

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

R.N., Appellant

and

DEPARTMENT OF HOMELAND SECURITY,
CUSTOMS & BORDER SECURITY,
Imperial, CA, Employer

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

**Docket No. 12-850
Issued: August 16, 2012**

Appearances:
Kelly A. Smith, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 5, 2012 appellant, through his attorney, filed a timely appeal from an Office of Workers' Compensation Programs' (OWCP) overpayment decision dated September 7, 2011. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3(e), the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received an overpayment in the amount of \$12,888.73 from April 4 to June 4, 2011; and (2) whether OWCP properly found appellant was at fault in creating the overpayment, thereby precluding waiver of the overpayment.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

Appellant, a 45-year-old supervisory border patrol agent, injured his left knee on February 16, 2010 when he fell between two rocks. He filed a claim for benefits, which OWCP accepted for torn medial meniscus of the left knee, left knee sprain of the medial collateral ligament and chondromalacia of the left patella. OWCP paid wage-loss compensation for total disability.

In the April 5, 2010 acceptance letter, OWCP advised appellant:

“RETURNING TO WORK

“You are expected to return to work (including light-duty or part-time work, if available) as soon as you are able. 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.”

On April 4, 2011 appellant returned to work for eight hours a day.

On June 17, 2011 OWCP issued a preliminary determination that an overpayment occurred in the amount of \$12,888.73 for the period April 4 through June 11, 2011 because appellant received wage-loss compensation to which he was not entitled. It found that he received compensation in the amount of \$17,493.81, but was only entitled to \$4,605.08, creating the overpayment of \$12,888.73. OWCP found that appellant was at fault in the matter because he accepted payment of compensation for temporary total disability after returning to work at full salary on April 4, 2011, and that the payments he had been receiving were incorrect. It informed him that, if he disagreed with the decision, he could, within 30 days, submit evidence or argument to OWCP or request a precoupment hearing with the Branch of Hearings and Review on the matter of the overpayment and that any response he wished to make with regard to the overpayment should be submitted within 30 days of the June 17, 2011 letter.

Appellant completed and submitted the overpayment questionnaire on July 8, 2011.

In a decision dated September 7, 2011, OWCP finalized the overpayment of \$12,034.75. It found that appellant was at fault in the creation of the overpayment as he accepted compensation to which he was not entitled and therefore the overpayment could not be waived.

LEGAL PRECEDENT -- ISSUE 1

Section 8102 (a) of FECA 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.² A claimant, however, is not entitled to receive temporary total disability and earnings for the same period. An overpayment of

² 5 U.S.C. § 8102(a).

compensation is created when a claimant returns to work but continues to receive wage-loss compensation.³

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation for the period April 4 through June 4, 2011. The record shows that he received an overpayment during the period in question because he received direct deposit checks for temporary total disability compensation after he returned to work on April 4, 2011. Based on this determination, OWCP properly found that appellant received an overpayment of compensation during that period. The record establishes that he received net compensation from March 13 to June 4, 2010 in the amount of \$17,493.81, but should only have received \$4,605.08, which represents the amount of compensation due prior to his return to work. The overpayment was correctly computed to be \$12,888.73. Thus OWCP's September 7, 2011 decision will be affirmed for fact and amount of overpayment.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA⁴ provides that 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 FECA or would be against equity and good conscience." No waiver of an overpayment is possible if the claimant is not "without fault" in helping to create the overpayment.⁵

Under OWCP regulations, waiver of the recovery of an overpayment may be considered only if the individual to whom it was made was not at fault in accepting or creating the overpayment.⁶ The fact that the overpayment was the result of error by OWCP or another government agency does not by itself relieve the individual who received the overpayment of liability for repayment if the individual also was at fault for receiving the overpayment.⁷ Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she received from OWCP are proper. The recipient must show good faith and exercise a high degree of care in reporting events that 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 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

³ *Danny E. Haley*, 56 ECAB 393 (2005); *Donna M. Rowan*, 54 ECAB 698 (2003).

⁴ 5 U.S.C. § 8129(a)-(b).

⁵ *Bonnye Mathews*, 45 ECAB 657 (1994).

⁶ 20 C.F.R. § 10.433(a).

⁷ *Id.* at § 10.435(a).

or she knew or should have known to be incorrect (this provision applies only to the overpaid individual).⁸

Whether 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.⁹

ANALYSIS -- ISSUE 2

OWCP applied the third standard in determining that appellant was at fault in creating the overpayment. For it to establish that he was with fault in creating the overpayment of compensation, OWCP must establish that, at the time appellant accepted the compensation direct deposits in question, he knew or should have known the payments were incorrect.¹⁰

OWCP requires that recipients of compensation benefits take all reasonable measures to ensure that payments from OWCP are proper. However, the Board has held that an employee who receives payments from OWCP in the form of direct deposit may not be at fault for the first incorrect deposit into his account, as the acceptance of that resulting overpayment lacks the requisite knowledge.¹¹ Because the 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, but not necessarily all, the claimant will not be at fault for accepting the first incorrect payment because the requisite knowledge is lacking at the time of deposit. A finding of no fault does not mean, of course, that the claimant gets to keep the money, only that OWCP must consider whether the claimant is eligible for waiver. In cases involving a series of incorrect payments, where the requisite knowledge is established by a letter or telephone call from OWCP or simply with the passage of time and a greater opportunity for discovery, the claimant will be at fault for accepting the payments subsequently deposited.¹² Each case must be judged on its merits. 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.

The record establishes that appellant received compensation by direct deposit payments every 28 days. The evidence of record does not establish that on the date of the first direct deposit of compensation after his return to work, he knew or should have known that he was accepting a direct deposit to which he was not entitled. Therefore appellant cannot be found at fault for at least the first compensation payment after his return to work.

⁸ *Supra* note 6.

⁹ *Id.* at § 10.433(b).

¹⁰ See *Claude T. Green*, 42 ECAB 174 (1990).

¹¹ *Tammy Craven*, 57 ECAB 689 (2006).

¹² *J.W.*, Docket No. 10-1271 (issued February 3, 2011).

On appeal, appellant's attorney disputes the finding of fault. She concedes that an overpayment occurred in this case; but asserts that appellant did in fact contact OWCP and return the payments to OWCP. The record is unclear as to whether appellant repaid OWCP.

The Board finds that this case is not in posture for decision regarding the issues of fault and waiver of the overpayment. On remand OWCP, shall verify whether any repayment was received and thereafter issue an appropriate decision.¹³

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation for the period April 4 through June 4, 2011. The September 7, 2011 decision is set aside and remanded to OWCP regarding the issues of fault and waiver of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the September 7, 2011 decision of the Office of Workers' Compensation Programs be affirmed in part and set aside and remanded in part.

Issued: August 16, 2012
Washington, DC

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

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

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

¹³ The evidence submitted by an employing establishment on the basis of their records will prevail over the assertions from the claimant unless such assertions are supported by documentary evidence. *See generally Sue A. Sedgwick*, 45 ECAB 211, 218 n.4 (1993); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Computation of Compensation*, Chapter 2.900(b)(3) (September 1990).