

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

J.P., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Bellmawr, NJ, Employer**

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**Docket No. 11-564
Issued: November 1, 2011**

Appearances:

*Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 4, 2011 appellant filed a timely appeal from an Office of Workers' Compensation Programs' (OWCP) decision dated October 4, 2010, which found that he received an overpayment of compensation and that he was at fault in its creation. Pursuant to the Federal Employees' Compensation Act (FECA)¹ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received an overpayment in the amount of \$2,241.61 for the period August 4 to 28, 2010; and (2) whether he was at fault in the creation of the overpayment.

On appeal, appellant's representative argued that OWCP erred in finding an overpayment as appellant did not return to work.

¹ 5 U.S.C. § 8101 *et seq.*

² Appellant's representative has not appealed any other decisions.

FACTUAL HISTORY

On October 13, 2009 appellant, then a 54-year-old clerk, injured his left leg after a “heavy night” at work.³ Appellant stopped work on October 13, 2009. OWCP accepted the claim for left knee sprain and placed him on the periodic rolls.

On May 10, 2010 OWCP notified appellant that, to avoid an overpayment of compensation, he was to immediately notify it when he returned to work. He was also advised to return any check to OWCP which included a period during which he worked.

Appellant’s physicians indicated that he was unable to return to his regular job. An OWCP referral physician, Dr. Stanley Askin, a Board-certified orthopedic surgeon, opined in a May 14, 2010 report, that appellant had no work-related restrictions and could perform his date-of-injury job. In an August 3, 2010 letter, an employing establishment nurse asked that Dr. Askin complete an OWCP work restriction form in view of his stated opinion. In an August 4, 2010 work capacity evaluation form, Dr. Askin advised that appellant could perform his usual job.

On August 18, 2010 OWCP received an August 13, 2010 Form CA-3 from the employing establishment indicating that appellant returned to full duty on August 4, 2010.

On August 24, 2010 OWCP advised appellant and the employing establishment that his periodic rolls payments had stopped as he returned to work on August 4, 2010.

On September 3, 2010 OWCP notified appellant of its preliminary determination that he received a \$2,241.61 overpayment of compensation for the period August 4 through 28, 2010 because he received compensation for total disability after he returned to work. Appellant was found at fault in creating of the overpayment, as he knew or should have known that he was not entitled to receive wage-loss compensation for a period after his return to work. OWCP further informed appellant that he had 30 days to request a telephone conference, a final decision based on the written evidence, or a prerecolement hearing on the issues of fault and a possible waiver.

The record contains calculations showing that appellant should have been paid net compensation of \$2,510.60 for the period August 1 through 28, 2010; however, as he returned to work on August 4, 2010, OWCP determined he was only entitled to three days. The daily net rate was determined to be \$89.66. OWCP found that appellant was entitled to three days of compensation, or \$268.98, before he returned to work. The difference between the net amount paid for the entire period and the net amount to which appellant was entitled, resulted in an overpayment of \$2,241.61 ($\$2,510.60 - \$268.98 = \$2,241.61$).

In a September 7, 2010 telephone call memorandum, appellant informed OWCP that he had not returned to work. OWCP advised appellant that the employing establishment reported

³ Appellant actually claimed a recurrence of disability due to a prior injury. The record reflects that appellant has a prior claim for tear of the left medial meniscus under File No. xxxxxx317. OWCP treated the recurrence as a new traumatic injury in the present claim. Both claims have been combined.

that he had returned to work on August 4, 2010 and that he was being removed from the periodic rolls until his employer verified that he had not returned to work.

In a letter dated September 14, 2010, appellant's attorney notified OWCP that appellant did not return to work on August 4, 2010 and that his compensation benefits should not be discontinued.

By decision dated October 4, 2010, OWCP finalized its finding that appellant received an overpayment of compensation in the amount of \$2,241.61 for the period August 4 to 28, 2010, based upon his receipt of wage-loss compensation after his return to work. It further found that he was at fault in the creation of the overpayment, as he accepted a payment which he knew or should have known was incorrect. OWCP found that, without documentary evidence supporting his contention that he did not return to work, the Form CA-3 was controlling with regard to whether appellant returned to work.

LEGAL PRECEDENT -- ISSUE 1

Section 8102 of FECA⁴ 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.⁵

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, she may not receive salary, pay or remuneration of any type from the United States, except in limited circumstances.⁶ OWCP's 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 from earning the wages earned before the work-related injury.⁷

ANALYSIS -- ISSUE 1

The Board finds that this case is not in posture for decision.

OWCP determined that appellant received an overpayment in the amount of \$2,241.61 based upon the employer's assertion that he returned to work on August 4, 2010. When an employee returns to work and ceases to have any loss of wages, he is no longer entitled to compensation for wage loss.⁸ In this case, the evidence is not conclusive as to whether appellant returned to work. The record contains an employing establishment's notification on a Form CA-3 that he returned on August 4, 2010; but there is no other evidence from the employer

⁴ 5 U.S.C. §§ 8101-8193.

⁵ *Id.* at § 8102.

⁶ *Id.* at § 8116(a).

⁷ 20 C.F.R. § 10.500(a).

⁸ See *Kenneth E. Rush*, 51 ECAB 116 (1999).

verifying that appellant returned to work on that day. Appellant and his attorney notified OWCP that he did not return to work and that his wage-loss compensation should continue.⁹ In view of appellant's assertion that he did not return to work, OWCP should have verified his work status before finding that he received an overpayment of compensation. Under these circumstances, OWCP should have obtained verification of appellant's return to work with the employing establishment.¹⁰ As the record requires clarification regarding whether appellant returned to work on August 4, 2010, the record is insufficient to establish that appellant received an overpayment of compensation beginning that date.

Upon return of the case record, OWCP should verify with the employing establishment whether appellant returned to work on August 4, 2010. Following this and such other further development as it deems necessary, it should make appropriate findings and a decision regarding any overpayment that may have been received beginning August 4, 2010.¹¹

CONCLUSION

The Board finds that this case is not in posture for decision.

⁹ There is no evidence that OWCP sought to terminate or reduce appellant's wage-loss compensation.

¹⁰ See *R.E.*, 59 ECAB 323 (2008); *Willie A. Dean*, 40 ECAB 1208 (1989) (OWCP has a responsibility in the developing the evidence, particularly when such evidence is of the character normally obtained from the employing establishment or other government source).

¹¹ In light of the Board's finding, the other issues are moot.

ORDER

IT IS HEREBY ORDERED THAT the October 4, 2010 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this decision.

Issued: November 1, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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