayment would defeat the purpose of FECA if such recovery would cause hardship because

⁹ *R.C.*, Docket No. 19-0845 (issued February 3, 2020); *A.F.*, Docket No. 19-0054 (issued June 12, 2019).

¹⁰ *Id.*

¹¹ *See R.F.*, Docket No. 20-0159 (issued October 15, 2020); *see D.C.*, Docket No. 17-0559 (issued June 21, 2018).

¹² 5 U.S.C. § 8129(a)-(b).

¹³ *D.H.*, Docket No. 19-0384 (issued August 12, 2019); *V.H.*, Docket No. 18-1124 (issued January 16, 2019); *L.S.*, 59 ECAB 350 (2008).

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.¹⁴ 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 \$50.00.¹⁵ 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.¹⁶ 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.¹⁷ Nonliquid assets include, but are not limited to, the fair market value of an owner's equity in property such as a camper, boat, second home, furnishings/supplies, vehicle(s) above the two allowed per immediate family, retirement account balances (such as Thrift Savings Plan or 401(k)), jewelry, and artwork.¹⁸

Section 10.437 of OWCP's implementing regulations provides that 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 attempting to repay the debt; and when an individual, in reliance on such payments 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

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied waiver of recovery of the overpayment of compensation.²¹

As OWCP found appellant without fault in the creation of the overpayment, waiver must be considered. As noted above, even if a claimant is found without fault in the creation of the overpayment, recovery of the overpayment is still required unless adjustment or recovery of the overpayment would defeat the purpose of FECA or would be against equity and good conscience.²²

¹⁴ 20 C.F.R. § 10.436(a)(b).

¹⁵ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Final Overpayment Determinations*, Chapter 6.400.4a(3) (September 2020).

¹⁶ *Id.* at Chapter 6.400.4a(2).

¹⁷ *Id.* at Chapter 6.400.4b(3).

¹⁸ *Id.* at Chapter 6.400.4b(3)(a), (b).

¹⁹ 20 C.F.R. § 10.437; *see E.H.*, Docket No. 18-1009 (issued January 29, 2019).

²⁰ *Supra* note 15 at Chapter 6.400.4c(3).

²¹ *A.C.*, Docket No. 18-1550 (issued February 21, 2019).

²² *Supra* note 19.

In its preliminary overpayment determination dated January 17, 2023, OWCP explained the importance of providing the completed Form OWCP-20 and financial information. It advised appellant 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 respond. The evidence of record is, therefore, insufficient to establish that recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.²³

Consequently, as appellant did not submit the information required under 20 C.F.R. § 10.438 of OWCP's regulations, which was necessary to determine his eligibility for waiver, the Board finds that OWCP properly denied waiver of recovery of the overpayment.²⁴

LEGAL PRECEDENT -- ISSUE 3

Where an employee claims that a condition not accepted or approved by OWCP was due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury.²⁵

The claimant bears the burden of proof to establish a claim for a consequential injury.²⁶ As part of this burden, he or she must present rationalized medical opinion evidence, based on a complete factual and medical background, establishing causal relationship.²⁷ The opinion of the physician must be expressed in terms of a reasonable degree of medical certainty, and must be supported by medical rationale, explaining the nature of the relationship between the diagnosed condition and appellant's employment injury.²⁸

When an injury arises in the course of employment, every natural consequence that flows from that injury likewise arises out of the employment, unless it is the result of an independent intervening cause attributable to the claimant's own intentional misconduct.⁹ The basic rule is that, a subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury.¹⁰

Causal relationship is a medical question that requires rationalized medical opinion evidence to resolve the issue.²⁹ A physician's opinion on whether there is causal relationship between the diagnosed condition and the accepted employment injury must be based on a complete factual and medical background.³⁰ Additionally, the physician's opinion must be expressed in

²³ 20 C.F.R. § 10.438.

²⁴ See *E.T.*, Docket No. 22-0234 (issued August 17, 2022); *T.E.*, Docket No. 19-0348 (issued December 11, 2019).

²⁵ *K.T.*, Docket No. 19-1718 (issued April 7, 2020); *Jaja K. Asaramo*, 55 ECAB 200, 204 (2004).

²⁶ *S.S.*, Docket No. 21-1140 (issued June 29, 2022); *V.K.*, Docket No. 19-0422 (issued June 10, 2020); *A.H.*, Docket No. 18-1632 (issued June 1, 2020); *I.S.*, Docket No. 19-1461 (issued April 30, 2020).

²⁷ *F.A.*, Docket No. 20-1652 (issued May 21, 2021); *E.M.*, Docket No. 18-1599 (issued March 7, 2019); *Victor J. Woodhams*, 41 ECAB 345 (1989).

²⁸ *M.M.*, Docket No. 20-1557 (issued November 3, 2021); *M.V.*, Docket No. 18-0884 (issued December 28, 2018).

²⁹ *E.M.*, *supra* note 27; *Robert G. Morris*, 48 ECAB 238 (1996).

³⁰ *M.V.*, *supra* note 28; *Victor J. Woodhams*, *supra* note 27.

terms of a reasonable degree of medical certainty, and must be supported by medical rationale, explaining the nature of the relationship between the diagnosed condition and appellant's employment injury.³¹

A recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition, which resulted from a previous compensable injury or illness and without an intervening injury or new exposure in the work environment.³² This term also means an inability to work because a light-duty assignment made specifically to accommodate an employee's physical limitations, and which is necessary because of a work-related injury or illness, is withdrawn or altered so that the assignment exceeds the employee's physical limitations. A recurrence does not occur when such withdrawal occurs for reasons of misconduct, nonperformance of job duties, or a reduction-in-force.³³ An employee who claims a recurrence of disability due to an accepted employment-related injury has the burden of proof to establish by the weight of the substantial, reliable, and probative evidence that the disability for which he or she claims compensation is causally related to the accepted injury.³⁴

ANALYSIS -- ISSUE 3

The Board finds that appellant has not met his burden of proof to expand the acceptance of his claim to include an injury to the left arm, back, and/or neck, resulting in a recurrence of disability, as causally related or consequential to his accepted employment injury. Appellant claimed a recurrence of a medical condition. He alleged that his left shoulder, back, and neck pain was caused by compensating for his accepted right shoulder injury. As discussed, appellant has the burden of proof to establish a claim for a consequential injury through the submission of rationalized medical evidence.³⁵

In a March 23, 2017 progress report, Dr. Hoffman noted that appellant experienced pain in his left shoulder when using his right upper extremity over his head or lifting weight away from his body. On March 15, 2019 he discussed appellant's complaints of pain in his left shoulder for nine months. Dr. Hoffman advised that a left shoulder MRI scan demonstrated mild arthritis of the AC joint and chronic tendinitis of the supraspinatus, infraspinatus, and subscapularis tendons. In a March 15, 2019 Form OWCP-5c, he diagnosed a right rotator cuff tear and left shoulder osteoarthritis of the AC joint. Dr. Hoffman, however, did not address the cause of appellant's left shoulder conditions and thus his opinion is of no probative value on the issue of causal relationship.³⁶

³¹ *Id.*

³² 20 C.F.R. § 10.5(x); *see J.D.*, Docket No. 18-1533 (issued February 27, 2019).

³³ *Id.*

³⁴ *J.D.*, Docket No. 18-0616 (issued January 11, 2019); *see C.C.*, Docket No. 18-0719 (issued November 9, 2018).

³⁵ *See R.B.*, Docket No. 19-0426 (issued June 25, 2019); *Y.F.*, Docket No. 17-1187 (issued June 5, 2018).

³⁶ *See R.B.*, Docket No. 22-0713 (issued July 26, 2022); *R.P.*, Docket No. 20-0891 (issued September 20, 2021); *V.R.*, Docket No. 19-0758 (issued March 16, 2021); *L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

Appellant also submitted the results of an FCE indicating that he could perform light work and an August 17, 2022 impairment evaluation from Dr. McAlister finding that appellant had 12 percent permanent impairment of the right upper extremity. This evidence, however, contains no opinion on the relevant issue of whether his claim should be expanded to include additional conditions or a consequential injury, and thus is of no probative value.³⁷

As appellant has not submitted rationalized medical evidence in support of his request to expand the acceptance of his claim to include a consequential injury to his left arm, back, and/or neck as causally related to the accepted employment injury, the Board finds that he has not met his burden of proof.

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 OWCP properly determined that appellant received an overpayment of compensation in the amount of \$2,151.35, for which he was without fault, because he concurrently received FECA wage-loss compensation and SSA age-related retirement benefits for the periods January 3 through March 31, 2018 and August 6, 2018 through August 5, 2019, without an appropriate offset. The Board further finds that OWCP properly denied waiver of recovery of the overpayment.³⁸ The Board also finds that appellant has not met his burden of proof to expand the acceptance of his claim to include an injury to the left arm, back, and/or neck, resulting in a recurrence of disability, as causally related or consequential to his accepted employment injury.

³⁷ See *S.D.*, Docket No. 21-0085 (issued August 9, 2021); *O.M.*, Docket No. 18-1055 (issued April 15, 2020); *J.M.*, Docket No. 18-0853 (issued March 9, 2020).

³⁸ With respect to recovery of the overpayment of compensation, the Board's jurisdiction is limited to reviewing those cases where OWCP seeks recovery from continuing compensation benefits under FECA. As appellant is no longer receiving wage-loss compensation, the Board does not have jurisdiction with respect to the recovery of the overpayment under the Debt Collection Act. See *T.C.*, Docket No. 21-0612 (issued December 2, 2021); *R.W.*, Docket No. 18-1059 (issued February 6, 2019); *Cheryl Thomas*, 55 ECAB 610 (2004).

ORDER

IT IS HEREBY ORDERED THAT the March 29 and 31, 2023 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: April 25, 2024
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