



On appeal, appellant, through counsel, argues that he timely requested a prerecoupment hearing. He further contends that he was without fault in the creation of the overpayment and that it would be against equity and good conscience to allow recovery.

### **FACTUAL HISTORY**

On November 7, 2003 appellant sustained an injury to his right shoulder and arm while removing a fence and carrying fence rails to the truck. OWCP accepted his claim for right shoulder tendinitis, a herniated disc at C5-6, brachial neuritis and right brachial plexopathy.<sup>2</sup> It paid medical and wage-loss compensation benefits.

OWCP issued an April 13, 2007 loss of wage-earning capacity decision, reducing appellant's wage-loss benefits effective May 13, 2007 based on his capacity to earn wages in the constructed position of photographer (photojournalist). It determined that he was capable of earning \$357.20 per week and compensation was set at \$929.40 every four weeks. Compensation was paid based on the new amount. OWCP denied modification of this decision by decisions dated February 7 and May 9, 2008. Appellant filed an appeal with the Board.

While the case was pending before the Board, appellant telephoned OWCP on April 3, 2009 to advise that he had returned to work. In an April 6, 2009 letter, OWCP noted that had he returned to work and asked that he forward job information within the next 15 days. Depending upon the amount appellant earned, he might be entitled to ongoing benefits. OWCP received the requested information on April 22, 2009. On a copy of his pay stub appellant noted that he called OWCP three days after he got the job and stated that compensation should make up the difference between the two jobs. He noted that he did not get a pay stub right away. Subsequently, appellant submitted an earnings statement that he started work on March 1, 2009. In an April 24, 2009 letter, OWCP advised him that it was in the process of collecting additional information in order to determine whether any adjustment was required with regard to his ongoing compensation benefits.

In a decision dated September 28, 2009, the Board found that OWCP improperly denied modification of appellant's wage-earning capacity based on the constructed position of photojournalist and reversed the February 7, 2008 decision. The findings of fact as set forth in the Board's September 28, 2009 decision are hereby incorporated into this decision.<sup>3</sup>

By letter to appellant dated October 9, 2009, OWCP requested that he submit earning statements for the period commencing April 13, 2007. By letter dated October 23, 2009, appellant's attorney referenced the Board's decision and asked about OWCP's plans to make appellant whole. In a November 19, 2009 letter, OWCP requested that he review a Form SSA-581 and correct any information that was incorrect. In a December 16, 2009 note to OWCP, appellant reiterated that he started full-time work on March 1, 2009 and that OWCP had to stop sending payments. In an August 23, 2010 letter, his attorney stated that appellant's position paid

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<sup>2</sup> Appellant previously filed a claim for a work injury that occurred on December 17, 2002 this claim was approved for right rotator cuff strain.

<sup>3</sup> Docket No. 08-2366 (issued September 28, 2009).

the same as his preinjury position. He was not sure whether appellant should receive partial wage-loss benefits. On December 15, 2009 appellant completed the authorization to obtain earnings data from the Social Security Administration. On a December 16, 2009 he wrote, "As I have stated before and Mr. Tomasko has told you, I started a full time March 1, 2009 at Letterkenny Army Depot. You need to stop sending my OWCP payments. I stated this before. I also have been paying for my health insurance on my paycheck and through OWCP. We need to straighten this out."

In an August 31, 2010 letter, appellant's attorney advised OWCP that appellant's new position paid the same as his preinjury position. As a consequence, he was not sure whether appellant was eligible for partial wage-loss benefits. Counsel stated, "In other words, if all monies owed [appellant] as a result of the [Board decision of September 28, 2009] have now been paid, ongoing partial wage loss no longer appears appropriate in light of [his] current federal earnings." He enclosed copies of appellant's earning statements from December 19 through 31, 2009 and August 28 through September 9, 2010. By letter dated April 12, 2011 appellant, through his attorney, advised OWCP that he had an increase of earnings, but noted that his physical restrictions remained the same. Counsel also noted that appellant never received a lump sum of past due partial wage loss to which he was entitled as a result of the September 28, 2009 decision.

In a letter dated June 15, 2011, OWCP determined that appellant would be refunded \$3,127.02 as OWCP erroneously deducted health insurance premiums from March 1 through November 21, 2009, while he had these deductions taken from his salary. Payment was made to him on June 17, 2011. On June 9, 2011 OWCP paid appellant compensation by direct deposit of \$25,120.60, an amount that it noted that he was underpaid for wages from May 13, 2007 through February 28, 2009, as the Board found that OWCP improperly set his loss of wage-earning capacity with regard to the constructed position of a photojournalist and he was entitled to full compensation for that period.

On June 15, 2011 OWCP issued a preliminary determination that appellant was overpaid compensation in the amount of \$9,471.93. It explained that the Board found that it had incorrectly determined his loss of wage-earning capacity. OWCP also noted that appellant had actual earnings starting on March 1, 2009. It explained that the difference between what he was actually paid and the amount of benefits he should have received resulted in the overpayment. OWCP also made a preliminary determination that appellant was at fault in the creation of the overpayment because he accepted a payment that he should have known was incorrect. It provided instructions with regard to challenging the overpayment finding and requesting waiver of recovery of the overpayment.

In a June 23, 2011 decision, OWCP found that appellant's actual earnings as of August 1, 2010 exceeded the current wages for the job he held when injured. Therefore, according to the provisions of 5 U.S.C. § 8106 and 5 U.S.C. § 8115, his entitlement to wage loss ended on August 1, 2010, as he had no loss in earning capacity effective that date.

By decision dated August 29, 2011, OWCP finalized the overpayment determination in the amount of \$9,471.93 and that appellant was at fault in its creation. From March 1 to November 21, 2009, appellant received compensation based on the pay rate of the constructed

loss of wage-earning capacity position in the amount of \$8,870.53. However, he should have been paid based on his actual earnings or \$1,149.50. The difference resulted in an overpayment of \$7,721.03. For the period December 6, 2009 to July 31, 2010, appellant was paid in the amount of \$1,050.50, but should have been paid in the amount of \$427.50, resulting in an overpayment of \$623.00. For the period August 1, 2010 to April 9, 2011, he received compensation in the amount of \$1,127.90 but should have been paid \$0.00, resulting in an overpayment of \$1,127.90. The total amount of the overpayments (\$7,721.03 + \$623.00 + \$1,127.90) was \$9,471.93.

On August 29, 2011 the date of its decision, OWCP received appellant's financial data with regard to the recovery of the overpayment as well as a request for a prerecoupment hearing and a request for waiver of recovery of the overpayment. Appellant had signed these documents on July 12, 2011. The record also contains an envelope for these documents. The date stamp on the envelope is not completely legible, but reflects that it was mailed in August 2011.

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

In response to a preliminary notice of overpayment, an individual may present evidence to OWCP in writing or at a prerecoupment hearing. The evidence must be presented or the hearing requested within 30 days of the date of the written notice of overpayment. Failure to request the hearing within the 30-day time period shall constitute a waiver of that right.<sup>4</sup>

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

The Board finds that appellant did not timely request a prerecoupment hearing. The preliminary notice of overpayment was dated June 15, 2011. Appellant's request for a hearing was received by OWCP on August 29, 2011. The request was signed on July 12, 2011; however, OWCP kept a copy of the envelope which contained his request. Although the exact date it was mailed is not legible from the stamp, the request was date stamped in August 2011. This established that the request was mailed after the 30-day period for requesting a prerecoupment hearing had expired. Accordingly, the Board finds that OWCP properly determinate that appellant failed to timely request a prerecoupment hearing.

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

Section 8102 of FECA<sup>5</sup> 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.<sup>6</sup> Section 8129(a) of FECA provides that when an overpayment has been made to an individual under this subchapter because of an error of factor or law, adjustment shall be made under regulations prescribed by the Secretary of Labor.<sup>7</sup>

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<sup>4</sup> 20 C.F.R. § 10.432.

<sup>5</sup> 5 U.S.C. §§ 8101-8193.

<sup>6</sup> *Id.* at § 8102(a).

<sup>7</sup> *Id.* at § 8129(a).

## **ANALYSIS -- ISSUE 2**

The Board finds that appellant received an overpayment of wage-loss benefits in the amount of \$9,471.93. Effective May 13, 2007, OWCP reduced his compensation for wage loss as it determined that he had the capacity to earn wages as a photojournalist. This determination was reversed by the Board in a September 28, 2009 decision. In the interim, appellant had commenced work at Letterkenny Army Depot on March 1, 2009. The difference between what he was paid and what he was due, a determination that changed with the issuance of the Board's September 28, 2009 decision, resulted in an underpayment and overpayments.

With regard to the underpayment, for the period from May 13, 2007 to February 28, 2009, appellant was entitled to compensation not reduced by the wage-earning capacity determination. The amount of the underpayment was calculated by OWCP as \$25,120.60. The record reflects that this amount was paid to appellant by direct deposit on June 9, 2011.

With regard to the overpayments, these began after appellant returned to work on March 1, 2009. From March 1 to November 21, 2009, appellant received compensation based on his loss of wage-earning capacity rate in the amount of \$8,870.53; but, he should have been paid based on his actual earnings in the amount of \$1,149.50. This resulted in an overpayment of \$7,721.03.<sup>8</sup> Appellant received pay increases while at Letterkenny Army Depot. From December 6, 2009 to July 31, 2010, he received compensation in the amount of \$1,050.50 but he should have been paid in the amount of \$427.50, resulting in an overpayment of \$623.00. Starting August 1, 2011 appellant was entitled to no further wage-loss compensation as his salary increased to be more than that of his date-of-injury job. For the period August 1, 2010 to April 9, 2011, he received the amount of \$1,127.90 but this entire amount was an overpayment. The total of the overpayments equaled \$9,471.93. Accordingly, OWCP properly determined that appellant received an overpayment of compensation in the amount of \$9,471.93.

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

According to 5 U.S.C. § 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 FECA or would be against equity and good conscience. No waiver of an overpayment is possible if the claimant is at fault in creating the overpayment.<sup>9</sup>

On the issue of fault, 20 C.F.R. § 10.433 provides that an individual will be found at fault if he or she has done any of the following: (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

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<sup>8</sup> As was noted above, an additional error was made by OWCP because during this time period it continued to erroneously deduct health insurance premiums in the amount of \$3,127.02. Health insurance premiums were improperly deducted because deductions were being taken from appellant's pay check at Letterkenny Army Depot. However, OWCP made a payment to appellant for this amount on June 8, 2011.

<sup>9</sup> *L.A.*, Docket No. 11-374 (issued October 21, 2011); *Gregg B. Manston*, 45 ECAB 344 (1994).

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 was incorrect.

### **ANALYSIS -- ISSUE 3**

The Board finds that OWCP improperly determined that appellant was at fault in the creation of the overpayment. OWCP found that he accepted payments he knew or should have known to be incorrect. It stated that appellant should have known that he could not accept compensation after he returned to work.

The Board finds that OWCP improperly determined that appellant accepted a payment he knew or should have known to be incorrect. Appellant has not been found to have made an incorrect statement as to a material fact and he promptly responded to OWCP's request for information as to his earnings. However, this is not a case where he returned to work at full salary. When appellant returned to work on March 1, 2000, he was due compensation with regard to the difference between his wages at his date-of-injury job and his salary at his new job at Letterkenny Army Depot. He would not be expected to calculate his own loss of wage-earning capacity once he returned to work to determine if he was entitled to further compensation.<sup>10</sup> The matter of the overpayment in this case was compounded by the fact that the Board's September 28, 2009 decision that reversed OWCP's determination of his loss of wage-earning capacity, OWCP owed appellant money and this underpayment was not paid until June 9, 2011. Appellant cooperated with OWCP at all times and advised that there was a problem with the payments. He could not be expected to have known the correct amount of his compensation checks with regard to this complicated matter. In addition, OWCP did not refer to any probative evidence of record establishing that appellant knew or should have known that the pay rate was incorrect.<sup>11</sup>

The Board will set aside OWCP's June 15, 2011 decision on the issue of fault. The Board will remand the case for further development of appellant's financial circumstances and consideration of waiver of the recovery of the overpayment.<sup>12</sup> OWCP shall issue an appropriate decision regarding whether waiver of recovery of the overpayment is warranted.

### **CONCLUSION**

The Board finds that OWCP properly denied appellant's request for a prerecoupment hearing as untimely filed and properly determined that he was overpaid in the amount of \$9,471.93. The finding that appellant was at fault in the creation of the overpayment is reversed and the case is remanded for further consideration on the issue of waiver.

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<sup>10</sup> *Kathryn M. Nichols*, Docket No. 04-377 (issued January 28, 2005).

<sup>11</sup> *B.A.*, Docket No. 10-2202 (issued July 5, 2011).

<sup>12</sup> *M.E.*, Docket No. 11-1735 (issued March 5, 2012).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated August 29, 2011 is affirmed in part and reversed in part.

Issued: October 5, 2012  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

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