

employing establishment's 2008 spreadsheet and May 20, 2010 explanatory letter in calculating the overpayment, that OWCP wrongly found overpayments for pay periods in which there were no time or attendance records, that appellant is not at fault in the creation of the overpayment, and that OWCP erred by denying waiver.

FACTUAL HISTORY

This case was previously before the Board. By decision and order issued December 4, 2009,² the Board reversed OWCP's February 13, 2009 decision finding a \$46,325.69 overpayment of compensation for the period April 5, 1992 to August 10, 2002, as appellant worked more than four hours a day while receiving wage-loss compensation for four hours a day. OWCP based its overpayment calculations on a 2008 spreadsheet provided by the employing establishment. The Board found that OWCP failed to establish the fact or amount of the overpayment. The Board also found that OWCP did not comply with its procedures by providing a detailed calculation of the amount of the overpayment, that the 2008 spreadsheet did not have clearly explained column headings, and that the 2008 spreadsheet attributed work hours to appellant although no time and attendance records existed for specific dates. The Board also reversed OWCP's finding that appellant was at fault in creating the overpayment as the fact and amount of the overpayment were not established. OWCP based its finding of fault in an April 23, 1992 letter advising appellant to notify OWCP immediately if her hours were increased or if she received an increase in pay, as "[f]ailure to do so could cause an overpayment." Appellant was also instructed to return a check for total disability compensation for the period February 10 to April 4, 1992 as she returned to work on February 10, 1992. The facts of the case as set forth in the Board's decision are incorporated by reference.

In an April 8, 2010 letter, OWCP requested that the employing establishment explain the 2008 spreadsheet and other time and attendance records previously provided, within 20 days. The employing establishment responded by May 20, 2010 letter, noting that the specialists who prepared the 2008 spreadsheet were no longer employed, so a complete explanation was no longer possible. It explained the column headings and annotations as follows: "REG" denoted "regular time (paid by the agency);" "162" denoted "worker's comp[ensation] not compensated by agency;" "TOTAL PROOF" denoted "total of hours for that day;" "note ... appear[ed] to mean that [appellant] was paid by FECA and not compensated by the agency."

By notice dated November 18, 2010, OWCP advised appellant of its preliminary determination of a \$63,063.83 overpayment of compensation from May 3, 1992 to January 26, 2002 for which it found her at fault. It noted that it based its determination on the 2008 employing establishment spreadsheet.

Appellant requested a hearing, held on April 26, 2011. At the hearing, counsel contended that OWCP did not provide a clear basis for the fact or amount of the overpayment, particularly in light of the May, 20, 2010 employing establishment letter acknowledging that the 2008 spreadsheet on which the overpayment was based could not be fully interpreted.

² Docket No. 09-1710 (issued December 4, 2009).

By decision dated August 25, 2011, an OWCP hearing representative vacated the November 18, 2010 preliminary finding of overpayment and remanded the case to OWCP for further development. The hearing representative found that: “[S]ufficient reference to errors and/or miscalculations from 1992 to 1994 have been identified to question [OWCP’s] calculation of the overpayment amount of the entire period and require additional review, (re-)calculation, explanation and/or clarification prior to further consideration of the overpayment or issues of fault and waiver on appeal.” The hearing representative directed OWCP to provide a “clear explanation of the overpayment calculation correcting and/or explaining the number of hours worked/paid by the agency and the amount of hours for wage loss that the claimant is entitled to for each pay period of the identified overpayment period. [OWCP] must show the calculations of [appellant’s] entitlement for each period to ensure that the record is correct in determining the overpayment amount.”

By notice dated January 31, 2013, OWCP advised appellant of its preliminary finding of a \$71,139.65 overpayment of compensation for the period May 3, 1992 to January 26, 2002, based on the 2008 employing establishment spreadsheet.

Appellant requested a hearing, held on June 28, 2013. At the hearing, counsel asserted that the January 31, 2013 notice did not explain the calculation of the alleged overpayment, that time and attendance records differed for 20 pay periods from the 2010 decisions, and no new documents were provided regarding the 33 pay periods from which time and attendance records were missing. Appellant provided financial information.

In an August 16, 2013 decision, an OWCP hearing representative finalized the January 21, 2013 preliminary notice, finding a \$71,139.65 overpayment for the period May 3, 1992 to January 26, 2002. She found that appellant was at fault in creating the overpayment as she knew or should have known she was not entitled to receive four hours a day of wage-loss compensation while working more than the remaining four hours a day. The hearing representative noted that the paper checks appellant received at her home noted the period covered. She directed recovery by deducting \$500.00 a month from appellant’s continuing compensation payments, based on the financial information provided by appellant.

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.³ Section 8129(a) of FECA provides, in pertinent part, that when “an overpayment has been made to an individual under this subchapter because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.”⁴

³ 5 U.S.C. § 8102(a).

⁴ *Id.* at § 8129(a).

OWCP procedures state that the preliminary notice of overpayment must clearly set forth the reason why the overpayment occurred and contain a clearly written explanation as to how the overpayment was calculated.⁵

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained a lumbar injury in 1984 requiring two fusion surgeries. On February 10, 1992 she returned to work for four hours a day and received wage-loss compensation for four hours a day. Appellant continued to work this schedule through August 2005.

In its August 16, 2013 decision, OWCP found a \$71,139.65 overpayment of compensation for the period May 3, 1992 to January 26, 2002. This overpayment was based on the finding that the 2008 employing establishment spreadsheet established that appellant worked more than four hours a day while receiving wage-loss compensation for four hours a day on specified dates during this period. The Board finds, however, that the 2008 spreadsheet of record regarding appellant’s earnings during the period at issue, establishes an overpayment of only 65 hours.

In reviewing the 2008 spreadsheet, the Board applies the column heading and code explanations contained in the employing establishment’s May 20, 2010 letter. The column heading “TOTAL PROOF” indicates the total number of hours for which appellant received wages (listed in the “REG” column) and FECA compensation (listed in the “162” column). Thus, a day on which an overpayment occurred would necessarily list more than eight hours in the “TOTAL PROOF” column. On days when “TOTAL PROOF” did not exceed eight hours, no overpayment could have occurred. On that basis, the May 13, 2008 employing establishment spreadsheet establishes that appellant was overpaid for a total of 65 hours on the following dates as she received wage-loss compensation although she worked a full eight-hour day:

DATE	REG	162	TOTAL PROOF
6/29/92	8.00	4.00	12.00
6/30/92	8.00	4.00	12.00
7/1/92	8.00	2.00	10.00
7/2/92	8.00	3.00	11.00
7/6/92	8.00	2.00	10.00
7/7/92	8.00	4.00	12.00
7/8/92	8.00	1.00	9.00
7/9/92	8.00	8.00	16.00
7/10/92	8.00	4.00	12.00
9/8/92	8.00	5.00	13.00 (code “note”)
9/9/92	8.00	5.00	13.00 (code “note”)
2/8/93	8.00	2.00	10.00
2/9/93	8.00	3.00	11.00
2/12/93	8.00	1.00	9.00

⁵ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.4a (June 2009).

2/16/93	8.00	4.00	12.00
2/17/93	8.00	4.00	12.00
2/18/93	8.00	1.00	9.00
2/19/93	8.00	8.00	16.00

For all workdays other than those listed above, the “TOTAL PROOF” column did not exceed eight hours. Therefore, the Board finds that OWCP did not meet its burden of proof to establish an overpayment for the other dates listed during the period May 3, 1992 to January 26, 2002.

Additionally, the 2008 spreadsheet shows missing time and attendance data for the dates November 29, 1993, May 2, 1994, May 15, 1995, March 16 and 30, 1998, March 29, April 26, May 24, October 11 and December 20, 1999, January 17, 31 and February 28, 2000. To calculate the alleged overpayment for those dates, OWCP relied on the employing establishment’s estimates rather than accurate time and attendance records. These unproven estimates are insufficient to establish the fact or amount of overpayment for these dates.

The 2008 spreadsheet indicates that, from June 2 to September 9, 1992, appellant’s hourly pay rate was \$21.72. For the period February 8 to 19, 1993, her hourly pay rate was \$22.53. As the evidence establishes that appellant was overpaid for 65 hours during the period June 29, 1992 to February 19, 1993, the actual amount of the overpayment is considerably less than the \$71,139.86 amount found by OWCP. Therefore, the case will be remanded to OWCP for additional development. On return of the case, OWCP shall calculate the amount of the overpayment for the dates June 29 and 30, July 1, 2, 6, 7, 8, 9, 10, September 8 and 9, 1992 and February 8, 9, 12, 16, 17, 18 and 19, 1993. It shall then issue an appropriate decision in the case.

On appeal, counsel asserts that OWCP did not meet its burden of proof in establishing the fact or amount of the overpayment. Counsel also contends that OWCP erred by relying on the employing establishment’s 2008 spreadsheet and May 20, 2010 letter in calculating the overpayment, and that OWCP wrongly found overpayments for pay periods in which there were no time or attendance records. The Board finds that the record establishes that appellant was overpaid 65 hours of compensation during the period June 29, 1992 to February 19, 1993.

LEGAL PRECEDENT -- ISSUE 2

An individual who is found at fault in either accepting or creating an overpayment is not eligible for a waiver of recovery of overpayment.⁶ A benefits recipient will be at fault if the individual: (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 knew or should have

⁶ 5 U.S.C. § 8129(b); 20 C.F.R. §§ 10.423(a) and 10.434.

known to be incorrect.⁷ No waiver of an overpayment is possible if the claimant is at fault in creating the overpayment.⁸

With respect to whether an individual is without fault, section 10.433(b) of OWCP's regulations provide that whether or not OWCP determines that an individual was at fault with respect to creation of an overpayment depends on 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.⁹

Section 10.430(a) of OWCP's regulations advise that OWCP includes on each periodic check a clear indication of the period for which payment is being made. A form is sent to the recipient with each supplemental check which states the period for which payment is being made. Section 10.430(b) notes that, by these means, OWCP puts the recipient on notice that a payment was made and the amount of the payment.¹⁰

ANALYSIS -- ISSUE 2

OWCP applied the third standard in this case, finding that appellant accepted compensation payments that she knew or should have known were incorrect. Appellant accepted compensation payments for intermittent periods from June 29, 1992 to February 19, 1993 while working a full eight-hour day.

OWCP advised appellant by April 23, 1992 letter of her obligation to advise it immediately if she worked more than four hours a day or if her pay increased. It explained that failure to do so could cause an overpayment. OWCP also instructed appellant to return a check issued after she had returned to work. This establishes that she knew or should have known that she was not entitled to accept wage-loss compensation while working full time. As appellant did not return the relevant checks for the period June 29, 1992 to February 19, 1993, OWCP properly found her at fault in creation of the overpayment. As she was at fault under the third standard as set forth above, the overpayment may not be waived.

⁷ 20 C.F.R. § 10.433(a).

⁸ *Gregg B. Manston*, 45 ECAB 344 (1994).

⁹ 20 C.F.R. § 10.433(b).

¹⁰ *R. W.*, Docket No. 13-1285 (issued November 13, 2013); 20 C.F.R. § 10.430.

On appeal, counsel contends that appellant is not at fault in creation of the overpayment, and that OWCP erred by denying waiver. The Board finds that appellant was at fault in creating the 65-hour overpayment. Therefore, OWCP properly found that waiver of recovery is not possible in this case.¹¹

CONCLUSION

The Board finds that OWCP has met its burden of proof in establishing that appellant was overpaid for 65 hours during the period June 29, 1992 to February 19, 1993. The Board further finds that the case is not in posture regarding the amount of the overpayment. The Board further finds that appellant was at fault in creation of the 65-hour overpayment and that the overpayment is therefore not subject to waiver.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated and finalized August 16, 2013 is affirmed in part regarding the fact of overpayment and fault, and is set aside in part regarding the amount of the overpayment. The case is remanded to OWCP for additional development consistent with this decision.

Issued: July 22, 2014
Washington, DC

Patricia Howard Fitzgerald, Acting Chief Judge
Employees' Compensation Appeals Board

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

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

¹¹ With respect to the recovery of the overpayment, the Board's jurisdiction is limited to those cases where OWCP seeks recovery from continuing compensation benefits. *D.R.*, 59 ECAB 148 (2007); *Miguel A. Muniz*, 54 ECAB 217 (2002). Therefore, the Board does not have jurisdiction over the method of recovery issue in this case. *Lorenzo Rodriguez*, 51 ECAB 295 (2000); 20 C.F.R. § 10.441.