

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

<b>J.S., Appellant</b>	)	
	)	
<b>and</b>	)	
	)	<b>Docket No. 11-1356</b>
	)	<b>Issued: March 19, 2012</b>
<b>DEPARTMENT OF VETERANS AFFAIRS,</b>	)	
<b>VETERANS BENEFITS ADMINISTRATION,</b>	)	
<b>Winston Salem, NC, Employer</b>	)	
	)	

*Appearances:*  
Appellant, pro se  
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 May 13, 2011 appellant filed a timely appeal from a March 11, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) finding that he received an overpayment of compensation and that he was at fault in its creation. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

**ISSUES**

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$3,189.38 for the period August 29 through September 25, 2010; and (2) whether he was at fault in creating the overpayment.

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

On appeal, appellant contends that he was not aware that he was not entitled to the payment of \$3,189.38 for the period August 29 through September 25, 2010 as he did not receive the March 11, 2011 overpayment decision and had no knowledge of when his benefits ended.

### **FACTUAL HISTORY**

On May 22, 2008 appellant, then a 40-year-old service representative, filed a traumatic injury claim alleging that he sustained injuries to his knees, legs, right hand and back due to a slip and fall in the performance of duty on May 16, 2008 and stopped work that same day. OWCP accepted the claim for lumbar disc herniation at L4-5 and paid him compensation beginning July 4, 2008.

By decision dated August 19, 2010, OWCP terminated appellant's wage-loss compensation effective August 29, 2010 on the basis that he had no further injury-related disability or condition.

On September 23, 2010 OWCP noted that it had failed to delete appellant from the periodic rolls after it terminated his benefits. It calculated that it paid him \$3,189.38 after the termination of his compensation.

On January 19, 2011 OWCP informed appellant of its preliminary determination that he received an overpayment of compensation in the amount of \$3,189.38 for the period August 29 through September 25, 2010 because he continued to receive compensation after the termination of his benefits. It further advised him of its preliminary determination that he was at fault in the creation of the overpayment. OWCP requested that appellant complete an enclosed overpayment recovery questionnaire and submit supporting financial documents. It also notified him that, within 30 days of the date of the letter, he could request a telephone conference, a final decision based on the written evidence or a precoupment hearing.

On January 26, 2011 appellant submitted a completed overpayment recovery questionnaire and requested a decision based on the written evidence and waiver of the overpayment. He maintained that he had no knowledge of an overpayment and was not at fault in its creation.

By decision dated March 11, 2011, OWCP finalized its finding that appellant received an overpayment of compensation in the amount of \$3,189.38 for the period August 29 through September 25, 2010 because he continued to receive compensation after OWCP terminated his wage-loss compensation benefits. It further finalized its finding that he was at fault in the creation of the overpayment on the basis that he accepted a payment which he knew or should have know to be incorrect. OWCP considered the financial information submitted and determined that appellant should forward a check for \$3,189.38 to repay the overpayment.

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

FECA<sup>2</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 duty.<sup>3</sup> Section 8129(a) of FECA provides that, when an overpayment has been made to an individual because of an error of fact or law, adjustment shall be made under regulations prescribed by OWCP, by decreasing later payments to which the individual is entitled.<sup>4</sup>

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

OWCP accepted that appellant sustained a lumbar disc herniation at L4-5 due to a slip and fall in the performance of duty on May 16, 2008. It paid him compensation for disability beginning July 4, 2008. By decision dated August 19, 2010, OWCP terminated appellant's entitlement to wage-loss compensation benefits effective August 29, 2010. It, however, continued to pay him wage-loss compensation in the amount of \$3,189.38 from August 29 through September 25, 2010. Appellant thus received a \$3,189.38 overpayment of compensation.

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

Under section 8129 of FECA and its 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 FECA or would be against equity and good conscience.<sup>5</sup> Section 10.433 of the implementing regulations provide that OWCP may consider waiving an overpayment if the individual to whom it was made was not at fault in accepting or creating the overpayment.<sup>6</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 OWCP are proper.<sup>7</sup> Under the regulations, a recipient will be found to be at fault with respect to creating an overpayment if he or she accepted a payment which he or she knew or should have known to be incorrect.<sup>8</sup> Whether OWCP determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment.<sup>9</sup>

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<sup>2</sup> 5 U.S.C. §§ 8101-8193.

<sup>3</sup> *Id.* at § 8102(a).

<sup>4</sup> *Id.* at § 8129.

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

<sup>6</sup> *Id.* at § 10.433(a).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at § 10.433(a)(3). See *Tammy Craven*, 57 ECAB 589 (2006).

<sup>9</sup> *Id.* at § 10.433(b). See *Neill D. Dewald*, 57 ECAB 451 (2006).

## ANALYSIS -- ISSUE 2

By accepting payments after his entitlement to wage-loss compensation benefits was terminated effective August 29, 2010, appellant accepted payments that he knew or should have known were incorrect.<sup>10</sup> By decision dated August 19, 2010, OWCP terminated his wage-loss compensation effective August 29, 2010 on the basis that he had no further injury-related disability or condition. As noted, however, it paid appellant compensation payments from August 29 through September 25, 2010 in the amount of \$3,189.38. Appellant was aware that OWCP had terminated his entitlement to wage-loss compensation benefits. Thus, he accepted payments that he knew or should have known to be incorrect. Accordingly, the Board finds that appellant was at fault in the creation of the overpayment. The fact that OWCP may have been negligent in issuing the payments does not mitigate this finding.<sup>11</sup>

On appeal, appellant contends that he was not aware that he was not entitled to the payment of \$3,189.38 for the period August 29 through September 25, 2010, as he did not receive the March 11, 2011 overpayment decision and had no knowledge of when his benefits ended. In determining fault, OWCP applies a reasonable person test.<sup>12</sup> The Board finds that, under the circumstances of the case, it was not reasonable for appellant to believe that he was entitled to continued compensation payments after August 29, 2010 given the plain language of OWCP's August 19, 2010 termination decision. Therefore, appellant's argument is not substantiated.

As appellant was at fault in the creation of the overpayment, he is not eligible for waiver of recovery of the overpayment. OWCP is required by law to recover the overpayment.<sup>13</sup>

## CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$3,189.38 for the period August 29 through September 25, 2010. The Board further finds that he was at fault in creating the overpayment.

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<sup>10</sup> See *R.B.*, Docket No. 08-1384 (issued October 21, 2008).

<sup>11</sup> See 20 C.F.R. § 10.435(a); *D.R.*, 59 ECAB 148 (2007); *William E. McCarty*, 54 ECAB 525 (2003).

<sup>12</sup> See *Ralph P. Beachum, Sr.*, 55 ECAB 442 (2004).

<sup>13</sup> No waiver of an overpayment is possible if the claimant is at fault in creating the overpayment. *L.J.*, 59 ECAB 264 (2007).

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 11, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 19, 2012  
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