

FACTUAL HISTORY

Appellant, a 61-year-old rural carrier, has an accepted traumatic injury claim for brachial neuritis which arose on March 26, 2011. She received continuation of pay through May 12, 2011, and afterwards OWCP commenced payment of wage-loss compensation. About every two weeks appellant submitted a Form CA-7 claim for compensation and OWCP paid her wage-loss benefits on the supplemental roll beginning May 13, 2011.² Supplemental roll payments continued through August 27, 2011. Effective August 28, 2011, OWCP transferred appellant to the periodic compensation rolls.³ On September 24, 2011 it disbursed a check in the amount of \$3,068.14 which covered the 28-day period August 28 to September 24, 2011; but appellant had resumed her regular, full-time duties on August 26, 2011. A nurse care manager assigned by OWCP to monitor appellant's medical treatment reportedly advised the claims examiner of appellant's return to work on August 26, 2011.⁴ Appellant personally advised OWCP of her return to work by letter dated September 21, 2011, which OWCP received on September 27, 2011.⁵

By correspondence dated September 28, 2011, OWCP addressed how it had computed appellant's compensation for the period July 30 to August 27, 2011. The letter explained that she would be receiving regular compensation payments every 28 days beginning August 28, 2011. OWCP provided information regarding appellant's weekly pay rate for compensation purposes and itemized various deductions for health benefits and life insurance. The September 28, 2011 correspondence also included a certification (EN1049) that appellant was to sign and return to OWCP regarding her rights and responsibilities with respect to receiving wage-loss compensation.

On September 30, 2011 OWCP realized its mistake and immediately ceased further periodic rolls payments.

On November 15, 2011 OWCP issued a preliminary determination of overpayment in the amount of \$3,657.59 for the period July 30 to September 24, 2011. It explained that the overpayment occurred, in part, because it had not withheld optional life insurance premiums for the period July 30 to August 25, 2011. The majority of the overpayment occurred because appellant returned to work on August 26, 2011 and OWCP continued to pay wage-loss compensation for temporary total disability through September 24, 2011. OWCP also made a preliminary finding that appellant was at fault in creating the overpayment because she accepted payment(s) she either knew or reasonably should have known to be incorrect. Additionally, the claims examiner noted that appellant waited until September 21, 2011 before notifying OWCP of

² Appellant submitted a total of eight CA-7 forms covering the period May 13 to August 25, 2011.

³ Appellant's last supplemental roll payment of \$3,366.11 was disbursed on September 2, 2011, and covered the period July 30 to August 27, 2011.

⁴ OWCP's nurse care manager accompanied appellant on her August 25, 2011 medical appointment where she received clearance to resume her regular duties.

⁵ The primary purpose of appellant's September 21, 2011 correspondence was to resolve a problem regarding the transfer of her health benefits coverage.

her August 26, 2011 return to work. She stated that appellant had knowledge of the return to work reporting requirement as appellant previously filed numerous other workers' compensation claims.

On November 22, 2011 appellant requested a prerecoupment hearing. She noted her disagreement with the amount of the overpayment and contended that she was not at fault. Appellant had not cashed the September 24, 2011 check for \$3,068.14 which covered the period August 28 to September 24, 2011. Rather, she returned the check to OWCP with "VOID" written across the front.⁶ Appellant explained that she received the payment in early October 2011, and had been waiting to be notified as to where she should return the check. She noted that she had never submitted a Form CA-7 requesting compensation following her August 26, 2011 return to work. With respect to her alleged failure to timely notify OWCP of her return to work, appellant explained that OWCP-appointed nurse care manager attended her August 25, 2011 medical appointment and was aware of the August 26, 2011 return to work. According to appellant, the nurse care manager would notify all parties of the medical release, and in fact, prepared a letter to that effect on August 26, 2011.⁷ Under the circumstances, appellant did not believe she was at fault in creating the overpayment. Although appellant requested waiver of recovery of the overpayment, she did not complete and return the overpayment recovery questionnaire (Form OWCP-20) that accompanied the November 15, 2011 preliminary determination.

On February 7, 2012 OWCP provided appellant a 30-day advance notice of her prerecoupment hearing which had been scheduled for March 8, 2012.⁸ The hearing notice was sent to her address of record. Notice was also sent to the employing establishment. On February 23, 2012 the employing establishment advised OWCP of its intent to participate in the March 8, 2012 scheduled hearing.

The March 8, 2012 telephonic hearing did not occur as scheduled, and instead OWCP's hearing representative conducted a review of the written record. The hearing representative stated that appellant did not appear for the March 8, 2012 hearing and had not provided any explanation as to why she failed to appear.

By decision dated June 11, 2012, OWCP's hearing representative affirmed the preliminary overpayment determination. Although appellant had already returned the September 24, 2011 periodic rolls payment of \$3,068.14.⁹ The hearing representative credited appellant for the amount returned to OWCP, and reduced the outstanding debt to \$232.14. She also found appellant at fault in creating the overpayment. The hearing representative noted that

⁶ Appellant enclosed the voided check with her November 22, 2011 correspondence. OWCP received the returned payment on December 2, 2011.

⁷ The record includes a copy of the above-referenced August 26, 2011 letter, but it was not received by OWCP until October 3, 2011.

⁸ OWCP scheduled a telephonic hearing and advised appellant of the date, time (1:30 p.m. EST), toll-free number and pass code necessary to access the telephone hearing.

⁹ See *supra* note 6.

appellant did not “make any attempt to return the compensation prior to receiving the [November 15, 2011] overpayment notice.”

On appeal, appellant claimed not to have received notification of the March 8, 2012 prerecoupment hearing.

LEGAL PRECEDENT -- ISSUE 1

A claimant is not entitled to receive temporary total disability (TTD) benefits and actual earnings for the same time period.¹⁰ An overpayment of compensation is created when a claimant returns to work but continues to receive wage-loss compensation for TTD.¹¹

When Federal Employees’ Group Life Insurance premiums are incorrectly withheld, the entire amount of the unpaid premium is deemed an overpayment of compensation because OWCP must pay the full premium to the Office of Personnel Management upon discovery of the error.¹²

ANALYSIS -- ISSUE 1

Before addressing the issues of fact and amount of overpayment, the Board notes that OWCP properly notified appellant of the March 8, 2012 prerecoupment hearing. The record includes a copy of OWCP’s February 7, 2012 30-day hearing notice which was addressed to both appellant and the employing establishment. In the absence of evidence to the contrary, it is presumed that a notice mailed in the ordinary course of business was received in due course by the intended recipient.¹³ This is commonly referred to as the “mailbox rule” and the presumption arises when the record reflects that the notice was properly addressed and duly mailed.¹⁴ Appellant’s copy of the February 7, 2012 notice of hearing, was addressed to her address of record. There is no indication of record that the February 7, 2012 notice was returned to OWCP as undeliverable. Accordingly, it is presumed that appellant received OWCP’s 30-day hearing notice in due course. Because she did not participate in the March 8, 2012 scheduled hearing and did not explain her absence, OWCP’s hearing representative properly treated appellant’s hearing requests as a request for review of the written record.¹⁵

Appellant was not entitled to wage-loss compensation for total disability following her August 26, 2011 return to full-time, regular duty. The September 2, 2011 check she received covered the 29-day period July 30 to August 27, 2011. Because she had returned to work

¹⁰ *L.S.*, 59 ECAB 350, 352-53 (2008).

¹¹ *Id.*; Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2a (May 2004).

¹² *Keith H. Mapes*, 56 ECAB 130, 132-33 (2004); *James Lloyd Otte*, 48 ECAB 334, 337 (1997).

¹³ *Kenneth E. Harris*, 54 ECAB 502, 505 (2003).

¹⁴ *Id.*

¹⁵ *See* 20 C.F.R. §§ 10.439 and 10.622(b) (2012).

effective August 26, 2011, appellant was not entitled to wage-loss compensation for two of the 29 days included in the September 2, 2011 supplemental rolls payment. She was also not entitled to the 28-day periodic rolls payment she received on or about September 24, 2011. This check in the amount of \$3,068.14 covered the period August 28 to September 24, 2011. Appellant acknowledges that she was not entitled to the September 24, 2011 check. She did not cash the check and returned it to OWCP on November 22, 2011. Given that appellant never accepted the September 24, 2011 check, there is no overpayment of compensation for the period August 28 to September 24, 2011. Accordingly, the Board finds that the period of the overpayment is limited to July 30 to August 27, 2011, which was covered by the September 2, 2011 check.¹⁶

The September 2, 2011 check included two days that appellant was not entitled to wage-loss compensation; August 26 and 27, 2011. The compensation appellant received for these two days was properly declared an overpayment.¹⁷ The Board notes that OWCP also neglected to withhold optional life insurance (OLI) premiums for the period July 30 to August 25, 2011.¹⁸ OWCP calculated that it should have withheld OLI premiums in the amount of \$175.40 for the period July 30 to August 25, 2011. Its failure to deduct OLI premiums resulted in an additional overpayment of benefits.¹⁹ Whereas appellant received net compensation of \$3,366.11 for the 29-day period July 30 to August 27, 2011, OWCP determined that she was only entitled to receive net compensation of \$2,958.57.²⁰ The difference represented an overpayment of \$407.54. The hearing representative mistakenly found there was a remaining debt of only \$232.14. The miscalculation was due to her failure to account for the OLI premiums (\$175.40) previously neglected from withholding. Accordingly, the Board finds that appellant received an overpayment of \$407.54 for the period July 30 to August 27, 2011.

LEGAL PRECEDENT -- ISSUE 2

Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments she receives from OWCP are proper.²¹ A recipient will be found to be at fault with respect to creating an overpayment if the individual “[a]ccepted a payment which ... he or she knew or should have known to be incorrect.”²²

¹⁶ As discussed *infra*, because there was no overpayment for the period August 28 to September 24, 2011, OWCP’s hearing representative’s finding of fault based on the timing of appellant’s return of the September 24, 2011 check is rendered moot.

¹⁷ *Supra* note 10.

¹⁸ OWCP had previously deducted health insurance (HBI) and basic life insurance (BLI) premiums for the 29-day period July 30 to August 27, 2011.

¹⁹ *Keith H. Mapes, supra* note 12.

²⁰ OWCP recalculated appellant’s gross compensation as well as appropriate deductions for HBI, BLI and OLI premiums for the 27-day period ending August 25, 2011.

²¹ 20 C.F.R. § 10.433(a).

²² *Id.*

An individual who is without fault in creating or accepting an overpayment is nonetheless subject to recovery of the overpayment unless adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.²³ Recovery of an overpayment will defeat the purpose of FECA if such recovery would cause hardship to a current or former beneficiary because the beneficiary from whom OWCP seeks recovery needs substantially all of her current income, including compensation benefits, to meet current ordinary and necessary living expenses, and the beneficiary's assets do not exceed a specified amount as determined by OWCP.²⁴ Additionally, recovery of an overpayment is considered to be against equity and good conscience when any individual who received an overpayment would experience severe financial hardship in attempting to repay the debt or when any individual, in reliance on such payment or on notice that such payments would be made, relinquished a valuable right or changed her position for the worse.²⁵

The individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by OWCP.²⁶ This information is necessary for determining whether a waiver of recovery of the overpayment is warranted.²⁷ The information is also used to determine an appropriate repayment schedule, if necessary.²⁸ Failure to submit the requested information within 30 days of the request shall result in denial of waiver.²⁹ No further request for waiver shall be considered until the requested information is furnished.³⁰

ANALYSIS -- ISSUE 2

OWCP's November 15, 2011 preliminary determination found that appellant was with fault in creating the overpayment because she was aware or should have reasonably been aware that she was not entitled to receive wage-loss benefits after returning to full-time work. OWCP did not distinguish between the September 2 and 24, 2011 payments despite the differing circumstances.³¹ After receiving the preliminary determination, appellant returned the September 24, 2011 check to OWCP.³² In her November 22, 2011 correspondence, she

²³ 5 U.S.C. § 8129(b); 20 C.F.R. §§ 10.433, 10.434, 10.436 and 10.437.

²⁴ 20 C.F.R. § 10.436(a), (b). For an individual with no eligible dependents the asset base is \$4,800.00. The base increases to \$8,000.00 for an individual with a spouse or one dependent, plus \$960.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6a(1)(b) (June 2009).

²⁵ *Id.* at § 10.437(a), (b).

²⁶ *Id.* at § 10.438(a).

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at § 10.438(b).

³⁰ *Id.*

³¹ Each overpayment situation must be considered on its own merit in terms of determining fault. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.4 (June 2009).

³² *See supra* note 6.

explained that she knew the payment was “erroneous” and had not cashed the check. Appellant further stated that she was waiting to hear from OWCP regarding where to return the check.

While appellant returned the \$3,068.14 check to OWCP in November 2011, OWCP’s hearing representative’s June 11, 2012 decision essentially found appellant at fault for not having returned the September 24, 2011 check sooner. She did not separately address the issue of fault as it pertained to the September 2, 2011 payment of which appellant was entitled to approximately 90 percent.

As noted, there is no overpayment for the period August 28 to September 24, 2011. Appellant did not cash the September 24, 2011 check and returned it to OWCP prior to its hearing representative’s final overpayment decision. She did not accept what she considered to be an “erroneous” September 24, 2011 periodic rolls payment. Because there was no overpayment for the period August 28 to September 24, 2011, the hearing representative’s finding of fault as it pertains to the September 24, 2011 payment is rendered moot.

Appellant was entitled to a sizeable portion of the payment she received from OWCP on or about September 2, 2011. The \$407.54 overpayment for the period July 30 to August 27, 2011 represents a portion of the \$3,366.11 payment OWCP disbursed on September 2, 2011. The procedure manual states that “under-deduction of health benefits or life insurance premiums” is a situation that “should always result in a finding of without fault.”³³ The procedure manual further provides that in situations where an equally valid argument can be made for finding a benefits recipient “with fault” and “without fault,” the benefit of the doubt should go to the claimant, and a finding of without fault should be made consistent with the nature of FECA as social legislation designed to benefit entitled employees.³⁴ Under the circumstances, the Board finds that appellant was without fault in accepting the \$407.54 overpayment for the period July 30 to August 27, 2011.

Because OWCP’s hearing representative found appellant at fault, waiver of recovery of the overpayment was not considered. As the Board finds that appellant was not at fault as to the creation of the \$407.54 overpayment, the case will be remanded to OWCP for consideration of waiver.

CONCLUSION

Appellant received an overpayment of \$407.54 for the period July 30 to August 27, 2011 for which she was without fault.

³³ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.5b(1)(c). OWCP’s overpayment procedures reflect an understanding that FECA is social legislation intended to benefit entitled employees, and that “[e]very effort should be made to accommodate the claimant’s best interest...” *Id.* at Chapter 6.200.1.

³⁴ *Id.* at Chapter 6.200.5.

ORDER

IT IS HEREBY ORDERED THAT the June 11, 2012 decision of the Office of Workers' Compensation Programs is affirmed as to fact of overpayment, set aside as to amount and fault and remanded for consideration of waiver.

Issued: July 26, 2013
Washington, DC

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

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

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