

FACTUAL HISTORY

On April 30, 2008 appellant, then a 43-year-old mail processing clerk, filed a Form CA-2 claim for benefits, alleging a right wrist condition causally related to employment factors. OWCP accepted the claim for right-sided de Quervains/tenosynovitis. Appellant underwent surgery on October 29, 2008 and began receiving compensation for temporary total disability.

On July 29, 2009 appellant accepted a job as a modified mail processing clerk with the employing establishment.

By decision dated October 23, 2009, OWCP reduced appellant's compensation to zero, finding that his actual wages as a modified mail processing clerk exceeded his wages for the job he held on the date of injury, that he had held this position for two months or more, and that therefore the position fairly and reasonably represented his wage-earning capacity. Its final payment of disability compensation, in the amount of \$871.51, was sent to him to cover the period July 18 to 27, 2009, the date he began work as a modified mail processing clerk.

In a Form CA-7 dated May 4, 2010, appellant requested a schedule award based on a partial loss of use of his right upper extremity.

By decision dated August 16, 2010, OWCP granted appellant a schedule award for a 10 percent permanent impairment of the right upper extremity for the period March 25 to October 29, 2010 or a total of 31.2 weeks of compensation. The decision stated that "payment of your award ends when you have been paid for the last day shown in item 3 above."

In a Form EN1032 completed on September 22, 2010, received by OWCP on September 27, 2010, appellant indicated that he had last worked from July 29, 2009 to March 17, 2010 and that he was currently receiving disability retirement checks.

In Forms EN1032 completed on September 22, 2011 and October 4, 2012, appellant reported that he had not received any benefits paid by the Federal Government within the past 15 months.

In a letter dated March 25, 2013, the employing establishment's Office of the Inspector General (OIG) informed OWCP that it had identified an overpayment of appellant's OWCP benefits. It stated that appellant had been granted a schedule award on August 16, 2010 for a period of 31.2 weeks of compensation, at the weekly rate of \$824.25. The total amount of the award was \$25,716.60; however, appellant was still receiving schedule award benefits pursuant to this award. OIG's letter indicated that he had received payments from March 25, 2010 through March 9, 2013, totaling \$130,214.92. This resulted in an overpayment of \$104,499.32 (\$130,214.92 in payments minus \$25,716.60 the amount of benefits he should have received from March 25 to October 29, 2010). The letter included a worksheet listing monthly payments to appellant from March 25, 2010 to March 9, 2013.

In a letter dated December 5, 2013, OWCP advised appellant that it had made a preliminary determination that he received a \$104,428.67 overpayment of compensation for the period October 30, 2010 to March 9, 2013. This overpayment occurred, the letter explained, because a computer system error continued to make schedule award payments for a significant

period of time after the schedule award ended. OWCP found that appellant was with fault in the creation of this overpayment because he continued to accept payments without returning them to OWCP, when he knew or should have known that he was not entitled to the compensation, thereby creating an overpayment. It calculated the amount of the overpayment for the period October 30, 2010, the last day of the schedule award to March 9, 2013 by adding the monthly checks appellant received during this period. OWCP advised him that he must complete and submit an enclosed Form OWCP-20 overpayment recovery questionnaire within 30 days if he wished to request waiver of the overpayment.

On January 20, 2014 appellant completed the form OWCP-20 and listed his monthly income and expenses. He also submitted a January 20, 2014 letter in which he stated that, after he received the final payment for the schedule award, he received another payment from OWCP. At this time his wife called OWCP and was told that “everything was fine and payment was not an error.” Appellant stated that he subsequently received another payment but continued to suspect that an error had been made. He asserted that, because he had previously received payment for loss of wages, he assumed that this was why he was still receiving payments.

In a decision dated February 5, 2014, OWCP finalized its determination regarding the overpayment of a schedule award for which appellant was at fault and not eligible for waiver. It found that he was at fault in creating the overpayments as he knew or should have known that the payments were incorrect.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of FECA² and its implementing regulations³ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members or functions of the body. Section 20 C.F.R. § 10.404 states that compensation is provided for specified periods of time for the permanent loss or loss of use of certain members.

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$104,428.67 for the period October 30, 2010 to March 9, 2013. The amount of the overpayment is not in dispute.

Appellant was granted a schedule award on August 16, 2010 for the period March 25 to October 29, 2010, for a total of 31.2 weeks of compensation. The evidence of record establishes that he continued to receive schedule award payments from OWCP after October 29, 2010, the date the award was scheduled to expire, until March 9, 2013. Consequently, any payments appellant received from OWCP beginning October 30, 2010 constituted an overpayment of benefits. OWCP properly calculated the \$104,428.67 overpayment by totaling the amount of

² *Id.* at § 8107.

³ 20 C.F.R. § 10.404. Effective May 1, 2009, OWCP began using the A.M.A., *Guides* (6th ed. 2009).

compensation checks appellant received during the period October 30, 2010 through March 9, 2013. The Board affirms its finding of fact and amount of overpayment.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA⁴ provides that an overpayment must be recovered 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.” No waiver of an overpayment is possible if the claimant is not “without fault” in helping to create the overpayment.⁵

In determining whether an individual is with fault, section 10.433(a) of OWCP’s 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:

Made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or

Failed to provide information which the individual knew or should have known to be material; or

Accepted a payment which he or she knew or should have known to be incorrect.”⁶

With respect to whether an individual is without fault, section 10.433(b) of OWCP’s regulations provide in relevant part:

“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.”⁷

ANALYSIS -- ISSUE 2

OWCP applied the third standard in determining that appellant was at fault in creating the overpayment.

⁴ 5 U.S.C. § 8129(a)-(b).

⁵ *Bonnye Mathews*, 45 ECAB 657 (1994).

⁶ 20 C.F.R. § 10.433(a).

⁷ *Id.* at § 10.433(b).

OWCP found that appellant was at fault in the creation of the overpayment as he accepted payments that he knew or should have known he was not entitled to receive. The record establishes that it informed appellant in its August 16, 2010 schedule award decision that payment of his award was supposed to end when he had been paid for the last day shown in the award, October 29, 2010. Appellant stated in his January 20, 2014 letter that his wife contacted OWCP and inquired as to the propriety of the continuing schedule award payments. This demonstrated his awareness that acceptance of compensation benefits for periods after October 29, 2010 was incorrect. The record also indicates that OWCP discontinued compensation for wage loss effective July 27, 2009, the date he had returned to work. Appellant therefore had no expectation or right to further wage-loss benefits.

Further, the Board notes that on the Forms EN1032 appellant completed on September 22, 2011 and October 4, 2012, he stated, incorrectly, that he had not received any benefits paid by the Federal Government within the past 15 months.

The record clearly indicates that appellant knew or should have known that acceptance of compensation benefits for periods after October 29, 2010 was incorrect. However, appellant continued to accept payments after this date which he knew or should have known were incorrect. As appellant accepted compensation benefits from OWCP which covered the period October 30, 2010 through March 9, 2013, the Board finds that he was at fault in the creation of the overpayment and is not entitled to waiver.⁸

With respect to the 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.⁹ As appellant is no longer receiving wage-loss compensation, the Board does not have jurisdiction with respect to recovery of the overpayment under the Debt Collection Act.¹⁰

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$104,428.67 for the period October 30, 2010 through March 9, 2013 because he continued to receive compensation for a schedule award after the period of the award had expired. The Board further finds that OWCP properly found that appellant was at fault in the creation of the overpayment and is therefore not entitled to waiver.

⁸ *Lawrence J. Dubuque*, 55 ECAB 667, 673 (2004).

⁹ *Terry A. Keister*, 56 ECAB 559 (2005); *see also Cheryl Thomas*, 55 ECAB 610 (2004).

¹⁰ *Cheryl Thomas, id.*

ORDER

IT IS HEREBY ORDERED THAT the February 5, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 26, 2015
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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