

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

---

**P.M., Appellant**

**and**

**DEPARTMENT OF THE ARMY, ARMY  
NATIONAL GUARD, Milford, MA, Employer**

---

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

**Docket No. 08-1476  
Issued: December 17, 2008**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

DAVID S. GERSON, Judge  
COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On April 24, 2008 appellant filed a timely appeal from a February 1, 2008 merit decision of the Office of Workers' Compensation Programs regarding an overpayment of compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this overpayment decision.

**ISSUES**

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$4,925.70 for the period June 12 through August 4, 2007; and (2) whether the Office properly found that appellant was at fault in creating the overpayment, thus precluding waiver of the recovery.

**FACTUAL HISTORY**

On August 22, 2006 appellant, then a 39-year-old surface maintenance mechanic, filed a traumatic injury claim alleging that he crushed his right index finger while in the performance of duty. On October 11, 2006 the Office accepted the claim for right closed fracture of the middle

or proximal phalanx and paid appropriate compensation. In its October 11, 2006 letter accepting the claim, the Office advised appellant:

“Once you return to work, or obtain new employment, notify this Office immediately. Full compensation is payable only while you are unable to perform the duties of your regular job because of your accepted employment-related condition. If you receive a compensation check which includes payment for a period you have worked, return it to us immediately to prevent an overpayment of compensation.”

Appellant stopped work on August 22, 2006. He underwent closed reduction and internal fixation of a right middle phalanx comminuted fracture on August 30, 2006 and corrective osteotomy of the right index middle phalanx on March 29, 2007. Appellant returned to full-time modified duty with restrictions on June 12, 2007. On August 6, 2007 he called the Office to advise that he had returned to work and to stop his compensation payments. However, appellant was paid on the periodic compensation rolls through August 4, 2007 at the rate of \$2,462.81 every 28 days.

On November 28, 2007 the Office made a preliminary determination that appellant received an overpayment in the amount of \$4,749.70 from June 12 through August 4, 2007 because he received wage-loss compensation during a period after he returned to work. Appellant was found at fault in the creation of the overpayment because he knew or should have known that he was not entitled to wage-loss compensation after he returned to full-time work. An overpayment worksheet noted that he received \$2,462.81 every 28 days and had received a total of \$4,925.62 during the June 10 through July 7 and July 8 through August 10, 2007 payment cycles. As appellant was entitled to \$175.92 from June 10 through 11, 2007, the Office subtracted that amount from the total \$4,925.62 to find an overpayment amount of \$4,749.70 from June 12 through August 4, 2007. He was advised that he could request a telephone conference, a final decision based on the written evidence only or a hearing within 30 days if he disagreed that the overpayment occurred, with the amount of the overpayment or if he believed that recovery of the overpayment should be waived. The Office requested that appellant complete an accompanying overpayment recovery questionnaire (Form OWCP-20) and submit financial documents in support thereof within 30 days.

On January 2, 2008 appellant called the Office to contest the overpayment. He was advised to complete the Form OWCP-20 and submit information. The Office received no further evidence from appellant.

By decision dated February 1, 2008, the Office finalized the overpayment determination. Appellant was at fault in the creation of the overpayment in the amount of \$4,749.70.<sup>1</sup>

---

<sup>1</sup> Following the February 1, 2008 decision, the Office received additional evidence. This included a completed Form OWCP-20 from appellant dated January 2, 2008 and a check in the amount of \$2,462.81. The Office also issued a letter dated March 25, 2008, which advised that appellant had an overpayment in the amount of \$2,286.89, which he had agreed to pay during the March 25, 2008 telephone call. A copy of a Debt Amortization Schedule and a Repayment Agreement were attached.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8102(a) of the Federal Employees' Compensation Act<sup>2</sup> 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 his duty.<sup>3</sup> Section 8116 of the Act defines the limitations on the right to receive compensation benefits. This section of the Act 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.<sup>4</sup>

Section 10.500 of the Office regulations provides 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 or her from earning the wages earned before the work-related injury.<sup>5</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that appellant received an overpayment of compensation in the amount of \$4,749.70. The record supports that he returned to full-time work on June 12, 2007, but received wage-loss compensation until August 4, 2007. As appellant was not entitled to compensation for any period after he returned to work, the amount of compensation that he received from June 12 through August 4, 2007 represents an overpayment.<sup>6</sup> The record reflects that he received compensation at the rate of \$2,462.81 every 28 days and received a total of \$4,925.62 from June 10 through August 4, 2007. Appellant was only entitled to compensation of \$175.92 for June 10 and 11, 2007. The Office subtracted this amount from \$4,925.62, to find an overpayment of \$4,749.70 for the period June 12 through August 4, 2007. There is no contrary evidence regarding the fact and the amount of the overpayment. The Board finds that an overpayment occurred in the amount of \$4,749.70 as appellant returned to work but received wage-loss compensation from June 12 to August 4, 2007.

### **LEGAL PRECEDENT -- ISSUE 2**

The Office may 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 the Office 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 with respect to creating an overpayment: (1) Made an incorrect statement as to a material fact which he or she knew or

---

<sup>2</sup> 5 U.S.C. §§ 8101-8193.

<sup>3</sup> *Id.* at § 8102(a).

<sup>4</sup> *Id.* at § 8116(a); *see Danny E. Haley*, 56 ECAB 393 (2005).

<sup>5</sup> 20 C.F.R. § 10.500.

<sup>6</sup> *W.F.*, 57 ECAB 705 (2006).

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 (this provision applies only to the overpaid individual).<sup>7</sup>

Whether or not the Office 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.<sup>8</sup>

### **ANALYSIS -- ISSUE 2**

The Office applied the third standard in determining that appellant was at fault in creating the overpayment. It found that he accepted payments which he knew or should have known to be incorrect following his return to full-time employment. Even if the overpayment resulted from negligence on the part of the Office, this does not excuse the employee from accepting payment which he knew or should have known to be incorrect.<sup>9</sup>

Appellant received an overpayment of compensation in the amount of \$4,749.70 by direct deposit. This occurred in two payments of \$2,462.81 for the period June 10 through July 7 and July 8 through August 4, 2007. The Office found that appellant should have known that he received an incorrect payment for total temporary disability because he had been advised to return any money he received after returning to work. The Board has found a claimant to be at fault in cases where he or she is receiving compensation checks through direct deposit which involve a series of payments over several months with clear knowledge that the payments were incorrect.<sup>10</sup> It is not appropriate, however, to make a finding that a claimant has accepted an overpayment by direct deposit until such time as a reasonable person would have been aware that an overpayment had occurred. This awareness could be established either through documentation such as a bank statement or notification from the Office or where a reasonable period of time has passed during which a claimant could have reviewed independent confirmation of the incorrect payment.<sup>11</sup>

Since Office 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 in many cases the claimant will not be at fault for accepting the first incorrect payment because the requisite knowledge is lacking at the time of deposit.<sup>12</sup> Appellant had no reason to suspect at the time the first overpayment of \$2,462.81 was deposited into his checking account that the Office had

---

<sup>7</sup> 20 C.F.R. § 10.433(a).

<sup>8</sup> *Id.* at § 10.433(b).

<sup>9</sup> See *Russell E. Wageneck*, 46 ECAB 653 (1995).

<sup>10</sup> See *Karen K. Dixon*, 56 ECAB 145 (2004).

<sup>11</sup> See *K.H.*, Docket No. 06-191 (issued October 30, 2006).

<sup>12</sup> See *Karen K. Dixon*, *supra* note 10.

issued an incorrect payment, given that this was the first incorrect payment made by the Office.<sup>13</sup> As the funds were deposited directly into his bank account, he was not in a position to immediately decline acceptance of the amount paid by the Office. The Board finds that appellant was not at fault in accepting the first payment of \$2,462.81 for the period June 10 through July 7, 2007, of which \$2,286.89 was an overpayment.<sup>14</sup> A finding of no fault, however, does not mean he may keep the money, only that the Office must consider his eligibility for waiver for this period. After such further development as is deemed necessary, the Office shall issue an appropriate decision on the issue of waiver for the relevant portion of the June 10 through July 7, 2007 direct deposit payment.

With respect to the second payment of \$2,462.81 for the period July 8 through August 4, 2007, the Board finds appellant was with fault in creating such overpayment. Appellant was informed by the Office on October 11, 2006 that he was to immediately report to the Office a return to work and return any compensation received after a return to work or otherwise an overpayment of compensation would be created. He returned to work on June 12, 2006. Appellant additionally reported his return to work to the Office on August 6, 2007 and asked that compensation payments be discontinued. He therefore knew or should have known that an overpayment would be created if he accepted compensation benefits after his return to work. For these reasons, the Board finds that, under the circumstances of this case, the Office properly found appellant at fault for the second overpayment of \$2,462.81 for the period July 8 through August 4, 2007.

As noted, the Office improperly found that appellant was at fault in the creation of the overpayment in the amount of \$2,286.89, for the period June 12 through July 7, 2007. As appellant was without fault for this portion of the overpayment, recovery of the overpayment of compensation in the amount of \$2,286.89 may be considered for waiver.<sup>15</sup> Thus, the February 1, 2008 Office decision is affirmed, as modified.<sup>16</sup>

### CONCLUSION

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$4,749.70 for the period June 12 through August 4, 2007. The Board further finds that the Office properly found that appellant was at fault for the overpayment paid from July 8 through August 4, 2007, but reversed as to fault for

---

<sup>13</sup> See *Tammy Craven*, 57 ECAB 689 (2006).

<sup>14</sup> *Id.* Since appellant was entitled to \$175.92 of the first payment of \$2,462.81, the first overpayment equaled \$2,286.89.

<sup>15</sup> The guidelines for determining whether recovery of an overpayment would defeat the purpose of the Act or would be against equity and good conscience are set forth in 20 C.F.R. §§ 10.434, 10.436, 10.437.

<sup>16</sup> The Board notes that the Office instituted recovery procedures on the overpayment amount of \$2,286.89. However, with respect to the disposition of this case, such recovery procedures are premature. Furthermore, it is noted that repayment of the overpayment is not an issue in this case as appellant is not in receipt of continuing total disability payments. With respect to the recovery of the overpayment, the Board's jurisdiction is limited to those cases where the Office seeks recovery from continuing compensation benefits under the Act. 20 C.F.R. § 10.441(a); see also *Joan Ross*, 57 ECAB 694 (2006); *Bob R. Gilley*, 51 ECAB 377 (2000).

the portion of the overpayment paid from June 12 to July 7, 2007. The case is remanded for determination of waiver on the portion of the overpayment for which appellant was found to be at fault.

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 1, 2008 decision of the Office of Workers' Compensation Programs is affirmed in part, as modified, and remanded for further proceedings consistent with this opinion.

Issued: December 17, 2008  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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