



## **FACTUAL HISTORY**

On November 23, 1994 appellant, then a 25-year-old student, filed a traumatic injury claim alleging injury to his right knee when he stepped into a hole while running to his trade. On January 14, 1995 the Office accepted his claim for a right knee meniscus tear. Appellant underwent surgery for a right knee partial lateral meniscectomy and one-third patellar tendon anterior cruciate ligament reconstruction on February 14, 1995.<sup>1</sup>

In a January 26, 2005 letter, the Office notified appellant of its proposal to reduce his wage-loss compensation as he had the capacity to perform the duties of an assembler of small products and earn wages of \$300.80 a week. The letter was sent to his address of record.

In a March 23, 2005 decision, the Office reduced appellant's compensation to reflect his 87 percent wage-earning capacity in the constructed position. The decision was sent to appellant's address of record.

In a July 19, 2007 letter, appellant advised the Office that he had been released from incarceration and sought a medical appointment with his attending physician. He noted that he sought to have his compensation reinstated. Appellant also notified the Office of a new home address.

On August 1, 2008 the Office notified appellant of its preliminary determination of an overpayment in compensation of \$10,409.57. It advised that it had reinstated wage-loss compensation for total disability rather than under the 2005 wage-earning capacity determination. From September 30, 2007 to July 5, 2008, appellant received benefits in the amount of \$11,612.25 but was entitled to only \$1,202.68, the difference representing an overpayment. The Office found that appellant was at fault in the creation of the overpayment because he knew or should have known that the compensation he received was at an incorrect rate for total disability. Appellant was advised of the procedures for contesting the preliminary determination and requested to submit updated financial information. The notice was sent to appellant's new address of record. Appellant did not respond.

In a September 5, 2008 decision, the Office finalized the overpayment determination in the amount of \$10,409.57. Appellant was found at fault in the creation of the overpayment and advised that it would be recovered by deductions of \$123.00 from his continuing periodic roll payments. The decision was sent to appellant's address of record.

## **LEGAL PRECEDENT -- ISSUE 1**

The Federal Employees' Compensation Act 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>2</sup> If disability is total, the United States will pay the employee

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<sup>1</sup> The record reflects that appellant was referred for vocational rehabilitation services in 1995, 2002 and 2003 following periods of incarceration. The evidence does not reflect that he filed any claim for a schedule award.

<sup>2</sup> 5 U.S.C. § 8102(a).

during the disability monthly compensation equal to 66 2/3 percent of his monthly pay.<sup>3</sup> If the disability is partial, the United States will pay the employee during the disability monthly monetary compensation equal to 66 2/3 percent of the difference between his monthly pay and his wage-earning capacity.<sup>4</sup>

Section 8129 provides that when an overpayment has been made to an individual 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 the individual is entitled.<sup>5</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that appellant received an overpayment in the amount of \$10,409.57.

In a March 25, 2005 decision, the Office found that appellant had an 87 percent wage-earning capacity based on his ability to perform the duties of a small parts assembler. It reduced his wage-loss benefits from total disability to partial disability effective that day and advised appellant of his new compensation rate of \$170.00 each four weeks. The record reflects that appellant was incarcerated and his compensation benefits were suspended. Upon his release, he requested on July 19, 2007 that the Office reinstate his benefits and advised it of a new home address. The Office restored appellant's wage-loss benefits but at the rate of total disability and not under the wage-earning capacity for partial disability as found in 2005. From September 30, 2007 through July 5, 2008, appellant received monetary compensation in the amount of \$11,612.25; however, he should have received only \$1,202.68. The difference resulted in an overpayment in the amount of \$10,409.57. The Board will affirm the fact and amount of overpayment in this case.

### **LEGAL PRECEDENT -- ISSUE 2**

Under section 8129 of the Act and the implementing regulations, 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 the Act or would be against equity and good conscience.<sup>6</sup> Section 10.433 of the implementing regulations specifically provide that the Office may consider waiving an overpayment if the individual to whom it was made was not at fault in accepting or creating the overpayment.<sup>7</sup> The regulations further provide that each recipient of compensation benefits is responsible to ensure that payments he or she receives from the Office are proper.<sup>8</sup> An individual is with fault in the creation of the overpayment who:

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<sup>3</sup> *Id.* at § 8105(a).

<sup>4</sup> *Id.* at § 8106(a).

<sup>5</sup> *Id.* at § 8129(a).

<sup>6</sup> 5 U.S.C. § 8129(b); 20 C.F.R. §§ 10.433, 10.434, 10.436, 10.437.

<sup>7</sup> 20 C.F.R. § 10.433(a).

<sup>8</sup> *Id.*

(1) made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or (2) failed to provide information which he or she knew or should have known to be material; or (3) accepted a payment which he or she knew or should have known to be incorrect.<sup>9</sup> Whether or not the Office determines that an individual was at fault with respect to the creation of an overpayment depends on the factual circumstances surrounding the claim.<sup>10</sup>

### ANALYSIS -- ISSUE 2

The Board finds that the Office properly determined that appellant was not without fault in the creation of the overpayment. The Office found that appellant was at fault in the creation of the overpayment as he accepted payments that he knew or should have known to be incorrect.

On appeal, appellant contends that he never received notice of the Office's wage-earning capacity determination as he had been incarcerated and no longer lived at his former residence. The Board notes that the Office sent the March 23, 2005 wage-earning capacity decision to appellant's address of record at that time. It is well established that, in the absence of evidence to the contrary, a letter properly addressed and mailed in the ordinary course of business is presumed to have been received by that person in due course.<sup>11</sup> Appellant contends that the presumption of receipt should be rebutted by the fact that he had been incarcerated; but the mailbox rule presumes his receipt of the wage-earning capacity determination at his mailing address of record absent any evidence that he timely notified the Office of his incarceration or a change of address.<sup>12</sup> Appellant, as a recipient of compensation, has the general responsibility to timely notify the Office of such conditions as may affect his receipt of benefits.<sup>13</sup> The Office did not abuse its discretion in finding that appellant received notice of the reduction in his wage-loss benefits in 2005 and was no longer entitled to compensation at the rate for total disability.

Upon his release from incarceration, appellant requested on July 19, 2007 that his benefits be restored and advised of a new home address. When it reinstated compensation, wage-loss benefits were paid at the rate for total disability and not under the rate established by the 2005 wage-earning capacity determination. The evidence of record establishes that appellant received benefits in the amount of \$11,612.25 from September 30, 2007 to July 5, 2008, when the Office notified appellant of the error in his payments. It is well established that the fact that the Office may have been negligent in issuing compensation payments for total disability does not excuse a recipient's acceptance of such payments if he knew or should have known they

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<sup>9</sup> *Id.* at § 10.433(a).

<sup>10</sup> *Id.* at § 10.433(b).

<sup>11</sup> See *Jeffrey M. Sagrecy*, 55 ECAB 724, 2004); *James A. Gray*, 54 ECAB 277 (2002).

<sup>12</sup> On appeal, appellant noted that he was incarcerated from September 1, 2004 to July 18, 2007; however, there is no evidence of record that he advised the Office of this fact at any time prior to the wage-earning capacity determination.

<sup>13</sup> See *Larry D. Strickland*, 48 ECAB 669 (1997) (the employee failed to timely notify the Office of his divorce) and *Madge H. Gurr*, 39 ECAB 1124 (1988) (the employee failed to timely notify the Office as to the change of status of a claimed dependent).

were incorrect.<sup>14</sup> The Office found that appellant had an 87 percent wage-earning capacity and should have only received wage-loss benefits in the amount of \$1,202.68 during that period. The difference resulted in an overpayment in the amount of \$10,409.57. As appellant was on notice of the prior reduction in his wage-loss benefits, the evidence of record establishes that he accepted payments that he knew or should have known to be incorrect. Appellant was informed of the reduction in his benefits based on his partial disability and should have known that he was not entitled to wage loss paid at the rate for total disability. As he is not without fault in the creation of the overpayment, appellant is not eligible for waiver of the overpayment.<sup>15</sup>

### **LEGAL PRECEDENT -- ISSUE 3**

The amount of adjustment of continuing compensation to recover an overpayment lies within the Office's discretion. The analysis that determines the amount of adjustment is substantially the same as that used to determine waiver.<sup>16</sup> Section 10.441(a) of the regulations provide:

“When an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to [the Office] the amount of the overpayment as soon as the error is discovered or his or her attention is called to same. If no refund is made, [the Office] shall decrease later payments of compensation, 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.”<sup>17</sup>

### **ANALYSIS -- ISSUE 3**

The evidence establishes that the Office sent the August 1, 2008 preliminary overpayment notice to the address of record appellant provided on July 19, 2007.<sup>18</sup> He was advised that he could request a prerecoupment hearing or have the Office further consider the questions of fault and waiver provided he made a request in 30 days. Failure to provide a reply would result in a final decision based on the evidence of record. As discussed, under the mailbox rule, appellant is presumed to have received the Office's preliminary overpayment notice. He failed to respond within the allotted time.

When a claimant is being paid compensation on the periodic rolls and does not respond to the preliminary notice of overpayment, a final decision should be issued without conducting a

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<sup>14</sup> See *Judith A. Cariddo*, 55 ECAB 348 (2004); *Diana L. Booth*, 52 ECAB 370 (2001).

<sup>15</sup> No waiver of an overpayment is possible if the claimant is at fault in creating the overpayment. *L.J.*, 59 ECAB \_\_\_ (Docket No. 07-1844, issued December 11, 2007).

<sup>16</sup> *Howard R. Nahikian*, 53 ECAB 406 (2002).

<sup>17</sup> 20 C.F.R. § 10.441(a).

<sup>18</sup> On appeal, appellant stated that he was incarcerated again on June 4, 2008 for violation of his parole until June 4, 2009.

conference and the debt recovered from such benefits as quickly as possible.<sup>19</sup> Appellant did not respond to the preliminary overpayment determination or provide any information concerning his financial circumstances. The Board finds that the Office did not abuse its discretion in following its regulations and directing recovery of \$123.00 every four weeks from his continuing compensation.

**CONCLUSION**

The Board finds that appellant received an overpayment in the amount of \$10,409.57 for which he was at fault in its creation. The Board also finds that the Office properly directed that the overpayment be recovered by deducting \$123.00 from his continuing compensation payments.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated September 5, 2008 is affirmed.

Issued: June 11, 2010  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>19</sup> See Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.4(c)(2) (October 2004).