

**United States Department of Labor
Employees' Compensation Appeals Board**

R.R., Appellant

and

**U.S. POSTAL SERVICE, MAIN POST OFFICE,
Miami, FL, Employer**

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**Docket No. 14-14
Issued: April 24, 2014**

Appearances:
Ron Watson, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 9, 2013 appellant, through his representative, filed a timely appeal from a September 11, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP) that found an overpayment of compensation. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$4,049.14 for the period October 28 through December 15, 2012 as he received FECA compensation after his benefits were terminated effective October 28, 2012; and (2) whether OWCP properly found appellant at fault in the creation of the overpayment.

¹ 5 U.S.C. §§ 8101-8193.

² Appellant requested oral argument but did not respond to the December 12, 2013 letter from the Clerk of the Appellate Boards to confirm the need for oral argument. The Board has decided the appeal on the record as submitted.

On appeal, appellant asserted that he was not informed that his compensation would stop and that his physician did not agree with OWCP's referral physician.

FACTUAL HISTORY

On August 17, 2010 appellant, then a 48-year-old city carrier, twisted his right ankle and fell. He stopped work on August 18, 2010 and returned on August 26, 2010. The claim was accepted for bilateral ankle sprain and sprains of the neck, right shoulder and upper arm. On October 26, 2010 Dr. Fernando Moya, a Board-certified orthopedic surgeon, performed an arthroscopy and right subacromial decompression with distal clavicle excision and acromioclavicular (AC) joint debridement for a partial rotator cuff tear. Appellant received continuation of pay and wage-loss compensation. He was placed on the periodic compensation rolls.³

A March 31, 2011 magnetic resonance imaging (MRI) scan of the right shoulder demonstrated postoperative changes and thickening consistent with tendinopathy. On April 13, 2011 Dr. Moya described the MRI scan findings and noted appellant's complaint of discomfort with certain mechanical movements such as pushing and pulling. The right shoulder evaluation showed localized tenderness and pain with crepitus and some decreased motion. Dr. Moya diagnosed right shoulder impingement syndrome and rotator cuff tendinosis, right shoulder AC joint pain and post-traumatic right shoulder status post arthroscopic surgery. He advised that appellant could perform light-duty work with no heavy lifting, pushing or pulling. On a May 13, 2011 form report, Stephanie Rasbury, a physician's assistant, diagnosed right shoulder status post arthroscopic rotator cuff repair. She advised that appellant could perform light duty with no lifting greater than 25 pounds with the right upper extremity.

In 2012, OWCP referred appellant to Dr. Gilbert D. Beauperthuy, a Board-certified osteopath specializing in orthopedic surgery, for a second opinion evaluation. In an August 10, 2012 report, Dr. Beauperthuy advised that appellant's bilateral ankle and neck sprains had resolved. He diagnosed status post right shoulder rotator cuff tendon strain with impingement and subacromial decompression. Dr. Beauperthuy found that appellant was capable of returning to his date-of-injury job, full time and that no further medical treatment was required.

In an August 30, 2012 letter, OWCP proposed to terminate appellant's medical and wage-loss benefits. It found that the weight of the medical evidence rested with the opinion of Dr. Beauperthuy who found that appellant had no residuals of the accepted conditions. Appellant was given 30 days to submit further evidence. On September 24, 2012 he disagreed with the proposed termination and requested a second opinion.

On October 26, 2012 OWCP finalized the termination of appellant's compensation benefits, effective October 27, 2012.

³ The record indicates that appellant received a third-party settlement for this claim.

On December 3, 2012 appellant requested a hearing.⁴

In correspondence dated December 12, 2012, the employing establishment advised that, although appellant's wage-loss benefits had been terminated, he continued to receive compensation on the periodic compensation rolls.

In a December 12, 2012 treatment record, Dr. Moya noted that appellant had not been seen since May 13, 2011. He discussed appellant's surgical history and stated that he had been placed with restrictions of no heavy lifting, pushing or pulling greater than 25 pounds. Right shoulder examination demonstrated tenderness and mild swelling of the AC joint with deltoid and tuberosity tenderness and crepitus with adduction of the shoulder. Cross chest, flexion, adduction, pronation and supination tests were positive. Strength and range of motion were diminished on the right.

By decision dated December 31, 2012, OWCP denied appellant's request for a hearing on the grounds that it was untimely.

On January 31, 2013 OWCP issued a preliminary determination that appellant received a \$5,049.14 overpayment of compensation for the period October 28 through December 15, 2012 because he received wage-loss compensation after his benefits were terminated. Appellant was found at fault in the creation of the overpayment because he accepted payments that he knew or should have known to be incorrect. He was provided an overpayment action request form and an overpayment questionnaire. Computer print-outs in the record indicate that appellant received compensation by check in the amount of \$5,049.14 for the period October 28 through December 15, 2012.⁵

Appellant disagreed that an overpayment occurred and requested a prerecoupment hearing. He also submitted an overpayment questionnaire. Appellant was not present at the hearing held on June 12, 2013. Appellant's representative agreed that a \$5,049.14 overpayment had been created but asserted that appellant was not at fault because he did not receive the termination decision until late. He further argued that a conflict in medical evidence was created between the opinions of Dr. Moya, appellant's attending physician, and Dr. Beauperthuy, an OWCP referral physician. The hearing representative questioned some of the expenses listed on the overpayment questionnaire.

By letter dated June 28, 2013, appellant's representative advised that appellant's credit card debt had been liquidated through a bankruptcy process and that he had three dependents, a wife and two children.

⁴ The record indicates that on November 13, 2012 appellant called OWCP stating that he had received correspondence from the employing establishment directing him to return to work. He stated that he did not receive the decision dated October 26, 2012. On that date OWCP forwarded a copy of the October 26, 2012 decision to appellant.

⁵ Two checks were issued, one for the period October 21 through November 17, 2012 and the second for the period November 18 through December 15, 2012.

On September 11, 2013 an OWCP hearing representative finalized the overpayment decision, finding that appellant was at fault in creating the \$5,049.14 overpayment because he received wage-loss compensation after his benefits were terminated effective October 28, 2012.⁶ The hearing representative found that, as appellant was at fault, he was not entitled to waiver and set repayment at \$150.00 per month.

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 performance of his duty.⁷ Section 8129(a) of FECA provides that, when an overpayment has been made to an individual because of an error of fact or law, adjustment shall be made under regulations prescribed by OWCP, by decreasing later payments to which the individual is entitled.⁸ Section 10.500 of OWCP regulations provide that “compensation for wage loss due to disability is available only for any periods during which an employee’s work-related medical condition prevents him or her from earning the wages earned before the work-related injury.”⁹

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$5,049.14 for the period October 28 through December 15, 2012. The record reflects that OWCP terminated his wage-loss compensation benefits effective October 28, 2012; however, he continued to receive monetary benefits through December 15, 2012.¹⁰

OWCP print-outs reflect that checks in the amount of \$2,885.22 for 28 days of wage-loss compensation were sent to appellant on November 17 and December 15, 2012, for the period October 21 through December 15, 2012. Appellant’s wage-loss compensation was terminated as of October 28, 2012. An OWCP worksheet establishes that his compensation for the period October 28 through December 15, 2012 totaled \$5,049.14.

As to appellant’s assertion on appeal that his physician and OWCP’s referral physician did not agree, although Dr. Moya provided physical examination findings regarding appellant’s right shoulder in a December 12, 2012 report, he noted that he had not seen appellant since May 13, 2011 and the medical report that day was completed by a physician’s assistant and not

⁶ Regarding the assertion that appellant did not timely receive the October 26, 2012 decision, the hearing representative noted that, as the decision was properly addressed and not returned, a presumption was raised that the correspondence sent was received by the addressee.

⁷ 5 U.S.C. § 8102(a).

⁸ *Id.* at § 8129(a).

⁹ 20 C.F.R. § 10.500.

¹⁰ Appellant did not file an appeal with the Board of the October 26, 2012 termination decision.

by Dr. Moya.¹¹ The last report from Dr. Moya was dated April 13, 2011. Appellant had not worked since his right shoulder surgery on October 26, 2010. In the December 12, 2012 report, Dr. Moya did not discuss whether appellant's condition was caused by the August 17, 2010 employment injury or why he continued to have restrictions due to this injury. OWCP referral physician, Dr. Beauperthuy, provided a comprehensive report on August 10, 2012 in which he described physical examination findings and advised that appellant had no residuals of the accepted conditions. OWCP issued a decision on October 26, 2012 that terminated appellant's compensation. No appeal from that decision was made to the Board within 180 days.¹² Therefore, the termination decision is not within the jurisdiction of the Board on this appeal.

The Board finds that, as appellant received monetary compensation after his benefits were terminated, an overpayment was created from October 28 through December 15, 2012.¹³ The fact and amount of overpayment are affirmed.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA provides that an overpayment in compensation shall be recovered by OWCP unless "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."¹⁴

Section 10.433(a) of OWCP regulations provide that OWCP:

"... may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from OWCP are proper. The recipient must show good faith and exercise a high degree of care in reporting events which may affect entitlement to or the amount of benefits. A recipient who has done any of the following will be found to be at fault in creating an overpayment: (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 which he or she knew or should have known to be material; or (3) Accepted a payment which he or she

¹¹ Reports from a physician's assistant are not considered medical evidence as a physician's assistant is not considered a physician under FECA. *Ricky S. Storms*, 52 ECAB 349 (2001). Section 8101(2) defines the term "physician" to include surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by state law. 5 U.S.C. § 8101(2).

¹² See 20 C.F.R. § 501.3(e).

¹³ The Board notes that in correspondence dated June 28, 2013 appellant's representative indicated that his credit card debt had been liquidated through a bankruptcy process. There is no further evidence of record concerning a bankruptcy proceeding.

¹⁴ 5 U.S.C. § 8129; see *Linda E. Padilla*, 45 ECAB 768 (1994).

knew or should have known to be incorrect. (This provision applies only to the overpaid individual).”¹⁵

To determine if an individual was at fault with respect to the creation of an overpayment, OWCP examines 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.¹⁶

ANALYSIS -- ISSUE 2

OWCP determined that appellant was at fault in the creation of the overpayment because he accepted payments that he knew or should have known to be incorrect. While appellant asserts on appeal that he did not timely receive the October 26, 2012 decision in which his compensation benefits were terminated; the record establishes that the decision was sent to his address of record. The Board has held that, in the absence of evidence to the contrary, it is assumed that a notice properly mailed to an individual in the ordinary course of business was received by that individual. This is known as the mailbox rule.¹⁷ A properly addressed copy of a decision is in the case record, together with the mailing custom or practice of OWCP. This raises the presumption that the original was received by the addressee.¹⁸

Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives are proper.¹⁹ The recipient must show good faith and exercise a high degree of care in reporting events that may affect entitlement to or the amount of benefits.²⁰

In this case, appellant received compensation by check which listed the dates of compensation entitlement. He did not return the compensation checks dated November 17 and December 15, 2012. The Board finds that appellant knew or should have known that at the time his monetary compensation was terminated, effective October 28, 2012, that he was not entitled to additional wage-loss compensation. Appellant had the obligation to return payments he knew or should have known were incorrect.²¹ Under section 10.433(a) of OWCP regulations, he is at fault and is not entitled to waiver of the overpayment in compensation.²² Consequently, the overpayment must be recovered.

¹⁵ 20 C.F.R. § 10.433; *see Sinclair L. Taylor*, 52 ECAB 227 (2001); *see also* 20 C.F.R. § 10.430.

¹⁶ *Id.* at § 10.433(b); *Neill D. Dewald*, 57 ECAB 451 (2006).

¹⁷ *See Joseph R. Giallanza*, 55 ECAB 186 (2003).

¹⁸ *See Levi Drew, Jr.*, 52 ECAB 442 (2001).

¹⁹ *Danny E. Haley*, 56 ECAB 393 (2005).

²⁰ *Sinclair L. Taylor*, *supra* note 15.

²¹ *Id.*

²² *Id.*

With respect to recovery of the overpayment in compensation, the Board's jurisdiction is limited to reviewing those cases where OWCP seeks recovery from continuing compensation benefits under FECA.²³ As appellant is no longer receiving wage-loss compensation, the Board does not have jurisdiction with respect to the recovery of the overpayment under the Debt Collection Act.²⁴

CONCLUSION

The Board finds that appellant was at fault in the creation of an overpayment in compensation in the amount of \$5,049.14 for the period October 28 through December 15, 2012. As appellant was at fault, he is entitled to waiver of recovery of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the September 11, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 24, 2014
Washington, DC

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

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

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

²³ *Cheryl Thomas*, 55 ECAB 610 (2004).

²⁴ *Id.*