



properly found that appellant was at fault in the creation of the \$5,024.41 overpayment and, therefore, ineligible for waiver of recovery.

### **FACTUAL HISTORY**

On September 25, 2012 appellant, then a 32-year-old mail clerk, sustained a right shoulder injury when he picked up a flat tub full of mail. By decision dated November 14, 2012, OWCP accepted the claim for right rotator cuff labral tear. Appellant stopped work on September 15, 2012 and received wage-loss compensation for total disability beginning September 16, 2012. On February 10, 2013 he was placed on the periodic rolls.<sup>3</sup>

On June 3, 2013 OWCP notified appellant of a proposal to terminate his compensation benefits based on the report of Dr. Robert Smith, the second opinion physician, who determined that he did not have any residuals or disability related to his September 15, 2012 employment injury.

By decision dated August 1, 2013, OWCP terminated appellant's compensation benefits effective that day. It found that the medical evidence of record established that he did not have residuals of his work-related injury and his condition had resolved.

On October 7, 2013 OWCP determined that following the August 1, 2013 termination decision appellant had received wage-loss compensation in the amount of \$2,318.96 from August 1 to 24, 2013 and \$2,705.45 from August 25 to September 21, 2013. The total amount of \$5,024.41 constituted an overpayment.

By letter dated October 22, 2013, OWCP made a preliminary determination that appellant received an overpayment of compensation in the amount of \$5,024.41 from August 1 through September 21, 2013 because he received wage-loss compensation after such benefits were terminated. It noted that appellant was on the periodic rolls and received net compensation every 28 calendar days in the amount of \$2,705.45, which he received for the period August 25 through September 21, 2013. Appellant's \$2,705.45 net compensation was divided by the 28-calendar-day payment period totaling \$96.62 received daily.<sup>4</sup> The daily rate was multiplied by the 24 calendar days for which appellant was overpaid from August 1 to 24, 2013 totaling \$2,318.96.<sup>5</sup> The \$2,318.96 overpayment received from August 1 through 24, 2013 was added to the \$2,705.45 received from August 25 through September 21, 2013, resulting in a total overpayment of \$5,024.41.<sup>6</sup> OWCP further found that appellant was at fault in creating the

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<sup>3</sup> The Board notes that appellant received his OWCP compensation benefit payments by paper check on a recurring basis.

<sup>4</sup> The overpayment calculations used the full daily rate value at \$96.6232 which was rounded to \$96.62 for the purposes of the overpayment memorandum.

<sup>5</sup> The daily rate of \$96.6232 was multiplied by the 24 calendar days which totaled \$2,318.9568. This figure was used to calculate appellant's overpayment for the period of August 1, 2013 through August 24, 2013.

<sup>6</sup> The \$2,318.9568 received for the period of August 1 to 24, 2013 was added to the \$2,705.45 received for the period August 25 to September 21, 2013 totaling \$5,024.4068, which was rounded up resulting in an overpayment of \$5,024.41.

overpayment because he accepted payments that he knew or reasonably should have known were incorrect. It informed him of his review rights and instructed him to complete an enclosed overpayment recovery questionnaire form (OWCP-20) and submit supporting financial documentation.

On November 7, 2013 appellant submitted an overpayment recovery questionnaire form and contested the amount of the overpayment. He argued that his physician did not release him to return to work until September 16, 2013. As his physician had him under work restrictions from August 1 to September 15, 2013, appellant contended that he was only overpaid for the period September 16 through 21, 2013. He also contended that he was not at fault in the creation of the overpayment because he assumed that the postmaster had contacted OWCP about his September 16, 2013 return to work date and thought he was entitled to such benefits. Appellant did not fill out the refund questionnaire portion of the form and failed to provide any information regarding his monthly income, monthly payments, debt and additional funds.

In support of his claim, appellant submitted a September 16, 2013 letter from the employing establishment informing him that he would be placed on administrative leave and that it had received his physician's note returning him to full duty on September 16, 2013. He also submitted medical reports dated December 5, 2012 to February 1, 2013 from Dr. Richard Lyons.

By decision dated November 25, 2013, OWCP finalized the overpayment in the amount of \$5,024.41 from August 1 through September 21, 2013. It found that he received wage-loss compensation after his benefits were terminated. Appellant was found at fault in the creation of the overpayment and directed to submit the full amount of the overpayment or contact OWCP within 30 days to arrange for recovery.

### **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>7</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 or she may not receive salary, pay or remuneration of any type from the United States, except in limited circumstances.<sup>8</sup> OWCP's regulations state in pertinent part: 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.<sup>9</sup>

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<sup>7</sup> 5 U.S.C. § 8102.

<sup>8</sup> *Id.* at § 8116(a).

<sup>9</sup> 20 C.F.R. § 10.500.

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

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$5,024.41 for the period August 1 through September 21, 2013. The record reflects that OWCP terminated his wage-loss compensation benefits effective August 1, 2013; however, he received monetary benefits through September 21, 2013. Accordingly, the Board finds that appellant received an overpayment of compensation.<sup>10</sup>

The record establishes that, from August 1 to September 21, 2013, appellant received \$5,024.41 in wage-loss compensation but was not entitled to any monetary compensation for this period following the termination decision. OWCP properly explained that appellant's 28-day net disability compensation amounted to \$2,705.45, the equivalent of receiving \$96.62 daily. As appellant improperly received wage-loss compensation from August 1 to 24, 2013, a period of 24 days, OWCP multiplied the daily compensation rate of \$96.62 by 24 calendar days to calculate an overpayment in the amount of \$2,318.96. It then added the \$2,318.96 overpayment received from August 1 through 24, 2013 to the \$2,705.45 overpayment received for the 28 calendar days from August 25 through September 21, 2013. This totaled an overpayment of compensation in the amount of \$5,024.41.

On appeal, appellant argued that his physician did not release him to return to work until September 16, 2013 and, as such, he was only overpaid from September 16 to 21, 2013. He further argued that an OWCP second opinion physician was wrong in his conclusion that his disability had resolved. The Board notes that OWCP issued a final termination decision on August 1, 2013 which informed appellant that he would no longer be entitled to wage-loss compensation or medical benefits. As noted, no appeal from that decision was made to the Board within 180 days.<sup>11</sup> Therefore, the termination decision became final and is not within the jurisdiction of the Board on this appeal.

The Board finds that OWCP explained how the overpayment occurred and provided this to appellant with the preliminary notice of overpayment. There is no evidence that the overpayment did not occur as found by OWCP. The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$5,024.41 from August 1 through September 21, 2013 as he received monetary compensation after his benefits were terminated. The fact and amount of the overpayment are affirmed.<sup>12</sup>

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

Section 8129(b) of FECA<sup>13</sup> provides that an overpayment of compensation shall be recovered by OWCP unless incorrect payment has been made to an individual who is without

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<sup>10</sup> *R.R.*, Docket No. 14-14 (issued April 24, 2014).

<sup>11</sup> *Supra* note 2.

<sup>12</sup> *J.H.*, Docket No. 08-732 (issued November 4, 2008).

<sup>13</sup> 5 U.S.C. § 8129(b).

fault and when adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.<sup>14</sup> Thus, OWCP may not waive the overpayment of compensation unless appellant was without fault.<sup>15</sup> Adjustment or recovery must, therefore, be made when an incorrect payment has been made to an individual who is with fault.<sup>16</sup>

On the issue of fault, section 10.433 of OWCP's regulations provide 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 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.<sup>17</sup>

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 the 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.<sup>18</sup>

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.<sup>19</sup>

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

OWCP applied the third standard to determine 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. To establish that he was at fault in creating the overpayment of compensation, it must establish that, at the time he accepted the compensation checks in question, he knew or should have known the payments were incorrect.<sup>20</sup>

As noted, OWCP erroneously issued wage-loss compensation for total disability for the period August 1 to September 21, 2013 following the termination of such benefits. Appellant was not entitled to disability compensation for this period as his wage-loss compensation benefits were terminated effective August 1, 2013.

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<sup>14</sup> *Michael H. Wacks*, 45 ECAB 791, 795 (1994).

<sup>15</sup> *Norman F. Bligh*, 41 ECAB 230 (1989).

<sup>16</sup> *Diana L. Booth*, 52 ECAB 370, 373 (2001); *William G. Norton, Jr.*, 45 ECAB 630, 639 (1994).

<sup>17</sup> 20 C.F.R. § 10.433(a).

<sup>18</sup> *Id.* at § 10.433(b).

<sup>19</sup> *J.R.*, Docket No. 08-1107 (issued June 15, 2009). 20 C.F.R. § 10.430.

<sup>20</sup> *See Claude T. Green*, 42 ECAB 174, 278 (1990).

Appellant asserts on appeal that, because his treating physician did not release him to return to work until September 16, 2013, he was entitled to the compensation payments and assumed the postmaster had contacted OWCP. The Board notes that OWCP issued a June 3, 2013 preliminary notification that appellant's compensation benefits would be terminated and finalized the termination decision on August 1, 2013. Appellant was clearly notified that he would no longer be entitled to wage-loss compensation or medical benefits effective August 1, 2013. The record reflects that a copy of OWCP's decisions were properly mailed to appellant at his address of record in the ordinary course of business.<sup>21</sup> Accordingly, appellant was on notice that his benefits were terminated and that he was not entitled to receive any compensation payments effective August 1, 2013.<sup>22</sup>

Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives are proper.<sup>23</sup> 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.<sup>24</sup> While OWCP may have been negligent in making the incorrect payments, this did not excuse appellant from accepting payments he knew or should have known to be incorrect.<sup>25</sup>

In this case, appellant received compensation by check which listed the dates of compensation entitlement. He did not return the compensation checks dated August 24, 2013 and September 21, 2013. The Board finds that appellant knew or should have known that at the time his monetary compensation was terminated, effective August 1, 2013, that he was not entitled to additional wage-loss compensation.<sup>26</sup> Appellant had the obligation to return payments he knew or should have known were incorrect.<sup>27</sup> Under section 10.433(a) of OWCP regulations, he is at fault and is not entitled to waiver of the overpayment in compensation. Consequently, the overpayment must be recovered.

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.<sup>28</sup> As appellant is no longer receiving wage-loss compensation, the Board

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<sup>21</sup> 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. See *Joseph R. Giallanza*, 55 ECAB 186 (2003). 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. See *Levi Drew, Jr.*, 52 ECAB 442 (2001).

<sup>22</sup> *D.R.*, Docket No. 07-823 (issued November 1, 2007).

<sup>23</sup> *Danny E. Haley*, 56 ECAB 393 (2005).

<sup>24</sup> See *Sinclair L. Taylor*, 52 ECAB 227 (2001).

<sup>25</sup> See *Russell E. Wageneck*, 46 ECAB 653 (1995); *C.O.*, Docket No. 07-2440 (issued April 1, 2008).

<sup>26</sup> *Supra* note 10.

<sup>27</sup> *Id.*

<sup>28</sup> *Cheryl Thomas*, 55 ECAB 610 (2004).

does not have jurisdiction with respect to the recovery of the overpayment under the Debt Collection Act.<sup>29</sup>

**CONCLUSION**

The Board finds that appellant received an overpayment of compensation in the amount of \$5,024.41 for the period August 1 through September 21, 2013 for which he was at fault.

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 25, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 10, 2014  
Washington, DC

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

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

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

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<sup>29</sup> See *Desiderio Martinez*, 55 ECAB 245 (2004).