



## **FACTUAL HISTORY**

In mid 1992, OWCP accepted that appellant, then a 45-year-old letter carrier, sustained several occupational conditions of her right arm, including elbow and shoulder tendinitis and shoulder impingement. It authorized the performance of subacromial decompression of her right shoulder. In 1999, OWCP accepted that appellant sustained additional occupational conditions, including right rotator cuff syndrome and left shoulder strain.

Appellant received disability compensation from OWCP for various periods, including the period beginning August 13, 2008 and continuing. On October 31, 2009 she received a \$10,000.00 check from the employing establishment which represented an incentive payment to encourage voluntary retirement.<sup>2</sup>

The record contains a memorandum of a telephone call appellant made to OWCP on March 22, 2010. Appellant advised that she did receive retirement incentive pay from the employing establishment. The memorandum stated that she “understands that an [overpayment] has been created due to the incentive pay as well as continuing payments on the [periodic rolls] plate and that she will receive corresp[ondence] from us on her options for repayment.”<sup>3</sup>

In a June 30, 2010 letter, OWCP advised appellant that it had made a preliminary determination that she received a \$10,000.00 overpayment because she received a retirement incentive payment in this amount from the employing establishment during the same period that she was receiving disability compensation.<sup>4</sup> It also made a preliminary determination that she was at fault in creating the overpayment because she failed to provide information which she knew or should have known to be material. OWCP advised appellant that she could submit evidence challenging the fact, amount or finding of fault and request waiver of the overpayment. It requested that she complete and return an enclosed financial information questionnaire (Form OWCP-20) within 30 days even if she was not requesting waiver.

Appellant responded to OWCP’s preliminary determination by letter dated July 22, 2010 and included a completed Form OWCP-20. She stated that she did not receive any lump-sum payment from OPM as part of an alternate annuity under her retirement plan. Appellant acknowledged that she received a \$10,000.00 incentive payment to retire from the employing establishment. She noted that she filed her retirement papers on October 31, 2009.

---

<sup>2</sup> On October 31, 2009 appellant filed retirement papers. A December 15, 2009 bank deposit record and other evidence of record indicate that the actual check she received from the employing establishment equaled \$6,795.00 but that the deductions made from the \$10,000.00 amount were for her benefit.

<sup>3</sup> The record of an April 26, 2010 telephone call from appellant to OWCP stated, “[Appellant] understands that the incentive pay from [employing establishment] has to be addressed as an overpayment.” Appellant elected to receive Office of Personnel Management (OPM) benefits effective May 31, 2010.

<sup>4</sup> OWCP noted that in late 2009 appellant received an incentive payment in the gross amount of \$10,000.00 from the employing establishment. From August 13, 2008 to June 30, 2010, appellant received disability compensation from OWCP totaling the gross amount of \$75,013.40, less deductions for insurance benefits on her behalf, resulting in a net payment of \$66,381.92. The record contains documents supporting these figures.

In a September 1, 2010 decision, OWCP determined that appellant received a \$10,000.00 overpayment of compensation because she received an impermissible dual benefit of the first payment of a retirement incentive from the employing establishment and disability compensation from OWCP during the same period.<sup>5</sup> It also determined that she was at fault in the creation of the overpayment of compensation, thereby precluding waiver of recovery of the overpayment, because she failed to provide information which she knew or should have known to be material.<sup>6</sup>

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

Section 8102 of FECA<sup>7</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 duty.<sup>8</sup> Section 8116 limits the right of an employee to receive compensation: While an employee is receiving compensation, she may not receive salary, pay or remuneration of any type from the United States.<sup>9</sup> Section 10.421 of the implementing regulations provide that an employee may not receive compensation for total disability concurrently with separation pay (which is also known as retirement incentive pay).<sup>10</sup> When OWCP discovers concurrent receipt of benefits, it must declare an overpayment in compensation and give the usual due process rights.<sup>11</sup>

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

The Board finds that appellant received a \$10,000.00 overpayment of compensation that arose when she concurrently received compensation for temporary disability and separation pay. While receiving compensation for disability resulting from her employment injury, appellant entered into a retirement incentive agreement with the employing establishment that resulted in her receiving an initial payment of \$10,000.00 in exchange for her voluntary resignation.<sup>12</sup> Although compensation under FECA is paid for the incapacity to earn the wages an employee

---

<sup>5</sup> The employing establishment indicated that appellant would receive a second separation incentive payment of \$5,000.00 in November 2010.

<sup>6</sup> The decision indicated, "If [OWCP] had been advised that [appellant] had received payment from the employing [establishment] at the same time she was receiving disability compensation from [OWCP], the disability compensation would have been terminated to avoid an overpayment and then resumed at the appropriate time."

<sup>7</sup> 5 U.S.C. §§ 8101-8193.

<sup>8</sup> *Id.* at § 8102(a).

<sup>9</sup> *Id.* at § 8116(a).

<sup>10</sup> 20 C.F.R. § 10.421(c); *see L.J.*, 59 ECAB 264 (2007).

<sup>11</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.17.d(4) (April 1996).

<sup>12</sup> The employing establishment made the retirement incentive payment on October 31, 2009. A December 15, 2009 bank deposit record and other evidence of record indicate that the actual check appellant received from the employing establishment equaled \$6,795.00 but that the deductions made from the \$10,000.00 amount were for appellant's benefit. Appellant later received a second retirement incentive payment in the amount of \$5,000.00. The record also reveals that between August 13, 2008 and June 30, 2010 she received disability compensation from OWCP totaling the gross amount of \$75,013.40 and the net amount of \$66,381.92 (after deductions for her benefit).

was receiving at the time of the work injury and although she was no less disabled for having accepted the separation pay, the law is clear in providing that she may not concurrently receive compensation for total disability and separation pay.<sup>13</sup> Because appellant's separation pay created an overpayment of compensation, the Board must affirm OWCP's September 1, 2010 decision on the issue of fact and amount of overpayment.<sup>14</sup>

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

Section 8129(a) of FECA 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>15</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>16</sup> No waiver of payment is possible if the claimant is not "without fault" in helping to create the overpayment.<sup>17</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>18</sup>

Section 10.433(c) of OWCP's regulations provide:

"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

---

<sup>13</sup> See *L.D.*, 59 ECAB 673 (2008).

<sup>14</sup> OWCP gave appellant the appropriate due process rights by sending her a preliminary overpayment determination and providing her an opportunity to respond.

<sup>15</sup> 5 U.S.C. § 8129(a).

<sup>16</sup> *Id.* at § 8129(b).

<sup>17</sup> *Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

<sup>18</sup> 20 C.F.R. § 10.433(a).

circumstances and the individual's capacity to realize that he or she is being overpaid."<sup>19</sup>

Even though OWCP may be negligent in allowing an overpayment of compensation to occur, this does not excuse a claimant's acceptance of a check she knew or should have known to be incorrect or her failure to accurately provide material information to OWCP in a timely manner.<sup>20</sup>

### **ANALYSIS -- ISSUE 2**

OWCP applied the second standard in determining that appellant was at fault in creating the \$10,000.00 overpayment of compensation. In order for it to establish that she was at fault in creating the overpayment, OWCP must show that she failed to provide information which she knew or should have known to be material.

On appeal, appellant argued that she was not at fault in the creation of the \$10,000.00 overpayment because OWCP erred by issuing disability checks while she received retirement incentive pay and because she had not "seen a regulation addressing an incentive payment." The Board notes that the retirement incentive payment was made in late 2009 but the record does not indicate that she reported the payment to OWCP until March 2010. The record further shows that appellant understood the materiality of reporting the receipt of the payment in a timely manner. When she called OWCP to report receipt of the incentive payment, appellant stated that she understood that she could not concurrently receive disability compensation and the incentive payment without creating an overpayment.

In determining whether a claimant is at fault in creating an overpayment, OWCP will consider the circumstances surrounding the overpayment and the degree of care expected by a recipient of compensation may vary with the complexity of the circumstances and the individual's capacity to realize that she is being overpaid.<sup>21</sup> Appellant's actions demonstrate that she knew or should have known that she was not entitled to receive a retirement incentive payment and wage-loss compensation concurrently and that she knew or should have known that it was material that she reports her receipt of an incentive payment in a timely manner.<sup>22</sup>

---

<sup>19</sup> *Id.* at § 10.433(c).

<sup>20</sup> *Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

<sup>21</sup> *Neill D. Dewald*, 57 ECAB 451 (2006).

<sup>22</sup> *See L.D.*, *supra* note 13. Even if OWCP were negligent in allowing the overpayment to occur, this does not excuse appellant's failure to provide material information to OWCP in a timely manner. *See supra* note 20.

In applying the tests to determine fault, OWCP applies a reasonable person test.<sup>23</sup> Under the circumstances of this case, the Board finds that appellant was at fault in the creation of the overpayment of compensation.<sup>24</sup>

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

### **CONCLUSION**

The Board finds that OWCP properly determined that appellant received a \$10,000.00 overpayment of compensation. The Board further finds that OWCP properly determined that she was at fault in creating the overpayment, thereby precluding waiver of recovery of the overpayment.

---

<sup>23</sup> *Ralph P. Beachum, Sr.*, 55 ECAB 442 (2004).

<sup>24</sup> With respect to recovery of the overpayment, where no further compensation benefits are due an individual, as in this case, the Board does not have jurisdiction and the recovery of an overpayment remains within the discretion of OWCP. The Board's jurisdiction over recovery is limited to reviewing those cases of whether OWCP seeks recovery from continuing compensation payments under FECA. *Terry A. Keister*, 56 ECAB 559 (2005).

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 1, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 3, 2011  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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