

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

J.D., Appellant)	
)	
and)	Docket No. 24-0477
)	Issued: June 28, 2024
DEPARTMENT OF DEFENSE, DEFENSE)	
LOGISTICS AGENCY, San Joaquin, CA,)	
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
JANICE B. ASKIN, Judge

JURISDICTION

On April 3, 2024 appellant filed a timely appeal from a January 31, 2024 merit decision and a March 12, 2024 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).¹ Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.³

¹ Appellant timely requested oral argument before the Board. 20 C.F.R. § 501.2(b). Pursuant to the Board's *Rules of Procedure*, oral argument may be held in the discretion of the Board. 20 C.F.R. § 501.5(a). In support of his oral argument request, appellant asserted that oral argument should be granted based on the complexities and significant discrepancies in his case. The Board in exercising its discretion, denies appellant's request for oral argument because the arguments on appeal can adequately be addressed in a decision based on a review of the case record. Oral argument in this appeal would further delay issuance of a Board decision and not serve a useful purpose. As such, the oral argument request is denied, and this decision is based on the case record as submitted to the Board.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that OWCP received additional evidence following the March 12, 2024 decision. 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.*

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$1,707.09, during the period May 12 through 21, 2022, for which he was without fault, because he continued to receive wage-loss compensation for total disability following his return to full-time work; (2) whether OWCP properly denied waiver of recovery of the overpayment; and (3) whether OWCP properly denied appellant's request for a prerecoupment hearing.

FACTUAL HISTORY

On August 18, 2021 appellant, then a 39-year-old fire protection and prevention agent, filed a traumatic injury claim (Form CA-1) alleging that on August 10, 2021, he sustained abrasions to his hands and wrists when he fell while in the performance of duty. OWCP accepted the claim for contusions of the bilateral wrists, and right wrist triquetrum fracture, displaced, malunion. OWCP paid appellant wage-loss compensation on the supplemental rolls beginning on October 11, 2021, and on the periodic compensation rolls from March 27 through May 21, 2022.

On May 12, 2022 the employing establishment reported that appellant returned to full-time modified work that day. On May 19, 2022 the employing establishment confirmed that appellant returned to full-time work on May 12, 2022.

On May 19, 2022 OWCP identified an overpayment of compensation because appellant returned to full-time work on May 12, 2022, and concurrently received temporary total disability compensation from OWCP through May 21, 2022.

On June 29, 2022 OWCP issued a preliminary overpayment determination, finding that appellant received an overpayment of compensation during the period May 12 through 21, 2022 in the amount of \$1,862.33 because he continued to receive wage-loss compensation following his May 12, 2022 return to full-time work.

On July 26, 2022 appellant requested a prerecoupment hearing before a representative of OWCP's Branch of Hearings and Review. A hearing was held on November 10, 2022.

In a January 27, 2023 decision, OWCP's hearing representative set aside and vacated the June 29, 2022 preliminary overpayment determination. The hearing representative found that OWCP had utilized an incorrect payrate as appellant's testimony established that the correct payrate was \$1,943.87 per week. OWCP was instructed, on remand, to provide appellant with a *de novo* decision utilizing the correct payrate and explaining how the overpayment was calculated.

In a May 30, 2023 preliminary overpayment determination, OWCP explained that appellant was overpaid wage-loss compensation for the period May 12 through 22, 2022, in the amount of \$1,707.09, because it continued to pay him wage-loss compensation for total disability following his May 12, 2022 return to full-time work. It noted that it paid him \$5,214.53 for the 28-day compensation period from April 24 to May 21, 2022. OWCP divided this amount by 28 days to calculate the daily rate of \$186.23 and multiplied the daily rate by the 10 days from May 12 through 21, 2022, to determine that appellant received \$1,862.33, in total disability compensation after he returned to work. However, it further explained that \$155.24 of his

compensation was paid for 5.75 hours of medical appointments during the period May 17 through 20, 2022 and subtracted this amount which resulted in an overpayment of \$1,707.09. OWCP also noted that while appellant had been paid compensation for this period at the incorrect pay rate of \$1,745.43, the amount of the overpayment was calculated on the actual amount of compensation paid. It explained that he was without fault in creating 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 and canceled checks, pay slips, and any other records that support income and expenses. Additionally, OWCP 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 prerecoupment hearing. It afforded him 30 days to respond.

On June 26, 2023 appellant requested a prerecoupment hearing before a representative of OWCP's Branch of Hearings and Review. A hearing was held on November 17, 2023. The hearing representative advised that appellant should submit a completed Form OWCP-20 along with supporting financial documentation. No response was received.

By decision dated January 31, 2024, OWCP's hearing representative finalize the May 30, 2023 preliminary overpayment decision, finding that appellant had received an overpayment of compensation in the amount of \$1,707.09 during the period May 12 through 21, 2022 and that appellant was without fault in the creation of the overpayment. The hearing representative also found that the overpayment could not be waived as appellant had not submitted the necessary financial documentation to support waiver.

On February 24, 2024 appellant again requested a prerecoupment hearing before a representative of OWCP's Branch of Hearings and Review.

By decision dated March 12, 2024, OWCP determined that appellant was not entitled to a prerecoupment hearing as a matter of right, following the January 31, 2024 final overpayment decision.

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.⁴ Section 8129(a) of FECA provides, in pertinent part, that 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.⁵ Section 8116(a) of FECA provides that, while an employee is receiving compensation or if he or she has been paid a lump sum in commutation of installment payments until the expiration of the period during which the installment payments would have continued, the employee may not receive salary, pay, or remuneration of any type from the United States, except in limited specified instances.⁶

⁴ 5 U.S.C. § 8102(a).

⁵ *Id.* at § 8129(a).

⁶ *Id.* at § 8116(a).

OWCP's procedures provide that an overpayment of compensation is created when a claimant returns to work, but continues to receive wage-loss compensation.⁷

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$1,707.09, for the period May 12 through 21, 2022, because he continued to receive temporary total disability compensation after he returned to full-time work.

The record establishes that appellant returned to full-time work at the employing establishment on May 12, 2022. OWCP, however, continued to pay him wage-loss compensation for temporary total disability through May 21, 2022. As noted, appellant was not entitled to receive total disability benefits and actual earnings for the same time period.⁸ Thus, an overpayment of compensation was created in this case.⁹

With regard to the amount of the overpayment, the Board finds that OWCP properly calculated appellant's net wage-loss compensation for the period May 12 through 21, 2022.

OWCP noted that it paid appellant \$5,214.53 for the 28-day compensation period from April 24 through May 21, 2022. It divided this amount by 28 days to calculate the daily rate of \$186.23 and multiplied the daily rate by the 10 days from May 12 through 21, 2022, to determine that appellant received \$1,862.33, in total disability compensation after he returned to work. However, OWCP further explained that \$155.24 of appellant's compensation was paid for medical appointments during the period and subtracted this amount which resulted in an overpayment of \$1,707.09.

The Board has reviewed these calculations and finds that OWCP properly determined that an overpayment of compensation in the amount of \$1,707.09 was created for the period May 12 through 21, 2022.¹⁰

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Review of the Written Record*, Chapter 6.300.4g (September 2020); *see A.N.*, Docket No. 23-0350 (issued April 8, 2024); *see also D.L.*, Docket No. 20-1522 (issued July 27, 2023); *L.T.*, Docket No. 19-1389 (issued March 27, 2020); *K.P.*, Docket No. 19-1151 (issued March 18, 2020).

⁸ *See id.* at Chapter 2.1601.6g (September 2020); 20 C.F.R. § 10.500(a); *see V.J.*, Docket No. 20-1335 (issued March 11, 2021); *D.L., id.*; *K.K.*, Docket No. 19-0978 (issued October 21, 2019); *E.V.*, Docket No. 17-1328 (issued December 11, 2017).

⁹ *See T.H.*, Docket No. 23-0194 (issued July 17, 2023); *A.C.*, Docket No. 22-0118 (issued December 15, 2022).

¹⁰ *See K.L.*, Docket No. 23-0149 (issued July 13, 2023); *T.H., id.*; *D.R.*, Docket No. 21-0234 (issued November 17, 2022).

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA provides that an overpayment must be recovered 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.”¹¹

According to 20 C.F.R. § 10.436, recovery of an overpayment would defeat the purpose of FECA if recovery would cause hardship because the beneficiary needs substantially all of his income (including compensation benefits) to meet current ordinary and necessary living expenses, and also, if the beneficiary’s assets do not exceed a specified amount as determined by OWCP from data provided by the Bureau of Labor Statistics.¹²

Section 10.437 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.¹³

Section 10.438 of 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 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.¹⁴

ANALYSIS -- ISSUE 2

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

As OWCP found appellant without fault in the creation of the \$1,707.09 overpayment for the period May 12 through 22, 2022, 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.¹⁵

In its May 30, 2023 preliminary overpayment determination, OWCP requested that appellant submit a completed Form OWCP-20 and supporting financial information. It advised

¹¹ 5 U.S.C. § 8129(a)-(b); *see D.D.*, Docket No. 20-1522 (issued July 27, 2023); *R.Q.*, Docket No. 18-0964 (issued October 8, 2019); *D.C.*, Docket No. 7-0559 (issued June 21, 2018).

¹² 20 C.F.R. § 10.436. OWCP’s procedures provide that a claimant is deemed to need substantially all of his or her current net income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. Its procedures further provide that 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. *Supra* note 8 at Chapter 6.400.4a(2) and (3) (September 2020).

¹³ 20 C.F.R. § 10.437.

¹⁴ *Id.* at § 10.438.

¹⁵ *Id.* at § 10.436.

him that waiver of recovery would be denied if he failed to furnish the requested financial information within 30 days. During the November 17, 2023 prerecoumment hearing, OWCP's hearing representative again requested that appellant submit this documentation. No response was received. The Board therefore finds that appellant has not established that recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.

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.¹⁶

LEGAL PRECEDENT -- ISSUE 3

OWCP's regulations provide that before collecting an overpayment, it must provide the claimant with written notice of the fact and amount of the overpayment, the finding of fault, the right to submit evidence challenging the fact, amount or finding of fault and the right to request waiver of the overpayment.¹⁷ The regulations further provide that a claimant may request a prerecoumment hearing with respect to an overpayment.¹⁸ However, once the overpayment decision has been finalized the only right to review of a final overpayment decision is to the Board.¹⁹ The hearing provisions of 5 U.S.C. § 8124(b) do not apply to a final overpayment decision.²⁰

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly denied appellant's February 24, 2024 request for a prerecoumment hearing.

On February 24, 2024 appellant requested a prerecoumment hearing before a representative of OWCP's Branch of Hearings and Review.

The Board finds that OWCP properly determined that appellant was not entitled to a second prerecoumment hearing as a matter of right.

OWCP's regulations and Board case law are clear that the only right to review of a final overpayment decision is an appeal to the Board.²¹ The hearing provisions of 5 U.S.C. § 8124(b) do not apply to final overpayment decisions. The Branch of Hearings and Review has no discretion to grant a hearing after an overpayment decision has been finalized.

¹⁶ See *E.T.*, Docket No. 22-0234 (issued August 17, 2022); *T.E.*, Docket No. 19-0348 (issued December 11, 2019).

¹⁷ 20 C.F.R. § 10.431.

¹⁸ *Id.* at § 10.432.

¹⁹ *Id.* at § 10.440(b).

²⁰ *Id.*; see also *G.G.*, Docket No. 12-159 (issued May 24, 2012); *R.H.*, Docket No. 11-1790 (issued April 2, 2012); *Philip G. Feland*, 48 ECAB 485 (1997).

²¹ *Id.*

Accordingly, the Board finds that OWCP properly denied appellant's request for a prerecoupment hearing, after his overpayment was finalized on January 31, 2024.

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$1,707.09 during the period May 12 through 21, 2022, for which he was without fault because he continued to receive wage-loss compensation for total disability following his return to full-time work. It finds that OWCP properly denied waiver of the overpayment. The Board also finds that OWCP properly denied appellant's February 24, 2024 request for a prerecoupment hearing.

ORDER

IT IS HEREBY ORDERED THAT the January 31 and March 12, 2024 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: June 28, 2024
Washington, DC

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

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board