

FACTUAL HISTORY

On January 5, 2010 appellant, then a 47-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that he sustained an injury while carrying mail up a flight of stairs. OWCP accepted the claim for a right inguinal hernia. Appellant began receiving compensation for wage loss as of February 20, 2010.

By letter dated May 11, 2010, OWCP advised appellant that he would be receiving net compensation of \$2,561.43 every 28 days until further notice. Appellant was advised that he must notify OWCP of any return to work. OWCP stated that compensation payments included the period covered by each payment and, if appellant worked for any part of the period covered by a payment, it must be returned to OWCP.

The record establishes that appellant returned to work on May 19, 2010. Compensation payments were issued for the periods May 9 to June 5, June 6 to July 3 and July 4 to 31, 2010. Each payment was in the amount of \$2,561.43.

By letter dated August 20, 2010, OWCP advised appellant of a preliminary finding that an overpayment of \$6,767.49 had occurred.² As to the amount of the overpayment, it calculated that for the payment from May 9 to June 5, 2010, \$1,646.63 was an overpayment of compensation. The remaining two payments of \$2,561.43 were also found to be overpayments, resulting in a total of \$6,769.49.³ It found that appellant had returned to work on May 19, 2010 and was issued compensation payments through July 31, 2010 that he had not returned. In addition, OWCP found that he was at fault in creating the overpayment, as he had accepted payments he knew or should have known were incorrect and failed to provide material information regarding his return to work. Appellant was advised that he could request a prerecoupment hearing if he disagreed with the finding of overpayment, amount or fault determination within 30 days. He did not respond.

By decision dated September 20, 2010, OWCP finalized its finding that an overpayment of \$6,767.49 was created. It also found that appellant was at fault in creating the overpayment and therefore was not entitled to waiver of the overpayment.

On September 24, 2010 OWCP's Branch of Hearings and Review received a request for a prerecoupment hearing on fault and waiver issues. Appellant stated that he "never filed after [May 6, 2010]." The request was postmarked September 21, 2010.

By decision dated November 29, 2010, OWCP denied appellant's request for a prerecoupment hearing as it was untimely filed. It found that appellant did not have a right to a hearing after a final overpayment decision.

² OWCP included an overpayment calculation, which actually showed an overpayment of \$6,769.49.

³ OWCP found that the overpayment amount was \$6,767.49.

LEGAL PRECEDENT -- ISSUE 1

Section 8116 of FECA defines the limitations on the right to receive compensation benefits. This section of FECA provides that, while an employee is receiving compensation, he may not receive salary, pay or remuneration of any type from the United States, except in limited circumstances.⁴ 20 C.F.R. § 10.500 provides that “compensation for wage loss due to disability is available only for any periods during which an employee’s work-related medical condition prevents him or her from earning the wages earned before the work-related injury.”

ANALYSIS -- ISSUE 1

In the present case, the record indicates and appellant does not contest, that he returned to full-time work on May 19, 2010. He continued to receive compensation for wage loss through July 31, 2010. As noted above, appellant is not entitled to compensation for wage loss after he returned to work earning his date-of-injury wages. Therefore, an overpayment of compensation resulted.

Appellant received compensation payments dated June 5 and July 3 and 31, 2010. The entire amounts of the July 3 and 31, 2010 payments (each compensation payment was \$2,561.43) are considered an overpayment, since appellant worked during the entire period covered by the payments. The period covered by the June 5, 2010 payment was May 9 to June 5, 2010. OWCP calculated that \$1,646.63 of the payment included the period May 19 to June 5, 2010, resulting in an overpayment. Combining the two payments of \$2,561.43 with \$1,646.63, it found an overpayment of \$6,767.49.⁵ The Board finds that OWCP properly determined that an overpayment of \$6,767.49 was created in this case.

LEGAL PRECEDENT -- ISSUE 2

According to 5 U.S.C. § 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 FECA or would be against equity and good conscience.” No waiver of an overpayment is possible if the claimant is at fault in creating the overpayment.⁶

On the issue of fault, 20 C.F.R. § 10.433 provides that an individual will be found at fault if he or she has done any of the following: “(1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; (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 was incorrect.”

⁴ 5 U.S.C. § 8116(a).

⁵ The actual amount was \$6,769.49, but any error in the stated amount was not adverse to appellant.

⁶ *Gregg B. Manston*, 45 ECAB 344 (1994).

ANALYSIS -- ISSUE 2

OWCP had advised appellant by letter dated May 11, 2010 of his obligation to notify OWCP of any return to work. In addition, appellant was notified that if he received a compensation payment covering any portion of a period that he had worked, he must return the check to OWCP. The Board notes that OWCP regulations state that each periodic check includes clear indication of the period for which payment is being made.⁷ In this case, OWCP issued a payment on June 5, 2010 for the period May 9 to June 5, 2010, a payment dated July 3, 2010 covering the period June 6 to July 3, 2010 and a payment dated July 31, 2010 covering the period July 4 to 31, 2010. When appellant received the payments he should have known each payment was incorrect, because he was clearly notified that he must return any payment that covered a period during which he had worked for any portion of that period.

There is no evidence of record that appellant returned any of the three compensation payments at issue. The Board accordingly finds that he accepted payments he should have known were incorrect.⁸ Pursuant to 20 C.F.R. § 10.433 appellant was at fault in creating the overpayment and therefore no waiver of the overpayment is possible.

On appeal, appellant submitted a letter that he had apparently included with a request for a prerecoupment hearing. He stated that “everybody was notified” of his return to work on May 19, 2010. The Board notes that there was no indication of record that appellant notified OWCP of his return to work, although OWCP did receive a Form CA-3 (Report of Termination of Disability and/or Payment) on May 25, 2010 indicating appellant had returned to work. But even if OWCP should have been generally aware that appellant had returned to work and issued the payments in error, he should have been aware of the error and returned the payments. Appellant also stated that he never filed or applied for compensation benefits after his return to work, an apparent reference to the claims for compensation (Form CA-7) that he filed with OWCP. As the May 11, 2010 OWCP letter indicated however appellant was going to be paid pursuant to periodic payments every four weeks. There is no question appellant did not submit a specific claim for compensation after May 19, 2010. The finding of fault in this case was based on the acceptance of periodic payments he knew or should have known to be incorrect. For the reasons noted, the Board finds that the evidence of record supports the finding of fault in this case.

LEGAL PRECEDENT -- ISSUE 3

OWCP regulations provide that an individual may present evidence in response to a preliminary notice of overpayment in writing or at a prerecoupment hearing.⁹ The evidence must be presented or the hearing requested within 30 days of the date of the written notice of

⁷ 20 C.F.R. § 10.430.

⁸ See. e.g., *M.J.*, Docket No. 10-554 (issued November 3, 2010).

⁹ 20 C.F.R. § 10.432.

overpayment. Failure to request the hearing within this 30-day period shall constitute a waiver of that right.¹⁰

ANALYSIS -- ISSUE 3

In the present case, OWCP issued the preliminary overpayment determination on August 20, 2010. The 30-day period to request a prerecoupment hearing expired on Monday, September 20, 2010. The prerecoupment hearing request was postmarked September 21, 2010.¹¹ The evidence therefore established that appellant failed to request the hearing within the specific time period. Pursuant to 20 C.F.R. § 10.432, he waived his right to a prerecoupment hearing. The Board finds that OWCP properly denied the hearing request.¹²

CONCLUSION

The Board finds that an overpayment of \$6767.49 was created from May 19 to July 31, 2010 as appellant received compensation for wage loss during a period he had returned to work. The Board further finds that OWCP properly found appellant accepted payments he should have known were incorrect and therefore he is at fault in creating the overpayment and not entitled to waiver. In addition, the Board finds that OWCP properly denied the request for a prerecoupment hearing.

¹⁰ *Id.*

¹¹ See 20 C.F.R. § 10.439 (prerecoupment hearings shall be conducted in exactly the same manner as provided for hearings under 5 U.S.C. § 8124(b)); 20 C.F.R. § 10.616(a) (the hearing request must be sent within 30 days as determined by postmark or other carrier's date marking).

¹² See *N.D.*, Docket No. 10-1601 (issued April 6, 2011).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated November 29 and September 20, 2010 are affirmed.

Issued: October 21, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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

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