

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

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C.S., Appellant )

and )

DEPARTMENT OF VETERANS AFFAIRS, )  
VETERANS ADMINISTRATION MEDICAL )  
CENTER, Bay Pines, FL, Employer )

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**Docket No. 10-926  
Issued: March 16, 2011**

*Appearances:*

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Judge  
COLLEEN DUFFY KIKO, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On February 19, 2010 appellant filed a timely appeal from a January 8, 2010 decision of the Office of Workers' Compensation Programs regarding an overpayment of compensation. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>2</sup>

**ISSUES**

The issues are: (1) whether the Office properly determined that appellant received an overpayment of compensation in the amount of \$5,264.37 for the period April 6 to June 6, 2009; and (2) whether the Office properly found that appellant was at fault in the creation of the \$5,264.37 overpayment and therefore not entitled to waiver.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> Appellant's request for appeal was postmarked on February 11, 2010. On February 18, 2010 the Office issued a decision regarding a schedule award. Its February 18, 2010 decision is not before the Board on the present appeal.

On appeal, counsel asserts that the Office's January 8, 2010 decision is "contrary to fact and law."

### **FACTUAL HISTORY**

The Office accepted that on October 2, 2008 appellant, then a 56-year-old maintenance mechanic, sustained an L4 compression fracture and a laceration of his left middle finger when a metal crowbar fell from a shelf.<sup>3</sup> Appellant stopped work on the date of injury. He received wage-loss compensation for temporary total disability on the daily rolls.

In an October 31, 2008 letter, the Office advised appellant to inform it immediately when he returned to work. It explained that, if he received a compensation check covering a period in which he had worked, he should return it immediately to prevent an overpayment.

On November 12, 2008 appellant authorized the Office to pay his compensation through electronic funds transfer (EFT).

In a December 15, 2008 letter, the Office advised appellant that his case was being placed on the periodic compensation rolls effective December 1, 2008. Compensation would be paid every 28 days. The Office again advised appellant to report immediately when he returned to work. It explained that each automated payment would "include the period for which payment [was] made. If [appellant] worked for any portion of this period, [he] must return the check" to the Office to avoid creating an overpayment.

On April 6, 2009 appellant return to full-time, limited duty at a retained pay rate. The Office continued to issue periodic rolls payments for total disability: \$2,377.45 for the period March 15 to April 11, 2009, including \$565.83 for the period April 6 to 11, 2009; \$2,349.77 for the period April 12 to May 9, 2009; and \$2,348.77 for the period May 10 to June 6, 2009.

On June 8, 2009 appellant and the employing establishment advised the Office that he returned to work with no wage loss on April 6, 2009. The Office calculated that, from April 6 to June 6, 2009, appellant received \$5,264.37 in compensation while working full time with no wage loss.

By notice dated June 24, 2009, the Office advised appellant of its preliminary determination that an overpayment of \$5,264.37 was created in his case for the period April 6 to June 6, 2009 as he received compensation for temporary total disability although he had returned to work. It found him at fault as he was advised that he was not entitled to compensation for total disability after he returned to work. The Office afforded appellant 30 days to submit additional evidence and argument and to request a hearing.

In a July 15, 2009 letter, appellant requested a prerecoupment hearing. He asserted that he was not at fault in creating the overpayment and that repaying the debt would cause severe financial hardship. Appellant submitted financial documentation, including an overpayment recovery questionnaire (Form OWCP-20) showing \$2,403.22 in monthly household income,

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<sup>3</sup> Appellant underwent kyphoplasty at L4, approved by the Office.

\$1,920.95 in monthly mortgage, food, clothing and utility expenses and \$795.95 in monthly debt repayments. He listed assets of \$3,931.17 in cash and bank accounts.

At the precoupment hearing, held telephonically on November 5, 2009, appellant did not contest the fact or amount of the overpayment. He asserted that he was not at fault in its creation as the EFT payments did not specify the period for which compensation was paid. Alternatively, appellant contended that he thought the Office might have owed him the money. He noted that he omitted certain financial information from his OWCP-20 form and that he typically had \$500.00 left over at the end of each month. Counsel acknowledged that appellant “clearly ha[d] the money to pay [the Office] back.” Following the hearing, appellant repaid \$2,300.00 to the Office by lump-sum check, leaving a remainder of \$2,964.37.

By decision dated January 8, 2010, the Office affirmed the fact and amount of the \$5,264.37 overpayment, of which \$2,964.37 remained outstanding. It found that appellant was at fault in its creation as he knew or should have known he was not entitled to receive total disability compensation after he returned to work. The Office denied waiver as his household income exceeded his ordinary and necessary living expenses by more than \$50.00 a month. It directed recovery of the overpaid amount by lump sum of the entire remaining debt.

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

Section 8102(a) of the Act<sup>4</sup> 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.<sup>5</sup> Section 8129(a) of the Act provides, in pertinent part, that 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.”<sup>6</sup> The Office’s procedure manual identifies various situations when overpayments of compensation may occur, including when a claimant receives compensation for total disability while working.<sup>7</sup>

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

The Office accepted that appellant sustained lumbar and finger injuries disabling him for work from October 2, 2008 to April 5, 2009. Appellant returned to work with no wage loss on April 6, 2009. However, the Office continued to issue compensation payments on the periodic rolls through June 6, 2009. The evidence reflects and appellant does not dispute that he received \$5,264.37 in total disability compensation while working from April 6 to June 6, 2009. The

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<sup>4</sup> 5 U.S.C. §§ 8101-8193.

<sup>5</sup> *Id.* at § 8102(a).

<sup>6</sup> *Id.* at § 8129(a).

<sup>7</sup> Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2 (May 2004).

Board therefore finds that the Office correctly determined that he received an overpayment of compensation in the amount \$5,264.37 for the period in question.<sup>8</sup>

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

Under section 8129 of the Act and the implementing regulations, an overpayment must be recovered unless incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience.<sup>9</sup> Section 10.433 of the implementing regulations specifically provide that the Office may consider waiving an overpayment if the individual to whom it was made was not at fault in accepting or creating the overpayment.<sup>10</sup> The regulations further provide that 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.<sup>11</sup>

Section 10.433 of the Office's regulations, provide that an individual will be found at fault if he or she has done any of the following: (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 was incorrect.<sup>12</sup> Section 10.433(b) of the Office's regulations provide in relevant part, that the determination of 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 overpaid."<sup>13</sup> In cases where a claimant receives compensation through electronic direct deposits, to establish fault for accepting such payments, the Office must show that the claimant knew or should have known at the time of deposit that the payment was incorrect.<sup>14</sup>

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

The Office found that appellant was at fault in the creation of the \$5,264.37 overpayment because he accepted compensation payments that he knew or should have known to be incorrect.

Appellant returned to work on April 6, 2009. He did not notify the Office until June 8, 2009. The record establishes that, on April 11, 2009, the Office made a direct deposit of

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<sup>8</sup> *Alberto Pineiro*, 51 ECAB 310 (2000).

<sup>9</sup> 5 U.S.C. § 8129(b); 20 C.F.R. §§ 10.433, 10.434, 10.436, 10.437.

<sup>10</sup> 20 C.F.R. § 10.433 (a).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at § 10.433(a)(3).

<sup>13</sup> *Id.* at § 10.433(b).

<sup>14</sup> *W.B.*, Docket No. 09-1440 (issued April 12, 2010); *Tammy Craven*, 57 ECAB (2006) (order granting petition for recon., denying the Director's request for oral argument and reaffirming prior Board decision) (holding that acceptance occurs in direct deposit cases when the funds are placed in the employee's account and that fault for acceptance must be judged by what the employee knew or should have known at the time of deposit).

\$2,349.77 into appellant's bank account for the period March 15 to April 11, 2009. This deposit included \$565.83 in compensation for the period April 6 to 11, 2009, after appellant returned to work. Appellant was entitled to the remaining \$1,783.94, covering the period March 15 to April 5, 2009. On May 9, 2009 the Office made a \$2,349.77 direct deposit for the period April 12 to May 9, 2009 and on June 6, 2009 deposited \$2,348.77 for the period May 10 to June 6, 2009. As noted, these payments included a total overpayment of \$5,264.37.

On June 24, 2009 the Office issued a preliminary determination of the overpayment. It found that appellant was aware or should have been aware that he was not entitled to total disability compensation while working. The Office advised him, in October 31 and December 15, 2008 letters, that he should immediately return any compensation payments issued for any period in which he had worked.

The Office found appellant at fault in creation of the entire \$5,264.37 overpayment and that it was not subject to waiver. However, the Board finds that appellant was not at fault for \$565.83 of the overpayment covering the period April 6 to 11, 2009. On April 11, 2009 the Office deposited \$2,349.77 into his bank account. Appellant was entitled to \$1,783.94 of the April 11, 2009 payment, covering the period March 15 to April 5, 2009. The \$565.83 paid for the period April 6 to 11, 2009, after he returned to work with no wage loss, constitutes an overpayment. The Board has held that an employee who received payments from the Office in the form of direct deposit may not be at fault the first time the incorrect funds are deposited into his account.<sup>15</sup> Receiving one or two erroneous direct deposit payments over a short time immediately following the employee's return to work does not necessarily create the requisite knowledge to find that a claimant was at fault in the creation of the overpayment.<sup>16</sup> While appellant accepted the overpayment by gaining control of the funds deposited into his account pursuant to his authorization, he did not know that he would receive an incorrect payment on that day.<sup>17</sup> Therefore, he was without fault for the \$565.83 overpayment deposited into his account on April 11, 2009.

Although appellant is without fault in creating \$565.83 of the total overpayment, this finding does not mean that he may keep the money. Rather, the Office must consider his eligibility for waiver for this period.<sup>18</sup> On remand, the Office should consider whether appellant is entitled to waiver of this portion of the overpayment. This consideration should be followed by issuance of an appropriate decision.

The Board notes that it does not have jurisdiction to review the Office's determination of recovery by lump-sum payment. The Board's jurisdiction is limited to reviewing those cases

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<sup>15</sup> *Tammy Craven*, 57 ECAB 689 (2006).

<sup>16</sup> *W.P.*, 59 ECAB 514 (2008).

<sup>17</sup> *W.P.*, *supra* note 16.

<sup>18</sup> *J.W.*, Docket No. 10-1271 (issued February 3, 2011).

where the Office seeks recovery from continuing compensation under the Act.<sup>19</sup> Appellant is not in receipt of continuing compensation.

On appeal, counsel contends that the Office's January 8, 2010 decision is "contrary to fact and law." As noted, the Office properly found a \$5,264.37 overpayment of compensation. Appellant was at fault for \$4,698.54 of the overpayment, rendering him ineligible for waiver. However, the Office improperly found that he was at fault in creating \$565.83 of the total \$5,264.37 overpayment. The case will be remanded to the Office to consider whether the \$565.83 is subject to waiver.

### **CONCLUSION**

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of amount of \$5,264.37 for the period April 6 to June 6, 2009. The Board further finds that the Office properly found that he was at fault in creation of a \$4,698.54 overpayment of compensation for the period April 12 to June 6, 2009. The Board further finds that the Office improperly found appellant at fault in creating \$565.83 of the overpayment for the period April 6 to 11, 2009 and improperly denied waiver for this period. The case will be remanded to the Office to determine if he is entitled to waiver of the \$565.83 in compensation paid for the period April 6 to 11, 2009 as he was not at fault in its creation.

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<sup>19</sup> *Judith A. Cariddo*, 55 ECAB 348, 353 (2004).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated January 8, 2010 is affirmed in part regarding the fact and amount of overpayment, affirmed regarding the findings of fault and denial of waiver for the \$4,698.54 paid for the period April 12 to June 6, 2009, reversed in part regarding the finding of fault for the period April 6 to 11, 2009 and set aside in part regarding the denial of waiver for the period April 6 to 11, 2009.

Issued: March 16, 2011  
Washington, DC

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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