



shoulder surgeries in 1977 and 1985. The Office paid appellant appropriate compensation for periods of disability.

On February 17, 2007 the Office issued appellant a disability compensation check in the amount of \$2,568.20, which covered the period January 21 to February 17, 2007. The record contains a photocopy of the front and back of the check which shows that the period covered by the check was printed on the front of the check and that appellant endorsed and cashed the check.

On February 23, 2007 appellant had contacted the Office and indicated that he had not received a compensation check for the compensation period ending February 17, 2007. He was advised on February 26, 2007 to notify the Office of this circumstance in writing so that the check could be cancelled and reissued. On the same day, appellant faxed a letter which indicated that he had in fact since received his check for February 2007.<sup>1</sup> An Office claim examiner told appellant that he could cash that check.<sup>2</sup> On May 4, 2007 the Office apparently believing appellant had not cashed the February 17, 2007 check, issued him another disability compensation check in the amount of \$2,568.20, which covered the period January 21 to February 17, 2007. The record contains a photocopy of the front and back of the check which shows that the period covered by the check was printed on the front of the check and that appellant endorsed and cashed the check.

In a May 27, 2008 letter, the Office advised appellant that it had made a preliminary determination that he received a \$2,568.20 overpayment of compensation because he received and cashed two checks (dated February 17 and May 4, 2007) covering the same period of compensation, January 21 to February 17, 2007. It also made a preliminary determination that appellant was at fault in the creation of the overpayment because he knew or should have known that he could not accept two checks for the same period of compensation. The Office noted that the periods covered by the checks were printed on the front of both checks. It provided appellant with an opportunity to present evidence and argument to contest the overpayment and request waiver of the overpayment. The Office directed him to complete and return a financial information questionnaire even if he was not contesting the overpayment.

In a financial information questionnaire completed on June 24, 2008, appellant indicated that he had \$3,862.00 in monthly income, \$2,276.00 in monthly expenses and \$700.00 in assets. On the form, he asserted that he did not recall receiving two compensation checks for the same period.

Appellant requested a hearing with an Office hearing representative regarding the proposed overpayment determinations. At the December 10, 2008 hearing, he stated that he recalled receiving the February 2007 check shortly after he reported it missing and being told by an Office claims examiner that he could cash the check and that the replacement would be cancelled. When asked to state why he cashed the replacement check, appellant stated that he

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<sup>1</sup> This acknowledgment was written in a postscript. Appellant indicated in the body of the letter that he had not received his compensation check for the period "Jan[uary] 20 to Feb[ruary] 17, 2007."

<sup>2</sup> Even though the Office indicated that it had cancelled the February 17, 2007 check, appellant was nevertheless able to cash it at his bank.

could not recall receiving it and was unaware that he had received two checks for the same period. He indicated that all subsequent checks were received on time.

In a January 29, 2009 decision, the Office hearing representative determined that appellant received a \$2,568.20 overpayment of compensation and that he was at fault in creating the overpayment, thereby precluding waiver of recovery of the overpayment. He indicated that appellant should have known that he could not cash two compensation checks covering the same period, particularly since both checks clearly displayed the period covered by the checks. The Office noted that the financial information submitted by appellant showed that his monthly income exceeded his monthly expenses by \$1,586.00 and determined that the overpayment would be recovered by deducting \$500.00 from his compensation payments every 28 days.

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

Section 8102(a) of the Federal Employees' Compensation Act<sup>3</sup> 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 duty.<sup>4</sup> Section 8129(a) of the Act provides, in pertinent part, "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>5</sup> Section 8116(a) of the Act provides that, while an employee is receiving compensation or if he 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>6</sup>

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

On February 17, 2007 the Office issued appellant a disability compensation check in the amount of \$2,568.20, which covered the period January 21 to February 17, 2007. The record is undisputed that he endorsed and cashed the check. This compensation check represented the entire amount of compensation to which appellant was entitled to for the period January 21 to February 17, 2007. On May 4, 2007 the Office issued appellant another disability compensation check in the amount of \$2,568.20, which covered the period January 21 to February 17, 2007. The record also is unrefuted that appellant endorsed and cashed the second check. Appellant would not be entitled to receive a double recovery of compensation for a given period. Therefore, he received an overpayment of compensation in the amount of \$2,568.20 for the period January 21 to February 17, 2007.

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<sup>3</sup> 5 U.S.C. §§ 8101-8193.

<sup>4</sup> *Id.* at § 8102(a).

<sup>5</sup> *Id.* at § 8129(a).

<sup>6</sup> *Id.* at § 8116(a).

## LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of the Act provides that where an overpayment of compensation has been made “because of an error of fact or law,” adjustment shall be made by decreasing later payments to which an individual is entitled.<sup>7</sup> The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): “Adjustment or recovery 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>8</sup> No waiver of payment is possible if the claimant is not “without fault” in helping to create the overpayment.<sup>9</sup>

In determining whether an individual is not “without fault” or alternatively, “with fault,” section 10.433(a) of Title 20 of the Code of Federal Regulations provides in relevant part:

“An individual is with fault in the creation of an overpayment who --

- (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>10</sup>

Section 10.433(c) of the Office’s regulations provide:

“Whether or not [the Office] determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual’s capacity to realize that he or she is being overpaid.”<sup>11</sup>

## ANALYSIS -- ISSUE 2

The Board finds that appellant was at fault in the creation of the \$2,568.20 overpayment because he knew or should have known that he could not accept two checks covering the same period of entitlement to compensation. The February 17 and May 4, 2007 checks were made out in the same amount and each check clearly indicated on its front that it covered the period

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<sup>7</sup> *Id.* at § 8129(a).

<sup>8</sup> *Id.* at § 8129(b).

<sup>9</sup> *Robert W. O’Brien*, 36 ECAB 541, 547 (1985).

<sup>10</sup> 20 C.F.R. § 10.433(a).

<sup>11</sup> *Id.* at § 10.433(c).

January 21 to February 17, 2007. At the December 2007 hearing before the Office hearing representative, appellant asserted that he did not remember receiving the May 4, 2007 compensation check, yet appellant had reported in February 2007 that he had not received a compensation check for the period ending February 17, 2007 and engaged in communications with the Office in order to resolve this matter. Appellant ultimately indicated that he did receive a compensation check for the period January 21 to February 17, 2007 and noted that all subsequent checks were received on time. It would appear reasonable that the matter of compensation for the period February 17 and May 4, 2007 would have stood out in appellant's memory. The \$2,568.20 check that the Office issued on May 17, 2007 clearly covered the period January 21 to February 17, 2007 and appellant was on notice that this check was for the same period and should have been aware that it not intended to constitute his May 2007 compensation check, but rather represented an impermissible payment for a period, for which he had already been compensated.

Even though the Office may have been negligent in issuing two compensation checks covering the same period, this does not excuse the fact that appellant cashed the second check, which he knew or should have been expected to know should have been returned to the Office.<sup>12</sup> For these reasons, it properly determined that he was at fault in creating the \$2,568.20 overpayment of compensation and that, therefore, the overpayment was not subject to waiver.

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

Section 10.441(a) of Title 20 of the Code of Federal Regulations provides in pertinent part:

“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 the 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>13</sup>

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

The record supports that, in requiring repayment of the overpayment by deducting \$500.00 from appellant's compensation payments every 28 days, the Office took into consideration the financial information submitted by appellant as well as the factors set forth in section 10.441 and found that this method of recovery would minimize any resulting hardship on appellant. The Office noted that the financial information submitted by appellant showed that his monthly income exceeded his monthly expenses by \$1,586.00.

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<sup>12</sup> Robert W. O'Brien, *supra* note 9.

<sup>13</sup> 20 C.F.R. § 10.441(a); *see Donald R. Schueler*, 39 ECAB 1056, 1062 (1988).

On appeal, appellant asserted that his monthly income had since been reduced by about \$800.00 and posited that, therefore, it was improper to recover the overpayment by deducting \$500.00 from his continuing compensation each month. The Board notes, however, that the Office properly evaluated the financial information that was most current at the time that it made its determination regarding the method of recovery of the overpayment. Therefore, the Office properly required repayment of the overpayment by deducting \$500.00 from appellant's compensation payments every 28 days.

**CONCLUSION**

The Board finds that the Office properly determined that appellant received a \$2,568.20 overpayment of compensation. The Board finds that whether the Office properly determined that he was at fault in creating the \$2,568.20 overpayment of compensation and that, therefore, the overpayment was not subject to waiver. The Board further finds that the Office properly required repayment of the overpayment by deducting \$500.00 from appellant's compensation payments every 28 days.

**ORDER**

**IT IS HEREBY ORDERED THAT** the Office of Workers' Compensation Programs' January 29, 2009 decision is affirmed.

Issued: November 25, 2009  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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