



## **FACTUAL HISTORY**

On October 20, 2009 appellant, then a 50-year-old sheet metal mechanic, filed a traumatic injury claim alleging that he injured his right shoulder lowering an inboard transmission in the performance of duty. OWCP accepted his claim for sprain of right shoulder and upper arm. Appellant underwent a right shoulder arthroscopy with rotator cuff repair and subacromial decompression, Mumford distal clavical resection and labral debridement on January 28, 2011. He completed a direct deposit form on January 31, 2011.

On August 1, 2011 OWCP authorized compensation benefits for the period July 31 through August 27, 2011 in the amount of \$3,155.79. On August 16, 2011 appellant's attending physician released him to return to light duty on August 17, 2011. Appellant filed a claim for compensation on August 17, 2011 and requested leave without pay compensation from July 30 through August 16, 2011. He returned to work on August 17, 2011.

In a letter dated November 8, 2011, OWCP made a preliminary determination that appellant was overpaid in the amount of \$1,083.02 because he returned to limited-duty work on August 17, 2011 but received compensation benefits through August 27, 2011. It determined that he was at fault in the creation of the overpayment because he accepted a payment that he knew or reasonably should have known was incorrect. OWCP found that appellant received \$3,155.79 for the period July 31 through August 27, 2011, but that he returned to work on August 17, 2011. Appellant was therefore only entitled to receive compensation benefits from July 31 through August 16, 2011 in the amount of \$1,916.02. OWCP noted that he received an overpayment of \$1,239.77, but that the employing establishment reccredited his health benefits, basic life insurance and optional life insurance benefits, reducing his overpayment to \$1,083.02.

By decision dated January 25, 2012, OWCP finalized the preliminary determination and found that appellant received an overpayment in the amount of \$1,083.02, for which he was at fault. It requested payment of the full amount within 30 days.

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

Section 8102 of FECA provides that the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.<sup>2</sup>

Section 8116 of FECA defines the limitations on the right to receive compensation benefits. This section of FECA provides that, while an employee is receiving compensation, he may not receive salary, pay, or remuneration of any type from the United States, except in limited circumstances.<sup>3</sup> OWCP's regulations provide that compensation for wage loss due to

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<sup>2</sup> *Id.* at § 8102.

<sup>3</sup> *Id.* at § 8116(a).

disability is available only for any periods during which an employee's work-related medical condition prevents her from earning the wages earned before the work-related injury.<sup>4</sup>

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

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$1,083.02. The record reflects that he returned to work on August 17, 2011. As noted, FECA and OWCP regulations provide that a claimant may not receive wage-loss compensation while simultaneously receiving salary or other type of pay from the United States.<sup>5</sup> Fiscal records establish that appellant received compensation in the amount of \$3,155.79 for the period July 31 through August 27, 2011. This resulted in an overpayment of \$1,083.02. The Board will affirm the fact and amount of overpayment of compensation of \$1,083.02.

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

Section 8129(a) of FECA<sup>6</sup> provides that, where an overpayment of compensation has been made "because of an error or fact of law," adjustment shall be made by decreasing later payments to which an individual is entitled. 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 FECA or would be against equity and good conscience."<sup>7</sup> Accordingly, no waiver of an overpayment is possible if the claimant is with fault in helping to create the overpayment.

In determining whether an individual is with fault, section 10.320(b) of OWCP's regulations<sup>8</sup> 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 the individual knew or should have known to be incorrect; or
- (2) Failed to furnish information which the individual knew or should have known to be material; or
- (3) With respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect."

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<sup>4</sup> 20 C.F.R. § 10.500(a).

<sup>5</sup> 5 U.S.C. § 8116(a).

<sup>6</sup> *Id.* at §§ 8101-8193, 8129(a).

<sup>7</sup> *Id.* at § 8129(b).

<sup>8</sup> 20 C.F.R. § 10.320(b).

The Board has found the claimant to be at fault in cases where he or she is receiving compensation checks through direct deposit which involve a series of payments over several months with clear knowledge that the payments were incorrect.<sup>9</sup> It is not appropriate, however, to make a finding that a claimant has accepted an overpayment *via* direct deposit until such time as a reasonable person would have been aware that this overpayment had occurred. This awareness could be established either through documentation such as a bank statement or notification from OWCP or where a reasonable period of time has passed during which a claimant could have reviewed independent confirmation of the incorrect payment.<sup>10</sup>

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

The Board finds that appellant was not at fault in the creation of an overpayment of compensation in the amount of \$1,083.02 for the period August 17 through 27, 2011.

An overpayment of compensation occurred in this case when appellant returned to full-time work on August 17 2011 and received compensation for temporary total disability for the period August 17 through 27, 2011. The compensation check thus covered two periods: a period of total disability through August 16, 2011, for which appellant remained entitled to compensation and a period of full-time employment from August 17 through 27, 2011 for which he was not entitled to compensation. It is during this latter period that the overpayment occurred.

OWCP determined that appellant was at fault in the creation of the overpayment because he accepted payments that he knew or reasonably should have known to be incorrect. In cases where a claimant receives compensation through direct deposit, however, it must establish that at the time a claimant received the direct deposit in question he knew or should have known that the payment was incorrect.<sup>11</sup> The Board has held that an employee who receives payments from OWCP in the form of a direct deposit might not be at fault the first time an incorrect payment is deposited into her account since the acceptance of the overpayment, at the time of receipt of the direct deposit, lacks the requisite knowledge.<sup>12</sup> OWCP's regulations, effective August 29, 2011, place claimants on notice that good faith and exercise of a high degree of care in regard to receipt of benefits require review of electronic bank statements. This regulation does not diminish the effect of the Board's previous decisions, as in *Tammy Craven*,<sup>13</sup> that the deposit of compensation into appellant's bank account marks the moment that claimant gains control of the funds from the U.S. Treasury and the overpayment was created. As explained in *Craven*, because fault is defined by what the claimant knew or should have known at the time of acceptance, one of the consequences of electronic fund transfers is that a claimant may not be at fault for accepting the first incorrect payment because the requisite knowledge is lacking at the time of deposit. In this

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<sup>9</sup> See *Karen K. Dixon*, 56 ECAB 145 (2004).

<sup>10</sup> See *K.H.*, Docket No. 06-191 (issued October 20, 2006).

<sup>11</sup> *C.K.*, Docket No. 12-746 (issued May 1, 2012); *J.H.*, Docket No. 11-114 (issued July 18, 2011); *R.C.*, Docket No. 10-2113 (issued July 6, 2011); *C.S.*, Docket No. 10-926 (issued March 16, 2011).

<sup>12</sup> *Tammy Craven*, 57 ECAB 689 (2006); see also *George A. Hirsch*, 47 ECAB 520 (1996).

<sup>13</sup> *Id.*

case, appellant received a payment electronically for a period ending August 27, 2011. Although he accepted the overpayment in this case by gaining control of the funds deposited into his account, OWCP has not shown that he knew or should have known at the time of the electronic deposit of August 1, 2011 that the payment was incorrect. It has not presented sufficient evidence to establish that appellant accepted a payment which he knew or should have known to be incorrect. The Board finds that OWCP improperly determined that he was at fault in the creation of the August 17 through 27, 2011 overpayment. The Board will set aside OWCP's January 25, 2012 decision on the issues of fault and recovery with respect to the August 1, 2011 electronic payment and remand the case for consideration of waiver based on appellant's current financial circumstances.

### **CONCLUSION**

The Board finds that appellant received an overpayment in the amount of \$1,083.02 for the period August 17 through 27, 2011 because he received wage-loss compensation after he returned to regular duty on August 16, 2011. The Board finds that OWCP improperly found that he was at fault in the creation of the overpayment and will remand the case for consideration of whether waiver of the recovery of the overpayment is warranted.

### **ORDER**

**IT IS HEREBY ORDERED THAT** that the January 25, 2012 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part. The case is remanded for further action consistent with this decision.

Issued: September 12, 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