

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

Appellant, a 62-year-old rural carrier, injured his right shoulder on January 9, 2010 when he slipped and fell on a patch of ice. He filed a claim for benefits, which OWCP accepted for right rotator cuff. In its February 19, 2010 letter accepting the claim, OWCP advised appellant:

“You are expected to return to work (including light duty or part-time work, if available) as soon as you are able. Once you return to work, or obtain new employment, notify this office immediately. Full compensation is payable only while you are unable to perform the duties of your regular job because of your accepted employment-related condition. If you receive a compensation check which includes payment for a period you have worked, *return it to us immediately to prevent an overpayment of compensation.*” (Emphasis added.)

OWCP paid appellant wage-loss compensation for total disability and placed him on the periodic rolls. Appellant returned to full duty without restrictions with the employing establishment on February 3, 2011. OWCP continued to pay temporary total disability compensation. It issued appellant a check for \$1,036.00, for the period January 16 to February 12, 2011.²

By letter dated March 9, 2011, OWCP made a preliminary determination that an overpayment of compensation arose in the amount of \$1,406.00, from February 3 to 12, 2011. It found that appellant was at fault in creating the overpayment because he knew or should have known that he was not entitled to receive compensation payments after he returned to work. OWCP informed him that if he disagreed with the decision he could, within 30 days, submit evidence or argument to it, or request a prerecoumpment hearing with the Branch of Hearings and Review. The record contains its overpayment worksheet stating that appellant had been overpaid \$1,406.00. The worksheet did not indicate how OWCP calculated the amount of overpayment.

Appellant completed and submitted the overpayment questionnaire to OWCP. He stated that he had informed OWCP during the second week of January that he would shortly be returning to work. Appellant acknowledged that he had received and cashed a check in the amount of \$1,036.00. Accompanying the form was a copy of a benefit statement, mailed to him by OWCP, which indicated that it had sent him a check for \$1,036.00 covering the period January 16 to February 12, 2011. Appellant also submitted a copy of a cancelled check from it which covered the period February 13 to March 14, 2009.

In a decision dated April 12, 2011, OWCP finalized the preliminary determination regarding the overpayment of \$1,406.00. It found that appellant was at fault in the creation of the overpayment because he accepted a payment which he knew or reasonably should have known was incorrect. OWCP stated that he should have been aware he was not entitled to receive compensation checks after he returned to work on February 3, 2011.

² OWCP issued another check for \$1,036.00 covering the period February 13 to March 12, 2011. Appellant's records indicate that this check was cancelled, a copy of which was received by OWCP on April 11, 2011.

LEGAL PRECEDENT -- ISSUE 1

Compensation for total disability under FECA is payable when the employee starts to lose pay.³ Compensation for wage loss due to disability is available only for any periods during which an employee's work-related medical condition prevents him from earning the wages earned before the work-related injury.⁴

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation for the period February 3 through 12, 2011. The record establishes that appellant received an overpayment during the period in question because he received a check for temporary total disability compensation after returning to full-time work on February 3, 2011. The Board notes, however, that OWCP incorrectly calculated the amount of overpayment. While OWCP found an overpayment in the amount of \$1,406.00, it provided no payroll records or computations as to how it arrived at this amount. The record shows that appellant received a check in the amount of \$1,036.00 for the period January 16 to February 12, 2011, which he subsequently cashed. The Board finds that appellant received an overpayment of compensation covering nine days of the pay period, from February 3 to 12, 2011. The amount of the overpayment for the period February 3 through 12, 2011 however cannot be greater than the amount of compensation that appellant received for the whole period January 16 to February 12, 2011. On remand of the case, OWCP shall recalculate the amount of overpayment for the period February 3 to 12, 2011.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA⁵ 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." No waiver of an overpayment is possible if the claimant is not "without fault" in helping to create the overpayment.⁶

In determining whether an individual is with fault, section 10.433(a) of OWCP's regulations provide in relevant part:

"A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment:

(1) Made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or

³ 20 C.F.R. § 10.401(a) (2003).

⁴ *Id.* at § 500(a) (2003).

⁵ 5 U.S.C. § 8129(a)(b).

⁶ *Bonnye Mathews*, 45 ECAB 657 (1994).

(2) Failed to provide information which the individual 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.”⁷

ANALYSIS -- ISSUE 2

OWCP applied the third standard in determining that appellant was at fault in creating the overpayment.

Even if the overpayment resulted from negligence on the part of OWCP, this does not excuse the employee from accepting payment which he knew or should have known he was not entitled.⁸ Appellant was informed by OWCP on February 19, 2010 that he was to immediately report to it to return to work and return any compensation received after a return to work or otherwise an overpayment of compensation would be created. He returned to full-time work on February 3, 2011, accepted and cashed a compensation check for disability from January 16 to February 12, 2011. OWCP’s regulations provide that each compensation check includes a clear indication of the period for which payment is made.⁹

The Board finds that OWCP properly found that appellant was at fault in the creation of the overpayment covering the period February 3 to 12, 2011. The Board finds that the overpayment cannot be waived.

The April 12, 2011 decision is set aside and remanded for recalculation of the amount of overpayment, which includes nine days during the January 16 to February 12, 2011 pay period. As appellant was at fault under the third standard outlined above, recovery of the overpayment cannot be considered for waiver. Accordingly, the April 12, 2011 OWCP decision is affirmed in part and remanded in part.

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation for the period February 3 to 12, 2011. The Board finds that it properly found he was at fault for the overpayment. The case is remanded to OWCP for recalculation of the amount of overpayment, consistent with this decision.

⁷ 20 C.F.R. §10.433(a).

⁸ See *Russell E. Wageneck*, 46 ECAB 653 (1995).

⁹ 20 C.F.R. §10.430(a).

ORDER

IT IS HEREBY ORDERED THAT the April 12, 2011 decision of the Office of Workers' Compensation Programs is affirmed in part and remanded in part.

Issued: November 25, 2011
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board