



## **ISSUES**

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$4,662.29 for the period November 9, 2009 to January 16, 2010; (2) whether OWCP properly determined that appellant was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment; and (3) whether OWCP properly directed recovery of the overpayment by deducting \$100.00 every 28 days from appellant's continuing compensation.

## **FACTUAL HISTORY**

This case has previously been before the Board.<sup>4</sup> The facts and circumstances of the case as set forth in the prior Board decisions are incorporated herein by reference. The relevant facts are as follows.

On September 1, 1993 appellant, then a 29-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging progressive deterioration of both her knee joints while in the performance of her federal employment duties.<sup>5</sup> On October 20, 1993 OWCP accepted the claim for aggravation of bilateral knee degenerative joint disease and paid her wage-loss compensation and medical benefits on the periodic compensation rolls commencing December 17, 1993.<sup>6</sup>

OWCP subsequently placed appellant on the daily rolls, effective May 28, 1997, and subsequently on the periodic compensation rolls for partial disability compensation. In a letter dated August 29, 1997, it notified her of her continuing compensation payments and her responsibility to return to work if she no longer was totally disabled. To minimize the possibility of an overpayment of compensation, appellant was instructed to notify OWCP immediately if and when she returned to work. OWCP noted that her first payment would be for the period May 28 to August 16, 1997 in the net amount of \$1,414.61.

Appellant was paid total disability compensation on the periodic compensation rolls, effective June 10, 2007, and subsequently on the supplemental rolls.

In a disability/return-to-work notice dated January 21, 2010, the employing establishment informed OWCP that appellant had returned to part-time, modified-duty work with restrictions on November 9, 2009.

By letter dated January 25, 2010, OWCP notified the employing establishment that although appellant had returned to part-time, modified-duty work on November 9, 2009, she received wage-loss compensation for total disability through January 16, 2010. It notified the

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<sup>4</sup> Docket No. 02-2373 (issued June 27, 2003); Docket No. 06-2184 (issued April 10, 2007).

<sup>5</sup> Appellant has a prior traumatic injury claim in which OWCP accepted that she sustained a contusion of the right knee and fracture of the distal end of the right femur on April 23, 1992 due to a motor vehicle accident while in the performance of duty. OWCP assigned that claim File No. xxxxxx133. It administratively combined File No. xxxxx133 and File No. xxxxxx292, with File No. xxxxxx292 serving as the master file.

<sup>6</sup> Starting in May 1995 appellant performed part-time, limited-duty work at the employing establishment, for 20 hours a week, and continued to receive wage-loss compensation on the supplemental rolls.

employing establishment that, in order to calculate the overpayment amount, it needed leave analysis records for the period November 9, 2009 to January 16, 2010 and premium deductions for health benefits and life insurance.

On January 29, 2010 the employing establishment again informed OWCP by a documented telephone call that on November 9, 2009 appellant had returned to part-time, modified-duty work, six hours a day, five days a week. On June 22, 2010 appellant contacted OWCP and reported that she had returned to work as a router in November 2009 and she had notified OWCP of her return to work. She acknowledged that she had received three compensation payments before her wage-loss compensation was adjusted to reflect her return to work.

By letter dated June 25, 2010, OWCP requested that the employing establishment provide information regarding appellant's date-of-injury pay rate and current actual earnings.

In a telephone call on July 9, 2010, the employing establishment informed OWCP that appellant's actual earnings as of November 9, 2009 were \$1,015.36 per week and that the current annual pay rate for her date-of-injury, full-time job was \$50,723.00 per year.

In a Memorandum to the Director from the Claims Examiner dated July 13, 2010, OWCP identified and calculated an overpayment of compensation in the amount of \$1,552.64 for the period November 9, 2009 through January 16, 2010 as appellant continued to receive total disability compensation after she had returned to part-time work on November 9, 2009. Worksheets prepared on July 13, 2010 and computer printouts documented that for the period November 9, 2009 through January 16, 2010 she received temporary total disability compensation in the net amount of \$5,989.03. These records also documented that appellant was only entitled to receive the net amount of \$1,282.50 for partial disability and the net amount of \$3,153.89 for total disability, totaling \$4,436.39. This yielded an overpayment of compensation in the amount of \$1,552.64 for the period November 9, 2009 through January 16, 2010.

On July 22, 2010 OWCP issued an informal loss of wage-earning capacity determination (LWEC), adjusting appellant's compensation based on her actual earnings in a part-time, limited-duty position working 30 hours a week. It noted that she had been due wage-loss compensation based on her actual earnings from November 9, 2009 through July 3, 2010, but that she was paid compensation for total disability through January 16, 2010 even though she had already returned to work. OWCP advised that it would compute whether any overpayment existed for this period and, if so, then it would inform appellant by separate letter.

Also, by telephone on July 22, 2010, OWCP requested that appellant review its informal LWEC determination letter and advise whether any errors had been made in its computation. It informed her that it had estimated the amount of an overpayment based on the computed LWEC, but that it wanted her to review its letter first and then it would finalize the overpayment and inform her about its decision. No response was received from appellant.

On August 14, 2017 the employing establishment again informed OWCP that it noticed that appellant was still paid on the periodic compensation rolls after she had returned to work on November 9, 2009. It related that it could not see any repayments in the system. The employing establishment requested that OWCP review appellant's case record and notify her if an overpayment had been created. On August 14, 2017 OWCP responded that the worksheets had

been completed, but for some reason it never reported the overpayment. It advised the employing establishment that it would move forward with the overpayment.

In a letter dated September 13, 2017, OWCP advised appellant of its preliminary determination that she had received a \$4,662.29 overpayment of compensation for the period November 9, 2009 to January 16, 2010 because she had been paid temporary total disability compensation after her return to part-time, modified-duty work on November 9, 2009. It also made a preliminary finding that she was at fault in the creation of the overpayment because she was aware or should have been aware that it had incorrectly paid compensation. OWCP advised appellant that she could submit evidence challenging the fact, amount, or finding of fault and request waiver of recovery of the overpayment. Additionally, it informed her that within 30 days she could request a telephone conference, a final decision based on the written evidence, or a precoupment hearing. OWCP requested that appellant complete the enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documentation.

A worksheet prepared on August 14, 2017 showed that from November 9, 2009 to January 16, 2010 appellant received temporary total disability compensation in the net amount of \$5,944.79, when she was only entitled to the net amount of \$1,282.50 for partial disability for this period. This yielded an overpayment of compensation in the amount of \$4,662.29 for the period November 9, 2009 to January 16, 2010.

On October 17, 2017 appellant requested a telephone conference regarding the amount of the overpayment and the finding of fault. She contended that any overpayment that occurred was recouped by OWCP when it had suspended her compensation for 10 hours of work per week, commencing January 16, 2010 and had not reinstated her compensation until her payment for wage loss for the period July 4 to 31, 2010. Appellant further contended that on November 11, 2009 she informed OWCP that she had returned to part-time work. She related that she did not realize there was a problem until she received a compensation check on December 19, 2009 and again on January 16, 2010. Shortly after receiving each payment appellant informed OWCP about the compensation checks and was told that nothing could be done without the submission of an official disability/return-to-work notice by the employing establishment. She alleged that she was also instructed to cash the checks and that the situation would be straightened out after OWCP received the official paperwork from the employing establishment. Appellant submitted an overpayment recovery questionnaire (Form OWCP-20) and supporting financial documentation.

By decision dated January 18, 2018, OWCP finalized its determination that appellant received an overpayment of compensation in the amount of \$4,662.29 for the period November 9, 2009 to January 16, 2010 and that she was at fault in the creation of the overpayment as she had accepted compensation payments she knew or reasonably should have known were incorrect.<sup>7</sup> It directed recovery of the overpayment by deducting \$100.00 every 28 days from her continuing compensation payments.

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<sup>7</sup> OWCP made several unsuccessful attempts to schedule the requested telephone conference. As a result, it made a determination based on the evidence of record.

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

Section 8102(a) 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 8129(a) of FECA provides, in pertinent part, that when an overpayment has been made to an individual under this subchapter 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 an individual is entitled.<sup>9</sup>

Section 8116(a) of FECA provides that, while an employee is receiving compensation or if he or she has been paid a lump sum in commutation of installment payments until the expiration of the period during which the installment payments would have continued, the employee may not receive salary, pay, or remuneration of any type from the United States, except in limited specified instances.<sup>10</sup> Section 10.500 of OWCP's regulations provides 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>11</sup> A claimant is not entitled to receive temporary total disability benefits and actual earnings for the same time period.<sup>12</sup> OWCP procedures provide that an overpayment of compensation is created when a claimant returns to work, but continues to receive wage-loss compensation for temporary total disability.<sup>13</sup>

OWCP's procedures provide that, once an overpayment is identified, it is responsible for determining whether the claimant was with fault or without fault, issuing a preliminary finding, and unless a hearing is requested, OWCP is responsible for issuing a final decision.<sup>14</sup> These procedures note that, if the claimant is determined to be at fault, a Form CA-2201 (preliminary finding notice) must be released (along with a Form OWCP-20) within 30 days of the date the overpayment is identified. Both the reason that the overpayment occurred and the reason for the finding of fault must be clearly stated. A Form CA-2201 informs the claimant of the right to submit evidence and the right to a precoupment hearing on the issue of: (a) fact and amount of overpayment; (b) fault; and (c) waiver. Along with the Form CA-2201, OWCP should provide a clearly written statement explaining how the overpayment was created.

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<sup>8</sup> 5 U.S.C. § 8102(a).

<sup>9</sup> *Id.* at § 8129(a).

<sup>10</sup> *Id.* at § 8116(a).

<sup>11</sup> 20 C.F.R. § 10.500(a).

<sup>12</sup> *See M.S.*, Docket No. 16-0289 (issued April 21, 2016); *L.S.*, 59 ECAB 350, 352-53 (2008).

<sup>13</sup> *J.L.*, Docket No. 18-1266 (issued February 15, 2019); *B.H.*, Docket No. 09-0292 (issued September 1, 2009); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(a) (May 2004).

<sup>14</sup> *C.G.*, Docket No. 15-0891 (issued August 9, 2016); Federal (FECA) Procedure Manual, *id.* at Chapter 6.200.4(a)(1).

## **ANALYSIS -- ISSUE 1**

The Board finds that OWCP improperly determined that appellant received an overpayment of compensation in the amount of \$4,662.29 for the period from November 9, 2009 to January 16, 2010.

As noted, OWCP's procedures provide that an overpayment of compensation is created when a claimant returns to work, but continues to receive wage-loss compensation for temporary total disability. On January 25, 2010 it identified an overpayment of compensation as appellant had returned to part-time, modified-duty work on November 9, 2009, but continued to receive temporary total disability compensation for the period November 9, 2009 through January 16, 2010. It was not until September 13, 2017, however, that OWCP issued a preliminary determination, finding an overpayment in the amount of \$4,662.29 had been created for the period November 9, 2009 to January 16, 2010 because appellant continued to receive compensation for total disability following her return to part-time, modified-duty work. By decision dated January 18, 2018, OWCP finalized the preliminary overpayment determination finding that appellant was at fault in the receipt of an overpayment of compensation in the amount of \$4,662.29 and, thus, she was not entitled to waiver of recovery of the overpayment. It required recovery of the overpayment by deducting \$100.00 every 28 days from her continuing compensation.

The Board finds that OWCP failed to follow its procedures in issuing the January 18, 2018 overpayment decision. As noted, OWCP procedures provide that a Form CA-2201 (preliminary finding notice) must be released along with an OWCP-20 within 30 days of the date the overpayment is identified.<sup>15</sup> In this case, OWCP first identified the overpayment of compensation on January 25, 2010, but it did not, however, issue a preliminary notice regarding the overpayment until September 13, 2017, more than seven years later.

Timely issuance of the preliminary overpayment notice is particularly important given the disparity between OWCP's initial finding of a \$1,552.64 overpayment for the period November 9, 2009 through January 16, 2010 and its subsequent finding of a greater overpayment in the amount of \$4,662.29 overpayment for the same period. Moreover, it is particularly noteworthy that OWCP acknowledged in its own statements to the employing establishment on August 14, 2017 that it had previously computed the overpayment, but never reported it.

The Board thus finds that OWCP failed to follow its established procedures in determining that appellant received an overpayment of compensation in the amount of \$4,662.29 during the period November 9, 2009 through January 16, 2010.<sup>16</sup>

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<sup>15</sup> *Id.*

<sup>16</sup> Based on the Board's disposition of whether an overpayment of compensation was created, the issues of fault and recovery are moot. *See C.C.*, Docket No. 16-1190 (issued May 12, 2017).

**CONCLUSION**

The Board finds that OWCP failed to follow its established procedures in determining that appellant received an overpayment of compensation in the amount of \$4,662.29 for the period November 9, 2009 to January 16, 2010.

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 18, 2018 decision of the Office of Workers' Compensation Programs is reversed.

Issued: August 2, 2019  
Washington, DC

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

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

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