

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

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**E.R., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Paterson, NJ, Employer**

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**Docket No. 14-1401  
Issued: October 24, 2014**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Judge  
ALEC J. KOROMILAS, Alternate Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On June 4, 2014 appellant filed a timely appeal from the April 7, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUES**

The issues are: (1) whether OWCP properly determined that appellant received a \$111,364.07 overpayment of compensation; and (2) whether it properly determined that he was at fault in creating the overpayment of compensation, thereby precluding waiver of recovery.

**FACTUAL HISTORY**

OWCP accepted that on September 20, 2000 appellant, then a 49-year-old electronic technician, sustained a right heel contusion due to a fall at work. Appellant's claim was later

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

accepted for cervical sprain and cervical spondylosis with myelopathy.<sup>2</sup> OWCP also accepted that he sustained a recurrence of disability beginning October 5, 2001. On November 15, 2001 appellant underwent OWCP-approved laminectomy surgery on his C2 through C7 discs. On February 13, 2006 he filed a CA-7 form alleging entitlement to schedule award compensation due to the accepted work conditions.

OWCP developed the medical evidence with respect to appellant's schedule award claim. On October 17, 2006 an OWCP medical adviser reviewed the August 2006 examination findings of an attending physician and concluded that appellant had 54 percent permanent impairment of his right arm, 50 percent permanent impairment of his left arm, 8 percent permanent impairment of his right leg and 10 percent permanent impairment of his left leg.

In a March 5, 2008 decision, OWCP granted appellant schedule awards for 54 percent permanent impairment of his right arm, 50 percent permanent impairment of his left arm, 8 percent permanent impairment of his right leg and 10 percent permanent impairment of his left leg. It advised him that the awards would run for 376.52 weeks from October 15, 2003 to December 31, 2010. The decision outlined the periods over which schedule award compensation would be paid relative to each extremity. OWCP stated, "Your Continuing Payment each Four Weeks: \$3,064.00 until December 31, 2010. Payment of your award ends when you have been paid for the last day shown in item 3 above." The last day shown in item three was December 31, 2010.

In a July 29, 2013 letter, OWCP advised appellant of its preliminary determination that he received a \$111,364.07 overpayment of compensation which occurred from January 1, 2011 to June 29, 2013. Due to a computer error, appellant continued to receive schedule award compensation for this period after his March 5, 2008 schedule award expired effective December 31, 2010. OWCP also made a preliminary determination that he was at fault in the creation of the overpayment because he accepted payments that he knew or should have known to be incorrect. Regarding its fault determination, OWCP stated:

"The claimant was advised by letter of May 5, 2008 that payment would cease after the last day of [his] award, December 31, 2010. The checks, it is noted, clearly indicated the dates covered by the payments, and the claimant was aware, or reasonably should have been aware, that the checks included periods subsequent to December 31, 2010, the ending date of [his] schedule award payments, and that [he] was not entitled to those payments."<sup>3</sup>

Appellant requested a telephonic preresoupment hearing before an OWCP hearing representative in connection with the overpayment. During the preresoupment hearing held on January 16, 2014, he testified that he came from Ethiopia when he was 31 years old and that

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<sup>2</sup> The acceptance of these additional conditions was based on a February 1, 2005 report from an OWCP medical adviser who found that appellant's cervical conditions were related to his September 20, 2000 fall.

<sup>3</sup> OWCP requested that appellant complete and return an enclosed overpayment recovery questionnaire and advised him that he could request a preresoupment hearing with an OWCP hearing representative. OWCP attached payment records and worksheets showing that appellant received \$111,364.07 in schedule award payments for the period January 1, 2011 to June 29, 2013.

English was not his native language. Appellant studied English in school, but noted that he did not speak the language in his home. He noted that he had two years of college and had received an associate's degree. Appellant confirmed that he received OWCP's March 5, 2008 schedule award decision in March 2008 and now understood that the award expired on December 31, 2010. He testified that he thought he was entitled to the continuing compensation because he received and completed CA-1032 forms which advised him that his compensation was "under review" by OWCP.<sup>4</sup> Under questioning by the hearing representative, appellant acknowledged that he did not receive any correspondence from OWCP informing him that he would be entitled to compensation after December 31, 2010. He testified that he used part of the overpayment funds to pay down mortgages on his primary residence in the United States and a secondary residence in Ethiopia. Appellant's counsel at the time contended during the hearing that appellant had "changed his position" due to the monies he received that were now being declared as an overpayment.

Appellant submitted an overpayment recovery questionnaire, completed on February 4, 2014. He listed that he had monthly income of \$4,760.00, monthly expenses of \$2,923.00 and assets of \$159,427.00. Appellant asserted that he was not at fault in the creation of overpayment because OWCP continued to pay him schedule award compensation due to a computer error and because it informed him that his compensation was under review.

In an April 7, 2014 decision, the hearing representative finalized that appellant received a \$111,364.07 overpayment of compensation which occurred for the period January 1, 2011 to June 29, 2013 because he received schedule award compensation after the schedule award expired. She found 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. Given the fault finding, waiver of recovery of the overpayment was precluded. OWCP's hearing representative found that the \$111,364.07 overpayment would be recovered through payments of \$500.00 per month.<sup>5</sup>

### **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>6</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

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<sup>4</sup> Appellant completed several CA-1032 forms during the overpayment period. The forms stated, "Please be advised that your compensation case is undergoing a periodic review to verify that appropriate compensation payments are being made." The forms requested, *inter alia*, that information regarding income and work activities be reported.

<sup>5</sup> With respect to the recovery of an 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). As appellant was not in receipt of compensation at the time of OWCP's overpayment determination, the Board does not have jurisdiction over the method of recovery of the overpayment in this case. *See Lorenzo Rodriguez*, 51 ECAB 295 (2000); 20 C.F.R. § 10.441.

<sup>6</sup> 5 U.S.C. § 8102.

or she may not receive salary, pay or remuneration of any type from the United States, except in limited circumstances.<sup>7</sup> Schedule award compensation is paid for specified periods according to the extent of the permanent impairment of the scheduled member or members.<sup>8</sup>

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

The Board finds that the evidence of record establishes that appellant received a \$111,364.07 overpayment of compensation. In a March 5, 2008 decision, OWCP granted appellant schedule awards for 54 percent permanent impairment of his right arm, 50 percent permanent impairment of his left arm, 8 percent permanent impairment of his right leg and 10 percent permanent impairment of his left leg. The awards ran for 376.52 weeks from October 15, 2003 to December 31, 2010. OWCP notified appellant in the award that there was no entitlement to schedule award compensation after December 31, 2010. The record contains payment records and worksheets showing that appellant received \$111,364.07 in schedule award payments from January 1, 2011 to June 29, 2013. Given that appellant was not entitled to receive compensation after December 31, 2010, the Board will affirm the fact and amount of a \$111,364.07 overpayment for the period January 1, 2011 to June 29, 2013.

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

Section 8129(a) of FECA provides that where an overpayment of compensation has been made “because of an error of fact or law,” adjustment shall be made by decreasing later payments to which an individual is entitled.<sup>9</sup> The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): “Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience.”<sup>10</sup> No waiver of payment is possible if the claimant is not “without fault” in helping to create the overpayment.<sup>11</sup>

In determining whether an individual is not “without fault” or alternatively, “at fault,” section 10.433(a) of Title 20 of the Code of Federal Regulations provide in relevant part:

“A recipient who has done any of the following will be found to be at fault with respect to 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>7</sup> *Id.* at § 8116(a).

<sup>8</sup> *Id.* at § 8107.

<sup>9</sup> *Id.* at § 8129(a).

<sup>10</sup> *Id.* at § 8129(b).

<sup>11</sup> *L.J.*, 59 ECAB 264 (2007).

(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....”<sup>12</sup>

Section 10.433(b) of OWCP’s regulations provide:

“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>13</sup>

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. Recovery of an overpayment is also considered to be against equity and good conscience when any individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.<sup>14</sup> An individual must show that he made a decision he otherwise would not have made in reliance on the overpaid amount and that this decision resulted in a loss.<sup>15</sup>

### ANALYSIS -- ISSUE 2

OWCP properly found that appellant was at fault in the creation of the \$111,364.07 overpayment of compensation under the third prong of the above-described test, *i.e.*, he accepted payments which he knew or should have known to be incorrect.

The Board notes that OWCP clearly notified appellant that he would not be entitled to receive schedule award compensation after December 31, 2010. Therefore, appellant knew or should have known that he could not accept schedule award payments after that date. In its March 5, 2008 schedule award decision, OWCP advised him that the award would run for 376.52 weeks from October 15, 2003 to December 31, 2010. The decision outlined the precise periods over which schedule award compensation would be paid relative to each extremity. OWCP stated, “Your Continuing Payment each Four Weeks: \$3,064.00 until December 31, 2010. Payment of your award ends when you have been paid for the last day shown in item 3 above.” The last day shown in item three was December 31, 2010. During the prerecoupment hearing, appellant acknowledged that he received OWCP’s March 5, 2008 decision in March 2008. During the prerecoupment hearing and on appeal, appellant stated that he thought he was entitled to the continuing compensation because he received and completed CA-1032 forms which advised him that his compensation was under review by OWCP.

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<sup>12</sup> 20 C.F.R. § 10.433(a).

<sup>13</sup> *Id.* at § 10.433(b).

<sup>14</sup> *Id.* at § 10.437; *see W.P.*, 59 ECAB 514 (2008).

<sup>15</sup> *See Wayne G. Rogers*, 54 ECAB 482 (2003).

However, while the forms stated that appellant's case was "undergoing a periodic review to verify that appropriate compensation payments are being made," the forms did not provide that appellant would be entitled to schedule award compensation or any other form of compensation after December 31, 2010. During the precoupment hearing, appellant acknowledged that he did not receive any correspondence from OWCP informing him that he would be entitled to compensation after December 31, 2010.

During the precoupment hearing, appellant testified that he came from Ethiopia when he was 31 years old and that English was not his native language. The Board has reviewed appellant's testimony at the hearing and his written communications with OWCP. Appellant's various letters to OWCP do not evidence that he lacked proficiency in English such that he would not be able to understand the contents of OWCP's March 5, 2008 decision or other documents of record.

On appeal, appellant alleged that OWCP misinformed him about the extent of his compensation payments and that, under section 10.435 of OWCP's regulations, he would not be at fault if he accepted improper payments after relying on such misinformation. However, he did not adequately describe the nature of this claimed misinformation or present written evidence of misinformation from OWCP or any other government agency which he had reason to believe was connected with the administration of benefits.<sup>16</sup> As previously discussed, appellant was clearly informed that he would not be entitled to schedule award compensation after December 31, 2010. The improper payments he received after December 31, 2010 specifically identified the various periods they covered and, given the totality of the facts, appellant knew or should have known that it was improper for him to accept these payments.<sup>17</sup> Even though OWCP may have been negligent in continuing to issue appellant checks for schedule award compensation after December 31, 2010, this does not excuse his acceptance of such checks which he knew or should have known were incorrect.<sup>18</sup> OWCP properly found appellant at fault in the creation of the \$111,364.07 overpayment, thereby precluding waiver of recovery of the overpayment.<sup>19</sup>

### CONCLUSION

The Board finds that OWCP properly determined that appellant received a \$111,364.07 overpayment of compensation. The Board further finds that OWCP properly determined that appellant was at fault in creating the overpayment of compensation, thereby precluding waiver of recovery of the overpayment.

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<sup>16</sup> See 20 C.F.R. § 10.435(b). During the precoupment hearing, appellant's counsel at the time suggested that the overpayment should not be recovered because appellant changed his position to his disadvantage by using the overpayment funds to pay down his mortgages. While OWCP's regulations at 20 C.F.R. § 10.437 provide for waiver of overpayment recovery in some cases of detrimental reliance, the finding of fault in appellant's case would preclude application of these particular regulations in his case. See *supra* notes 10 and 11.

<sup>17</sup> The Board notes that OWCP properly considered the factors discussed in section 10.433(b) of OWCP's regulations. See *supra* note 13.

<sup>18</sup> *Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

<sup>19</sup> See *supra* note 11.

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 7, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 24, 2014  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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