

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

A.M., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Dallas, TX, Employer**

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**Docket No. 11-154
Issued: March 7, 2012**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 26, 2010 appellant filed a timely appeal from an October 5, 2010 decision of the Office of Workers' Compensation Programs (OWCP) finding an overpayment of compensation and denying waiver of the recovery of the overpayment. 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 an overpayment of compensation in the amount of \$8,294.64; and (2) whether it properly denied waiver of the recovery of the overpayment.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On April 8, 2009 appellant, then a 58-year-old mail handler, filed an occupational disease claim alleging that he sustained a left arm injury from lifting letter trays and tabs weighing between 25 to 40 pounds. On August 26, 2009 OWCP accepted the claim for bilateral carpal tunnel syndrome. Appellant stopped work on November 12, 2009 and was placed on the periodic rolls. He was released to modified duty as of January 10, 2010. On January 15, 2010 Dr. Robert Ippolito, an attending orthopedic surgeon, performed a decompression of the median nerve of the left carpal tunnel and excision of a cyst of the left thumb. Appellant returned to work at modified duty on January 19, 2010.

The record reflects that appellant was paid wage-loss compensation by check. On December 31, 2009 payment for the period November 12 to December 19, 2009 was made in the amount of \$3,812.35; on January 16, 2010 payment in the amount of \$2,809.10 for the period December 20, 2009 to January 16, 2010; on February 13, 2010 payment in the amount of \$2,764.88 for the period January 17 to February 13, 2010; on March 13, 2010 payment in the amount of \$2,764.88 for the period February 14 to March 13, 2010; and an April 10, 2010 payment in the amount of \$2,764.88 for the period March 14, 2010.²

On April 13, 2010 OWCP made a preliminary overpayment determination for the period January 17 to April 10, 2010 in the amount of \$8,294.64. It found that appellant had returned to modified duty as of January 19, 2010 at his regular salary with no loss in wages. OWCP determined that the amount of overpayment by multiplying the three payments of \$2,764.88 for which he was compensated from January 17 to April 10, 2010 to total \$8,294.64. Appellant was found at fault in the creation of the overpayment as he received wage-loss payments that he knew or reasonably should have known to be incorrect.

Appellant requested a telephone conference with OWCP on April 27, 2010. He stated that he disagreed with the fact of overpayment, contending that there had been a delay in his prior compensation benefits and he had missed five paychecks.

Appellant submitted a partially completed June 30, 2010 recovery questionnaire. He listed his total monthly income as \$1,044.22. Appellant listed expenses of \$703.27 for rent or mortgage, \$400.00 for food, \$150.00 for clothing, \$900.00 for utilities and \$500.00 in miscellaneous expenses and \$20.00 for debts.

A prerecoupment hearing was held on August 11, 2010. Appellant contended that the compensation checks were for periods prior to his surgery and not after he returned to work. He noted that he did not question how the amount of overpayment was calculated. Appellant stated that his current monthly income was \$644.00 from the Department of Veterans Affairs.

² The employing establishment noted that after appellant's return to work modified duty on January 10, 2010, his scheduled days off were January 15 and 16, 2010; he took annual leave for January 17, 2010 and January 18, 2010 was a holiday. OWCP determined that an overpayment was created in the amount of \$501.63 for the period December 20, 2009 to January 16, 2010 as appellant was overpaid by five days. Appellant remitted payment of the debt in full on April 19, 2010. He did not seek review of this overpayment determination and it is not an issue in the present appeal. *See* 20 C.F.R. § 501.2(c).

OWCP's hearing representative advised him that the record would remain open in order that he could submit additional evidence pertaining to his income and expenses. Appellant subsequently submitted several BlueCross/BlueShield explanations of benefit forms that listed \$20.00 copays in December 2009, May and July 2010.

In an October 5, 2010 decision, OWCP's hearing representative determined that appellant received an overpayment in the amount of \$8,294.64 for which he was at fault. Appellant noted that he had returned to work as of January 19, 2010 but subsequently received three checks in the amount of \$2,764.88 for wage-loss compensation from January 17 to April 10, 2010. While he contended that he believed the payments were for the period prior to his surgery on January 15, 2010, it was found that each check bore the period for which the payment was made. For this reason, appellant accepted payments which he knew or should have known to be incorrect. The hearing representative noted that appellant did not submit complete and accurate financial information to establish financial hardship. She found that he received \$644.00 in monthly disability benefits from the VA and as of July 4, 2010, was returned to the periodic rolls in receipt of compensation from OWCP of \$2,764.88 a month through September 13, 2010, when he again returned to work. The employing establishment confirmed that appellant had gross earnings in his employment of \$4,035.56 a month. He had listed expenses of \$2,673.27 a month. The hearing representative found that appellant had the ability to repay the overpayment.³

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of FECA⁴ 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 duty.⁵ 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.”⁶

A final decision of OWCP shall contain findings of fact and a statement of reasons.⁷ With respect to overpayment decisions, OWCP must provide clear statements showing how the overpayment was calculated.⁸ A claimant is not entitled to receive temporary total disability and

³ As appellant is not in receipt of continuing compensation payments, the Board has no jurisdiction over the method of recovery of the overpayment under the Debt Collection Act. *See Albert Pineiro*, 51 ECAB 310 (2000); *see also T.L.*, Docket No. 10-2141 (issued July 1, 2011).

⁴ 5 U.S.C. §§ 8101-8193.

⁵ *Id.* at § 8102(a).

⁶ *Id.* at § 8129(a).

⁷ 20 C.F.R. § 10.126.

⁸ *James Tackett*, 54 ECAB 611 (2003); *Sandra K. Neil*, 40 ECAB 924 (1989).

actual earnings for the same period.⁹ OWCP procedures provide that an overpayment of compensation is created when a claimant returns to work but continues to receive wage-loss compensation.¹⁰

OWCP regulations on the recovery of overpayments provide that before collecting the overpayment, it must provide the claimant with written notice of the fact and amount of the overpayment, the finding of fault, the right to submit evidence challenging the fact, amount or finding of fault and the right to request waiver of the overpayment.¹¹

ANALYSIS -- ISSUE 1

The Board finds appellant received an overpayment of compensation in the amount of \$8,294.64 for which he was at fault in the creation. OWCP found that he received an overpayment as he received and kept three compensation checks in the amount of \$2,764.88 for the period January 17 through April 10, 2010. Appellant returned to work on January 10, 2010. He then had surgery on January 15, 2010 and used annual leave for January 17, 2010, prior to his return on January 19, 2010. Appellant cannot receive wages from employment and compensation benefits for the same period of time. Accordingly, the compensation received for this period constituted an overpayment in the amount of \$8,294.64 (three times \$2,764.88).

LEGAL PRECEDENT -- ISSUE 2

An individual who is found at fault in either accepting or creating an overpayment is not eligible for a waiver of recovery of overpayment.¹² A benefits recipient will be at fault if the individual: (1) made an incorrect statement as to a material fact which he knew or should have known to be incorrect; (2) failed to provide information which he knew or should have known to be material; or (3) accepted a payment which he knew or should have known to be incorrect.¹³

ANALYSIS -- ISSUE 2

The Board finds that appellant knew or should have known that he was not entitled to wage-loss compensation for such periods that he earned his salary from employment as a mail handler. OWCP found him at fault in the creation of the overpayment because each check issued after his return to work on January 19, 2010 listed the period for which compensation was being paid. Appellant stated that his belief that the payments were for periods in November 2009 prior to his surgery; but the record does not establish that he claimed compensation at that time. Furthermore, the compensation checks clearly stated the dates for which payment was made.

⁹ 5 U.S.C. § 8116(a).

¹⁰ *Danny E. Haley*, 56 ECAB 393, 400 (2005); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(a) (May 2004).

¹¹ 20 C.F.R. § 10.431.

¹² 5 U.S.C. § 8129(b); 20 C.F.R. §§ 10.433(a) and 10.434.

¹³ *Id.* at § 10.433(a).

The Board finds that appellant received an overpayment in the amount of \$8,294.64 for the period January 17 through April 10, 2010. Appellant kept three wage-loss compensation checks for a period in which he earned his regular salary from employment. The evidence establishes that he knew or should have known such payment to be incorrect. Therefore, appellant was with fault in creating the overpayment. Because he was at fault, he is not eligible for waiver of recovery of the overpayment.¹⁴

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$8,294.64 for which he was at fault.

ORDER

IT IS HEREBY ORDERED THAT the October 5, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 7, 2012
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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

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

¹⁴ *Id.* at § 10.441(a).