

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

M.E., Appellant)	
)	
and)	Docket No. 11-1735
)	Issued: March 5, 2012
DEPARTMENT OF THE AIR FORCE,)	
NATIONAL GUARD BUREAU, Syracuse, NY,)	
Employer)	

<i>Appearances:</i>	<i>Case Submitted on the Record</i>
<i>Jeffrey P. Zeelander, Esq., for the appellant</i>	
<i>Office of Solicitor, for the Director</i>	

DECISION AND ORDER

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

JURISDICTION

On July 20, 2011 appellant, through his representative, filed a timely appeal from the July 13, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) which found him at fault for an 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 appellant received a \$4,994.61 overpayment from November 8 to December 18, 2010; and (2) whether he was at fault in creating the overpayment, thus precluding waiver.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On February 23, 1999 appellant, a 40-year-old aircraft mechanic, sustained an injury in the performance of duty while helping to move a canopy off a maintenance stand to the floor. OWCP accepted his claim for right wrist sprain and triangular fibrocartilage complex tear. In 2008, appellant received compensation for temporary total disability on the periodic rolls. He received payments through direct deposit.

Appellant accepted an offer of modified work on July 2, 2010. On October 1, 2010 his representative notified OWCP that the start date was November 8, 2010. On November 2, 2010 OWCP received confirmation of the start date from the employing establishment. Appellant returned to work on November 8, 2010.

Appellant received a compensation payment for total disability on November 20, 2010. On December 9, 2010 OWCP explained that it was reducing his compensation effective November 8, 2010 to reflect his actual earnings in the modified position. Appellant received a compensation payment for total disability on December 18, 2010.

OWCP made a preliminary determination that appellant received a \$4,994.61 overpayment of compensation from November 8 to December 18, 2010.² It found that he was at fault in the creation of the overpayment because he accepted a payment that he knew or reasonably should have known was incorrect: he was aware or should have been aware that there was no entitlement to receive wage-loss benefits after returning to full-time work. OWCP noted that its June 17, 2008 letter to appellant informing him that he would receive compensation every 28 days and that he was responsible for informing OWCP upon return to any work and to return all payments received for periods after he returned to work.

Appellant's representative argued at the precoupment hearing that appellant was not at fault for the first direct deposit. Appellant testified that, a couple of days after the first direct deposit, he received a receipt in the mail showing the amount deposited and the date of deposit. He believed that OWCP would eventually change his compensation rate to reflect his income.

On his overpayment recovery questionnaire, appellant explained that he returned to work in the middle of a benefit period and that he was due some unknown payment of compensation -- he did not know the numbers or what the benefit would be. He noted that he had always received what OWCP stated he should receive. Appellant added that he had direct deposit and could not control what was sent to his account.³ He informed OWCP of his reemployment.

In a decision dated July 13, 2011, an OWCP hearing representative found that appellant was at fault in creating a \$4,994.61 overpayment from November 8 to December 18, 2010. The

² OWCP subtracted his gross entitlement -- \$1,992.86 from October 24 to November 7, 2010 and \$1,253.43 from November 8 to December 18, 2010 -- from the gross amount paid for that same period or \$7,440.00.

³ The direct deposit sign-up form explains that the agreement remains in effect until canceled by the recipient by notice to the federal agency or by death or legal incapacity of the recipient. Upon cancellation by the recipient, the recipient should notify the receiving financial institution that he or she is doing so.

hearing representative calculated that he received \$7,440.00 for total disability from October 24 to December 18, 2010 but was entitled to only \$2,445.39 due to his actual wages.

The hearing representative found that appellant was at fault on the grounds that he accepted a payment which he knew or should have known to be incorrect. The hearing representative noted that, for payments sent by electronic funds transfer, a notification of the date and amount of payment appears on the statement from the recipient's financial institution.⁴ Further, appellant testified that, a day or two after he received a compensation payment by direct deposit, he separately received in the mail a receipt showing the amount of the payment and the dates for which payment was made.⁵ The hearing representative found that the regulations, together with this testimony, constituted sufficient evidence that he had the requisite knowledge regarding the amount and period of the November 20, 2010 compensation payment. Given the substantial difference between his compensation checks for temporary total disability and his loss of wage-earning capacity after returning to work,⁶ the hearing representative found that appellant should have known that he was accepting incorrect payments: "he did not have a reasonable expectation that he would continue to receive compensation at the full compensation rate following his return to work on November 8, 2010." Having found appellant at fault, the hearing representative denied waiver.

On appeal, appellant argues that OWCP misapplied *S.H.*, Docket No. 10-499 (issued November 29, 2010).

LEGAL PRECEDENT -- ISSUE 1

FECA places limitations on the right to receive compensation: While an employee is receiving compensation, he may not receive salary, pay or remuneration of any type from the United States, with certain exceptions.⁷ It is, therefore, well established that an employee is not entitled to compensation for temporary total disability after returning to work.⁸

ANALYSIS -- ISSUE 1

Fact of overpayment is not in dispute. After appellant returned to work on November 8, 2010, he received two compensation checks for total disability, one on November 20, 2010 for the period October 24 to November 20, 2010 and another on December 18, 2010 for the period

⁴ 20 C.F.R. § 10.430 ("How does OWCP notify an individual of a payment made?").

⁵ On page 16 of the hearing transcript, appellant stated that he received in the mail a receipt showing the amount deposited and the date of deposit.

⁶ The record shows gross compensation of \$3,720.00 on November 20 and December 18, 2010 and then gross compensation of \$856.00 beginning January 15, 2011.

⁷ 5 U.S.C. § 8116(a).

⁸ *E.g., Tammi L. Wright*, 51 ECAB 463, 465 (2000) (where the record established that the employee returned to work at the employing establishment for four hours a day from August 7, 1996 to January 8, 1997 but received compensation for total disability for that same period, the Board found that the employee received an overpayment of compensation).

November 21 to December 18, 2010. As he was not totally disabled for these periods, he received an overpayment of compensation. The Board will affirm OWCP's July 13, 2011 decision on the issue of fact of overpayment.

In its preliminary determination, OWCP calculated the amount of the overpayment by subtracting the gross compensation appellant should have received -- \$1,992.86 from October 24 to November 7, 2010 and \$1,253.43 from November 8 to December 18, 2010 -- from the gross compensation paid for that same period or \$7,440.00. But this gives an overpayment of \$4,193.71, not \$4,994.61. Worksheets in the record show that appellant should have received \$1,992.86 in gross compensation for the 15-day period October 24 to November 7, 2010.⁹ Worksheets also show that he should have received \$1,253.43 in gross compensation for the 41-day period November 8 to December 18, 2010.¹⁰ Subtracted from the \$7,440.00 appellant did receive over the combined 56-day period, these figures do not support the amount of overpayment OWCP found. The Board will, therefore, set aside OWCP's July 13, 2011 decision on the issue of amount of overpayment and remand the case for further calculation.

LEGAL PRECEDENT -- ISSUE 2

OWCP 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 received from OWCP 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 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 (this provision applies only to the overpaid individual).¹¹

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 is being overpaid.¹²

ANALYSIS -- ISSUE 2

OWCP found appellant at fault in creating the overpayment because he accepted a payment that he knew or should have known to be incorrect. The hearing representative relied on appellant's testimony that, several days after the first incorrect payment, he received in the mail a receipt showing the amount deposited and the date of deposit. Such information,

⁹ A 28-day payment of \$3,720.00 divided by 28 times 15 days is \$1,992.86.

¹⁰ A weekly compensation amount of \$214.00 divided by 7 times 41 days is \$1,253.43.

¹¹ 20 C.F.R. § 10.433(a).

¹² *Id.* § 10.433(b).

however, is immaterial to whether appellant had the requisite knowledge at the time of deposit. As the Board explained in *Tammy Craven*,¹³ fault is defined by what the claimant knew or should have known at the time of acceptance, which in direct deposit cases occurs upon deposit. Knowledge gained after the fact -- in *Craven*, OWCP wrote to the claimant four days after the incorrect payment was directly deposited to his bank account -- does not address the critical question.

As the hearing representative observed, appellant did not have a reasonable expectation that he would continue to receive compensation at the full compensation rate following his return to work on November 8, 2010. OWCP knew that he had accepted a modified position. Appellant's representative notified OWCP a month in advance that November 8, 2010 was the start date. Thus, prior to the direct deposit on November 20, 2010, there appeared to be no reason to expect that OWCP would pay compensation for total disability beyond the date of reemployment. The hearing representative offered no argument or evidence that appellant knew or should have known that his November 20, 2010 payment would be incorrect. The Board finds, therefore, that OWCP has not established fault with respect to the first incorrect payment.

With respect to the second incorrect payment, the question remains the same. To establish fault OWCP must show that appellant knew or should have known that the December 18, 2010 payment would also be incorrect. The hearing representative did not directly address this issue. The hearing representative noted the substantial difference between appellant's checks for temporary total disability and his checks for loss of wage-earning capacity after returning to work. Of course, appellant did not appreciate that comparison until he received his first check for loss of wage-earning capacity on January 15, 2011. Again, information obtained after the fact does not establish what he knew or should have known when the second check was deposited on December 18, 2010.

A question arises whether, having received one incorrect payment on November 20, 2010, appellant should have expected another. The circumstances of this case answer in the negative. Before the December 18, 2010 deposit, OWCP acknowledged appellant's return to work and explained that it was reducing his compensation effective November 8, 2010 to reflect his actual earnings in the modified position. It appeared, therefore, that OWCP was taking action to correct his compensation. Appellant had no reasonable expectation that OWCP would continue to pay him for total disability.

The Board finds that appellant was not at fault in the creation of the overpayment he received from November 8 to December 18, 2010. The Board will set aside OWCP's July 13, 2010 decision on the issue of fault. The Board will remand the case for further development of appellant's financial circumstances and consideration of waiver. The Board will set aside OWCP's July 13, 2010 decision on the issue of recovery from continuing compensation, which is not in posture pending a decision on waiver.

Appellant's representative argues that OWCP misapplied *S.H.*, Docket No. 10-499 (issued November 29, 2010). *S.H.* held that it is not appropriate to make a finding that a claimant has accepted an overpayment by direct deposit until such time as a reasonable person

¹³ 57 ECAB 689 (2006).

would have been aware that this overpayment had occurred, citing *K.H.*, Docket No. 06-191 (issued October 30, 2006). This language varies from the acceptance and knowledge components of fault, which are more clearly spelled out in *Craven*¹⁴ and should not be interpreted to make acceptance of a payment dependent upon knowledge that the payment was incorrect, a position argued by the Director in *Craven* but expressly rejected by the Board. In *S.H.*, the Board found that fault could not be imputed to the claimant for the first incorrect payment. Under the circumstances of that case, however, the Board found that it could be presumed that he knew the amount of compensation contained in subsequent direct deposit checks. Those circumstances do not obtain in the present case, where OWCP notified appellant before the second incorrect payment that it was reducing his compensation effective November 8, 2010 to reflect his actual earnings in reemployment.

CONCLUSION

The Board finds that appellant received an overpayment of compensation from November 8 to December 18, 2010. The Board finds that he was not at fault in creating this overpayment. The Board further finds that the case is not in posture for decision on the issues of amount of overpayment, waiver and recovery.

¹⁴ Because fault is defined by what a claimant knew or should have known at the time of acceptance, the knowledge component of fault must precede acceptance. This is so regardless of whether compensation is paid by paper check or direct deposit. Acceptance occurs when the check is negotiated. In direct deposit cases, this means upon deposit. Thus, acceptance establishes the overpayment. Knowledge at the time of acceptance defines fault.

ORDER

IT IS HEREBY ORDERED THAT the July 13, 2011 decision of the Office of Workers' Compensation Programs is affirmed on the issue of fact of overpayment, is set aside on the issue of amount of overpayment, is reversed on the issue of fault, is set aside on the issue of recovery and is remanded for further action consistent with this opinion.

Issued: March 5, 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