

FACTUAL HISTORY

On or before March 18, 2000 appellant, then a 32-year-old letter carrier, developed a left shoulder condition as a result of carrying mail. OWCP accepted left shoulder sprain and bilateral shoulder impingement syndrome. Appellant underwent a left shoulder subacromial decompression.

On August 10, 2010 OWCP granted appellant a schedule award for 10 percent impairment of the right upper extremity and 13 percent impairment of the left upper extremity. The period of the award was from January 27, 2010 to June 13, 2011. OWCP noted that appellant would be paid 71.76 weeks of compensation with a continuing payment each four weeks of \$2,733.00.

On January 28, 2011 appellant contacted OWCP by telephone and advised that his check for the period December 19, 2010 to January 15, 2011 had not been received. The claims examiner confirmed that the check had been issued on schedule and reverified his mailing address. The claims examiner suggested appellant sign up for direct deposit and instructed him to write a note to OWCP advising of the unreceived check and to request a tracer. In a letter dated January 28, 2011, appellant informed OWCP that his schedule award compensation check for the period December 19, 2010 to January 15, 2011 had not been received and requested a tracer be put on the check.

On January 28, 2011 OWCP placed a tracer on the check in question. The tracer revealed that on January 15, 2011 check number xxxxxxxxx926 in the amount of \$2,733.00 was issued to appellant. On February 1, 2011 the claims examiner cancelled the issued check.

On February 3, 2011 OWCP received appellant's direct deposit set up form.

On February 7, 2011 OWCP reissued the schedule award payment in the amount of \$2,733.00 for the period December 19, 2010 to January 15, 2011. It noted that a new electronic fund transfer was registered.

In a pacer system paid status display dated March 23, 2011, the claims examiner noted that check number xxxxxxxxx926 in the amount of \$2,733.00, paid to appellant, was cashed on March 11, 2011. This occurred after the tracer had been processed and after the Treasury Department had cancelled the check as requested.

OWCP advised appellant of its discovery that check number xxxxxxxxx926 in the amount of \$2,733.00 and dated January 15, 2011 had been cashed by him despite a second payment having been made by electronic funds transfer in the amount of \$2,733.00 on February 11, 2011. Attached was a copy of cancelled check, number xxxxxxxxx926, in the amount of \$2,733.00, which reflected: "Comp from 12/19/10 to 1/15/11." It had been endorsed by appellant.

In an April 28, 2011 letter, OWCP informed appellant of its preliminary determination of a \$2,733.00 overpayment of compensation from December 19, 2010 to January 15, 2011. It advised that on January 28, 2011, he reported a compensation check lost and requested a replacement. A replacement payment, by electronic funds transfer number xxxxxxxx533, in the

amount of \$2,733.00, was issued to appellant as a direct deposit into his account on February 11, 2011. However, OWCP noted that the previous paper check number xxxxxxxx926 was also received by him after the cancellation notice was issued and was cashed by him. It found that appellant was at fault in creating the overpayment because he accepted payment that he knew or reasonably should have known to be incorrect. OWCP informed him that he had the right to submit evidence or argument if he disagreed with OWCP's finding. It also informed appellant that he had a right to a prerecoupment hearing before an OWCP hearing representative. OWCP instructed him to complete an enclosed overpayment recovery form and submit supporting documentation.

In correspondence dated May 4, 2011, OWCP advised appellant that the Treasury Department reported that the original compensation check issued to him had been cashed after it was cancelled and after he had reported it missing. It instructed him to review the cancelled check to determine whether it was his signature on the back of the check and advised him of the steps to take if he had not endorsed or cashed the check.

On May 6, 2011 appellant requested a prerecoupment hearing. He indicated that the overpayment occurred through no fault of his own and requested waiver. Appellant noted that he called OWCP and informed the claims examiner that his compensation check was missing and was informed that the check was returned to OWCP and that he would receive replacement payment by direct deposit. He indicated that the paper checks continued to come in the mail and he did not realize it was the missing check but thought it was a normal payment. Appellant prepared an overpayment questionnaire and noted monthly income of \$2,300.00 and monthly expenses of \$2,365.00.

In a July 14, 2011 letter, OWCP advised appellant that a telephonic prerecoupment hearing would be held on September 7, 2011 at 12:00 p.m. eastern time. Appellant was provided a toll-free number to call and instructions for accessing the hearing. In an August 18, 2011 letter, OWCP noted his hearing scheduled for September 7, 2011 and requested that he submit financial documentation regarding his expenses and assets.

Appellant did not appear for the September 7, 2011 prerecoupment hearing.

By decision dated September 22, 2011, OWCP's hearing representative finalized the overpayment determination, finding that appellant was overpaid compensation benefits in the amount of \$2,733.00 from December 19, 2010 to January 15, 2011 for which he was at fault in creating. OWCP found that appellant was at fault in creating the overpayment because he reasonably should have been aware that the paper check he reported missing was received and cashed by him on March 11, 2011; that the check clearly noted payment for the period December 19, 2010 to January 15, 2011; and that a replacement payment had been issued by electronic funds transfer into his account on February 11, 2011. It also advised that a telephonic prerecoupment hearing was scheduled for September 7, 2011 and he was notified of the scheduled hearing by letter dated July 14, 2011 but he failed to appear for the hearing. OWCP noted that appellant further failed to contact OWCP either prior or subsequent to the scheduled hearing and therefore he was deemed to have abandoned the hearing.

LEGAL PRECEDENT -- ISSUE 2

Section 8102(a) 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.² 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.³

ANALYSIS -- ISSUE 2

On January 28, 2011 appellant reported a compensation check lost and requested a replacement check. A replacement payment, by electronic funds transfer, in the amount of \$2,733.00, was issued to appellant as a direct deposit into his account on February 11, 2011. However, the previous paper check number xxxxxxxxx926 was also received after the cancellation notice was issued and was cashed on March 11, 2011. Appellant received compensation payment for the period December 19, 2010 to January 15, 2011 by a check and also an electronic payment for the same period. As he was not entitled to receive two compensation payments for the same period of time, an overpayment occurred.

OWCP explained how the overpayment occurred and provided this to appellant with the preliminary notice of overpayment. The Board finds that it properly determined that appellant received an overpayment of compensation in the amount of \$2,733.00 for the period December 19, 2010 to January 15, 2011. Appellant did not dispute fact or amount of the overpayment.

LEGAL PRECEDENT -- ISSUE 3

Under OWCP regulations, waiver of the recovery of an overpayment may be considered only if the individual to whom it was made was not at fault in accepting or creating the overpayment.⁴ The fact that the overpayment was the result of error by OWCP or another government agency does not by itself relieve the individual who received the overpayment of liability for repayment if the individual also was at fault for receiving the overpayment.⁵ 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 that 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; (2) failed to provide information which he or she knew or should have known to be material; or (3) accepted a payment which he

² *Id.* at § 8102(a).

³ *Id.* at § 8129(a).

⁴ *Id.* at § 10.433(a).

⁵ *Id.* at § 10.435(a).

or she knew or should have known to be incorrect (this provision applies only to the overpaid individual).⁶

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.⁷

ANALYSIS -- ISSUE 3

OWCP applied the third standard in determining that appellant was at fault in creating the overpayment. For OWCP to establish that appellant was with fault in creating the overpayment of compensation, it must establish that, at the time appellant accepted the compensation check in question, he knew or should have known the payments were incorrect.⁸

As noted, on January 28, 2011, appellant reported a compensation check for the period December 19, 2010 to January 15, 2011 was missing and requested a replacement payment. OWCP advised him of what he needed to do to have the initial check cancelled and how to get a replacement payment. Appellant followed this instruction, requesting a tracer and cancellation of the initial payment and also provided information for direct deposit for his replacement payment. On February 11, 2011 OWCP issued a replacement payment in the amount of \$2,733.00 by direct deposit to his bank account. Despite the cancellation, the paper check was received and cashed by appellant on March 11, 2011. The paper check clearly noted on the front "Comp from 12/19/10 to 1/15/11." As appellant had previously requested action to cancel this check so that he could receive replacement payment, he should have reasonably known that he was not entitled to this double payment. In a May 6, 2011 overpayment questionnaire he also acknowledged that he was told that the compensation check was being cancelled and payment for that check would be deposited into his account. This further supports that appellant should have been reasonably aware that he should not have cashed that check on March 11, 2011. While he asserted that he continued receiving paper checks and believed it was for a subsequent month and not the missing month, this was not a reasonable belief in light of the language on the check which clearly noted on its face "Comp from 12/19/10 to 1/15/11."⁹ The evidence establishes that appellant should reasonably have been aware that he was not entitled to accept the check that he cashed on March 11, 2011. The Board notes that, even if an overpayment results from negligence on the part of OWCP, this does not excuse the employee from accepting payment to which he knew or should have known that he was not entitled.¹⁰

⁶ *Id.* at § 10.433(a).

⁷ *Id.* at § 10.433(b).

⁸ See *Claude T. Green*, 42 ECAB 174, 278 (1990).

⁹ See 20 C.F.R. § 10.430.

¹⁰ See *Russell E. Wageneck*, 46 ECAB 653 (1995).

For these reasons, OWCP properly found that appellant accepted compensation from December 19, 2010 to January 15, 2011 which he knew or should have known was incorrect. As appellant was at fault under the third fault standard, outlined above, recovery of the \$2,733.00 overpayment of compensation may not be waived.¹¹

LEGAL PRECEDENT -- ISSUE 1

OWCP's procedures regarding hearing abandonment are as follows:

“Abandonment of Hearing Requests. A claimant who fails to appear at a scheduled hearing may request in writing within 10 days after the date set for the hearing that another hearing be scheduled. Where good cause for failure to appear is shown, another hearing will be scheduled and conducted by teleconference. The second hearing will be scheduled as soon as possible but usually no later than 35 days from the date it is requested unless good cause is shown to reschedule at a later date.

“The failure of the claimant to request another hearing within 10 days or the failure of the claimant to appear at the second scheduled hearing without good cause shown, shall constitute abandonment of the request for a hearing.

“Where good cause is shown for failure to appear at the second scheduled hearing, review of the matter will proceed as a review of the written record. Hearing Representatives will ensure that the record is properly documented to reflect all changes made concerning rescheduling and changes in format.

“Where it has been determined that a claimant has abandoned his/her right to a hearing, [Hearings and Review] will issue a formal decision finding that the claimant has abandoned his or her request for a hearing. In cases involving prerecoumment hearings, [Hearings and Review] will issue a final decision on the overpayment based on the available evidence before returning the case to the [district Office]....”¹²

ANALYSIS -- ISSUE 1

In the present case, OWCP scheduled a telephonic prerecoumment hearing with an OWCP hearing representative at a specific time on September 7, 2011. The evidence establishes that OWCP mailed appropriate notice to the claimant at his address of record. The record also supports that appellant did not request postponement, failed to appear for the scheduled hearing and failed to provide any notification for such failure within 10 days of the scheduled date of the hearing. As this meets the conditions for abandonment specified in OWCP's procedures, the

¹¹ As OWCP did not direct recovery of the overpayment from continuing compensation payments, the Board does not have jurisdiction over the recovery of the overpayment. See *Desiderio Martinez*, 55 ECAB 245 (2004).

¹² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6(g) (October 2011). See 20 C.F.R. §10.622(f).

hearing representative properly found that appellant abandoned his request for a prerecoupment hearing.¹³

CONCLUSION

The Board finds that appellant abandoned his request for a prerecoupment hearing before an OWCP hearing representative and that OWCP properly determined that appellant received a \$2,733.00 overpayment of compensation for which he was at fault in creating.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' September 22, 2011 decision is affirmed.

Issued: August 1, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

¹³ See also *Claudia J. Whitten*, 52 ECAB 483, 485 (2001). After appellant abandoned the hearing, a decision was appropriately made based on the evidence of record.