United States Department of Labor
Employees' Compensation Appeals Board

L.W., Appellant	)	
and	)	**Docket No. 14-196**
	)	**Issued: June 17, 2014**
DEPARTMENT OF THE ARMY, DIRECTORATE OF LOGISTICS, Camp Ripley, MN, Employer	)	

Appearances:
Marshall H. Tanick, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA HOWARD FITZGERALD, Acting Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 5, 2013 appellant, through his attorney, filed a timely appeal from an October 21, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (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 OWCP properly found a $1,194.29 overpayment of compensation for the period July 29 to September 21, 2013 as appellant had been compensated at an incorrect rate; (2) whether OWCP properly found appellant at fault in creation of the overpayment, thereby precluding waiver of recovery of the overpayment; and (3) whether OWCP properly directed recovery of the overpayment by deducting $1,194.29 from appellant's December 14, 2013 compensation payment.

[1] 5 U.S.C. § 8101 *et seq.*

On appeal, appellant acknowledges that he was overpaid in August, September and October 2013 and does not contest the amount. He attributes the August 2013 overpayment to clerical error and OWCP's failure to correct the overpayment in September and October 2013 to the federal furloughs that occurred during that time. Appellant submitted several statements reviewing the circumstances of a third-party settlement in his case and the resulting offset against his compensation. He contends that repaying the overpayment would cause financial hardship.

FACTUAL HISTORY

OWCP accepted that on January 9, 2009 appellant, then a 50-year-old food service program specialist in dual status employment with the National Guard, sustained a cervical strain in an occupational motor vehicle accident. The National Guard released him on April 27, 2010 as he no longer met the physical requirements for deployment. Appellant retired from the employing establishment effective February 26, 2011 as he was no longer in the National Guard as was required by his dual status position.

Appellant received a third-party settlement related to the January 9, 2009 motor vehicle accident, resulting in a $34,026.61 credit against his future benefits. The credit was exhausted on September 14, 2011. OWCP paid wage-loss compensation for his federal service beginning on September 15, 2011.

On January 10, 2012 appellant began full-time private-sector employment with a firearms company, earning $400.00 a week. On April 24, 2012 OWCP reduced his compensation to reflect his actual earnings. Appellant signed a Form EN-1049 on June 28, 2012, acknowledging his obligation to report all earnings and employment to OWCP and that failure to do so could result in an overpayment of compensation. He was also advised to return any incorrect payments to OWCP.

Appellant received pay increases on April 22 and July 29, 2013. OWCP corrected his pay rate effective September 22, 2013.

By notice dated September 13, 2013, OWCP advised appellant of its preliminary determination of an overpayment of compensation for the period July 29 to September 21, 2013 of $1,194.29 as he was compensated at an incorrect rate. It found that, based on the current pay rate for his date-of-injury job of $1,346.33 a week and the revised actual earnings of $684.40 a week, he was entitled to $3,906.96 in compensation from July 29 to September 21, 2013. As appellant received $5,101.25 in compensation for that period, the difference of $1,194.29 constituted an overpayment. OWCP found him at fault in creation of the overpayment as "[appellant] failed to provide information in a timely manner which he knew or should have known to be material." It directed appellant to complete an attached overpayment recovery questionnaire (Form OWCP-20) to provide information on his income, assets and expenses. Appellant did not complete the form or otherwise submit financial information.

By decision dated October 21, 2013, OWCP finalized the fact and amount of the preliminary overpayment determination and the finding of fault. It directed recovery of the overpayment by deducting $1,194.29 from appellant's December 14, 2013 compensation

payment. OWCP noted that he did not respond to its request for financial information on which to base a repayment plan.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of FECA[2] 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.[3] 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."[4]

ANALYSIS -- ISSUE 1

The record establishes that appellant received compensation under FECA beginning on September 15, 2011. As of July 29, 2013, appellant was employed in the private sector with actual wages of $17.11 an hour. However, for the period July 29 to September 21, 2013, he received compensation based on private-sector earnings of $12.00 an hour, a previous pay rate. OWCP calculated that appellant received $5,101.25 in compensation from July 29 to September 21, 2013 but was only entitled to $3,906.96, resulting in an overpayment of $1,194.29. The Board finds that OWCP's calculations are mathematically correct.

The Board notes that on appeal, appellant does not contest the fact or amount of the overpayment as determined by OWCP. Appellant acknowledged that he was overpaid for the period at issue. The Board will therefore affirm OWCP's October 21, 2013 finding of overpayment.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of FECA[5] provides that, where an overpayment of compensation has been made because of an error of fact or law, adjustments shall be made by decreasing later payments to which an individual is entitled.[6] An individual who is found at fault in either accepting or creating an overpayment is not eligible for a waiver of recovery of overpayment.[7] A benefits recipient will be at fault if the individual: (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

[2] 5 U.S.C. §§ 8101-8193.

[3] *Id*. at § 8102(a).

[4] *Id*. at § 8129(a).

[5] *Id*.

[6] *Id*.

[7] 5 U.S.C. § 8129(b); 20 C.F.R. §§ 10.423(a) and 10.434.

payment which he or she knew or should have known to be incorrect.[8] No waiver of an overpayment is possible if the claimant is at fault in creating the overpayment.[9]

With respect to whether an individual is without fault, section 10.433(b) of OWCP's regulations provide that whether or not OWCP determines that an individual was at fault with respect to 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.[10]

Section 10.430(a) of OWCP's regulations advise that OWCP includes on each periodic check a clear indication of the period for which payment is being made. A form is sent to the recipient with each supplemental check which states the period for which payment is being made. Section 10.430(b) notes that, by these means, OWCP puts the recipient on notice that a payment was made and the amount of the payment.[11]

ANALYSIS -- ISSUE 2

OWCP applied the second standard in this case, finding that appellant failed to provide information which he knew or should have known to be material. Appellant accepted a compensation payment for the period July 29 to September 21, 2013 based on actual earnings of $480.00 a week, whereas he earned $684.40 a week during this period.

On June 28, 2012 appellant signed a certification acknowledging his obligation to report all earnings and employment to OWCP and that failure to do so could result in an overpayment of compensation. This establishes that he should have known that he was to report changes in earnings information to OWCP. As appellant did not return the payment as instructed, OWCP properly found him at fault in creation of the overpayment. Recovery of the $1,194.29 overpayment may not be waived because he was at fault under the second standard as set forth above.

On appeal, appellant attributes the overpayment to clerical error and federal furloughs. As stated above, the overpayment occurred because he failed to promptly report his increase in earnings. Appellant also submitted several statements reviewing the circumstances of the third-party settlement and resulting offset against his compensation. These documents are not relevant to the overpayment issue on appeal.

LEGAL PRECEDENT -- ISSUE 3

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

[8] *Id*. at § 10.433(a).

[9] *Gregg B. Manston*, 45 ECAB 344 (1994).

[10] 20 C.F.R. § 10.433(b).

[11] *R.W.*, Docket No. 13-1285 (issued November 13, 2013); *Id*. at § 10.430.

error is discovered or his or her attention is called to 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 any hardship.[12]

ANALYSIS -- ISSUE 3

In its October 21, 2013 decision, OWCP found that appellant failed to respond to its request for financial information on which to base a repayment plan. Appellant did not provide any information about his household income, assets or expenses to enable OWCP to determine a repayment plan that would minimize any financial hardship. OWCP advised that it would deduct $1,194.29 from his compensation check effective December 14, 2013. Under these circumstances, the Board will affirm OWCP's October 21, 2013 decision on the issue on the rate of recovery.

On appeal, appellant contends that repaying the overpayment would cause financial hardship. As stated above, he did not submit any financial information that would have assisted OWCP in formulating a repayment plan.

CONCLUSION

The Board finds that OWCP properly found a $1,194.29 overpayment of compensation for the period July 29 to September 21, 2013. The Board further finds that OWCP properly found appellant at fault in creation of the overpayment, thereby precluding waiver of recovery. The Board further finds that OWCP properly directed recovery of the overpayment by deducting $1,194.29 from his December 14, 2013 compensation payment.

[12] *Id*. at § 10.441(a) (2003).

ORDER

IT IS HEREBY ORDERED THAT the October 21, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 17, 2014
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board