

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

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**M.M., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
White Plains, NY, Employer**

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**Docket No. 17-1081  
Issued: November 15, 2017**

*Appearances:*  
*Rita H. Patrick*, for the appellant<sup>1</sup>  
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

CHRISTOPHER J. GODFREY, Chief Judge  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On April 24, 2017 appellant, through his representative, filed a timely appeal from a March 16, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</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 appellant received an overpayment of compensation in the amount \$2,370.42 because he received duplicate wage-loss compensation checks for the period

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<sup>1</sup> In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

December 14, 2014 to January 10, 2015; (2) whether OWCP properly found him at fault and thus not entitled to waiver of recovery of the overpayment; and (3) whether OWCP properly required recovery of the overpayment by deducting \$100.00 every 28 days from his continuing compensation payments.

On appeal appellant's representative asserts that, because she did not receive information requested from OWCP until February 15, 2017, she was unable to determine if appellant was with or without fault.

### **FACTUAL HISTORY**

On December 16, 2001 appellant, then a 27-year-old mail processor, suffered back pain when reaching into a hamper. He did not stop work. OWCP adjudicated the claim OWCP under File No. xxxxxx122 as a short-form closure case. In a claim adjudicated by OWCP under File No. xxxxxx507, OWCP accepted a May 31, 2002 injury for right shoulder strain, right shoulder impingement syndrome, and lumbosacral strain. Appellant stopped work on the date of injury, had right shoulder arthroscopic repair on October 28, 2002, and returned to modified duty on November 26, 2003.

On March 15, 2008 appellant filed a traumatic injury claim (Form CA-1), alleging that on February 20, 2008 he injured his lower back and extremities when bending over and lifting tubs of mail. He stopped work that day and returned on March 5, 2008. OWCP adjudicated the claim under File No. xxxxxx487, the master file.

On March 26, 2008 appellant filed a recurrence claim (Form CA-2a) under File No. xxxxxx507, alleging a recurrence of disability on March 23, 2008 when he was unable to perform work duties due to pain. By decision dated May 22, 2008, OWCP denied the recurrence claim. Appellant, through his representative, timely requested a hearing with OWCP's Branch of Hearings and Review. He returned to modified duty on June 3, 2008.

On August 26, 2008 OWCP denied the traumatic injury claim, adjudicated under File No. xxxxxx487. Appellant's representative timely requested a hearing.

On December 16, 2008 an OWCP hearing representative affirmed the May 22, 2008 decision that denied appellant's recurrence claim, under File No. xxxxxx507. Under File No. xxxxxx507, appellant filed a second recurrence claim on September 5, 2008, alleging that he sustained a recurrence of disability on September 4, 2008. He did not return to work. In a May 5, 2009 decision, OWCP denied this recurrence claim. Appellant timely requested a hearing.

On April 1, 2009 OWCP informed appellant that his traumatic injury claim, adjudicated under File No. xxxxxx487, had been accepted for aggravation of thoracic or lumbosacral neuritis or radiculitis; aggravation of sprain of shoulder and upper arm, unspecified site, right; and aggravation of disorder of bursae and tendons in shoulder region, unspecified.

In a November 12, 2009 decision, adjudicated under File No. xxxxxx507, an OWCP hearing representative found that appellant had established a recurrence of disability on September 4, 2008 and reversed the May 5, 2009 decision. The hearing representative noted that

appellant's February 20, 2008 traumatic injury claim had been accepted. Appellant returned to part-time modified duty on March 27, 2010 and received wage-loss compensation for partial disability.<sup>3</sup>

OWCP accepted a recurrence of total disability beginning February 4, 2011 when appellant had repeat right shoulder arthroscopic surgery. Appellant received appropriate wage-loss compensation and was placed on the periodic compensation rolls.<sup>4</sup>

Under File No. xxxxxx487, on December 21, 2012 OWCP additionally accepted right knee medial meniscus tear and bilateral strain of knee and leg. On January 24, 2013 appellant had arthroscopic partial medial and lateral meniscectomy of the right knee.

In letters dated May 23, 2013 and December 15, 2014, OWCP informed appellant of a Department of Treasury regulation that required that all federal payments be made electronically. It noted that appellant still received his FECA compensation by paper check form and attached an electronic fund transfer (EFT) form, urging him to submit it so that his compensation could be paid electronically. Appellant did not return an EFT form to OWCP at that time.

Appellant telephoned OWCP on January 20, 2015 indicating that he had not received his FECA compensation check for January 10, 2015. He confirmed this in correspondence dated January 21, 2015, and asked that another check be issued.

On January 26, 2015 a tracer was initiated by OWCP, and a stop payment was placed on the check. Appellant was informed that a replacement check would be issued, and this was done on February 13, 2015.

On May 20, 2015 appellant had authorized left knee arthroscopic surgery to repair a torn lateral meniscus.

On July 9, 2015 appellant submitted EFT information for direct deposit of his FECA compensation.

An April 19, 2016 tracer report indicates that check number xxxxxxxx7251, issued on February 13, 2015 in the amount of \$2,370.42 was paid on February 24, 2015, and that check number xxxxxxxx1499, issued on January 10, 2015 in the amount of \$2,370.42 and was paid on July 29, 2015. Appellant was the payee on both checks. Both checks covered the period December 14, 2014 to January 10, 2015. The record indicates that even though the January 10, 2015 was cancelled, it was cashed after cancellation. The report also contains a list of

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<sup>3</sup> By decision dated June 1, 2010, OWCP found that an overpayment of compensation in the amount of \$716.28 had been created because appellant continued to receive compensation through April 10, 2010 after his return to work on March 27, 2010. The overpayment was deducted from appellant's continuing compensation.

<sup>4</sup> In an August 3, 2012 decision, OWCP found that appellant received a \$7,381.07 overpayment of compensation because health benefit deductions were not made from September 1, 2008 through April 9, 2010 and February 5, 2011 through December 17, 2011. Appellant was found without fault, but waiver was denied. OWCP deducted \$100.00 every 28 days from appellant's continuing compensation to collect the overpayment. On November 13, 2013 the Board dismissed the representative's appeal of the August 3, 2012 decision because there was no indication that appellant authorized the representative before the Board. Docket No. 13-628 (issued November 13, 2013).

appellant's FECA compensation from October 18, 2014 to January 9, 2016 and copies of both checks, endorsed for deposit by appellant to the same account.

On October 13, 2016 OWCP issued a preliminary determination that appellant received an overpayment of compensation in the amount of \$2,370.42 because he received duplicate FECA compensation payments for the period December 14, 2014 to January 10, 2015. OWCP found him at fault because he accepted a payment that he knew or reasonably should have known was incorrect. Appellant was provided an overpayment action request form and an overpayment recovery questionnaire (OWCP Form 20).

Appellant submitted an overpayment action request dated November 2, 2016 in which he requested a prereducement hearing. He disagreed that an overpayment occurred or that he was at fault, alleging that OWCP failed to establish that an overpayment existed. In an attached overpayment recovery questionnaire (OWCP Form 20) appellant listed monthly income of FECA compensation of \$2,364.78, monthly expenses of \$2,243.00, and assets totaling \$150.00.

On November 7, 2016 appellant's representative requested copies of benefit statements for the period December 14, 2014 through November 11, 2016, copies of all checks cashed for that period, copies of OWCP policies and procedures for replacing checks, and copies of any documents or request appellant may have submitted relevant to an overpayment.

In correspondence dated January 30, 2017, addressed to appellant's representative, OWCP noted that benefit statements were issued by the Department of the Treasury, but that it was forwarding a copy of appellant's compensation history for the period December 14, 2014 through November 12, 2016. It further explained that it had no access to cashed checks as all payments were issued by the Department of the Treasury, but forwarded a copy of a check cashed for the period December 14, 2014 to January 10, 2015. OWCP explained that procedures for replacing checks were listed on OWCP CA-1032 forms and enclosed a copy for her attention. As to her request for documents or requests submitted by appellant relevant to an overpayment, since there was more than one overpayment declared, more specific information was needed.

At the hearing, held on February 10, 2017, appellant's representative agreed that copies of two checks were attached to the preliminary overpayment decision. She requested that the original checks should be forwarded for review. Appellant testified that he did not recall requesting a second check in writing and did not recall cashing two checks. The hearing representative noted that the two checks indicated that they were for the same period, December 14, 2014 to January 10, 2015.

By decision dated March 16, 2017, an OWCP hearing representative finalized the preliminary overpayment determination, finding that appellant received an overpayment of compensation in the amount of \$2,370.42 because he received and cashed duplicate compensation checks for the same compensation period. The hearing representative further found that appellant was at fault and thus not entitled to waiver of recovery of the overpayment. Repayment in the amount of \$100.00 was to be deducted every 28 days from his continuing compensation.

**LEGAL PRECEDENT -- ISSUE 1**

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 his or her duty.<sup>5</sup> When an overpayment has been made to an individual because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which the individual is entitled.<sup>6</sup>

**ANALYSIS -- ISSUE 1**

The Board finds that appellant received an overpayment of compensation in the amount of \$2,370.42 for the period December 14, 2014 to January 10, 2015.

The record indicates that on January 10, 2015 appellant was issued a check in the amount of \$2,370.42. As shown on its face, this check covered the period December 14, 2014 to January 10, 2015. Contrary to appellant's assertion on appeal, he advised OWCP by telephone on January 20, 2015 and in writing on January 21, 2015 that he did not receive his check. OWCP issued a stop payment on January 26, 2015, and on February 13, 2015 appellant was issued a replacement check in the amount of \$2,370.42 for the period December 14, 2014 to January 10, 2015. Appellant deposited this check into his account on February 24, 2015. The record also indicates that on or before July 29, 2015 appellant received the check dated January 10, 2015, which, even though a stop payment was issued, he successfully deposited this check into his account on July 29, 2015. The record thus establishes that duplicate payments were made for the period December 14, 2014 to January 10, 2015, and both checks were deposited by appellant. Therefore, an overpayment of compensation in the amount of \$2,370.42 was created.

**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>7</sup>

Section 10.433(a) of OWCP regulations provides 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

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<sup>5</sup> 5 U.S.C. § 8102(a).

<sup>6</sup> *Id.* at § 8129(a).

<sup>7</sup> *Id.* at § 8129; see *Linda E. Padilla*, 45 ECAB 768 (1994).

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
- (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>8</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>9</sup>

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

OWCP determined that appellant was at fault in the creation of the overpayment under the third standard, because he accepted a payment he knew or should have known was incorrect. As noted, it initially issued a paper check for \$2,370.42 on January 10, 2015 to cover compensation for the period December 14, 2014 to January 10, 2015. Appellant reported this check missing, and was issued a duplicate check on February 13, 2015. He deposited the February 13, 2015 check on February 24, 2015. The record also indicates that appellant subsequently deposited the check dated January 10, 2015 on July 29, 2015. The record contains an image of the face of each check, noting that the period of compensation covered was December 14, 2014 to January 10, 2015. The record also contains an image of the back of each check which clearly displays appellant's signature.<sup>10</sup> Appellant thus knew or reasonably should have known at the time he deposited the second check on July 29, 2015 that he was not entitled to receive a second check for the same period for which he had already received the compensation by duplicate check.

Therefore, the evidence of record establishes that appellant knew or reasonably should have known at the time he deposited the January 10, 2015 check on July 29, 2015 that he was not entitled to this duplicate compensation payment, since he had previously deposited a check covering the same compensation period on February 24, 2015. The record establishes appellant accepted a payment at the time of deposit on July 29, 2015, which he knew or should have

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<sup>8</sup> 20 C.F.R. § 10.433(a); *see Sinclair L. Taylor*, 52 ECAB 227 (2001); *see also* 20 C.F.R. § 10.430.

<sup>9</sup> 20 C.F.R. 10.433(b); *Neill D. Dewald*, 57 ECAB 451 (2006).

<sup>10</sup> Compare his signature on the overpayment action request signed and dated by appellant on November 2, 2016.

known to be incorrect.<sup>11</sup> Thus, the Board finds that appellant was at fault in creating the overpayment and thus waiver of recovery of the overpayment is precluded.<sup>12</sup>

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

Section 10.441 of OWCP's regulations provides that when an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to OWCP the amount of the overpayment as soon as the error is discovered or his or her attention is called to the same. If 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 hardship.<sup>13</sup>

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

The record supports that, in requiring repayment of the \$2,370.42 overpayment by deducting \$100.00 every four weeks from appellant's compensation payments, OWCP took into consideration the financial information submitted by him as well as the factors set forth in section 10.441(a) of its regulations and found that this method of recovery would minimize any resulting hardship on appellant. Therefore, it properly required repayment of the overpayment by deducting \$100.00 from appellant's compensation payments every four weeks.<sup>14</sup>

Finally, as to the representative's assertion on appeal regarding the untimely receipt of requested information, the record indicates that on November 7, 2016 she requested specific information from OWCP. On January 30, 2017 OWCP forwarded the information requested that was under its purview and informed her that some of the requested information was under the purview of the Department of the Treasury. On appeal the representative admits that she received the information from OWCP on February 15, 2017. The final decision was not issued until March 16, 2017. The record does not indicate that appellant or his representative contacted OWCP between the February 10, 2017 hearing and issuance of the final overpayment decision on March 16, 2017.

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<sup>11</sup> *S.M.*, Docket No. 16-1127 (issued December 12, 2016). *See also* 20 C.F.R. § 10.430(a)-(b) (notes that OWCP includes on each periodic check a clear indication of the period for which payment is being made; by these means, OWCP puts the recipient on notice that a payment was made and the amount of the payment).

<sup>12</sup> *Id.*

<sup>13</sup> 20 C.F.R. § 10.441; *see Steven R. Cofrancesco*, 57 ECAB 662 (2006).

<sup>14</sup> *Id.*; *see C.P.*, Docket No. 13-1341 (issued January 6, 2014).

**CONCLUSION**

The Board finds that OWCP properly determined that appellant was at fault in the receipt of an overpayment of compensation in the amount of \$2,370.42, and that OWCP properly required recovery of the overpayment by deducting \$100.00 every 28 days from his continuing compensation payments.

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 16, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 15, 2017  
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board