

FACTUAL HISTORY

On January 13, 2006 appellant, then a 49-year-old city letter carrier, filed a traumatic injury claim alleging that, while loading tubs into a hamper, he sustained an injury to his lower back and left leg. On June 26, 2006 OWCP accepted his claim for lumbar strain. It later accepted appellant's claim for herniated nucleus pulposus L4-5 and L5-S1. OWCP paid appropriate wage-loss compensation and medical benefits. Appellant's claim for recurrent disability commencing May 18, 2010 was accepted by OWCP.

On June 4, 2010 appellant filed a claim for compensation, Form CA-7, for the period June 5 through 17, 2010. However, by letter to OWCP dated June 21, 2010, he stated that he was going to withdraw his Form CA-7 for the period June 5 through 17, 2010 and would resubmit the Form CA-7 to request compensation for the period June 5 through 11, 2010. Appellant noted that he was going to apply for sick leave for the period June 12 through 18, 2010. On June 23, 2010 he submitted a corrected form indicating that he was only requesting compensation from June 5 through 11, 2010. On August 24, 2010 OWCP issued a payment in the amount of \$9,376.68 and noted that the compensation coverage date was from May 18 through August 28, 2010. By letter dated August 25, 2010, it advised appellant that, in order to avoid an overpayment of compensation, he should immediately apprise OWCP of his return to work. Moreover, OWCP advised appellant that each automated payment will include the period for which payment is made and added that, if he "worked for any portion of this period, [he] must return the check" to OWCP, otherwise "an overpayment of compensation may result."

On September 2, 2010 the employing establishment submitted time analysis forms indicating that appellant was paid leave for the period June 12 through July 31, 2010.

By letter dated September 2, 2010, OWCP informed the employing establishment that appellant received an overpayment for 287.68 hours of paid time during a period when he was in receipt of compensation benefits and that OWCP would recoup this payment.²

On October 13, 2010 OWCP issued a preliminary determination that appellant was overpaid in the amount of \$4,546.57 because he received compensation for temporary total disability for the period June 12 through July 30, 2010 and also received sick and annual leave earnings. It also made a preliminary determination that he was at fault in the creation of the overpayment because he knew or reasonably should have known that this was incorrect. OWCP

² Time analysis forms submitted by the employing establishment noted that appellant received leave pay as follows: for the period June 3 through 18, 2010, appellant was paid 28.07 hours of annual leave and 11.93 hours of sick leave; for the period June 19 through July 3, 2010, he was paid for 88 hours of sick leave; for the period July 5 through 31, 2010 he was paid for 151.68 hours of annual leave and 8 hours of holiday pay. Thus, appellant was paid a total of 287.68 hours of leave/holiday pay for this period.

sent appellant financial forms to complete and instructions as to how to challenge the overpayment.³

On November 11, 2010 appellant requested a prerecoupment hearing. He indicated that he believed the overpayment occurred through no fault of his own and he requested a waiver.

At the hearing held on March 18, 2011, appellant admitted that the checks showed the dates that the check covered, but stated that he thought the pay was being advanced. He did say he was aware that he could not receive wage-loss benefits and pay at the same time. In discussing his finances, appellant indicated that the check he was paid on March 12, 2011 was in the amount of \$2,477.00. He noted that he also has a military disability check of \$123.00. Appellant noted that he was single and that he continued to be off work. He stated that his rent was \$525.00 per month. Appellant testified that utilities were separate and noted that his home/telephone/Internet/cable is \$112.00 per month, water is about \$27.00 per month and cell phone is roughly \$60.00 per month. He stated that he spends about \$350.00 to \$400.00 per month on food. Appellant indicated that he had a car payment of \$648.17, car insurance premiums of \$91.00 per month, gas for the car is \$40.00 and On Star is \$14.00 per month. He testified that he makes minimum payments on his multiple credit cards in the amount of \$290.00. Appellant makes payments of \$50.00 per month for physicians and that his prescriptions run roughly \$100.00 per month. He also noted that he pays back union dues of about \$24.70 a month. The hearing representative told appellant that he would look for the completed financial forms and supporting documentation.

By decision dated June 1, 2011, an OWCP hearing representative finalized the October 13, 2010 preliminary overpayment determination and determined that the overpayment be repaid at a rate of \$300.00 every 28 days from continuing compensation benefits. She explained that appellant is in receipt of compensation benefits in the amount of \$2,510.00 every 28 days and although he testified that his expenses totaled \$2,281.00, he did not provide any evidence regarding his financial status or expenses. Thus, the hearing representative concluded that the recovery rate of \$300.00 every 28 days was reasonable.

LEGAL PRECEDENT -- ISSUE 1

FECA 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.⁴ When an overpayment has been made to an individual 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 the individual is entitled.⁵

³ Appellant's gross compensation for the period May 18 through August 28, 2010 was \$9,593.13. OWCP subtracted health benefits insurance premiums in the amount of \$157.96 and basic life insurance premiums in the amount of \$58.49 to determine that his compensation for this period was \$9,376.68. It determined that appellant should have received compensation in the amount of \$4,830.11 for this time period. The difference between the two amounts, \$4,546.57, was the amount of the overpayment.

⁴ *Id.* at § 8102(a).

⁵ *Id.* at § 8129(a).

A claimant is not entitled to receive total disability compensation and actual earnings for the same period. OWCP procedures provide that an overpayment n compensation is created when a claimant returns to work but continue to receive wage-loss compensation.⁶

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$4,546.57. Appellant was paid leave for 287.68 hours for the period June 12 through July 31, 2010. For the period May 18 through August 28, 2010 his actual earnings were in a net amount of \$9,376.68. Appellant should have been paid compensation in the amount of \$4,830.11. The difference between these two amounts, \$4,546.57, resulted in an overpayment.

LEGAL PRECEDENT -- ISSUE 2

An individual who is found at fault in either accepting or creating an overpayment is not eligible for a waiver of recovery of overpayment.⁷ A benefits recipient will be at fault if the individual: (1) made an incorrect statement as to a material fact which she knew or should have known to be incorrect; (2) failed to provide information which she knew or should have known to be material; or (3) accepted a payment which she knew or should have known to be incorrect.⁸

ANALYSIS -- ISSUE 2

OWCP found that appellant was at fault in creating the overpayment because he accepted a payment he knew or should have known to be incorrect. On August 24, 2010 it issued a check in the amount of \$9,376.68 for a supplemental roll payment and noted that the compensation coverage dates were from May 18 through August 28, 2010. Further, in a follow-up correspondence of August 25, 2010, OWCP apprised appellant “that if he worked for any days reflected on the check he “must return the check” or “an overpayment may result.” However, appellant’s time analysis forms indicate that he was paid leave by the employing establishment from June 12 through July 30, 2010. When he received the check for compensation at the same time he was receiving compensation for paid leave, he should have known that he received an incorrect payment as OWCP had initially explained that he could not receive actual wages and compensation concurrently. Furthermore, the Board notes that appellant changed his claim CA-7 form to indicate that he wished to withdraw his request for compensation for the period commencing June 12, 2010 as he was going to take leave for that period of time. Because appellant accepted payment that he should have known to be incorrect, the Board finds that he was at fault in the creation of the overpayment. The Board will affirm OWCP’s decision with regard to fault.

⁶ *Danny E. Haley*, 56 ECAB 393 (2005); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(a) (May 2004).

⁷ 5 U.S.C. § 8129(b); 20 C.F.R. §§ 10.433(a) and 10.434.

⁸ 20 C.F.R. § 10.433(a).

LEGAL PRECEDENT -- ISSUE 3

When an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to OWCP the amount of the overpayment as soon as the error is discovered or his or her attention is called to same. If no refund is made, OWCP 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 facts, so as to minimize any hardship.⁹

ANALYSIS -- ISSUE 3

OWCP asked appellant to submit financial information with regard to his ability to pay the overpayment. Appellant did not complete the form. At the hearing, he did testify with regard to his finances. However, appellant did not submit any proof with regard to his testimony such as cancelled checks or bills. The hearing representative indicated to appellant that he expected to receive this information, but none was submitted.

The Board finds that appellant failed to submit an overpayment recovery questionnaire or any other financial information prior to the overpayment decision. An overpaid individual is responsible for providing information about income, expenses and assets as specified by OWCP.¹⁰ Because appellant did not submit the requested financial information, there is no evidence of record to establish that OWCP erred by directing recovery of \$300.00 from each of appellant's continuing compensation payments. Accordingly, the Board will affirm OWCP's determination with regard to repayment schedule.

CONCLUSION

The Board finds that OWCP properly found that appellant received an overpayment of compensation in the amount of \$4,546.57; properly determined that appellant was at fault in creating the overpayment and therefore not subject to waiver; and properly set the rate of recovery of \$300.00 from continuing compensation payments.

⁹ 20 C.F.R. § 10.441(a).

¹⁰ *Id.*; *C.D.*, Docket No. 11-1095 (issued November 9, 2011).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 1, 2011 is affirmed.

Issued: April 9, 2012
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