



On appeal appellant asserts that OWCP overruled the Board's previous decision and maintained that the suitable work termination was in error. He further contended that repayment of the overpayment would create extreme financial hardship.

### **FACTUAL HISTORY**

This case has previously been before the Board. In an October 14, 2011 decision, the Board found that OWCP properly terminated appellant's monetary compensation benefits pursuant to 5 U.S.C. § 8106(c) on April 2, 2010. Appellant did not establish that his refusal of suitable work was justified.<sup>2</sup> The Board also noted that the record supported that appellant was entitled to wage-loss compensation for the period January 12 to April 2, 2010.<sup>3</sup> The facts of the previous Board decision are incorporated herein by reference.

In April 2012 appellant was paid compensation for the period January 15 through April 1, 2010. On April 18, 2012 he filed a schedule award claim.

On December 17, 2012 appellant was granted a schedule award for 18 percent impairment of the right arm, for 56.16 weeks, to run from December 2, 2010 to December 30, 2011.<sup>4</sup> OWCP paid the schedule award compensation in the amount of \$34,840.69 in a lump sum. The award was based on the 66-2/3 percent basic compensation rate.

On June 4, 2013 OWCP issued a preliminary determination that appellant received an overpayment of compensation in the amount of \$34,840.69 from December 2, 2010 to December 30, 2011 because he received monetary compensation after his benefits were terminated pursuant to section 8106(c) of FECA. Appellant was found at fault because he accepted payments he knew or should have known to be incorrect. He was provided an overpayment action request form and an overpayment questionnaire. An overpayment worksheet establishes that appellant was paid schedule award compensation in a lump sum of \$34,840.69 for the above period.

Appellant requested a final overpayment decision based on the written record. He maintained that the termination of his monetary benefits under section 8106(c) was in error. Appellant advised that he was responsible for both his disabled daughter and granddaughter and that repaying the overpayment would create financial hardship. He attached evidence regarding

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<sup>2</sup> Docket No. 11-691 (issued October 14, 2011). On October 20, 2008 appellant, a mail handler, had work-related tears to the supraspinatus and suprascapularis tendons of the right shoulder while loading mail. He worked modified duty until December 2, 2009 when Dr. Todd Bell, a Board-certified orthopedic surgeon, performed right shoulder arthroscopy with subacromial decompression, distal clavicle resection, and repair of a large rotator cuff tear. Appellant received wage-loss compensation at the basic statutory rate.

<sup>3</sup> On April 22, 2012 appellant filed a petition for reconsideration with the Board of its October 14, 2011 decision. In May 10, 2012 correspondence, the Clerk of the Board, informed appellant that, as his petition was not timely submitted within the 30-day period for filing a petition, the Board no longer had jurisdiction over his appeal.

<sup>4</sup> The schedule award was based on the opinions of Dr. C. Sanford Carlson, Jr., an OWCP referral physician, and Dr. James W. Dyer, an OWCP medical adviser. Dr. Carlson found that appellant had 18 percent right arm impairment and that the date of maximum medical improvement was December 2, 2010, one year following the right shoulder surgery.

an assault case in Tennessee that was dismissed,<sup>5</sup> documentation regarding student loans for his daughter and insurance claims made by his daughter. Appellant did not submit a completed overpayment questionnaire.

On July 24, 2013 OWCP finalized the overpayment in the amount of \$34,840.69 for which he was at fault because he received schedule award compensation after his monetary benefits were terminated under section 8106(c). Appellant accepted payment he knew or should have known to be incorrect because he refused an offer of suitable work. OWCP advised that his daughter and granddaughter did not qualify as dependents based on the information he provided. As he was at fault, he was not entitled to waiver. Repayment of the full amount was directed.<sup>6</sup>

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

Section 8106(c)(2) of FECA provides in pertinent part, “A partially disabled employee who ... refuses or neglects to work after suitable work is offered ... is not entitled to compensation.”<sup>7</sup> A claimant who refuses suitable work is not entitled to further compensation, including payment of a schedule award for the permanent impairment of a scheduled member.<sup>8</sup> If, however, a claimant reached maximum medical improvement prior to the refusal of suitable employment, he or she is entitled to payment of any portion of the schedule award due to the prior termination of monetary compensation benefits.<sup>9</sup>

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

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$38,840.69 for the period December 2, 2010 through December 30, 2011. The record reflects that OWCP properly terminated appellant’s monetary benefits on April 2, 2010, based on his refusal of an offer of suitable work. This was affirmed by the Board in its October 14, 2011 decision.<sup>10</sup>

Appellant asserted on appeal that OWCP overruled the Board’s October 14, 2011 decision. This is not the case. As found in the Board’s regulations, decisions and orders of the Board are final as to the subject matter appealed, and such decisions and orders are not subject to review except by the Board. The decisions and orders of the Board are final upon the expiration of 30 days from the date of issuance.<sup>11</sup> In this case, appellant filed a petition for reconsideration

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<sup>5</sup> The Tennessee case was in regard to a claim by appellant that someone he identified as an employing establishment supervisor had assaulted him.

<sup>6</sup> A telephone conference was held on September 18, 2013 at which time a repayment schedule of \$60.00 per month was set.

<sup>7</sup> 5 U.S.C. § 8106(c)(2).

<sup>8</sup> *D.S.*, Docket No. 08-885 (issued March 17, 2009).

<sup>9</sup> *Id.*

<sup>10</sup> *Supra* note 2.

<sup>11</sup> 20 C.F.R. § 501.6(d).

with the Board on April 22, 2012, well outside the 30-day reconsideration period following the Board's October 14, 2011 decision. In the absence of further review by OWCP of evidence pertaining to the issue addressed by the October 14, 2011 Board decision, the subject matter reviewed is *res judicata* and is not subject to further consideration.<sup>12</sup>

A claimant who refuses suitable work is not entitled to further monetary compensation, including payment of a schedule award for the permanent impairment of a scheduled member.<sup>13</sup> If a claimant reaches maximum medical improvement prior to the date suitable employment is refused, he or she is entitled to payment of any portion of the schedule award due prior to the termination of monetary compensation benefits.<sup>14</sup> In this case, appellant's monetary compensation benefits were terminated on April 2, 2010. On December 17, 2012 he received a schedule award for an 18 percent impairment of the right arm. As found by an OWCP referral physician and an OWCP medical adviser, maximum medical improvement was reached as of December 2, 2010 a year following surgery and some eight months following the termination of appellant's benefits on April 2, 2010.

The Board finds that appellant received schedule award compensation of \$34,840.69 after his benefits were terminated in accordance with section 8106(c)(2) for refusing an offer of suitable work. The entire schedule award paid from December 2, 2010 to December 30, 2011 constitutes an overpayment. The Board will affirm the fact and amount of the overpayment.

### **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."<sup>15</sup>

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

"[M]ay 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; or

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<sup>12</sup> *Joseph A. Brown, Jr.*, 55 ECAB 542 (2004).

<sup>13</sup> *D.S.*, *supra* note 8.

<sup>14</sup> *Id.*

<sup>15</sup> 5 U.S.C. § 8129; *see Linda E. Padilla*, 45 ECAB 768 (1994).

(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 to be incorrect. (This provision applies only to the overpaid individual).”<sup>16</sup>

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.<sup>17</sup>

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

OWCP determined that appellant was at fault in the creation of the overpayment because he accepted a payment that he knew or should have known to be incorrect. He asserts on appeal that the suitable work termination was in error, but offered no additional evidence to OWCP. The subject matter reviewed in the October 14, 2011 Board decision is *res judicata* and is not subject to further consideration.<sup>18</sup>

Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives are proper.<sup>19</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>20</sup>

On December 17, 2012 appellant was granted a schedule award in the lump sum of \$34,840.69. His entitlement to monetary compensation, however, was terminated on April 2, 2010. OWCP clearly informed appellant that, in accordance with section 8106(c)(2), his entitlement to further wage-loss compensation was terminated as well as to compensation for impairment of a scheduled member. Appellant did not return the schedule award compensation he received. Based on the termination of his benefits, the Board finds that appellant knew that he was not entitled to any additional monetary compensation after April 2, 2010 and had the obligation to return payments he knew or should have known to be incorrect.<sup>21</sup> Under section 10.433(a) of OWCP regulations, appellant is at fault in creating the overpayment and is not entitled to waiver.<sup>22</sup> Consequently, the overpayment must be recovered.

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<sup>16</sup> 20 C.F.R. § 10.433; *see Sinclair L. Taylor*, 52 ECAB 227 (2001); *see also* 20 C.F.R. § 10.430.

<sup>17</sup> 20 C.F.R. § 10.433(b); *Neill D. Dewald*, 57 ECAB 451 (2006).

<sup>18</sup> *Joseph A. Brown, Jr.*, *supra* note 12.

<sup>19</sup> *Danny E. Haley*, 56 ECAB 393 (2005).

<sup>20</sup> *Sinclair L. Taylor*, 52 ECAB 227 (2001).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

As to appellant's assertions on appeal regarding his daughter and granddaughter, there is no evidence of record that he has dependents. On his CA-1 claim form and multiple claims for compensation, including his schedule award claim, appellant noted that he has no dependents.

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.<sup>23</sup> 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.<sup>24</sup>

### **CONCLUSION**

The Board finds that appellant was at fault in the creation of an overpayment in compensation in the amount of \$34,840.69 from December 2, 2010 to December 30, 2011 because he accepted a lump-sum schedule award payment after his compensation benefits were terminated for refusal of an offer of suitable work. As appellant was at fault, he was not entitled to waiver of recovery of the overpayment.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the July 24, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 10, 2014  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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<sup>23</sup> *Cheryl Thomas*, 55 ECAB 610 (2004).

<sup>24</sup> *Id.*