

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

A.M., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Miami, FL, Employer**

)
)
)
)
)
)
)
)
)
)
)
)

**Docket No. 14-1229
Issued: May 13, 2015**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 6, 2014 appellant, through counsel, filed a timely appeal from the April 1, 2014 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 OWCP properly determined that appellant received a \$22,225.27 overpayment of compensation; and (2) whether it properly determined that he was at fault in the creation of the overpayment of compensation, thereby precluding waiver of recovery of the overpayment.

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On September 5, 2006 appellant, then a 26-year-old casual mail clerk, filed a traumatic injury claim alleging that on September 4, 2006 he injured his lower back due to dumping mail while working on a mail processing machine at work. OWCP initially accepted that he sustained a work-related lumbosacral sprain and his claim was later expanded to include acceptance of a herniated disc at L5-S1. Appellant returned to work for the employing establishment on October 18, 2006 in a limited-duty job. He stopped working on December 22, 2006 when his temporary appointment ended. Compensation for total temporary disability was paid beginning December 23, 2006 on the daily rolls. Appellant later received compensation on the periodic rolls.

In a July 2, 2007 letter, OWCP advised appellant regarding his pay rate for disability compensation purposes. It informed him that if he worked for any portion of the period he received disability compensation, he must return any checks he received to OWCP. Otherwise, an overpayment of compensation might result.

In a completed Form EN1032 received on March 2, 2010, appellant reported part-time seasonal work activity with H&R Block beginning December 1, 2009. By correspondence dated March 10, 2010, the Office of the Inspector General for the employing establishment notified OWCP that appellant was employed in the fourth quarter of 2009 and that an investigation was in process. OWCP received copies of H&R Block earnings records for periods between February 20 and March 19, 2010. By telephone contact dated January 5, 2011, appellant reported that he would begin working in a seasonal position on the same date with H&R Block. On January 18, 2011 OWCP received a copy of his October 20, 2010 employment and earning statements for the period November 27 to December 24, 2010. On a completed EN1032 form dated February 17, 2011 appellant reported his seasonal employment with H&R Block.

By correspondence dated May 28, 2011, appellant was asked to submit copies of all pay stubs for earnings from 2009 and to present details regarding his private employment, including wages, hours, and tax documents. Numerous documents were received by OWCP on May 10, 2011. After another document request dated December 13, 2011, additional employment and earnings documents were received on February 3, 2012. On a completed EN1032 form dated March 1, 2011, appellant again reported his seasonal work activity with H&R Block. Additional pay information was requested in a letter dated May 4, 2012 and earnings records were received on June 8, 2012. OWCP received a July 27, 2012 report of investigation from the Office of the Inspector General of the employing establishment along with numerous documents and video footage relating to the investigation of appellant's work and other activities.² Additional earnings records were received on March 6, 2013 regarding work activity from January 5 to February 15, 2013.

In a February 10, 2014 notice, OWCP advised appellant of its preliminary determination that he received a \$22,225.27 overpayment of compensation because he performed seasonal work for earnings in 2009 through 2013 with H&R Block at the same time he received

² The record contains DVD discs, obtained by the Office of Inspector General, containing the video footage of appellant's physical activities. However, this video footage is not relevant to the issues of the present case.

compensation for total temporary disability on the periodic rolls. The periods of overpayment were November 28, 2009 to April 16, 2010, October 2, 2010 to April 15, 2011, December 10, 2011 to April 27, 2012, and January 5 to February 15, 2013.³ OWCP also made a preliminary determination that appellant was at fault in the creation of the overpayment because he accepted payments that he knew, or reasonably should have known, were incorrect. In an accompanying memorandum, OWCP explained in detail how the overpayment was calculated, noting that it performed a series of informal wage-earning capacity determinations. It indicated that FECA provides that a partially disabled employee shall be paid compensation based on the difference between the monthly pay and the employee's wage-earning capacity, as determined by the employee's actual earnings or by OWCP. OWCP stated that appellant's case involved an overpayment based on actual earnings.

In its February 10, 2014 preliminary determination, OWCP found that appellant was paid \$6,412.19 in total temporary disability payments for November 29, 2009 to April 16, 2010. Appellant earned \$4,531.61 in regular wages with H&R Block for November 28, 2009 to April 16, 2010. During the 20 weeks worked, he earned \$226.58 weekly. The correct entitlement for a loss of wage-earning capacity during the period November 28, 2009 to April 16, 2010 was \$2,373.00. Appellant was paid \$6,412.19 for this period while his correct entitlement was \$2,373.00. He, therefore, received an overpayment of \$4,039.19. OWCP indicated that appellant was paid \$9,213.14 in OWCP total temporary disability payments for the period October 2, 2010 to April 15, 2011. Appellant earned \$10,088.43 in regular wages with H&R Block for October 2, 2010 to April 15, 2011. Total regular wages of \$10,088.43 divided by the 28 weeks he worked yielded \$360.30 earned weekly. There was no entitlement for a loss of wage-earning capacity from October 2, 2010 to April 15, 2011 and therefore appellant received an overpayment of \$9,213.14 for this period. OWCP performed similar wage-earning capacity calculations for the periods December 10, 2011 to April 27, 2012 and January 5 to February 15, 2013 and found overpayment amounts of \$6,754.08 and \$2,044.50, respectively, for these periods. OWCP attached worksheets which detailed these calculations.⁴

By decision dated March 13, 2014, OWCP adjusted appellant's compensation in accord with its determination that appellant's wage-earning capacity was represented by the constructed position of customer service representative.⁵

Appellant did not respond to OWCP's February 10, 2014 preliminary determination within the allotted time. In an April 1, 2014 decision, OWCP determined that appellant received

³ OWCP indicated that there was some evidence that appellant worked for H&R Block for other periods, but that this ostensible work activity was not the subject of the present overpayment action.

⁴ As part of these calculations, OWCP used data regarding appellant's actual wages and applied the *Shadrick* formula to calculate appellant's loss of wage-earning capacity. See *infra* note 13. In its February 10, 2014 preliminary determination, OWCP further advised appellant that he could submit evidence challenging the fact, amount, or finding of fault and request waiver of the overpayment. It informed him that he could submit additional evidence in writing or at precoupment hearing, but that a precoupment hearing must be requested within 30 days of the date of the written notice of overpayment. OWCP requested that appellant complete and return an enclosed financial information questionnaire within 30 days even if he was not requesting waiver of the overpayment.

⁵ The Board notes that appellant did not appeal OWCP's March 13, 2014 decision and subject matter of the decision is not currently before the Board.

a \$22,225.27 overpayment of compensation. It found that appellant was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment.⁶

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 his duty.⁷ 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.”⁸

Section 8116(a) of FECA provides that while an employee is receiving compensation or if he or she has been paid a lump sum in commutation of installment payments until the expiration of the period during which the installment payments would have continued, the employee may not receive salary, pay, or remuneration of any type from the United States, except in limited specified instances.⁹ OWCP’s regulations state in pertinent part: compensation for wage loss due to disability is available only for any periods during which an employee’s work-related medical condition prevents him or her from earning the wages earned before the work-related injury.¹⁰

Under section 8115(a) of FECA, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his or her wage-earning capacity.¹¹ Generally, wages actually earned are the best measure of wage-earning capacity and, in the absence of evidence showing that they do not fairly and reasonably represent the injured employee’s wage-earning capacity, must be accepted as such measure.¹² OWCP applies the *Shadrick* formula to calculate a given claimant’s loss of wage-earning capacity, a formula which was derived from principles contained in the case of *Albert C. Shadrick*.¹³

⁶ OWCP requested payment in full of the overpayment within 30 days.

⁷ 5 U.S.C. § 8102(a).

⁸ *Id.* at § 8129(a).

⁹ *Id.* at § 8116(a).

¹⁰ 20 C.F.R. § 10.500.

¹¹ 5 U.S.C. § 8115(a),

¹² *E.W.*, Docket No. 14-584 (issued July 29, 2014); *Dennis E. Maddy*, 47 ECAB 259, 262 (1995).

¹³ 5 ECAB 376 (1953).

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation for the periods November 28, 2009 to April 16, 2010, October 2, 2010 to April 15, 2011, December 10, 2011 to April 27, 2012, and January 5 to February 15, 2013 because he earned actual wages with H&R Block for these periods while receiving total disability compensation. OWCP properly found that appellant could not receive all of his total disability compensation payments for these periods¹⁴ and performed informal wage-earning capacity determinations based on actual earnings to calculate the portion of his compensation which represented an overpayment of compensation.¹⁵ For example, OWCP noted that appellant was paid \$6,412.19 in total temporary disability payments for the period November 29, 2009 to April 16, 2010 and earned \$4,531.61 in regular wages with H&R Block. For the 20 weeks worked, he earned \$226.58 weekly and the correct entitlement for this period was \$2,373.00, resulting in an overpayment of \$4,039.19 for this period. OWCP conducted similar calculations for the periods October 2, 2010 to April 15, 2011, December 10, 2011 to April 27, 2012, and January 5 to February 15, 2013 and found overpayment amounts of \$9,213.14, \$6,754.08, and \$2,044.50, respectively, for these periods. The Board notes that these calculations are supported by extensive documentation, including records of appellant's earnings at H&R Block and the disability compensation he received during the relevant periods. However, the total amount of appellant's overpayment must be modified to the amount of \$22,050.91 because adding the above-noted overpayment amounts for the periods November 28, 2009 to April 16, 2010, October 2, 2010 to April 15, 2011, December 10, 2011 to April 27, 2012, and January 5 to February 15, 2013 actually equals \$22,050.91 rather than \$22,225.27. For these reasons, the Board finds that appellant received a \$22,050.91 overpayment of compensation.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of FECA provides that where an overpayment of compensation has been made "because of an error of fact or law," adjustment shall be made by decreasing later payments to which an individual is entitled.¹⁶ The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): "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 this subchapter or would be against equity and good conscience."¹⁷ No waiver of payment is possible if the claimant is not "without fault" in helping to create the overpayment.¹⁸

¹⁴ See *supra* notes 7 through 10.

¹⁵ See *supra* notes 11 through 13. The Board notes that there is no evidence in the record showing that appellant's actual wages at H&R Block did not fairly and reasonably represent his wage-earning capacity at the time the wages were earned. See *supra* note 12.

¹⁶ 5 U.S.C. § 8129(a).

¹⁷ *Id.* at § 8129(b).

¹⁸ *L.J.*, 59 ECAB 264 (2007).

In determining whether an individual is not “without fault” or alternatively “at fault” in the creation of an overpayment, section 10.433(a) of Title 20 of the Code of Federal Regulations provides in relevant part:

“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; or
- (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....”¹⁹

Section 10.433(b) of OWCP’s regulations provide:

“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.”²⁰

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly found that appellant was at fault in the creation of the overpayment of compensation. It correctly found that he was at fault in the creation of the overpayment because he accepted payments that he knew, or reasonably should have known, were incorrect.²¹ In a July 2, 2007 letter, OWCP advised appellant regarding his pay rate for disability compensation purposes. It informed him that if he worked for any portion of the period he received disability compensation, he must return any checks he received to OWCP. Otherwise, an overpayment of compensation might result. Therefore, appellant was advised that he could not keep all of his total disability compensation when he received work earnings from outside employment sources during the same period. However, appellant did not return the impermissible compensation payments he received during the periods November 28, 2009 to April 16, 2010, October 2, 2010 to April 15, 2011, December 10, 2011 to April 27, 2012, and January 5 to February 15, 2013. The fact that OWCP may have been negligent in continuing to issue appellant checks for total disability after it was informed he had actual earnings does not excuse his acceptance of such checks which, he knew or should have been expected to know, should have been returned to OWCP.²² The record contains numerous communications and

¹⁹ 20 C.F.R. § 10.433(a).

²⁰ *Id.* at § 10.433(b).

²¹ *See supra* note 19.

²² *Robert W. O'Brien*, 36 ECAB 541 (1985).

forms completed by appellant and there is no indication that he was not able to understand his responsibility to return compensation checks to which he was not entitled.²³

For these reasons, the Board finds that appellant was at fault in the creation of the overpayment of compensation. Because he has been found to be at fault in the creation of the overpayment, he is precluded from qualifying for waiver of recovery of the overpayment.²⁴

CONCLUSION

The Board finds that appellant received a \$22,050.91 overpayment of compensation. The Board further finds that OWCP properly determined that appellant was at fault in the creation of the overpayment of compensation, thereby precluding waiver of recovery of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the April 1, 2014 decision of the Office of Workers' Compensation Programs is modified to reflect that appellant received a \$22,050.91 overpayment of compensation and affirmed with respect to the denial of waiver of recovery.

Issued: May 13, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

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

²³ See *supra* note 20.

²⁴ See *supra* notes 17 and 18.