



## **FACTUAL HISTORY**

On December 22, 2005 appellant, then a 49-year-old lead transportation security screener, alleged that she injured her right shoulder/upper arm and experienced pain in her neck and back when she was hit by a bag exiting a machine. She had leaned across the exit ramp to move a bin which was behind a screener when she was struck. OWCP accepted the claim for a cervical sprain/strain; displaced cervical disc; sprain/strain of right shoulder and adhesive capsulitis of right shoulder. Appellant underwent right shoulder arthroscopy on June 12, 2008 and left shoulder surgery on October 30, 2008. She also has an accepted traumatic injury under xxxxxx511. OWCP paid appellant compensation for total disability. Appellant returned to work on June 1, 2010.

In a June 3, 2010 letter, OWCP advised appellant as to her return to work effective June 1, 2010. It informed her that she would be receiving one last 28-day compensation check which partially covered the period following her return to work. OWCP requested that appellant return the check to avoid an overpayment. It noted that it would issue another check covering the appropriate period.

In a June 3, 2010 fiscal payment worksheet, OWCP noted that on June 5, 2010 appellant would electronically receive \$2,479.80 in net compensation for the 28-day period May 9 to June 5, 2010. It divided \$2,479.80 by 28 days to find she received \$88.56 per day. As appellant returned to full-time work June 1, 2010, it multiplied five days (for the period June 1 to 5, 2010) by \$88.56 per day to find an overpayment in the amount \$442.82.

By letter dated June 11, 2010, OWCP made a preliminary determination that a \$442.82 overpayment of compensation occurred for the period June 1 through 5, 2010. It found that appellant was at fault in creating the overpayment because she knew or should have known that she was not entitled to receive compensation payments after she returned to work. OWCP referenced the April 11, 2006 acceptance letter which advised her to return any compensation if she worked for any portion of the period for which compensation was made. It informed appellant that, if she disagreed with the decision she could, within 30 days, submit evidence or argument to OWCP or request a precoupment hearing with the Branch of Hearings and Review. A copy of an overpayment recovery questionnaire was also provided. No additional information was received from appellant.

By decision dated July 13, 2010, OWCP finalized the preliminary determination regarding the overpayment of \$442.82. It found that appellant knew or should have known she accepted wage-loss compensation to which she was not entitled after she returned to work June 1, 2010. Appellant was advised to pay the full amount of the overpayment.

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

Compensation for total disability under FECA is payable when the employee starts to lose pay.<sup>3</sup> Compensation for wage loss due to disability is available only for any periods during

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<sup>3</sup> 20 C.F.R. § 10.401(a) (2003).

which an employee's work-related medical condition prevents her from earning the wages earned before the work-related injury.<sup>4</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>5</sup> OWCP's procedure manual identifies various situations when overpayments of compensation may occur, including when a claimant receives compensation for total disability while working.<sup>6</sup>

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

OWCP determined that appellant received an overpayment of compensation in the amount of \$442.82 for the period June 1 through 5, 2010. The record shows that she received an overpayment during the period in question based on receipt of a check for temporary total disability compensation which covered the period May 9 to June 5, 2010 after she returned to full-time work with no wage loss on June 1, 2010. OWCP calculated the \$442.82 overpayment by totaling the net amount of temporary total disability compensation appellant received from May 9 through June 5, 2010, which amounted to \$2,479.80, dividing that by 28 days of the periodic rolls cycle, which amounted to \$88.56 per day, and multiplying that by 5 days in the overpaid period of June 1 through 5, 2010. On appeal appellant, however, disputed that she received \$442.82 in total disability compensation while working from June 1 through 5, 2010. On appeal she indicated that she only worked two hours on June 1, 2010, not eight hours. The record, however, is devoid of any evidence that appellant only worked two hours on June 1, 2010 or that any hours missed were due to the work injury. On appeal she also inquired whether the night shift differential was included in the overpayment. The record reflects the night shift differential was included in the overpayment. The Board finds that appellant received an overpayment in compensation during the period June 1 to 5, 2010 in the amount of \$442.82.

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

Section 8129 of FECA<sup>7</sup> 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.<sup>8</sup>

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<sup>4</sup> *Id.* at § 10.500(a) (2003).

<sup>5</sup> 5 U.S.C. § 8129(a).

<sup>6</sup> Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2 (May 2004).

<sup>7</sup> 5 U.S.C. § 8129(a)-(b).

<sup>8</sup> *Bonnye Mathews*, 45 ECAB 657 (1994).

In determining whether an individual is with fault, section 10.433(a) of OWCP's regulations provide that 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 (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.<sup>9</sup>

With respect to whether an individual is without fault, section 10.433(b) of OWCP's regulations provide that whether or not OWCP 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>10</sup>

### ANALYSIS -- ISSUE 2

OWCP applied the third standard in determining that appellant was at fault in creating the overpayment. In order for it to establish that she was at fault in creating the overpayment of compensation, OWCP must establish that, at the time she received the direct deposit in question she knew or should have known that the payment was incorrect.<sup>11</sup> The overpayment of compensation occurred in this case when appellant accepted a direct deposit after she returned to work on June 1, 2010, for the period ending June 5, 2010. Consequently, for her to be found at fault in creating the overpayments, the evidence must establish that when she accepted this direct deposit she knew or should have been expected to know that the check included a payment for a period of wage loss to which she was not entitled.<sup>12</sup> With regard to appellant's receipt of the June 5, 2010 direct deposit, the Board has held that an employee who receives payments from OWCP in the form of direct deposit may not be at fault the first time incorrect funds are deposited into her account, as the acceptance of the resulting overpayment lacks the requisite knowledge.<sup>13</sup> While she accepted the overpayment by gaining control of the funds deposited into her checking account pursuant to her authorization, she did not know that she would receive an incorrect payment on that day. Unlike the situation in which a claimant receives a physical

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<sup>9</sup> 20 C.F.R. § 10.433(a).

<sup>10</sup> *Id.* at § 10.433(b).

<sup>11</sup> *See Robin O. Porter*, 40 ECAB 421 (1989).

<sup>12</sup> *Id.*; *see also Michael R. Nixon*, 40 ECAB 398 (1988); *Marlene R. Pavlo*, 38 ECAB 716 (1987) (where the Board found that appellant was without fault where the record contained no evidence indicating that she was apprised by the Office, as of the time she received the compensation check, of the specific period the check covered so as to put her on notice that she was being paid incorrectly for a period of time during which she worked).

<sup>13</sup> *See Tammy Craven*, 57 ECAB 689 (2006). The Board has found a claimant to be at fault in cases where he or she is receiving compensation checks through direct deposit, which involve a series of payments over several months, with clear knowledge that the payments are incorrect. *See George A. Hirsch*, 47 ECAB 520 (1996); *Kveta M. Kleven*, Docket No. 99-2472 (issued August 10, 2000); *William J. Loughrey*, Docket No. 01-1861 (issued July 12, 2002). The Board notes that it is not appropriate to make a finding that a claimant has accepted overpayment *via* direct deposit until such time as a reasonable person would have been aware that this overpayment had occurred. This awareness could be established either through documentation such as a bank statement or notification from the Office or where a reasonable period of time has passed during which a claimant could have reviewed independent confirmation of the incorrect payment.

check and is aware of the amount of the payment before depositing it into her account, appellant was not on notice of the amount of the payment until after it was deposited electronically into her account. While OWCP attempted to put her on notice of the impending overpayment in its June 3, 2010 letter, but there is no evidence to establish that she received this letter prior to the compensation check being electronically deposited into her account. The Board finds that OWCP improperly determined that appellant was at fault in the creation of the June 5, 2010 overpayment. OWCP has not presented sufficient evidence to establish that she accepted a payment which she knew or should have known to be incorrect. The Board will set aside the finding of fault regarding the June 5, 2010 payment and remand the case for further development and a final decision on the issue of waiver of the overpayment.

### **CONCLUSION**

The Board finds that OWCP properly determined that an overpayment of compensation had occurred in the amount of \$442.82 during the period June 1 through 5, 2010. However, the Board set aside the finding of fault. The case is remanded for OWCP to determine the amount of overpayment and whether waiver of the recovery of the overpayment is warranted.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the July 13, 2010 decision of the Office of Workers' Compensation Programs is affirmed, in part, and set aside, in part. The case is remanded for action consistent with this decision.

Issued: July 6, 2011  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

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