



## **FACTUAL HISTORY**

Appellant, a 53-year-old general expediter, has an accepted occupational disease claim for right knee lateral collateral ligament sprain, right knee medial meniscus tear, left knee sprain, and left foot plantar fasciitis, which arose on or about May 1, 2008. He initially stopped work on November 4, 2008. OWCP paid wage-loss compensation and placed him on the periodic compensation rolls effective December 21, 2008. It authorized two arthroscopic procedures. Appellant underwent a right knee medial and lateral meniscectomy on January 21, 2009, and resumed full-time, limited-duty work on April 23, 2009.<sup>2</sup> He stopped work again on June 15, 2009, and underwent a repeat meniscectomy on July 14, 2009. Following the June 15, 2009 work stoppage, OWCP resumed payment of wage-loss compensation and placed appellant back on the periodic compensation rolls.

Appellant returned to work in a full-time, limited-duty capacity effective October 21, 2009, with no loss in pay. Despite his return to full-time employment, OWCP continued to pay him wage-loss compensation for temporary total disability through February 12, 2011.

In a preliminary overpayment decision dated March 2, 2011, OWCP found that appellant had been overpaid a total of \$49,605.15 for the period October 21, 2009 through February 12, 2011. It explained that he had returned to work in October 2009, but continued to receive compensation for temporary total disability for another 16 months after resuming full-time employment. OWCP credited appellant \$2,916.90 for having returned one 28-day compensation check covering the period September 26 through October 23, 2010. As such, appellant had an overpayment balance of \$46,688.25. OWCP also determined that he was at fault in creating the overpayment because he “knowingly accepted compensation to which [he was] not entitled.” OWCP advised appellant of the various options available in the event he disagreed with its preliminary findings, and afforded him 30 days to exercise his options.

In response, appellant submitted a March 24, 2011 overpayment recovery questionnaire (Form OWCP-20) outlining his monthly income and expenses. He also provided documentation supporting the various reported expenses. As to the issue of fault, appellant stated that he believed it was his employer’s responsibility to advise OWCP of his return to work. He also submitted copies of four additional 28-day compensation checks returned to OWCP.<sup>3</sup> Appellant noted that, after returning an “overpayment check” in November 2010, OWCP sent him four more checks.

On April 8, 2011 OWCP issued a final overpayment decision in the amount of \$46,688.25.<sup>4</sup> Appellant was found at fault in creating the overpayment because he accepted payments that he knew or reasonably should have known were incorrect. Because he was at

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<sup>2</sup> OWCP promptly terminated appellant’s periodic rolls payments following his return to work in April 2009.

<sup>3</sup> Each check was in the amount of \$2,916.90. The four checks covered the period October 24, 2010 through February 12, 2011 and totaled \$14,584.50.

<sup>4</sup> Appellant requested a telephone conference with OWCP, which was conducted on April 8, 2011 just prior to issuance of the decision.

fault, he was not entitled to waiver of recovery of the overpayment. Consequently, OWCP ordered that the entire \$46,688.25 overpayment be paid in full within 30 days.

On April 15, 2011 OWCP issued an amended decision finding an overpayment in the amount of \$35,024.25. It neglected to credit appellant for four returned checks it had received; each in the amount of “\$2,916.00.” The previous finding of fault remained unchanged. OWCP noted that by letter dated January 15, 2009, appellant was fully apprised of his rights and responsibilities as a benefits recipient, including the obligation to notify OWCP immediately upon his return to work so as to minimize the possibility of an overpayment of benefits, and to return any checks he received even if he had already advised OWCP that he was working.

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

If an employee returns to work and has earnings, he is not entitled to receipt of temporary total disability benefits and actual earnings for the same time period.<sup>5</sup> Where there are actual earnings and the continued receipt of wage-loss compensation for the same period, an overpayment of benefits exists.<sup>6</sup>

### **ANALYSIS - ISSUE 1**

Appellant returned to work in a full-time capacity on October 21, 2009. He was no longer entitled to receive wage-loss compensation for temporary total disability; however, OWCP continued to pay him wage-loss compensation through February 12, 2011.

The record reflects that OWCP overpaid appellant \$49,605.15 for the period October 21, 2009 through February 12, 2011. The 4-day period October 21 through 24, 2009 was at the end of a 28-day compensation period that began on September 27, 2009. Appellant received net compensation in the amount of \$2,892.41 for the period September 27 through October 24, 2009. He was entitled only to the first 24 days of compensation for the period. The October 21 through 24, 2009 overpayment is derived by dividing the 28-day net compensation by 28 and then multiplying the net daily compensation rate by 4.<sup>7</sup> Appellant was overpaid \$413.20 for the period October 21 through 24, 2009. For the subsequent period October 25, 2009 through February 12, 2011, OWCP issued 17 checks (28-day payment cycle) with net compensation totaling \$49,191.95. The two combined periods totaled \$49,605.15 in overpaid compensation.

Appellant returned five checks totaling \$14,584.50. These returned checks covered the period September 26, 2010 through February 12, 2011. OWCP’s April 8, 2011 decision credited appellant for having returned one check in the amount of \$2,916.90, which covered the period September 26 through October 23, 2010. In its April 15, 2011 amended decision, OWCP credited appellant for having returned an additional four checks. However, it incorrectly identified the amount of each check as “\$2,916.00” instead of \$2,916.90. Accordingly, appellant

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<sup>5</sup> *Daniel Renard*, 51 ECAB 466, 469 (2000).

<sup>6</sup> *L.S.*, 59 ECAB 350, 352-53 (2008).

<sup>7</sup>  $\$2,892.41 \div 28 = \$103.30035 \times 4 = \$413.20$

is entitled to an additional credit of \$3.60.<sup>8</sup> With this adjustment, his outstanding balance is \$35,020.65, rather than \$35,024.25 as noted by OWCP in its April 15, 2011 decision. Accordingly, the April 15, 2011 decision will be modified to reflect an overpayment balance of \$35,020.65.

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

OWCP may consider waving an overpayment only if the individual to whom it was made was not at fault in either accepting or creating the overpayment.<sup>9</sup> Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he receives from OWCP are proper.<sup>10</sup> A recipient will be found to be at fault with respect to creating an overpayment if the individual “[a]ccepted a payment which he or she knew or should have known to be incorrect.”<sup>11</sup>

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

When a disabled employee is placed on the periodic compensation rolls, OWCP routinely advises the employee of this fact and issues a CA-1049 identifying the weekly pay rate, the compensation rate, the gross payment, any applicable deductions, and the net amount to be disbursed.<sup>12</sup> The CA-1049 is generally accompanied by an EN1049, which explains the employee’s rights and responsibilities with respect to the receipt of compensation. This latter document provides pertinent information regarding returning to work and how to avoid an overpayment of benefits. It also includes a certification that the benefits recipient has read and understands the terms and conditions under which he may receive compensation. OWCP provided appellant this same information on January 15, 2009.

As of November 12, 2009, OWCP learned that appellant accepted a full-time, limited-duty assignment on October 21, 2009. Nonetheless, it continued to pay him wage-loss compensation for total disability for another 16 months. Despite OWCP’s mistake, appellant was obliged to return any compensation checks he received for periods of purported temporary total disability after his October 21, 2009 return to work. OWCP properly advised him of his responsibilities in this regard when it initially placed him on the periodic compensation rolls in January 2009. Yet appellant did not return his first self-described “overpayment check” until November 2010, more than a year after he resumed full-time employment.

Based on the evidence of record, appellant accepted at least a dozen periodic rolls payments which he “knew or should have known to be incorrect.”<sup>13</sup> The Board, therefore, agrees

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<sup>8</sup> \$ .90 x 4 = \$3.60

<sup>9</sup> 5 U.S.C. § 8129(b); 20 C.F.R. § 10.433(a) (2011).

<sup>10</sup> 20 C.F.R. § 10.433(a).

<sup>11</sup> *Id.*

<sup>12</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Periodic Review of Disability Cases*, Chapter 2.812.4 (March 2010).

<sup>13</sup> 20 C.F.R. § 10.433(a)(3).

with OWCP's finding that appellant was at fault in creating the overpayment of benefits. Because he was at fault, appellant is not eligible for a waiver of recovery of the outstanding debt of \$35,020.65.

**CONCLUSION**

The Board finds that appellant received an overpayment of \$35,020.65 for the period October 21, 2009 through February 12, 2011. Moreover, OWCP properly determined that appellant was at fault in creating the overpayment, and therefore, he is not entitled to waiver of recovery.

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 15, 2011 decision of the Office of Workers' Compensation Programs is affirmed, as modified.

Issued: January 10, 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