



## **FACTUAL HISTORY**

Appellant, then a 25-year-old coding clerk/data conversion operator, injured his right arm on June 30, 1988. He filed a claim for benefits, which OWCP accepted for right elbow strain, right forearm strain, right epicondylitis and right ulnar nerve lesion.<sup>2</sup> Appellant returned to a modified job which entailed checking trailers at the back gate of his work site. He worked at this position intermittently until May 2009, when he left work because the employing establishment no longer had a position available within his medical restrictions.

On May 19, 2009 appellant filed a Form CA-7 claim for compensation for the period May 8 through 22, 2009 and continuing. The employing establishment stated on the form that he was in a leave without pay (LWOP) status because there was a lack of operationally necessary tasks within his medical restrictions at the work site.

By letter dated June 23, 2009, OWCP advised appellant that he would be paid temporary total disability compensation. It stated that he would receive an initial payment covering the period June 7 to July 4, 2009, for the net amount of \$2,897.79. OWCP further informed appellant that he would be receiving a separate supplemental payment for the period May 8 to June 6, 2009. It stated, under the heading "OTHER COMPENSATION AND DISABILITY BENEFITS" that, "If you have filed for or receive other compensation or disability benefits ... from any [f]ederal agency, advise OWCP of the name of the federal agency and the nature of the disability involved."

In an October 27, 2009 memorandum, OWCP stated that it had received a call from postal inspectors who stated that appellant was a veteran and had been receiving administrative pay from the employing establishment since May 2009. It noted that it had been paying compensation to him during that same period of time. The employing establishment recommended a determination of overpayment and that appellant be taken off the periodic rolls.

In a November 10, 2009 investigative report, the employing establishment's Office of Inspector General (OIG) found that appellant had been simultaneously receiving compensation from both the employing establishment and OWCP. The report noted that appellant, due to his status as a veteran, was entitled to administrative payments from the employing establishment at the time he went off work in May 2009. The OIG became aware of the dual payment to him after he complained that he was not receiving night differential payments; this caused a review of his income and revealed that he was also receiving compensation from OWCP. Appellant was interviewed by OIG and stated that he had been sent home in accordance with the employing establishment's National Reassessment Process (NRP). He asserted that he filed a claim with OWCP because he was not given a clear definition as to how he could continue receiving payments from the employing establishment. Appellant acknowledged, in a sworn statement to OIG, that he ultimately received compensation from both the employing establishment and OWCP, stating "that's probably why you are here." He asked OIG if he could pay the money back to Department of Labor.

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<sup>2</sup> The instant record contains no contemporaneous documentation pertaining to the original injury claim. The essential facts regarding appellant's injury and the conditions accepted by OWCP are not contested.

On May 7, 2010 OWCP issued a preliminary determination that an overpayment had occurred in the amount of \$17,593.73 for the period May 8 to October 27, 2009. It found that appellant was at fault in creating the overpayment because he should have known that he was not entitled to receive compensation payments for the same period he received administrative payments from the employing establishment. OWCP calculated the amount of the overpayment by totaling the amounts of six checks he received from May 8 to October 27, 2009. It noted that it had initially paid appellant gross compensation in the amount of \$3,264.83 for the period May 8 to June 6, 2009, less a health deduction of \$142.37 and a basic life insurance deduction of \$17.68, for a net overpayment of \$3,104.78. With regard to the five remaining monthly checks, OWCP stated that it paid gross compensation of \$3,047.17, less a health deduction of \$132.88 and a basic life insurance deduction of \$16.50, which totaled a net monthly overpayment of \$2,897.79. It informed appellant that if he disagreed with the decision he could, within 30 days, submit evidence or argument to OWCP or request a preresoupment hearing with the Branch of Hearings and Review.

On June 7, 2010 appellant completed the overpayment questionnaire and requested a preresoupment hearing, which was held on December 13, 2010. Following the hearing, he submitted documentation regarding his financial status.

Appellant submitted a June 7, 2010 letter, received by OWCP on June 15, 2010, which summarized the actions he took from May 8, 2009, the day the employing establishment sent him home, through June 7, 2010. He stated that he was called into his supervisor's office on May 8, 2009 and instructed to clock out and leave the site; he was told not to report back for duty unless he elected to accept the most recently offered Form 2499, which was not shown to him. Appellant asserted that his supervisor made him sign the NRP letter and complete two forms CA-7 and CA-2a. He stated that his last pay check from the employing establishment was dated May 15, 2009 and that he did not receive any additional payments for pay periods ending June 12 and 26 and July 10 or 24, 2009. Appellant received his initial letter regarding compensation from OWCP on or about June 23, 2009. He alleged that he was not permitted to return to work due to the NRP and his injury.

Appellant asserted that he spoke with a fellow veteran who informed him that the employing establishment could not terminate him without proper notification; as a veteran he was entitled to all compensation, including premiums, as if he was still working there. He therefore filed a claim with the Merit Systems Protection Board (MSPB) and sent a copy to the employing establishment.

Accompanying appellant's June 15, 2010 letter to OWCP was a July 15, 2009 letter from him to the MSPB. He asserted in this letter that the employing establishment told him on May 8, 2009 that he was no longer permitted to work there, that he was required to complete a special form requesting leave and that he was only being paid straight leave, without night differential, Sunday premium and holiday pay, unlike other, similarly situated employees. Appellant also attached an August 7, 2009 pay stub which purportedly indicated that he had received \$1,020.82 on that date and an August 21, 2009 pay stub which purportedly indicated that he had received \$1,063.34 on August 21, 2009.

On June 15, 2010 OWCP also received a January 21, 2010 decision from MSPB. The decision noted that to resolve the appeal before MSPB appellant had been placed in paid administrative leave status retroactive to the date of his placement in LWOP status. MSPB also noted that the employing establishment agreed that appellant was entitled to a night differential, which he was now receiving.

At the hearing held on December 13, 2010 appellant's representative presented a summary of appellant's overpayment situation. He acknowledged that appellant had been receiving dual payments from OWCP and the employing establishment. He noted that appellant had been released again by the employing establishment in May 2010 and was currently receiving OWCP payments. Appellant's representative asserted that he was not paid by the employing establishment from May 8, 2009, when he stopped working, until August 23, 2009, when he received a retroactive, lump-sum payment for approximately \$3,000.00 after the employing establishment acknowledged that he was entitled to administrative payments as a veteran; he stated that he had submitted documentation which supported this assertion. Tr. at 9-12. Appellant's representative averred that the check stubs contained no indication of what the payment represented. He stated that appellant subsequently received another check in the amount of \$1,000.00.

Subsequent to an the hearing appellant submitted financial documents and copies of various bills, receipts and other documents related to his expenses. The hearing representative found that appellant had a monthly income based on OWCP compensation of \$3,168.74 per month, with \$1,675.05 per month in ordinary and necessary living expenses.

In a decision dated March 11, 2011, an OWCP hearing representative finalized the preliminary determination regarding the overpayment of \$17,593.73. She stated that appellant was aware as early as July 2009 that his leave status had been changed and that he had received payment from the employing establishment at the same time he was receiving compensation from OWCP. The hearing representative further stated that appellant did not report that he was receiving dual compensation payments until he was interviewed by OIG in October 2009. She found that while the employing establishment may have erred by issuing payments to appellant after advising OWCP that he was in LWOP status, he was aware as early as July 2009 that he was receiving dual benefits and should have been aware that he could not receive benefits from both agencies. The hearing representative therefore determined that appellant was with fault in the creation of the overpayment.

The hearing representative also determined that appellant had a monthly income based on OWCP compensation of \$3,168.74 per month, with \$1,675.05 per month in ordinary and necessary living expenses. She determined that, as he was with fault in creating the overpayment, recovery of the overpayment could not be waived. The hearing representative determined that the overpayment would be recovered by deducting \$700.00 every four weeks from appellant's continuing compensation payments.

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

Compensation for total disability under FECA is payable when the employee starts to lose pay.<sup>3</sup> Compensation for wage loss due to disability is available only for any periods during which an employee's work-related medical condition prevents him from earning the wages earned before the work-related injury.<sup>4</sup> Section 8116 of FECA provides that an employee who receives continuing compensation or 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, may not receive salary, pay or remuneration of any type from the United States.<sup>5</sup> Section 8129 of FECA<sup>6</sup> 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.

### **ANALYSIS -- ISSUE 1**

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$17,593.73 for the period May 8 through October 24, 2009.

The record shows that appellant received an overpayment during the period in question because he received monthly checks for temporary total disability compensation, then received retroactive administrative payments from the employing establishment which covered the same period. OWCP calculated the \$17,593.73 overpayment by totaling the amount from six compensation checks appellant received during the period May 8 through October 24, 2009. The first check, covering the period May 8 to June 6, 2009, was for net compensation of \$3,104.78; the next five checks, each in the amount of \$2,897.79, covering the periods June 7 to July 6, July 5 to August 1, August 2 to 29, August 29 to September 26 and September 27 to October 24, 2009, for a total overpayment of \$17,593.73. OWCP determined that the entire amount of OWCP compensation appellant had received constituted an overpayment because he had received salary, pay or remuneration from the employing establishment for the same period.

Appellant asserted that the overpayment amount should have been reduced because he was only being paid straight leave, by the employing establishment and not night differential, Sunday premium and holiday pay, unlike other, similarly situated employees. The record reflects that his remedy in that situation would be either an appeal to the employer or the MSPB. The record also reflects that appellant exercised those rights by filing a claim with MSPB. OWCP would have no jurisdiction over the amount of administrative pay to which he may or may not have been entitled from the employer.

The Board finds that OWCP properly determined that appellant had received an overpayment of \$17,593.73 for the period May 8 through October 24, 2009.

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<sup>3</sup> 20 C.F.R. § 10.401(a) (2003).

<sup>4</sup> *Id.* at § 500(a) (2003).

<sup>5</sup> *Id.* at § 10.400(b).

<sup>6</sup> 5 U.S.C. § 8129(a)-(b).

## LEGAL PRECEDENT -- ISSUE 2

Section 8129 of OWCP<sup>7</sup> provides that an overpayment must be recovered unless “incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of OWCP or would be against equity and good conscience.” No waiver of an overpayment is possible if the claimant is not “without fault” in helping to create the overpayment.<sup>8</sup>

In determining whether an individual is with fault, section 10.433(a) of OWCP’s regulations provide in relevant part:

“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 the individual knew or should have known to be incorrect; or
- (2) Failed to provide information which the individual 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.”<sup>9</sup>

## ANALYSIS -- ISSUE 2

OWCP applied the third standard in determining that appellant was at fault in creating the overpayment. Appellant continued to receive checks for temporary total disability after August 2009, the date he indicated that he received retroactive administrative payments from the employing establishment which covered the period May 8, 2009 and continuing. As of the date of the retroactive payment in August 2009 he knew or should have known that he was no longer entitled to wage-loss compensation. Upon his receipt of the August 2009 check, which contained the first overpayment, appellant had a duty to report this to OWCP. The Board notes, however, that there is contradictory evidence in the record regarding the amount of the initial overpayment check and the date he received it. In his June 15, 2010 letter, appellant stated that he received a check dated August 7, 2009 from the employing establishment in the amount of \$1,020.82 and another check on August 21, 2009 in the amount of \$1,063.34, with pay stubs which did not provide any indication of what the payments represented; he submitted copies of these pay stubs. At the hearing, however, appellant’s representative testified that appellant received a check for approximately \$3,000.00 on August 23, 2009, representing retroactive lump-sum compensation from the employing establishment. In light of this contradictory, confusing and insufficiently detailed information, the Board cannot verify the exact amount and the period of time for which compensation was paid.

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<sup>7</sup> *Id.*

<sup>8</sup> *Bonnye Mathews*, 45 ECAB 657 (1994).

<sup>9</sup> 20 C.F.R. § 10.433(a).

Appellant has stated, however, that he knew he was receiving double compensation from OWCP and the employing establishment after receiving a check from the employing establishment for retroactive payments in August 2009. OWCP advised him in its June 23, 2009 letter that he was required to inform them if he received other compensation or disability benefits from any other federal agency. Therefore, upon receipt of the August 2009 check from the employing establishment, at the latest, appellant had a duty to contact OWCP and inquire as to whether acceptance of this payment was appropriate. Instead, he accepted and did not question receipt of this compensation until October 24, 2009, when the payments were discontinued. Appellant could not have believed that he was entitled to wage-loss compensation from May to October 2009 once he began receiving retroactive administrative payments from the employing establishment. It could be presumed that he knew the amount of compensation contained in subsequent checks from OWCP exceeded the amount to which he was entitled; he admitted as much to the employing establishment's OIG investigators in November 2009 and at the December 13, 2010 hearing.

For these reasons, the Board finds that, under the circumstances of this case, OWCP properly found that appellant reasonably knew or should have known that the checks issued by OWCP from August through October 24, 2009, were in error. As appellant was not without fault under the third standard outlined above, recovery of the overpayment of compensation during this period may not be waived. As for the period from May 8 to August 2009, when he was only receiving compensation from OWCP, the Board finds that he was not at fault. Appellant cannot be held at fault for accepting compensation and employing establishment pay for periods prior to his actual receipt of pay. He is entitled to a waiver determination regarding the amount covering this period. The case is therefore remanded to OWCP for a determination as to the exact date appellant received the first check from the employment establishment, as well as waiver for periods preceding the receipt of administrative pay.

### **LEGAL PRECEDENT -- ISSUE 3**

OWCP's implementing federal regulations at section 10.441 provide that, whenever an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to OWCP the amount of the overpayment as soon as the error is discovered or his or her attention is called to the same. If no refund is made, OWCP shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize hardship.<sup>10</sup>

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<sup>10</sup> *Id.* at § 10.441(a) (2006).

### ANALYSIS -- ISSUE 3

In determining that deductions of \$700.00 should be made every four weeks from appellant's continuing compensation payments, the hearing representative determined that appellant had excess monthly income to make repayment of the overpayment. She found that his current monthly income from his compensation was \$3,168.74 per month and, after adding the monthly financial items and numerous bills he submitted, calculated that he had expenses of \$1,975.00 per month. Based on this determination, OWCP properly determined that appellant was capable of making payments of \$700.00 every four weeks without incurring undue hardship. Appellant is in receipt of compensation from OWCP. The hearing representative did not abuse her discretion by deducting \$700.00 every four weeks from appellant's continuing compensation payments.<sup>11</sup>

### CONCLUSION

The Board finds that OWCP properly found that appellant received an overpayment of compensation in the amount of \$17,593.73 for the period May 8 through October 24, 2009. The Board finds, however, that appellant was not at fault in acceptance of the initial OWCP checks from May 8 to August 2009. On remand, OWCP shall determine whether appellant qualifies for waiver for that period. The Board also affirms OWCP's decision denying waiver of the overpayment for the period August to October 24, 2009. The Board finds that OWCP properly directed recovery of \$700.00 every four weeks from appellant's continuing compensation.

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

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 11, 2011 decision of the Office of Workers' Compensation Programs is affirmed in part but remanded for further development on the issue of wavier.

Issued: May 1, 2012  
Washington, DC

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

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board