

OWCP had not determined the precise period that appellant was totally disabled after surgery on September 21, 2010. The hearing representative remanded the case for OWCP to recalculate the overpayment.

On April 6, 2011 OWCP notified appellant of its preliminary determination that he received an overpayment of \$8,656.74 because he received both leave from the employing establishment and compensation for total disability for the period September 15 to November 16, 2010. It additionally advised him of its preliminary determination that he was without fault in creating the overpayment.

By letter dated April 19, 2011, OWCP informed appellant that it had recalculated his pay rate for the period November 17, 2010 to March 12, 2011 and found that it had underpaid him by \$6,442.75. It subtracted the \$6,442.75 underpayment from the alleged overpayment of \$8,656.74 to find a total overpayment of \$2,213.95.

Appellant requested a preresoupment hearing. By decision dated October 12, 2011, the hearing representative set aside the April 6, 2011 preliminary overpayment determination. She noted that the issue on review was OWCP's April 6, 2011 preliminary finding of an overpayment in the amount of \$8,656.74. The hearing representative reviewed OWCP's recalculation of the overpayment in the April 19, 2011 letter but noted that there was no preliminary or final decision regarding the overpayment of \$2,213.95. She remanded the case for OWCP to recalculate the overpayment and issue a preliminary decision regarding the overpayment of \$2,213.95. The hearing representative indicated that if OWCP had already issued a preliminary determination, the case should be returned to the Branch of Hearings and Review for the requested preresoupment hearing.

By decision dated October 18, 2011, OWCP found that appellant received an overpayment of \$2,213.95 for the period September 15 to November 16, 2010. It determined that he received an overpayment of \$8,656.74 from September 15 to November 16, 2010 as he received both leave from the employing establishment and compensation for total disability. OWCP further found that it underpaid him by \$6,442.75 for the period November 17, 2010 to March 12, 2011 because it paid him at an inaccurate pay rate. It subtracted the underpayment of \$6,442.75 from the overpayment of \$8,656.74 to find a total overpayment of \$2,213.95. OWCP found that he was not at fault and denied waiver. It indicated that it had recovered the overpayment from a schedule award.

The Board finds that OWCP failed to follow its procedures in issuing the October 18, 2011 decision as the record contains no evidence that it issued a preliminary determination of overpayment and a preliminary fault finding. OWCP's regulations provide that, before seeking to recover an overpayment or adjust benefits, it will advise the individual in writing that the overpayment exists and the amount of the overpayment.² The written notification must also include a preliminary finding regarding whether the individual was at fault in the creation of the overpayment.³ OWCP must inform the individual of his or her right to challenge the fact or

² 20 C.F.R. § 10.431(a).

³ *Id.* at § 10.431(b).

amount of the overpayment, the right to contest the preliminary finding of fault in the creation of the overpayment, if applicable, and the right to request a waiver of recovery of the overpayment.⁴ OWCP's procedure manual further provides that a preliminary finding of overpayment must be provided within 30 days and must clearly identify the reason that the overpayment occurred and the basis for any fault finding.⁵ The recipient of the alleged overpayment may present evidence in response to OWCP's preliminary notice, either in writing or at a precoupment hearing requested within 30 days.⁶ According to OWCP's implementing regulations and its own procedure manual, it should have issued appellant a preliminary determination covering the amount and period of the overpayment, informing him of its preliminary finding that he was without fault in its creation and advising him of his rights under section 10.431. Consequently, the Board finds that OWCP improperly issued its October 18, 2011 decision.

Additionally, the Board notes that OWCP attempted to reduce the amount of the alleged overpayment of compensation with an underpayment of compensation created when it paid appellant at an inaccurate pay rate. As the Board explained in *Lawrence Sherman*,⁷ it is improper to attempt to offset the overpayment based on amounts owed to appellant. There must be proper consideration of waiver of the entire amount of the overpayment.

The Board finds that the case is not in posture for a decision with regard to the overpayment of compensation as OWCP's decision was improperly issued. The case will be remanded for OWCP to issue a preliminary overpayment determination in accordance with its procedures.

⁴ *Id.* at § 10.431(d).

⁵ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.4(a)(1) (May 2004).

⁶ *Id.* at § 10.432.

⁷ 55 ECAB 359 (2004).

IT IS HEREBY ORDERED THAT the October 18, 2011 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this order of the Board.

Issued: July 25, 2012
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board