



Appellant argued that he was not aware he had been overpaid until OWCP notified him, that he should not be penalized for OWCP's error in overpaying him and that he has already spent the money.

### **FACTUAL HISTORY**

On December 26, 2009 appellant, then a 41-year-old rural carrier, filed a traumatic injury claim alleging that on December 24, 2009 he fractured his right ankle when he slipped on snow and ice in a driveway. OWCP accepted the claim for right ankle deltoid ligament strain and closed fracture of the right lateral malleolus ankle. Appellant returned to full-duty work on March 18, 2010.

Appellant filed a claim for a schedule award on July 14, 2010 and listed no dependents.

On September 28, 2010 OWCP granted appellant a schedule award for nine percent impairment of the right lower extremity. Appellant was entitled to 25.92 weeks of compensation. The period of the award ran from July 13, 2010 through January 10, 2011. OWCP advised that appellant would receive \$8,492.00 for the period July 13 to September 25, 2010 and then \$3,170.35 every four weeks until the ending date of the award on January 10, 2011.

Appellant requested a lump sum for his schedule award on October 4, 2010.

On October 7, 2010 OWCP received appellant's amended July 14, 2010 claim for a schedule award which listed his wife as a dependent.

OWCP issued a check on October 12, 2010 to appellant for his schedule award, with a date of October 23, 2010, in the amount of \$3,791.94. The period of the award was noted on the check as July 13, 2010 through January 10, 2011.

On October 14, 2010 OWCP issued a supplemental check in the amount of \$1,664.98. It noted that this was a supplemental payment due to appellant's pay rate and dependency status. The period of the award was noted as July 13, 2010 through January 10, 2011.

On October 18, 2010 OWCP issued a "corrected copy" of the September 28, 2010 schedule award decision to reflect the corrected pay rate and dependency status. It advised that appellant would receive \$8,492.00 and \$1,664.98 for the period July 13 to September 25, 2010 and then \$3,791.94 every four weeks until the ending date of the award on January 10, 2011.

By letter dated October 25, 2010, OWCP informed appellant that it had received his request for a schedule award and informed him that the award ran through January 10, 2011. Appellant was informed that a lump-sum schedule award is computed a four percent discount rate compounded annually. As of November 21, 2010, OWCP informed him that a lump sum for his schedule award would be \$6,812.19. However, if appellant elected not to receive a lump sum then he would receive the remainder of his schedule award every 28 days until the end of the award on January 10, 2011.

On February 18, 2011 OWCP issued a preliminary determination that appellant received an overpayment of \$752.97 from January 11 through 15, 2011, because it continued to pay him schedule award benefits after the period of the award expired on January 10, 2011. It explained that he received compensation in the amount of \$25,324.74 for 187 days when he should have received \$24,571.77 for 181.44 days, resulting in an overpayment of \$752.97. OWCP found appellant to be at fault in creating the overpayment as he accepted a payment he knew or should have known was incorrect. Appellant was informed of his options if he wished to challenge the fact of overpayment or to request waiver of recovery of the overpayment. If he wished a waiver of the overpayment, he was advised to submit, within 30 days, a completed overpayment recovery questionnaire (Form OWCP-20) with supporting financial evidence.

On February 24, 2011 appellant requested a prerecoumment hearing and submitted a completed overpayment questionnaire form and supporting financial information. He contended he was not at fault in the creation of the overpayment as he did not keep track of the exact amount, but knew the schedule award ended sometime in January 2011. Appellant listed monthly income of \$4,166.66 on the overpayment questionnaire and monthly expenses of \$4,235.00. The monthly expenses included \$1,050.00 for rent or mortgage; \$450.00 for food; \$100.00 for clothing; \$620.00 for utilities; \$15.00 for HSBC Card Services;<sup>2</sup> and \$2,000.00 for miscellaneous expenses. Under other funds appellant reported \$2.00 for cash on hand and \$326.76 in a checking account.

A prerecoumment telephonic hearing was held before an OWCP hearing representative on July 14, 2011. At the hearing appellant testified that he was not aware that the last check would be a different amount as he noted the amounts OWCP stated he would receive. He agreed with the hearing representative that each check he received from OWCP contained the period the check covered. Appellant testified that last check he received was on January 15, 2011, that it seemed to be the correct amount and he had not calculated the amount he should have received. He stated that he was not at fault since he did not intentionally cash a check which he knew he was not entitled to.

Subsequent to the hearing, appellant submitted a detailed list of monthly expenses totaling \$3,625.00 and that his monthly income averaged out to \$1,957.11. He indicated that he believed he could afford \$25.00 a month to repay any overpayment.

By decision dated September 6, 2011, OWCP's hearing representative found that appellant was at fault in creating a \$752.97 overpayment of compensation from January 11 through 15, 2011. She affirmed OWCP's finding that he received a payment that he knew or should have known was incorrect. As appellant was at fault in the creation of the overpayment, waiver could not be granted.

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<sup>2</sup> Appellant noted the amount owed as \$251.01.

### LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of FECA<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 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 schedule award compensation after the expiration of the award.<sup>6</sup>

### ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained a right ankle deltoid ligament strain and closed fracture of the right lateral malleolus ankle as a result of the accepted December 24, 2009 employment injury. On September 28, 2010 it issued a schedule award for nine percent impairment of his right lower extremity which was amended on October 18, 2010 to reflect the correct dependency status and pay rate. Section 8107 of FECA provides 288 weeks of compensation for the total loss of a right leg.<sup>7</sup> Partial losses or impairments are compensated proportionately.<sup>8</sup> Accordingly, the September 28 and October 18, 2010 schedule awards correctly provided appellant 25.92 weeks of compensation for the nine percent impairment of his right lower extremity (0.09 times 288 equals 25.92 weeks).

The period of the award was thus limited. As both the September 28, 2010 and the corrected October 18, 2010 awards indicated, the period of the award ran from July 13, 2010 through January 10, 2011. However, OWCP mistakenly continued to pay appellant for an additional five days through January 15, 2011 after the schedule award expired. It determined that the amount of compensation he received for the period January 11 through 15, 2011 totaled \$752.97 (\$25,324.74 minus \$24,571.77). As appellant was not entitled to receive schedule award compensation after January 10, 2011, the Board finds that his receipt of such compensation from January 11 through 15, 2011 created an overpayment of compensation.

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<sup>3</sup> *Id.* at §§ 8101-8193.

<sup>4</sup> *Id.* at 8102(a).

<sup>5</sup> *Id.* at 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. § 8107(c)(2).

<sup>8</sup> *Id.* at § 8107(c)(19).

There is no contrary evidence nor does appellant contest the fact and the amount of the overpayment. The Board finds, therefore, that he received an overpayment of \$752.97 from January 11 through 15, 2011.<sup>9</sup>

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

Section 8129(b) of FECA<sup>10</sup> provides: 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.<sup>11</sup>

OWCP may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she received from OWCP are proper. The recipient must show good faith and exercise a high degree of care in reporting events, which may affect entitlement to or the amount of benefits. 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 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 (this provision applies only to the overpaid individual).<sup>12</sup>

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>13</sup>

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

OWCP found that appellant was at fault in the creation of the overpayment under the third standard noted above, because he accepted a payment from January 11 through 15, 2011 which he knew or should have known to be incorrect. In order for it to establish that he was at fault, it must establish that at the time he accepted the compensation check in question he knew or should have known that the payment was incorrect.<sup>14</sup>

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<sup>9</sup> *Alberto Pineiro*, 51 ECAB 310 (2000).

<sup>10</sup> 5 U.S.C. § 8129(b).

<sup>11</sup> *J.K.*, Docket No. 08-1761 (issued January 8, 2009); *Joan Ross*, 57 ECAB 694 (2006); *Desiderio Martinez*, 55 ECAB 245 (2004).

<sup>12</sup> 20 C.F.R. § 10.433(a).

<sup>13</sup> *Id.* at § 10.433(b).

<sup>14</sup> *Diana L. Booth*, 52 ECAB 370, 373 (2001).

OWCP regulations provide that each compensation check indicates the period for which the payment is made.<sup>15</sup> Appellant, at the hearing below, acknowledged that the checks he received identified the period covered and the last check was received around January 15, 2011. Additionally, both the September 28, 2010 schedule award and the corrected October 18, 2010 schedule award specified the amount and duration of the schedule award. The supplemental check issued on October 14, 2010, which included the augmented rate for a dependent and a corrected pay rate, also indicated the period of the schedule as July 13, 2010 through January 10, 2011. Appellant also received an October 25, 2010 letter from OWCP responding to his inquiry about a lump-sum award. In that letter, OWCP informed him as to the amount a lump-sum schedule award would and that if elected not to receive a lump sum, then the remainder of the schedule award would be paid every 28 days until the end of the award on January 10, 2011. The October 18, 2010 schedule award informed appellant that he would receive \$3,791.94 every four weeks until the ending date of the award on January 10, 2011. Therefore, appellant was on notice that the period of the award was from July 13, 2010 through January 10, 2011. He was on notice that payment would cease as of January 10, 2011. OWCP erroneously issued appellant a check for payment through January 15, 2011 when payment for the schedule award should have ceased on January 10, 2011. Under these circumstances, the Board finds that it properly found that appellant was at fault in the creation of the overpayment as he knew or should have known that he was not entitled to schedule award compensation after January 10, 2011.

Because appellant accepted payments that he knew or should have known were incorrect, the Board finds that he was at fault with respect to creating the overpayment, thereby precluding any consideration of waiver. The Board will affirm OWCP's September 6, 2011 decision on the issue of fault.

The Board notes that, with respect to the recovery of the overpayment of compensation, the Board's jurisdiction is limited to reviewing those cases where OWCP seeks recovery from continuing compensation benefits under FECA.<sup>16</sup> As appellant is no longer receiving wage-loss compensation, the Board does not have jurisdiction with respect to recovery of the overpayment under the Debt Collection Act.<sup>17</sup>

On appeal, appellant argues that it was not his fault that an overpayment was created due to OWCP's error that he has already spent the money and he should not be penalized for OWCP's error. As noted above, he accepted a payment he knew or should have known was not correct and, thus, was at fault in the creation of the overpayment. While OWCP erred in overpaying appellant, he had been informed as to the duration of the schedule award and the amount he should receive. As appellant was at fault in the creation of the overpayment waiver of recovery of the overpayment is precluded by regulation.

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<sup>15</sup> 20 C.F.R. § 10.430(a).

<sup>16</sup> *Terry A. Keister*, 56 ECAB 559 (2005); *see also Cheryl Thomas*, 55 ECAB 610 (2004).

<sup>17</sup> *Cheryl Thomas*, *supra* note 16.

**CONCLUSION**

The Board finds that appellant received an overpayment in the amount of \$752.97 for the period January 10 through 15, 2011. The Board further finds that OWCP properly determined that he was at fault in creating the overpayment and not entitled to waiver of recovery of the overpayment. As appellant was not in receipt of continuing compensation at the time the final decision was entered in this matter, the Board lacks jurisdiction to review the issue of recovery or repayment of the overpayment.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated September 6, 2011 is affirmed.

Issued: August 3, 2012  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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