

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

C.D., Appellant)

and)

**DEPARTMENT OF HOMELAND SECURITY,
TRANSPORTATION SECURITY
ADMINISTRATION, Atlanta, GA, Employer**)

**Docket No. 12-105
Issued: May 25, 2012**

Appearances:
Appellant, pro se
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 October 24, 2011 appellant timely appealed the May 10, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP), which found an overpayment of compensation. 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 the claim.

ISSUES

The issues are: (1) whether appellant received an overpayment of \$18,290.00 for the period October 24, 2010 to March 12, 2011; (2) whether appellant was at fault in creating the overpayment; and (3) whether OWCP properly reduced appellant's ongoing compensation payments by \$109.00 recover the overpayment.

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

Appellant, a 55-year-old transportation security screener, sustained a back injury in the performance of duty on February 13, 2003. OWCP accepted his traumatic injury claim for lumbar annular tear, sciatica and aggravation of lumbar spinal stenosis. Appellant received wage-loss compensation beginning April 20, 2003 and OWCP placed him on the periodic compensation rolls effective July 13, 2003. His compensation payments were approximately \$1,550.00 every 28 days based on a date-of-injury weekly pay rate of \$518.69.

In early November 2010, OWCP terminated appellant's compensation effective October 24, 2010, based on his election of Office of Personnel Management (OPM) benefits. At the time, appellant had been receiving gross compensation in the amount of \$1,661.00 every 28 days. On November 5, 2011 OWCP realized it had mistakenly removed her from the periodic rolls. When it reinstated benefits, it erroneously substituted \$1,661.00 (gross compensation) as appellant's weekly pay rate instead of \$518.69.

Relying on an incorrect weekly pay rate of \$1,661.00 resulted in a more than threefold increase in appellant's 28-day compensation payment. On November 20, 2010 OWCP disbursed the first of five incorrect payments in the amount of \$5,319.00. The initial payment covered the period October 24 to November 20, 2010.

On December 15, 2010 the employing establishment advised OWCP that appellant's periodic rolls payment had been increased in error and that he had been overpaid. OWCP did not immediately correct the mistake. It disbursed incorrect payments on December 18, 2010, January 14, February 12 and March 12, 2011.

On March 18, 2011 OWCP issued a preliminary overpayment determination in the amount of \$18,290.00. It acknowledged a "keying error" that resulted in appellant being compensated at a higher pay rate. OWCP found appellant at fault in creating the overpayment because he knowingly accepted compensation to which he was not entitled.

On March 29, 2011 appellant challenged OWCP's preliminary determination regarding fault. He stated that he had spoken with an OWCP customer service representative on November 19, 2010, who reportedly told him that the increased payment was due to an October 2010 hospitalization that OWCP previously declined to cover.² Appellant also submitted an overpayment recovery questionnaire. He listed total monthly income of \$1,661.00 and monthly liabilities (usual household expenses) of \$3,356.00. Appellant also listed \$47,800.00 of debt with reported monthly payments of approximately \$3,300.00. Additionally, he reported liquid assets of \$300.00 and an unspecified amount of jewelry.

² Appellant was hospitalized on October 19, 2010 for unspecified chest pains (ICD-9 786.50). On October 26, 2010 OWCP advised him that it would not authorize his recent cardiac-related care because it did not appear to be medically necessary for the treatment of his accepted lumbar condition or causally related to his February 13, 2003 employment injury.

By decision dated May 5, 2011, OWCP finalized the \$18,290.00 overpayment. Because appellant was found at fault in creating the overpayment, he was not eligible for waiver of recovery. OWCP directed that \$109.00 be withheld from his continuing compensation.

LEGAL PRECEDENT -- ISSUE 1

Wage-loss compensation for total disability is computed based on the employee's effective pay rate and whether he or she has any eligible dependents.³ Depending on whether the employee has at least one eligible dependent, wage-loss compensation will be paid at either 2/3 or 3/4 of the effective pay rate. A mistake in determining either the appropriate pay rate or dependent status may result in an overpayment of benefits.

ANALYSIS -- ISSUE 1

OWCP compensated appellant based on his date-of-injury weekly pay rate of \$518.69. This was the pay rate in effect when OWCP mistakenly dropped him from the periodic rolls on November 4, 2010. When it realized that appellant had not elected OPM benefits in lieu of FECA wage-loss compensation, OWCP returned him to the periodic compensation rolls. Instead of reinstating benefits based on his date-of-injury weekly pay rate of \$518.69, OWCP incorrectly applied a weekly pay rate of \$1,661.00. This latter figure represented appellant's previous 28-day gross compensation payment.

OWCP's reliance on an incorrect weekly pay rate of \$1,661.00 resulted in a 320 percent increase in appellant's 28-day compensation. Beginning November 20, 2010, it disbursed a total of five payments in the amount of \$5,319.00. For the period October 24, 2010 to March 12, 2011, OWCP paid appellant \$26,595.00 rather than \$8,350.00, which he should have received based on his date-of-injury weekly pay rate of \$518.69. Based on an incorrect weekly pay rate, it overpaid him \$18,290.00 for the period October 24, 2010 to March 12, 2011. Accordingly, the Board will affirm OWCP's findings with respect to fact and amount of overpayment.

LEGAL PRECEDENT -- ISSUE 2

OWCP may consider waiving an overpayment only if the individual to whom it was made was not at fault in either accepting or creating the overpayment.⁴ Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he receives from OWCP are proper.⁵ A recipient will be found to be at fault with respect to creating an overpayment if the individual "[a]ccepted a payment which he or she knew or should have known to be incorrect."⁶

³ See 5 U.S.C. §§ 8105(a), 8110, 8112, 8114; 20 C.F.R. §§ 10.5(s), 10.401(b).

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

⁵ 20 C.F.R. § 10.433(a).

⁶ *Id.*

ANALYSIS -- ISSUE 2

OWCP found that appellant was at fault because he accepted payments which he knew or should have known to be incorrect. It based its finding on the fact that he was a long-time recipient of wage-loss benefits, and thus, he should have questioned the unexplained increase in his compensation. Appellant had been receiving wage-loss compensation for more than seven years, and his regular 28-day payments were routinely less than \$1,700.00. Beginning in November 2010, his 28-day payment increased to \$5,319.00. As noted, appellant is responsible for taking all reasonable measures to ensure that the payments he receives from OWCP are proper.⁷

When appellant's compensation payments more than tripled in November 2010, he reportedly contacted OWCP to determine the reason for the increase. The record indicates that OWCP received a call from him on November 19, 2010 regarding his "pay check." Appellant claimed that, during this conversation, he was advised that the increase he received was due to his October 2010 hospitalization. Just a few weeks earlier, OWCP advised him that it could not authorize treatment for his cardiac condition because it did not appear to be either medically necessary or causally related to his accepted lumbar condition. The record does not support appellant's claim that OWCP advised him on November 19, 2010 -- or anytime thereafter -- that his compensation benefits were increased due to his October 2010 hospitalization.⁸

Disability compensation and medical benefits are separate issues. It is implausible for OWCP to have increased appellant's disability compensation as reimbursement for previously denied medical treatment. Payment for medical treatment, including hospitalization, is routinely handled by the medical service provider through the Department of Labor's Affiliated Computer Services bill processing service. Apart from reimbursement for out-of-pocket medical expenses, the bill payment process generally does not involve direct payment to the employee. When the cardiac care bills were initially submitted to OWCP in October 2010, it declined payment and advised appellant of the necessary steps for obtaining authorization. There is no indication that he followed OWCP's October 26, 2010 instructions. Moreover, in early March 2011, the medical service provider resubmitted the October 2010 charges and OWCP again denied authorization on March 4, 2011. Appellant was copied on this latest denial of service, which predated receipt of his March 12, 2011 compensation payment.

OWCP's repeated refusal to pay for appellant's October 2010 cardiac treatment undermines his argument that OWCP advised him on November 19, 2010 that his wage-loss compensation was increased because of his October 2010 hospitalization. Had the alleged misinformation been reduced to writing, appellant's claimed reliance might have perhaps been excused.⁹ Under the circumstances in this case, it was unreasonable for him to have believed that the threefold increase in his wage-loss compensation represented reimbursement for

⁷ *Id.*; L.C., 59 ECAB 569, 574-75 (2008).

⁸ The only other compensation-related conversation between appellant and OWCP occurred on February 22, 2011, when he requested an electronic funds transfer form.

⁹ See 20 C.F.R. § 10.435(b)(1) (individual not at fault where he "relied on misinformation given in writing by OWCP ... as to the interpretation of a pertinent provision of FECA or its regulations.").

previously denied medical benefits. While OWCP was primarily responsible for the overpayment, the Board finds that appellant shares responsibility, and thus, was at fault for having accepted a payment which he knew or should have known to be incorrect.¹⁰ Because appellant was at fault, waiver of recovery of the \$18,290.00 overpayment is not an option.¹¹

LEGAL PRECEDENT -- ISSUE 3

When an overpayment has been made to an individual who is entitled to further payments and no refund is made, OWCP shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors so as to minimize any hardship.¹²

ANALYSIS - ISSUE 3

With respect to OWCP's decision to deduct \$109.00 every 28 days from appellant's continuing compensation, the Board finds this repayment schedule appropriate. Appellant claimed that his monthly expenses exceeded his monthly income by approximately \$5,000.00. However, he did not submit adequate financial documentation to fully substantiate his reported expenses. The \$109.00 repayment represents 6.6 percent of appellant's documented monthly income of \$1,661.00. Under the circumstances, the Board finds that OWCP reasonably imposed a repayment schedule of \$109.00 every 28 days.

CONCLUSION

Appellant received an overpayment of \$18,290.00 for the period October 24, 2010 to March 12, 2011. Because he was at fault in creating the overpayment, appellant is not entitled to waiver of recovery. The Board further finds that OWCP reasonably imposed a repayment schedule of \$109.00 every 28 days to be withheld from appellant's continuing compensation payments.

¹⁰ *Id.* at § 10.433(a)(3). The fact that OWCP may have erred in making the overpayment, does not by itself relieve the overpayment recipient from liability for repayment if the individual was also at fault in accepting the overpayment. *Id.* at § 10.435(a).

¹¹ 5 U.S.C. § 8129(b); 20 C.F.R. §§ 10.433(a), 10.434; *L.C.*, *supra* note 7.

¹² 20 C.F.R. § 10.441(a).

ORDER

IT IS HEREBY ORDERED THAT the May 10, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 25, 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