

FACTUAL HISTORY

OWCP accepted that on March 15, 2008 appellant, then a 46-year-old rural route carrier, sustained several back, lower extremity and upper extremity conditions due to a motor vehicle accident at work. Appellant returned to work in a light-duty position for the employing establishment and OWCP paid her compensation for periods of partial disability. She also received wage-loss compensation for days when she had medical appointments related to her work injuries.

OWCP directed appellant to appear for a second opinion examination on February 5, 2010 with Dr. David West, an osteopath and Board-certified orthopedic surgeon, and she appeared for the examination on that date. Appellant also appeared for an OWCP-directed functional capacity evaluation on March 2, 2010.

In a Form CA-7 (Claim for Compensation) completed on March 16, 2010, appellant claimed compensation for intermittent periods between January 15 and March 8, 2010.²

In an April 6, 2010 letter, OWCP advised appellant that it had received her CA-7 and CA-7a forms alleging entitlement to compensation for intermittent periods of wage loss between January 15 and March 8, 2010. It further stated:

“The following payments will be issued to you upon completion of our internal processes:

“TIME PERIOD: [February 5 to March 2, 2010]. PAYMENT: \$2,271.61 for 100 percent compensation rate as required for [OWCP-] directed appointments.

“TIME PERIOD: [January 15 to March 8, 2010], 10 days for a total of 44.1 hours of [l]eave [w]ithout [p]ay ([January 15, 29 and February 1, 8, 9, 12, 23 and 26, and March 1 and 8, 2010]). PAYMENT: \$968.40.

“Please note our office was not able to process payment for the following dates given the lack of supporting medical documentation in file for the following dates: 48 h[ou]rs of [total temporary disability leave without pay] for time period of [January 20 to 27, 2010] + [partial temporary disability leave without pay] for [February 17, 24 and 27, 2010].”

On April 9, 2009 appellant received a \$4,274.61 check which was identified as covering wage loss for February 5 and March 2, 2010. On April 9, 2009 she also received a \$968.40 check which was identified as covering wage loss for interment periods between January 15 and March 8, 2010.

² In accompanying CA-7a forms, appellant claimed entitlement to wage-loss for about 20 dates in amounts of time varying from 1.75 to 8 hours. She specifically claimed that she was entitled to eight hours of compensation for the February 5, 2010 visit to Dr. West and to eight hours for the March 2, 2010 functional capacity evaluation.

In a November 22, 2010 letter, OWCP advised appellant that it had made a preliminary determination that she received a \$3,801.82 overpayment of compensation because she was only entitled to receive \$472.79 for OWCP-directed medical evaluations held on February 5 and March 2, 2010 (a total of 16 hours), but actually received wage-loss benefits of \$4,274.61 for these two days.³ It made a preliminary determination that appellant was at fault in the creation of the overpayment because she was aware or should have reasonably been aware that she was not entitled to receive \$4,274.61 for only 16 hours of missed work.

In its November 22, 2010 preliminary determination letter, OWCP provided appellant an opportunity to submit evidence and argument challenging the fact, amount and fault finding of the claimed overpayment. It requested that she submit a completed financial information questionnaire (Form OWCP-20) along with supporting documentation. OWCP requested that appellant submit these documents within 30 days of the date of the preliminary determination letter. The Form OWCP-20 indicated that she must request a telephone conference with the district OWCP, a decision by the district OWCP based on the written record or a prerecoupment hearing by the Branch of Hearings and Review within 30 days of the date of the preliminary determination letter.

On January 3, 2011 OWCP received a completed Form OWCP-20 in which appellant indicated that she believed that the claimed overpayment occurred through no fault of her own and that she wished to request a waiver of the overpayment.⁴ Appellant checked a box requesting a telephone conference with the district OWCP “on the issues of fault and possible waiver of this overpayment.”

In an April 27, 2011 decision, OWCP determined that appellant received a \$3,801.82 overpayment of compensation because she was paid \$4,274.61 for eight hours of missed work on February 5, 2010 and eight hours of missed work on March 2, 2010 when she was only entitled to receive a total of \$472.79 for these two days. It further found that she was at fault in the creation of the overpayment and therefore it was not subject to waiver. OWCP stated:

“You believed that you were entitled to a large check from our office and you kept the check you received. However, you were not entitled to this check for the dates issued. This check was issued in error and you are only entitled to a small portion of this check. Therefore a formal overpayment decision is being issued and you are required to make payment to recover the overpayment.”

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of 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

³ OWCP included a calculation indicating that the total of 16 hours of lost wages on February 5 and March 2, 2010 entitled him to \$472.79 in compensation.

⁴ Appellant stated that she had turned in several CA-7 forms and CA-7a forms which totaled “several thousand dollars” and which had not been paid. She reported monthly income of \$1,920.00, monthly expenses of \$2,553.00 and assets of \$844.00.

performance of her duty.⁵ Section 8129(a) of FECA provides, in pertinent part, “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.”⁶

Section 8116(a) of FECA provides that while an employee is receiving compensation or if she has been paid a lump sum in commutation of installment payments until the expiration of the period during which the installment payments would have continued, the employee may not receive salary, pay or remuneration of any type from the United States, except in limited specified instances.⁷

ANALYSIS -- ISSUE 1

The record reflects that on February 5, 2010 appellant took off work to appear for an OWCP-directed second opinion evaluation and that on March 2, 2010 she took off work to appear for an OWCP-directed functional capacity evaluation. These work stoppages were related to her accepted work injuries and therefore she was entitled to receive compensation for the total of 16 hours of work she missed on these two days. Appellant received a \$4,274.61 check for her missed work on February 5 and March 2, 2010, but she was only entitled to receive \$472.79 for these 16 hours of missed work. The difference between the two compensation amounts is \$3,801.82. Therefore, the Board finds that appellant received a \$3,801.82 overpayment of compensation.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of FECA provides that where an overpayment of compensation has been made “because of an error of fact or law,” adjustment shall be made by decreasing later payments to which an individual is entitled.⁸ The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): “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 this subchapter or would be against equity and good conscience.”⁹ No waiver of payment is possible if the claimant is not “without fault” in helping to create the overpayment.¹⁰

⁵ 5 U.S.C. § 8102(a).

⁶ *Id.* at § 8129(a).

⁷ *Id.* at § 8116(a).

⁸ *Id.* at § 8129(a).

⁹ *Id.* at § 8129(b).

¹⁰ *Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

In determining whether an individual is not “without fault” or alternatively, “with fault,” section 10.433(a) of Title 20 of the Code of Federal Regulations provide in relevant part:

“An individual is with fault in the creation of an overpayment who:

- (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....”¹¹

Section 10.433(c) of OWCP’s regulations provide:

“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.”¹²

ANALYSIS -- ISSUE 2

OWCP found appellant at fault for the creation of the claimed overpayment under the above-detailed third prong, *i.e.*, she accepted a payment which she knew or should have known to be incorrect. On April 9, 2009 appellant accepted a \$4,274.61 check which was identified as covering wage loss for February 5 and March 2, 2010.¹³ She asserted that she did not realize that she could not accept the \$4,274.61 check because she had turned in several CA-7 forms and CA-7a forms covering the period January 15 to March 8, 2010 which had not been paid. However, appellant was familiar with the process of receiving compensation for intermittent periods of wage loss¹⁴ and the monies she received on April 9, 2009 were so great that she knew or should have known that she was being overcompensated for her recent claims for intermittent periods of wage loss. She was advised that the \$4,274.61 check was for February 5 and March 2, 2010 (the dates of two OWCP-directed evaluations) and, given the large amount of the check, she knew or should have known that she was only entitled to receive a small portion of the amount of the check to compensate her for the total of 16 hours she missed work for these

¹¹ 20 C.F.R. § 10.433(a).

¹² *Id.* at § 10.433(c).

¹³ On April 9, 2009 appellant also accepted a \$968.40 check which was identified as covering wage loss for the period January 15 to March 8, 2010.

¹⁴ The Board notes that appellant often communicated with OWCP to follow up and ask questions about her claims for intermittent periods of wage loss.

two evaluations. On appeal, appellant alleged that OWCP prematurely made a determination on her case because she had requested a telephone hearing with the district OWCP. She had been informed that any such request must be made within 30 days of the November 22, 2010 preliminary overpayment determination. However, appellant's request for a telephone hearing was untimely as it was not made until January 3, 2011, *i.e.*, more than 30 days after November 22, 2010. For these reasons, the Board finds that she was at fault in creating the overpayment of compensation, thereby precluding waiver of recovery of the overpayment.

CONCLUSION

The Board finds that OWCP properly determined that appellant received a \$3,801.82 overpayment of compensation. The Board further finds that OWCP properly determined that she was at fault in creating the overpayment of compensation and that, therefore, the overpayment was not subject to waiver.

ORDER

IT IS HEREBY ORDERED THAT the April 27, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 7, 2012
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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