

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

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**J.R., Appellant** )

**and** )

**DEPARTMENT OF THE ARMY,** )  
**DIRECTORATE OF EMERGENCY SERVICES,** )  
**PROTECTION & PREVENTION,** )  
**Fort Bragg, NC, Employer** )

\_\_\_\_\_ )

**Docket No. 20-0025  
Issued: December 13, 2021**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge

JANICE B. ASKIN, Judge

VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On October 3, 2019 appellant filed a timely appeal from a May 3, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP).<sup>1</sup> Pursuant to the Federal Employees'

<sup>1</sup> Appellant timely requested oral argument before the Board. 20 C.F.R. § 501.5(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 appellant's oral argument request, he asserted that oral argument should be granted because OWCP improperly calculated an overpayment because the findings were based on his earnings as a firefighter, which required a special calculation under its procedures. 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.

Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>3</sup>

### **ISSUES**

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$5,255.57 for the period October 19, 2018 through February 2, 2019, for which he was without fault, because he continued to receive partial disability compensation following his return to full-time work; and (2) whether it properly denied waiver of recovery of the overpayment.

### **FACTUAL HISTORY**

On July 18, 2018 appellant, then a 36-year-old firefighter, filed a traumatic injury claim (Form CA-1) alleging that on that date he injured his left shoulder attempting to pull start a boat motor while in the performance of duty. The employing establishment indicated that his pay rate when he stopped work was \$68,109.60 per year. It paid continuation of pay (COP) from July 19 through September 2, 2018. On August 6, 2018 OWCP accepted appellant's claim for left shoulder strain of the muscle, fascia, and tendon.

Appellant returned to modified duty, with modified work hours, on July 23, 2018 working eight hours a day on scheduled shifts rather than his regular work schedule of 144 hours bi-weekly, based on medical evidence dated July 19, 2018.<sup>4</sup>

On October 2, 2018 appellant completed a claim for compensation (Form CA-7) and claimed disability from September 4 through 15, 2018 due to leave without pay (LWOP) and loss of mandatory overtime. On the reverse side of the claim form the employing establishment indicated that appellant's hourly base pay was \$16.07 per hour and that he received additional pay of \$24.11 per hour. It noted that he worked three days a week and 24 hours a day.

On October 3, 2018 the employing establishment offered appellant a full-time modified-duty position as a firefighter with a salary of \$44,281.00, working 40 hours a week, not including weekends, rather than his regular work hours of 144 hours bi-weekly, this job offer was based on medical evidence dated August 30, 2018.<sup>5</sup> Appellant accepted this position on October 3, 2018.

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<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The Board notes that, following the May 3, 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.*

<sup>4</sup> These restrictions included no work with the left hand, and no driving a government vehicle.

<sup>5</sup> These restrictions found that appellant could drive, but included no hazardous duty for one month.

On October 15, 2018 appellant filed a Form CA-7 for the period September 30 through October 13, 2018 for leave buy back.

In an October 16, 2018 letter, the employing establishment asserted that appellant was claiming LWOP for the period September 4 through 15, 2018 for the weekend shifts that he was unable to perform.

In a report of work status dated October 19, 2018, the employing establishment notified OWCP that on October 3, 2018 appellant had accepted a modified-duty position.<sup>6</sup> It further advised that his work schedule was 144 hours bi-weekly, but that he was working reduced hours. The October 3, 2018 position included working eight hours a day on assigned shifts, not including weekends.

On October 26, 2018 appellant informed OWCP that he had returned to full-duty work.

In an October 29, 2018 Form CA-7, the employing establishment indicated that appellant's position required mandatory overtime, and that, while his base pay was \$44,281.00 per year, he also had additional pay of \$23,829.00 per year. It noted that he worked 144 hours bi-weekly performing 24-hour work shifts. In a separate Form CA-7 of even date, appellant claimed disability from September 16 through 29, 2018.

On November 5, 2018 OWCP calculated appellant's pay rate including his annual pay rate of \$44,281.00 and his mandatory overtime of \$23,829.00 per year to reach his weekly pay rate at the time of injury and currently of \$1,309.80.<sup>7</sup> It established his tour of duty as three 24-hour shifts, with a regular bi-weekly tour of 144 hours (six 24-hour shifts), consisting of 106 regular hours and 38 "firefighter overtime hours."<sup>8</sup> OWCP determined that appellant was actually earning \$851.56 per 40-hour week,<sup>9</sup> and that he had 65 percent wage-earning capacity with wage loss of

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<sup>6</sup> *Id.*

<sup>7</sup> Federal (FECA) Procedure Manual, Part 2-- Claims, *Determining Pay Rates*, Chapter 2.900.8.d(1) (March 2011). (Annual salary/2756 (53 hours of regular pay per week x 52 weeks) = firefighter hourly rate; firefighter hourly rate x 106 hours = bi-weekly base pay; firefighter hourly rate x 1.5 = "firefighter overtime" rate (subject to GS-10, step 1 cap as described in Chapter 2.900.7.b.(22); "firefighter overtime" rate X number of hours in regular tour in excess of 106 hours = bi-weekly "firefighter overtime"; (Bi-weekly base pay + bi-weekly "firefighter overtime") / 2 = weekly pay rate.) These provisions of the procedure manual were updated following OWCP's May 3, 2019 decision in February 2020.

<sup>8</sup> *Id.* at, Chapter 2.900.3.g.(1)(a) and (2)(a) (March 2011). Appellant is a full-time firefighter on a military installation as described in Chapter 2.900.3.g.(1)(a). His tour of duty correlates with that described in Chapter 2.900.3.g. (2)(a). These provisions of the procedure manual were updated following OWCP's decision in February 2020.

<sup>9</sup> *Id.* at Chapter 2.900.6(b) 12 and 13. As appellant, a firefighter, was required to work more than 106 hours per pay period. The Federal Firefighters Overtime Pay Reform Act of 1998 (Public Law No. 105-277) amended Title 5 of the U.S. Code to define hours worked by firefighters in excess of 106 bi-weekly, or 53 weekly, as "overtime." Public Law 106-554, which was enacted in December 2000, contained language establishing that those hours in excess of 106 bi-weekly (or 53 weekly) should not be considered "overtime" pay for the purpose of computing pay under Section 5 U.S.C. 5545 b. These changes became effective the first day of the first pay period after October 1, 1998. *Id.* at Chapter 2.900.8(d)(1).

\$458.43 per week.<sup>10</sup> Multiplying \$458.43 by  $\frac{3}{4}$ , the augmented rate, as appellant has dependents, resulted in weekly compensation of \$343.82 and wage-loss compensation every four weeks in the amount of \$1,375.25.

On November 20, 2018 OWCP authorized wage-loss compensation in the amount of \$3,339.99 for the period September 4 through November 10, 2018.<sup>11</sup> It also authorized \$1,375.29 for the period November 11 through December 12, 2018.

On November 16, 2018 appellant filed a Form CA-7 requesting leave buy back for the period October 14 through 19, 2018.

In a February 6, 2019 report of work status, the employing establishment indicated that appellant had returned to full-time regular duty with no restrictions on October 19, 2018. The employing establishment noted his work restrictions had changed and referenced medical evidence dated October 19, 2018. It provided a form report from appellant's attending physician, Dr. Neil Conti, a Board-certified orthopedic surgeon, which provided that appellant could return to work without restrictions. The employing establishment also provided an occupational health clinic return to work certificate from Dr. Michael Creel, an employing establishment physician specializing in occupational medicine, dated October 19, 2018 which found that appellant could return to work without restrictions on October 19, 2018 and indicated that he required no further medical treatment.

On February 7, 2019 OWCP calculated an overpayment of compensation in the amount of \$5,255.57 for the 107-day period from October 19, 2018 through February 2, 2019.

In a February 11, 2019 preliminary overpayment determination, OWCP notified appellant that he received an overpayment of compensation in the amount of \$5,255.57 for the period October 19, 2018 through February 2, 2019 because he returned to full-time work with no wage loss on October 19, 2018, but continued to receive compensation for partial disability for this period. It determined that he was at fault in the creation of the overpayment, because he accepted a payment that he knew or reasonably should have known to be incorrect. OWCP provided appellant with a calculation of the overpayment in the amount of \$49.12 times 107 days for the period October 19, 2018 through February 2, 2019 or \$5,255.57. It further advised him of his

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<sup>10</sup> 20 C.F.R. §§ 402 and 403 (A claimant is considered partially disabled, when he or she cannot return to the date-of-injury position, but is not totally disabled for all gainful employment, and if the claimant has actual earnings which fairly and reasonable represent his or her wage-earning capacity, those earnings will form the basis for payment of compensation for partial disability.) Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on Actual Earnings*, Chapter 2.815.3.b(1) and 4.b (June 2013)(Where residuals of the accepted work injury prohibit the employee from returning to the employment held at the time of injury, or from earning equivalent wages, but do not render him/her totally disabled for all gainful employment, the employee is considered partially disabled and is entitled to compensation for a loss of wage-earning capacity (LWEC). The method for computing the compensation payable where an injured employee has actual earnings is called the *Shadrick* formula, as it reflects the principles set forth in *Albert C. Shadrick*, 5 ECAB 376(1953)).

<sup>11</sup> This is a period of 68 days. Appellant's daily LWEC was \$49.12 resulting the payment of \$3,339.99. (OWCP variously listed appellant's daily LWEC as \$49.11 and \$49.12. It used \$49.11 when issuing the payment, and \$49.12 when calculating the overpayment.)

appeal rights and provided an overpayment action request form and an overpayment recovery questionnaire (OWCP-20). OWCP afforded 30 days for a response.

In a March 14, 2019 letter, appellant contested the amount of wage-loss compensation he received prior to his return to full-duty work. He contended that his pay was not calculated properly for wage-loss compensation purposes.<sup>12</sup> Appellant also made a payment of \$4,125.87 toward the overpayment.

On April 2, 2019 appellant completed the overpayment action request form and indicated that OWCP should make a decision based on the written evidence and further indicated that he disagreed with the amount of the overpayment and the finding of fault in the creation of the overpayment. He provided a completed Form OWCP-20 and indicated that he had \$4,125.87 of the overpayment in his possession. Appellant listed his monthly income as \$3,376.22. He indicated that he had three dependents, his wife, and two minor children. Appellant listed his monthly expenses as: mortgage, \$761.00; food, \$1,200.00; clothing, \$40.00; utilities, \$375; miscellaneous expenses, \$115.00; and a monthly credit card payment of \$310.00, for total monthly expenses of \$2,801.00. He indicated that he had a checking account balance of \$3,970.00. Appellant contended that he was not at fault in the creation of the overpayment as he advised OWCP on October, 26, 2019 that he had returned to work without restrictions.

Appellant provided an earnings and leave statement which indicated that his yearly bi-weekly gross pay was \$2,794.40 and his bi-weekly net pay was \$1,803.55.

By decision dated May 3, 2019, OWCP finalized its preliminary overpayment determination finding that appellant received an overpayment of compensation in the amount of \$5,255.57 for the period October 19, 2018 through February 2, 2019, that he had paid \$4,125.87 toward the overpayment, overturned the preliminary finding, determining that he was not at fault in the creation of the overpayment, but finding that recovery of the overpayment would not defeat the purpose of FECA or be against equity and good conscience as appellant's income of \$3,372.27 exceeded his monthly expenses of \$2,801.00 by more than \$50.00.

### **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 duty.<sup>13</sup> 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.<sup>14</sup>

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<sup>12</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.3.g (March 2011); *Compensation Claims*, Chapter 2.0901.b.1 (February 2013).

<sup>13</sup> 5 U.S.C. § 8102(a).

<sup>14</sup> *Id.* at § 8129(a).

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.<sup>15</sup> OWCP's procedures provide that an overpayment of compensation is created when a claimant returns to work, but continues to receive wage-loss compensation.<sup>16</sup>

### ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$5,255.57 for the period October 19, 2018 through February 2, 2019, for which he was without fault, because he continued to receive partial disability compensation following his return to full-duty work.

Appellant resumed full-time work on October 19, 2018.<sup>17</sup> However, OWCP continued to pay him wage-loss compensation for partial disability following his return to full-time work, which resulted in an overpayment of compensation. Appellant was not entitled to receive compensation for partial disability and actual full-time earnings for the same time period.<sup>18</sup>

OWCP determined appellant's overpayment based on its proper calculation of appellant's pay rate including his annual pay rate of \$44,281.00 and his mandatory overtime of \$23,829.00 per year to reach his weekly pay rate at the time of injury and currently of \$1,309.80. It determined that appellant was actually earning \$851.56 per 40-hour week, and that he had a 65 percent wage-earning capacity with wage loss of \$458.43 per week. Multiplying \$458.43 by  $\frac{3}{4}$ , the augmented rate, as appellant has dependents, resulted in weekly compensation of \$343.82. OWCP then determined appellant's daily compensation rate by dividing his weekly compensation rate of \$343.82 by 7 days a week to reach \$49.12 and multiplied this amount by the number of days in the period from October 19, 2018 through February 2, 2019 of 107 days to reach the overpayment

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<sup>15</sup> *Id.* at § 8116(a).

<sup>16</sup> *L.T.*, Docket No. 19-1389 (issued March 27, 2020); *K.P.*, Docket No. 19-1151 (issued March 18, 2020); *K.K.*, Docket No. 19-0978 (issued October 21, 2019); *B.H.*, Docket No. 09-0292 (issued September 1, 2009); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Determinations in an Overpayment*, Chapter 6.300.4(g) (September 2018).

<sup>17</sup> The February 6, 2019 report of work status, from employing establishment indicated that appellant had returned to full-time regular duty with no restrictions on October 19, 2018 and the accompanying October 18, 2019 medical evidence established that appellant had no restrictions as of October 19, 2018.

<sup>18</sup> *M.S.*, Docket No. 16-0289 (issued April 21, 2016); *J.R.*, Docket No. 08-1107 (issued June 15, 2009).

amount of \$5,255.84.<sup>19</sup> Thus, the Board finds that he received an overpayment of compensation in the amount of \$5,255.57 during the above-noted period.<sup>20</sup>

### **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 without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience.”<sup>21</sup>

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.<sup>22</sup> 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.<sup>23</sup> 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.<sup>24</sup> 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.<sup>25</sup>

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.<sup>26</sup> OWCP’s procedures provide that, to establish that a valuable right has been relinquished,

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<sup>19</sup> While appellant disagreed that his wage-loss compensation was paid at the correct rate, he did not dispute that he received wage-loss compensation for partial disability in the amount of \$5,255.57 during the period in question. Instead he argued that he should have received more wage-loss compensation prior to his return to full-duty work on October 19, 2018.

<sup>20</sup> *R.Q.*, Docket No. 18-0964 (issued October 8, 2019).

<sup>21</sup> 5 U.S.C. § 8129(b).

<sup>22</sup> 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. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Final Overpayment Determinations*, Chapter 6.400.4a(2) (September 2018).

<sup>23</sup> *Id.* at Chapter 6.400.4a(3); *N.J.*, Docket No. 19-1170 (issued January 10, 2020); *M.A.*, Docket No. 18-1666 (issued April 26, 2019).

<sup>24</sup> *Id.* at Chapter 6.400.4a(2) (September 2018).

<sup>25</sup> *Id.* at Chapter 6.400.4b(3).

<sup>26</sup> *Id.* at § 10.437; *E.H.*, Docket No. 18-1009 (issued January 29, 2019).

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.<sup>27</sup>

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. The information is also used to determine the repayment schedule, if necessary.<sup>28</sup>

### **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.<sup>29</sup>

The Board finds that OWCP properly determined that appellant did not require substantially all of his income to meet ordinary living expenses. OWCP found that, after its review of the financial documents of record, he had total current monthly income of \$3,372.27 and total monthly expenses of \$2,801.00. As appellant's monthly income exceeds his ordinary and necessary living expenses by more than \$50.00, the Board finds that he did not need substantially all of his income for ordinary and necessary living expenses.<sup>30</sup>

Additionally, the evidence of record did not demonstrate that recovery of the overpayment would be against equity and good conscience because appellant has not shown that he would experience severe financial hardship in attempting to repay the debt or that he relinquished a valuable right or changed his position for the worse in reliance on the payment which created the overpayment. Therefore, the Board finds that OWCP properly denied waiver of recovery with regard to the \$5,255.57 overpayment.<sup>31</sup>

### **CONCLUSION**

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$5,255.57 for the period October 19, 2018 through February 2, 2019 for which he was without fault, because he continued to receive partial disability

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<sup>27</sup> *Id.* at Chapter 6.400.4c(3) (September 2018).

<sup>28</sup> *Supra* note 13 at § 10.438(a); *M.S.*, Docket No. 18-0740 (issued February 4, 2019).

<sup>29</sup> *Supra* note 13 at § 10.436.

<sup>30</sup> *M.C.*, Docket No. 19-0699 (issued February 12, 2020).

<sup>31</sup> *Id.*



compensation following his return to full-duty work. The Board further finds that OWCP properly denied waiver of recovery of the overpayment.

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 3, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 13, 2021  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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