



## **FACTUAL HISTORY**

On May 2, 2002 appellant, then a 47-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on that date he sustained neck, shoulder and back strains/sprains when his long life vehicle (LLV) was rear-ended in a motor vehicle accident while in the performance of duty. OWCP accepted the claim for neck and bilateral shoulder sprains. It paid appellant wage-loss compensation for temporary total disability on the supplemental rolls from June 17 through July 25, 2015 and on the periodic rolls from July 26, 2015 through December 7, 2019.

In a medical report dated June 2, 2017, Dr. John H. Chaglassin, a Board-certified orthopedic surgeon serving as an impartial medical examiner (IME), conducted an examination and determined that appellant no longer had residuals or disability causally related to his May 2, 2015 employment injury. He advised that appellant could perform his date-of-injury position without restrictions. Dr. Chaglassin completed a work capacity evaluation (Form OWCP-5c) and reiterated that he was capable of returning to his usual job without restrictions.

By decision dated April 11, 2019, following a March 8, 2019 notice of proposed termination, OWCP terminated appellant's wage-loss compensation and medical benefits, effective April 28, 2019, finding that the special weight of the medical evidence rested with the IME, Dr. Chaglassin, who concluded in his June 2, 2017 report that appellant had no residuals or disability due to his accepted May 2, 2015 employment injury.

On May 25, 2019 appellant received compensation *via* direct deposit in the amount of \$2,718.72 for the period from April 28, 2019 through May 25, 2019. On June 22, 2019 he received compensation in the amount of \$2,718.72 for the period from May 26, 2019 through June 22, 2019. OWCP continued to pay appellant compensation on the periodic rolls through December 7, 2019.

On December 19, 2019 OWCP issued a preliminary determination that an overpayment had been created in the amount of \$21,749.76 as appellant continued to receive compensation payments on the periodic rolls *via* direct deposit through December 7, 2019, after his FECA wage-loss compensation had been terminated on April 28, 2019. It also found that he was at fault in the creation of the overpayment because he accepted a payment that he knew or reasonably should have known was incorrect. OWCP requested that appellant complete the enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documentation. Additionally, it notified him that, within 30 days of the date of the letter, he could request a telephone conference, a final decision based on the written evidence, or a precoupment hearing. OWCP mailed the preliminary determination to appellant's address of record. No response was received.

OWCP, by decision dated January 24, 2020, finalized its determination that an overpayment of compensation had been created in the amount of \$21,749.76 for the period April 28 through December 7, 2019, and that appellant was at fault in its creation. It required recovery of the overpayment in full.

On January 27, 2020 OWCP received an overpayment action request form, dated January 17, 2020 and postmarked January 22, 2020, in which appellant requested a precoupment hearing. Appellant contested the fact of overpayment and recovery of the overpayment. He also

requested waiver of recovery of the overpayment. Appellant asserted that he remained totally disabled and that his oral hearing regarding the termination of his compensation benefits was still pending before OWCP. As such, he believed that he would continue to receive compensation benefits during the appeal process. Appellant also asserted that he did not have the means to repay the overpayment. He attached an undated and incomplete Form OWCP-20, in which he provided no information with regard to his monthly income, monthly expenses, and assets.

By decision dated February 8, 2020, OWCP's Branch of Hearings and Review denied appellant's request for a prerecoupment hearing, finding that he had untimely requested a hearing on the preliminary overpayment determination, and that the final overpayment decision was not subject to a hearing pursuant to 5 U.S.C. § 8124(b).

### **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>2</sup> Section 8129(a) of FECA provides, in pertinent part: "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>3</sup>

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>4</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>5</sup> OWCP's regulations provide in pertinent part that compensation for wage loss due to disability is available only for any periods during which the employee's work-related medical condition prevents him or her from earning the wages earned before the work-related injury.<sup>6</sup>

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

The Board finds that appellant received an overpayment of compensation in the amount of \$21,749.76 for the period April 28 through December 7, 2019 because he continued to receive wage-loss compensation following the termination of his compensation payments.

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<sup>2</sup> *Id.* at § 8102(a).

<sup>3</sup> *Id.* at § 8129(a).

<sup>4</sup> *Id.* at § 8102.

<sup>5</sup> *Id.* at § 8116(a).

<sup>6</sup> 20 C.F.R. § 10.500.

OWCP terminated appellant's wage-loss compensation, effective April 28, 2019 based on the opinion of the IME, Dr. Chaglassin. However, appellant continued to receive wage-loss compensation on the periodic rolls until December 7, 2019. Since OWCP had terminated his wage-loss compensation benefits, effective April 28, 2019, appellant was not entitled to receive compensation benefits after that date. It properly calculated that he received \$21,749.76 in FECA wage-loss compensation for the period April 28 through December 7, 2019. The Board, thus, finds that an overpayment of compensation in that amount was created.

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

Section 8129(b) of FECA<sup>7</sup> 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>8</sup>

OWCP may consider waiving an overpayment of compensation 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 received from OWCP are proper. The recipient must show good faith and exercise a high degree of care in reporting events, which may affect entitlement to or the amount of benefits. 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; (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>9</sup>

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>10</sup>

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

The Board finds that appellant was not at fault in creation of the overpayment for the period April 28 to May 25, 2019.

In cases where a claimant receives compensation through direct deposit, the Board has held that OWCP must establish that, at the time a claimant received the direct deposit in question, he

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<sup>7</sup> 5 U.S.C. § 8129(b).

<sup>8</sup> *T.N.*, Docket No. 17-0387 (issued November 28, 2018); *J.K.*, Docket No. 08-1761 (issued January 8, 2009), *Joan Ross*, 57 ECAB 694 (2006); *Desiderio Martinez*, 55 ECAB 245 (2004).

<sup>9</sup> 20 C.F.R. § 10.433(a).

<sup>10</sup> *Id.* at § 10.433(b).

or she should have known that the payment was incorrect.<sup>11</sup> The Board has held that an employee who receives payments from OWCP in the form of a direct deposit might not be at fault for the first incorrect deposit into his or her account since the acceptance of the overpayment, at the time of receipt of the direct deposit, lacks the requisite knowledge.<sup>12</sup> Because fault is defined by what the claimant knew or should have known at the time of acceptance, one of the consequences of electronic fund transfers is that the claimant lacks the requisite knowledge at the time of the first incorrect payment.<sup>13</sup> Whether or not OWCP determines that an individual is at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment.<sup>14</sup> It is not appropriate, however, to make a finding that a claimant has accepted an overpayment *via* direct deposit until such time as a reasonable person would have been aware that this overpayment had occurred. This awareness could be established either through documentation such as a bank statement or notification from OWCP or where a reasonable period of time has passed during which a claimant could have reviewed independent confirmation of the incorrect payment.<sup>15</sup>

The record establishes that on May 25, 2019, appellant received compensation by direct deposit for the period April 28 to May 25, 2019. The evidence of record does not establish that, on the date of the first direct deposit of compensation following the termination of his compensation, appellant knew or should have known that he was accepting a direct deposit to which he was not entitled. The record does not contain documentation or other evidence to demonstrate that appellant had knowledge at the time of the May 25, 2019 direct deposit covering the initial period April 28 to May 25, 2019 that the payment was incorrect or that a reasonable period of time passed during which he could have reviewed bank statements or been informed of the incorrect payment. Thus, the Board finds that when the initial direct deposit was made, appellant had no knowledge that this direct deposit was incorrect. Appellant, therefore, cannot be found to be at fault in the acceptance of the initial May 25, 2019 direct deposit. The case must, therefore, be remanded for OWCP to determine whether he is entitled to waiver of the recovery of the overpayment for the first incorrect compensation payment made on May 25, 2019.<sup>16</sup>

The Board further finds, however, that he was at fault in the creation of the remaining period of the overpayment of compensation for the period May 26 through June 22, 2019 and, therefore, precluded from waiver of recovery of the overpayment for this remaining period.

When OWCP issued the next compensation payment on June 22, 2019, appellant should have known that he was no longer entitled to compensation as OWCP had notified him that his compensation was formally terminated, effective April 28, 2019. Therefore, the Board finds that he was at fault in the creation of the remaining period of the overpayment for the period May 26

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<sup>11</sup> *T.N.*, *supra* note 8.

<sup>12</sup> *T.N.*, *supra* note 8; *Tammy Craven*, 57 ECAB 589 (2006).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *See T.N.*, *supra* note 8; *K.H.*, Docket No. 06-0191 (issued October 30, 2006).

<sup>16</sup> *E.N.*, Docket No. 19-1687 (issued May 27, 2020).

through June 22, 2019 as he knew or should have known at the time of the second incorrect payment that he was no longer entitled to additional wage-loss compensation.

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

OWCP's regulations provide that a claimant may request a prerecoupment hearing with respect to an overpayment.<sup>17</sup> The date of the request is determined by the postmark or other carrier's date marking.<sup>18</sup> Failure to request the prerecoupment hearing within 30 days shall constitute a waiver of the right to a hearing.<sup>19</sup> The only right to a review of a final overpayment decision is with the Board.<sup>20</sup> The hearing provisions of section 8124(b) of FECA do not apply to final overpayment decisions.<sup>21</sup>

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

The Board finds that OWCP's Branch of Hearings and Review properly denied appellant's request for a prerecoupment hearing as untimely filed.

OWCP's December 19, 2019 preliminary determination of overpayment provided appellant with a right to request a prerecoupment hearing within 30 days. The record indicates that it properly mailed its December 19, 2019 preliminary determination to appellant's address of record.<sup>22</sup> However, no response was received. By decision dated January 24, 2020, OWCP finalized its preliminary overpayment determination.

On January 27, 2020 OWCP's Branch of Hearings and Review received an overpayment action request form, dated January 17, 2020 and postmarked January 22, 2020, in which appellant requested a prerecoupment hearing contesting the overpayment. The timeliness of a request for a prerecoupment hearing is determined by the postmark date or other carrier's marking showing when the request was sent to OWCP.<sup>23</sup> As appellant's request for a prerecoupment hearing was

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<sup>17</sup> 20 C.F.R. § 10.432. *See D.H.*, Docket No. 19-0384 (issued August 12, 2019); *E.M.*, Docket No. 17-1502 (issued February 22, 2019).

<sup>18</sup> *Id.* at §§ 10.439, 10.616(a); *A.B.*, Docket No. 18-1172 (issued January 15, 2019); *see also B.W.*, Docket No. 18-1004 (issued October 24, 2018); *C.R.*, Docket No. 15-0525 (issued July 20, 2015).

<sup>19</sup> *Id.*

<sup>20</sup> 20 C.F.R. § 10.440(b).

<sup>21</sup> 5 U.S.C. § 8124(b). *See G.I.*, Docket No. 19-0297 (issued October 23, 2019).

<sup>22</sup> It is presumed, in the absence of evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by the individual. This presumption known as the mailbox rule arises when it appears from the record that the notice was properly addressed and duly mailed. The appearance of a properly addressed copy in the case record, together with the mailing custom or practice of OWCP itself, will raise the presumption that the original was received by the addressee. *See L.C.*, Docket No. 17-1939 (issued August 23, 2018); *George F. Gidicsin*, 36 ECAB 175 (1984).

<sup>23</sup> *Supra* note 17.

postmarked on January 22, 2020, more than 30 days after the December 19, 2019 preliminary overpayment determination, it was untimely filed.

OWCP's regulations, however, provide that when a final overpayment decision is issued, there is no right to a hearing or a review of the written record, and OWCP does not have discretion to grant such a request. The only right to appeal is with the Board.<sup>24</sup> As appellant's January 17, 2020 request for a hearing was made after the final overpayment determination the Board finds that OWCP's Branch of Hearings and Review properly denied appellant's January 17, 2020 request for a hearing.<sup>25</sup>

### CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$21,749.76 for the period April 28 through December 7, 2019 because he continued to receive wage-loss compensation following the termination of his compensation payments. With regard to OWCP's finding of fault, the Board finds that he was not at fault in the creation of the overpayment for the period April 28 through May 25, 2019, but was at fault in the creation of the overpayment of compensation for the period May 26 through June 22, 2019 and, therefore, precluded from waiver of recovery for that remaining period. The Board further finds that OWCP's Branch of Hearings and Review properly denied appellant's request for a prerecoupment hearing as untimely filed.

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<sup>24</sup> *Supra* note 18.

<sup>25</sup> *See E.M.*, Docket No. 19-0857 (issued December 31, 2019); *D.H.*, *supra* note 17.

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 18, 2020 decision of the Office of Workers' Compensation Programs is affirmed. The January 24, 2020 decision of the Office of Workers' Compensation Programs is affirmed in part and reversed in part. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: May 24, 2021  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge  
Employees' Compensation Appeals Board