

FACTUAL HISTORY

On August 28, 1998 appellant, then a 48-year-old mail handler, sustained a left lower extremity injury while in the performance of duty. OWCP accepted his occupational disease claim, assigned File No. xxxxxx766, for aggravation of left knee arthritis.² Appellant was placed on the periodic rolls effective September 27, 2009 and received disability compensation through November 20, 2010. His final payment was \$2,614.51 for the period October 24 to November 20, 2010.

In an October 1, 2009 letter, OWCP advised appellant that disability compensation was payable so long as he remained unable to perform his regular job duties due to his accepted condition. It further advised that he was expected to return to work when he was no longer totally disabled. Appellant signed and submitted an October 1, 2009 certification form acknowledging these requirements.

A November 26, 2010 notice from the employing establishment advised OWCP that appellant returned to modified full-time duty effective November 8, 2010. The case record confirms that OWCP issued a \$2,614.51 periodic rolls compensation check for disability on November 20, 2010 covering the period October 24 to November 20, 2010. OWCP calculated that, from November 8 to 20, 2010, appellant received net wage-loss compensation of \$1,213.88.

On December 8, 2010 OWCP made preliminary findings that appellant received an overpayment of \$1,213.88 from November 8 to 20, 2010 and was at fault in its creation because he knowingly accepted compensation to which he was not entitled. It explained how the overpayment occurred and was calculated. Appellant was also informed of his options if he wished to contest the fact or amount of overpayment or request a waiver of recovery.

Appellant requested a prerecoupment hearing on January 7, 2011. He submitted a January 7, 2011 overpayment recovery questionnaire indicating that his total monthly income and expenses were \$2,500.00 and \$2,725.00, respectively.³ During the April 18, 2011 telephonic hearing, appellant testified that he experienced multiple heart attacks and surgical complications before he returned to work on November 8, 2010. He received a check from OWCP for the period October 24 to November 20, 2010, but was unaware of an overpayment. Appellant was later placed on limited duty. He remarked that he was amenable to paying installments of up to \$100.00 to satisfy the debt.

By decision dated June 28, 2011, OWCP's hearing representative finalized the \$1,213.88 overpayment. He pointed out that appellant was paid \$2,614.51 for the period October 24 to November 20, 2010, or approximately \$93.375 per day for 28 days. Since appellant resumed work on November 8, 2010, he was only entitled to disability compensation for 15 days, which amounted to \$1,400.63. Therefore, he received an overpayment of \$1,213.88, the difference of \$2,614.51 and \$1,400.63. The hearing representative also held that appellant was at fault in the creation of the overpayment because he was notified by OWCP in an October 1, 2009 letter that

² OWCP combined this claim with File No. xxxxxx842.

³ In a subsequent questionnaire dated May 12, 2011, appellant reduced his total monthly expenses to \$2,450.00.

he was not entitled to disability compensation if he returned to work and submitted a signed certification form acknowledging receipt of this letter. In order to minimize hardship, appellant was advised to repay the balance at a rate of \$100.00 per month.

LEGAL PRECEDENT -- ISSUES 1 & 2

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.⁴ The statute places limitations on an employee's right to receive compensation benefits. Section 8116 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.⁵

"Temporary total disability" is defined as the inability to return to the position held at the time of injury or earn equivalent wages or to perform other gainful employment, due to the work-related injury.⁶ It is well established that an employee is not entitled to compensation for temporary total disability after returning to work.⁷ Furthermore, an employee is not entitled to receive temporary total disability compensation and actual earnings for the same period. OWCP's procedures provide that an overpayment in compensation is created when a claimant returns to work but continues to receive wage-loss compensation.⁸

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.⁹ Conversely, a waiver of recovery is not possible if the claimant is at fault in creating the overpayment.¹⁰

A claimant 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. Whether or not an individual was at fault 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

⁴ 5 U.S.C. § 8102(a).

⁵ *Id.* at § 8116; *R.H.*, Docket No. 09-1981 (issued June 11, 2010).

⁶ 20 C.F.R. § 10.400(b).

⁷ *W.B.*, Docket No. 09-1440 (issued April 12, 2010).

⁸ *D.C.*, Docket No. 09-1460 (issued April 19, 2010); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(a) (June 2009).

⁹ 5 U.S.C. § 8129(b); *Linda E. Padilla*, 45 ECAB 768 (1994).

¹⁰ *Donald L. Overstreet*, 54 ECAB 678 (2003); *Gregg B. Manston*, 45 ECAB 344 (1994).

overpaid.¹¹ In applying the tests to determine fault, OWCP applies a “reasonable person” standard.¹²

ANALYSIS -- ISSUES 1 & 2

Appellant specifies on appeal that he does not contest the fact or amount of overpayment. In addition, he does not dispute that he is not entitled to waiver of recovery.

The case record supports that appellant was placed on the periodic rolls effective September 27, 2009 and received disability compensation. His final payment was \$2,614.51 for the period October 24 to November 20, 2010. OWCP was notified on November 26, 2010 that appellant returned to full-time duty as of November 8, 2010. It subsequently terminated disability compensation retroactive to the date of return. Appellant also confirmed that he resumed work on November 8, 2010 at the April 18, 2011 prerecoupment hearing. Because he received wage-loss compensation for total disability after he returned to his federal employment, an overpayment was clearly created. The Board has held that OWCP must provide a clearly written statement explaining how the overpayment was calculated.¹³ In this case, OWCP detailed that appellant was paid \$2,614.51 for the period October 24 to November 20, 2010, a daily rate of \$93.375 per day for 28 days. Because appellant resumed work on November 8, 2010, he was no longer totally disabled and was only entitled to disability compensation from October 24 to November 7, 2010. This amounted to \$1,400.63, after multiplying \$93.375 by 15 days. OWCP subtracted \$1,400.63 from \$2,614.51 to calculate an overpayment of \$1,213.88. The Board finds that OWCP properly determined the fact and amount of the overpayment.

The Board further finds that OWCP properly determined that appellant was at fault in the creation of the overpayment under the third fault standard as noted above. The case record shows that OWCP advised appellant in an October 1, 2009 letter that disability compensation was payable so long as he remained unable to perform his regular job duties due to his accepted left knee injury and that he was expected to return to work when he was no longer totally disabled. Appellant signed and submitted an October 1, 2009 certification form acknowledging these conditions.¹⁴ Although he later alleged during the prerecoupment hearing that he was unaware of an overpayment when he received his last compensation payment for the period October 24 to November 20, 2010, he should have reasonably known that he was accepting an incorrect amount since he returned to work in the interim. Therefore, appellant was at fault in creating the overpayment and not eligible for waiver of recovery.

¹¹ 20 C.F.R. § 10.433.

¹² *Ralph P. Beachum, Sr.*, 55 ECAB 442, 447 (2004).

¹³ *O.R.*, 59 ECAB 432 (2008); *Sandra K. Neil*, 40 ECAB 924 (1989). See also 20 C.F.R. § 10.431; FECA Procedure Manual, *supra* note 8, Chapter 6.200.4(a).

¹⁴ Furthermore, 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 date and amount of the payment and 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. 20 C.F.R. § 10.430.

LEGAL PRECEDENT -- ISSUE 3

The Board's jurisdiction to review recovery of an overpayment is limited to those cases in which OWCP seeks recovery from continuing compensation payments under FECA.¹⁵ The amount of adjustment of continuing compensation to recover an overpayment lies within OWCP's discretion. The analysis that determines that amount of adjustment is substantially the same as that used to determine waiver.¹⁶

ANALYSIS -- ISSUE 3

Appellant contends on appeal that the rate of recovery should be reduced to \$25.00 per pay period due to financial circumstances. The case record indicates, however, that he is no longer receiving wage-loss compensation. Therefore, the Board does not have jurisdiction with respect to OWCP's recovery of the overpayment in this case.¹⁷

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment in the amount of \$1,213.88 for the period November 8 to 20, 2010, was at fault in the creation of the overpayment, and was not entitled to a waiver. The Board does not have jurisdiction to review the method of overpayment.

¹⁵ *George A. Rodriguez*, 57 ECAB 224 (2005); *Levon H. Knight*, 40 ECAB 658 (1989).

¹⁶ *R.H.*, *supra* note 5; *Howard R. Nahikian*, 53 ECAB 406, 411 (2002).

¹⁷ *Robert S. Luciano*, 47 ECAB 793, 799 (1996). *See also* 20 C.F.R. § 10.441(b) (overpayment subject to provisions of the Federal Claims Collection Act).

ORDER

IT IS HEREBY ORDERED THAT the June 28, 2011 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: July 17, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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