

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

L.G., Appellant)

and)

DEPARTMENT OF THE AIR FORCE, ROBINS)
AIR FORCE BASE, Warner Robins, GA,)
Employer)

Docket No. 12-274
Issued: November 20, 2012

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 18, 2011 appellant filed a timely appeal from an August 17, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees Compensation Act¹ (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 appellant received an overpayment of \$3,294.63 after he returned to work on September 14, 2010; and (2) whether OWCP properly determined that he was at fault in the creation of the overpayment and the overpayment was therefore not subject to waiver.

FACTUAL HISTORY

On February 25, 2010 appellant, then a 60-year-old aircraft engine repairer, filed a claim for traumatic injury, alleging that he sustained a left shoulder injury while in the performance of duty.

¹ 5 U.S.C. § 8101 *et seq.*

OWCP accepted appellant's claim for a left rotator cuff tear and left biceps tendinitis on April 9, 2010. It informed him that compensation benefits for total disability were payable only while he was unable to return to work. OWCP further instructed appellant as follows:

“Once you return to work or obtain new employment, notify this [OWCP] immediately ... if you receive compensation check, which includes payment for a period you have worked, return it to us immediately to prevent an overpayment of compensation.”

Appellant began receiving compensation benefits on the periodic rolls beginning June 6, 2010.

Appellant returned to work full time on September 14, 2010 and OWCP was notified by the field nurse of his return to work on that date. He continued to receive compensation benefits for the period August 29 through October 23, 2010 in the amount of \$4,612.48. The record indicates that appellant received a direct deposit in the amount of \$2,306.24 on September 25, 2010 and a direct deposit of \$2,306.24 on October 23, 2010.

An October 25, 2010 telephone memorandum states that OWCP contacted appellant and verified that he had returned to work on September 14, 2010. It was noted that he was aware that he should return the October 23, 2010 payment and a partial amount from the September 2010 check.

On January 20, 2011 OWCP issued a preliminary overpayment decision. It determined that appellant was overpaid \$3,294.63 for the period September 14, 2010 through October 23, 2010. Appellant was found to be with fault in the creation of the overpayment.

Appellant disagreed with the decision on February 6, 2011 and requested a preredemption hearing. He also submitted an overpayment recovery questionnaire.

At the June 1, 2011 hearing, appellant testified that he had received an overpayment of compensation, but that he did not agree with the amount of the overpayment or with the finding that he was at fault in the creation of the overpayment. He stated that his field nurse had notified OWCP of his return to work and that he expected OWCP to stop his payments. Appellant also stated that he had a telephone conversation with OWCP when he received a payment and asked why he had received it. The claims examiner advised him that OWCP had been notified of his return to work, but had failed to remove him from the periodic rolls.

Following the hearing an OWCP hearing representative finalized the preliminary findings. In a decision dated August 17, 2011, the hearing representative found that appellant had received an overpayment of compensation in the amount of \$3,294.63 for the period September 14 through October 23, 2010 as he had returned to work but continued to receive compensation on the periodic rolls. The hearing representative also found that he was at fault in creating the overpayment of compensation and that the recovery of the overpayment should be made in full.

On appeal, appellant contests the finding of fault. He states that he is only at fault for the first portion of the overpayment as OWCP was also at fault for failing to remove him from the periodic rolls.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of FECA² provides that the United States shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.³ An overpayment in compensation is created when a claimant returns to work and continues to receive compensation.⁴

ANALYSIS -- ISSUE 1

Appellant does not contest the fact or amount of overpayment; he acknowledges that he received an overpayment of compensation because he continued to receive periodic rolls payments after he returned to work. The record establishes that OWCP paid compensation for temporary total disability after he returned to work, with no wage loss. The fact of overpayment is established.

Regarding the amount of overpayment, appellant returned to work on September 14, 2010. The overpayment worksheet establishes that he was paid \$4,612.48 for the period covering August 29 through October 23, 2010 and that he was entitled to \$1,317.85 for the period covering August 29 through September 13, 2010. The overpayment amount therefore is \$4,612.48 - \$1,317.85, which is \$3,294.63. The Board affirms the fact and amount of the overpayment.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA provides that 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.⁵

Section 10.433(a) of OWCP regulations provide that OWCP:

“[M]ay consider waiving an overpayment 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 receives 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 in 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 5 U.S.C. §§ 8101-8193.

³ *Id.* at § 8102(a).

⁴ *L.S.*, 59 ECAB 350 (2008); *Danny E. Haley*, 56 ECAB 393 (2005).

⁵ 5 U.S.C. § 8129; *see Joan Ross*, 57 ECAB 694 (2006).

(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. (This provision applies only to the overpaid individual).”⁶

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.⁷

ANALYSIS -- ISSUE 2

In finding appellant at fault in the creation of the \$3,294.63 overpayment, OWCP relied on the third standard, finding that he accepted payments he knew or should have known were incorrect.

The evidence of record indicates that appellant received his compensation by direct deposit on September 25 and October 23, 2010. The Board has distinguished the situation where the claimant receives a check in the mail covering a period of employment and knows or should have known that he is not entitled to such compensation but decides nonetheless to cash or deposit the check; from the situation where the claimant receives a direct deposit into his bank account.⁸ The Board has found that the mere direct deposit of compensation by OWCP is not sufficient to establish acceptance by a claimant who has had no opportunity to make a decision on receipt of the compensation before it was deposited to his account.⁹ Appellant argues on appeal that he is only at fault for acceptance of one, but not two of the payments. The Board agrees. Regarding the first payment appellant received on September 25, 2010 by direct deposit, the Board has held that it is not appropriate 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 may be established either through documentation such as a bank statement or notification from OWCP that an incorrect payment had been received.¹⁰

OWCP regulations define fault 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 will not be at fault for accepting the first incorrect direct deposit payment because the requisite knowledge is lacking at the time of deposit. The Board finds that when the September 25, 2010 direct deposit was made, appellant had no knowledge that this direct deposit would be made. Appellant therefore was not at fault in the acceptance of the September 25, 2010 direct deposit.

⁶ 20 C.F.R. § 10.433; *see Sinclair L. Taylor*, 52 ECAB 227 (2001); *see also* 20 C.F.R. § 10.430.

⁷ *B.H.*, Docket No. 09-292, (issued September 1, 2009).

⁸ *Otha J. Brown*, 56 ECAB 228 (2004).

⁹ *See William F. Salmonson*, 54 ECAB 152 (2002).

¹⁰ *See K.H.*, Docket No. 06-191 (issued October 30, 2006).

OWCP must therefore consider eligibility for waiver for this period. The case will be remanded for OWCP to determine whether appellant is entitled to waiver for the direct deposit of compensation he received on October 23, 2010.

Even though OWCP may have been negligent in making incorrect payments, this does not excuse a claimant from accepting payments he or she knew or should have known to be incorrect.¹¹ By the time of the second payment, October 23, 2010, appellant should have taken further steps to prevent issuance of another payment, but did not do so until October 25, 2010.

CONCLUSION

The Board finds that OWCP properly determined that an overpayment in compensation in the amount of \$3,294.63 was created. Appellant was not at fault for acceptance of the overpayment he received by direct deposit on September 25, 2010. He is at fault for the direct deposit he received on October 25, 2010. The case is remanded for a determination of whether appellant is entitled to waiver of the September 25, 2010 overpayment.

ORDER

IT IS HEREBY ORDERED THAT the August 17, 2011 decision of the Office of Workers' Compensation Programs is affirmed, in part, set aside in part and the case remanded for further proceedings consistent with this decision.

Issued: November 20, 2012
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹¹ *William E. McCarty*, 54 ECAB 525 (2003).