



## **FACTUAL HISTORY**

On May 22, 2014 appellant, then a 56-year-old nursing assistant, filed a traumatic injury claim (Form CA-1) alleging that she injured her right shoulder on May 9, 2014 while she was moving a patient to a lift position. OWCP accepted the claim for right shoulder sprain and paid wage-loss compensation and medical benefits. Appellant underwent authorized right shoulder arthroscopic rotator cuff repair on July 31, 2014 and began receiving compensation for temporary total disability.

In a September 11, 2014 letter, OWCP notified appellant that she would be placed on the periodic rolls, effective August 24, 2014. To minimize the possibility of an overpayment of compensation, appellant was instructed to notify OWCP immediately when she returned to work. OWCP noted that if she received her compensation payments *via* paper check, the payment would reflect the period for which payment is made. If appellant worked for any portion of that period, she was to return the payment to OWCP, even if she had already informed OWCP that she was working. For payments sent by electronic funds transfer (EFT), a notification of the date and amount of payment appeared on the statement from her financial institution. Appellant was expected to monitor her EFT deposits carefully, at least every two weeks. If she worked for any portion of the period for which a deposit was made, she was to advise OWCP immediately so that an overpayment would not occur.

On August 22, 2014 appellant submitted the direct deposit form (Form SF-1199A) and provided relevant bank information.<sup>2</sup>

On September 29, 2014 the employing establishment submitted a work status report indicating that on September 29, 2014 appellant had returned to work full time in a modified-duty position. It noted, however, that she would not receive night differential or Sunday premium pay in this position, although she had received it in her date-of-injury position. OWCP continued to pay appellant total disability on the periodic rolls through October 18, 2014.

In an October 20, 2014 worksheet, OWCP indicated that for the full period of September 21 through October 18, 2014, appellant received wage-loss compensation of \$1,954.77.

By letter dated October 20, 2014, OWCP advised appellant of a preliminary determination that an overpayment of \$1,396.27 for the period September 29 through October 18, 2014, as she had returned to full duty on September 29, 2014. It found that for the full period from September 21 through October 18, 2014, a period of 28 days, appellant received \$1,954.77.<sup>3</sup> However, as she returned to work on September 29, 2014, she was only eligible for \$558.50 for the period September 21 through 28, 2014, causing an overpayment of compensation

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<sup>2</sup> Although there is evidence in the record of the request for payment by EFT, the payments to appellant at issue herein were made by paper check.

<sup>3</sup> On October 30, 2014 OWCP verified that a check was issued on October 18, 2014 for the period September 21 through October 18, 2014 in the amount of \$1,954.77.

for the period September 29 through October 18, 2014 (a period of 20 days) in the amount of \$1,396.27.

OWCP found that appellant was at fault in creating the overpayment as she knew or should have known that she could not receive wage-loss compensation after returning to full-time work. It informed her that she had a right to a prerecoumment hearing before an OWCP hearing representative. Appellant was also advised to complete the enclosed Form OWCP-20 questionnaire and submit supporting financial documents, as this was necessary information on the issues of waiver and recovery of the overpayment.

On November 7, 2014 appellant requested a prerecoumment hearing before OWCP's Branch of Hearings and Review and submitted supporting financial information. In a November 11, 2014 letter, she indicated that she had submitted her return to work form timely and that there should have been no reason why she was overpaid. Appellant indicated that she had updated her address and submitted the direct deposit forms, yet OWCP mailed her check to the wrong address and she did not receive her payment on time. She also reiterated that she was told she would receive compensation for the hours of night shift she was unable to work due to her injury.

A prerecoumment hearing was held by telephone on July 14, 2015. Appellant was provided with an overpayment recovery questionnaire and asked to submit supporting documentation. On August 13, 2015 OWCP received an updated overpayment recovery questionnaire with supporting documentation.

In the September 30, 2015 decision, the hearing representative affirmed the fact of overpayment, but reduced the amount of overpayment to account for the loss of night differential and Sunday premium pay that appellant had been earning in her date-of-injury position but which she no longer earned in her new full-time limited-duty position on September 29, 2014.<sup>4</sup> He recomputed appellant's entitlement to partial disability compensation by utilizing the *Shadrick* formula<sup>5</sup> and determined that appellant was entitled to \$174.42 of the \$1,396.26 compensation she had received from September 29 to October 18, 2014.<sup>6</sup> The difference between \$1,396.26 and \$174.42 reduced the amount of overpayment to \$1,221.84. The hearing representative finalized an overpayment of \$1,221.84 for the period September 29 through

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<sup>4</sup> The employing establishment verified that appellant earned a base salary of \$32,683.00 and had earned \$2,002.02 in night differential and \$1,959.10 in Sunday premium pay for the year prior to the date disability began. OWCP calculated that the pay rate, effective May 15, 2014, the date disability began, was \$32,683.00 (base pay) plus \$1,959.10 for Sunday premium and \$2,002.02 for night differential, for a total of \$36,644.12 or \$704.69 per week. Appellant earned \$628.52 per week (\$32,683.00/52 weeks) from September 29 to October 18, 2014 with a weekly pay rate of \$704.69 when disability began and a current pay rate of \$704.69 a week for the current date-of-injury position. In an October 22, 2014 letter, the employing establishment official indicated that appellant's new limited-duty work hours were from 6:00 a.m. to 2:30 p.m., Monday through Friday, and did not include night differential or Sunday premium.

<sup>5</sup> The method for determining loss of wage-earning capacity is set out in the case of *Albert C. Shadrick*, 5 ECAB 376 (1953). See also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on Actual Earnings*, Chapter 2.815.4.b (*Shadrick* formula codified at 20 C.F.R. § 10.403).

<sup>6</sup> The hearing representative dropped one cent in his calculation from the original overpayment.

October 18, 2014. In addition, appellant was found to be at fault as she had accepted compensation payments to which she knew or reasonably should have known she was not entitled.

The hearing representative reviewed appellant's updated overpayment recovery questionnaire and determined that the overpayment could be recovered by deducting \$900.00 from appellant's schedule award payment covering the period October 18 to November 14, 2015 and the remaining balance from the schedule award payment covering the period November 15 to December 10, 2015.<sup>7</sup>

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

Section 8102 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 duty.<sup>8</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>9</sup> Section 10.500 of OWCP regulations provide that 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>10</sup>

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

The record establishes that appellant returned to full-time limited-duty work on September 29, 2014. She continued to receive wage-loss compensation until October 18, 2014. By check dated October 18, 2014, appellant received compensation for the period September 21 through October 18, 2014 (a 28-day period) in the amount of \$1,954.77.<sup>11</sup> She was entitled to eight days of compensation for that period or \$558.50 creating an overpayment of \$1,396.26.<sup>12</sup> In addition, the hearing representative properly determined the amount of compensation to which she would have been entitled, under the *Shadrick* formula, for night differential and Sunday

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<sup>7</sup> OWCP granted appellant a schedule award on August 26, 2015 of five percent permanent impairment of the right upper extremity. The period of the award was from August 23 through December 10, 2015.

<sup>8</sup> 5 U.S.C. § 8102(a).

<sup>9</sup> *Id.* at § 8116(a); see *Danny E. Haley*, 56 ECAB 393 (2005).

<sup>10</sup> 20 C.F.R. § 10.500.

<sup>11</sup> See *supra* note 5.

<sup>12</sup> The Board will accept the calculations made by the hearing representative which reduce by one cent the amount of compensation appellant actually received for the period September 29 to October 18, 2014 (\$1,396.27 as found in the preliminary overpayment determination versus \$1,396.26 as found by the hearing representative).

premium pay in the amount of \$174.42 for that period.<sup>13</sup> The Board finds that OWCP properly found an overpayment in the amount of \$1,221.84 (\$1,396.26 - \$174.42 = \$1,221.84). Appellant has not disputed the fact or amount of the overpayment.

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

5 U.S.C. § 8129(b) provides: 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 FECA or would be against equity and good conscience.<sup>14</sup> A claimant who is at fault in creating the overpayment is not entitled to waiver.<sup>15</sup> On the issue of fault, 20 C.F.R. § 10.433 provides 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.

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

OWCP found that appellant was at fault in the creation of the overpayment because she accepted a payment she knew or should have known to be incorrect. Appellant returned to work in a full-time, limited-duty capacity on September 29, 2014. She received a compensation payment by paper check on October 31, 2014 for the period September 21 through October 18, 2014 for temporary total disability after returning to work on September 29, 2014. Although appellant acknowledged receipt of this check, it was not returned to OWCP. Section 10.433(b) of OWCP's regulations provide that whether or not OWCP determines that an individual was without fault with respect to the creation of the overpayment depends on the circumstances surrounding the overpayment. The degree of care expected could vary with the complexity of the circumstances and the individual's capacity to realize that he or she is being overpaid. The Board has also noted that in applying the tests to determine fault, OWCP should apply a reasonable person test.<sup>16</sup>

The Board finds that appellant was at fault in the creation of the overpayment. When appellant returned to full-time, limited-duty capacity on September 29, 2014, she knew that she was no longer entitled to compensation benefits for total disability. Appellant was informed of her responsibilities to avoid overpayments in OWCP's September 11, 2014 letter, which notified her that she was being placed on the periodic rolls, effective August 24, 2014.

The paper check that appellant received on October 31, 2014 clearly noted the period for which the compensation was being paid. Even though OWCP may have been negligent in continuing to issue appellant a check for wage-loss compensation after appellant had timely

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<sup>13</sup> *Supra* note 7.

<sup>14</sup> 5 U.S.C. § 8129(b).

<sup>15</sup> *See Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

<sup>16</sup> *C.D.*, Docket No. 12-193 (issued August 2, 2013).

notified OWCP of her return to work, this does not excuse her acceptance of such check which she knew or should have known was incorrect, especially since OWCP's preliminary determination had been issued prior to appellant's receipt of and cashing of the check.<sup>17</sup> While appellant claimed that her checks were always late and she knew she was entitled to some of the money for loss of night differential and Sunday premium pay, those factors do not absolve appellant from the responsibility of returning any payment to which she was not entitled after her return to work. For these reasons, OWCP properly found appellant at fault in the creation of the \$1,221.84 overpayment, thereby precluding waiver of recovery of the overpayment.<sup>18</sup>

### **LEGAL PRECEDENT -- ISSUE 3**

OWCP's implementing regulations provide that, if an overpayment of compensation has been made to an individual entitled to further payments and no refund is made, OWCP shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual, and any other relevant factors, so as to minimize any hardship.<sup>19</sup>

### **ANALYSIS -- ISSUE 3**

The Board finds that OWCP appropriately took into consideration the financial information submitted by appellant, as well as the factors set forth in section 10.441(a) of its regulations, when requiring recovery of the \$1,221.84 overpayment by deducting payments from her future schedule award.<sup>20</sup> It appropriately required repayment by deducting \$900.00 from the \$2,114.07 schedule award payment covering the period October 18 to November 14, 2015, and the remaining balance from the \$2,114.07 schedule award payment covering the period November 15 to December 10, 2015.

### **CONCLUSION**

The Board finds that OWCP properly determined that appellant received an overpayment of compensation during the period September 29 to October 18, 2014 in the amount of \$1,221.84 and that she was at fault in creating the overpayment of compensation, thereby precluding waiver of recovery of the overpayment. The Board also finds that OWCP properly recovered the overpayment from appellant's schedule award payments.

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<sup>17</sup> See *Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

<sup>18</sup> 5 U.S.C. § 8129(b); *L.J.*, 59 ECAB 264 (2007).

<sup>19</sup> 20 C.F.R. § 10.441(a).

<sup>20</sup> *Supra* note 15.

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 30, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 23, 2016  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board