

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

J.B., Appellant

and

**DEPARTMENT OF THE NAVY, NORFOLK
NAVAL BASE, Norfolk, VA, Employer**

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**Docket No. 12-1632
Issued: March 15, 2013**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 24, 2012 appellant filed a timely appeal from an Office of Workers' Compensation Programs' (OWCP) overpayment decision dated July 9, 2012. 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 in the amount of \$1,710.22 for the period June 5 through July 2, 2011; and (2) whether OWCP properly found appellant was at fault in creating the overpayment.

FACTUAL HISTORY

Appellant, a 47-year-old crane operator, injured his lower back on June 6, 2006 while pulling a pump engage handle on the crane he was operating. He filed a claim for benefits,

¹ 5 U.S.C. § 8101 *et seq.*

which OWCP accepted for lumbar sprain, aggravation of degenerative disc disease at L5-S1, aggravation of left-sided foraminal stenosis at L4-5 and L5-S1 and aggravation of central canal stenosis at L4-5. Appellant stopped work and OWCP commenced payment of compensation for temporary total disability and placed him on the periodic rolls.

In an August 28, 2006 letter, advising appellant that he would be paid temporary total disability compensation, OWCP stated:

“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.”

An employing establishment report of work status, dated June 20, 2011, related that appellant sustained a recurrence of disability and had undergone surgery on April 19, 2011. He returned to work for four hours a day on June 20, 2011 or 20 hours a week. The record contains an employing establishment time analysis form which states that he worked 40 hours during the period June 20 through July 1, 2011 and remained on leave without pay for 40 hours.

On May 15, 2012 OWCP issued a preliminary determination that an overpayment was created in the amount of \$1,710.22 for the period June 5 through July 2, 2011 because appellant received compensation to which he was not entitled. It found that he was at fault in the matter because he received compensation for total disability after he returned to work on June 20, 2011, but was only entitled to partial wage loss of 20 hours a week for leave without pay. OWCP calculated the amount of the overpayment by taking his net 28-day compensation payment from June 5 to July 2, 2011 of \$2,364.72 and subtracting the amount it found he should have received from June 20 to July 2, 2011 of \$654.50, which created an overpayment of \$1,710.22. It advised appellant that, if he disagreed with the fact or amount of the overpayment he could submit evidence or argument to OWCP, or request a preresoupment hearing, within 30 days.

Appellant completed an overpayment questionnaire on May 24, 2012 and requested a telephonic preresoupment hearing, which was held on July 9, 2012. He stated that he assumed when he returned to work, that his pay would automatically be reduced to the correct amount. Appellant asserted that this had occurred in the past. He contended that he and the employing establishment reported his return to work in a timely manner.

In a decision dated July 9, 2012, OWCP finalized the overpayment of \$1,710.22. It found appellant was at fault.

LEGAL PRECEDENT -- ISSUE 1

Compensation for total disability under FECA is payable when the employee starts to lose pay.² Compensation for wage loss due to disability is available only for any periods during

² 20 C.F.R. § 10.401(a) (2003).

which an employee's work-related medical condition prevents him from earning the wages earned before the work-related injury.³

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation. The record shows that appellant received an overpayment during the period in question because he received temporary total disability compensation after he returned to work on June 20, 2011. OWCP calculated the \$1,710.22 overpayment by totaling the amount of temporary total disability compensation appellant received from June 5 through July 2, 2011, \$2,364.72, and subtracting the amount of compensation to which it found he was entitled from June 20 to July 2, 2011, \$654.50. The Board notes, however, that OWCP did not adequately explain how the amount of overpayment was determined. Since appellant did not return to work until June 20, 2011, he was entitled to compensation benefits from June 5 to 19, 2011. He returned to work for four hours a day on June 20, 2011 and worked through July 1, 2011, a total of 10 days. The overpayment is the amount of compensation he received in excess of the 40 hours of work he performed from June 20 to July 2, 2011. While OWCP properly found that an overpayment occurred from June 20 to July 2, 2011, it did not provide an adequate explanation to appellant of how it calculated the overpayment in the amount of \$1,710.22.⁴ On remand, OWCP shall recalculate the amount of the overpayment.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA⁵ 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.⁶

In determining whether an individual is with fault, section 10.433(a) of OWCP regulations provide in relevant part:

"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 the individual knew or should have known to be incorrect; or

³ *Id.* at § 500(a) (2003).

⁴ See *Darlene A. Luck*, 54 ECAB 740 (2003); *James Tackett*, 54 ECAB 611 (2003).

⁵ 5 U.S.C. § 8129(a)-(b).

⁶ *Bonnye Mathews*, 45 ECAB 657 (1994).

“(2) Failed to provide information which the individual knew or should have known to be material; or

“(3) Accepted a payment which he or she knew or should have known to be incorrect.”⁷

ANALYSIS -- ISSUE 2

The Board finds that appellant is without fault in the creation of the overpayment.

OWCP applied the third standard in determining that appellant was at fault in creating the overpayment. That appellant should have known he was not entitled to compensation benefits after a return to work. Regarding the first direct deposit payment appellant received on July 2, 2011, after his return to work, the Board has held that it is not appropriate to make a finding that a claimant has accepted an overpayment *via* direct deposit until such time as a reasonable person would have been aware that this overpayment had occurred. This awareness may be established either through documentation such as a bank statement or notification from OWCP that an incorrect payment had been received.⁸

OWCP 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 the claimant will not be at fault for accepting the first incorrect direct deposit payment because the requisite knowledge is lacking at the time of deposit. The Board finds that when the July 2, 2011 direct deposit was made, appellant had no knowledge that this direct deposit would be made in the incorrect amount. Appellant therefore was not at fault in the acceptance of the July 2, 2011 direct deposit.

OWCP must therefore consider eligibility for waiver for this period. The case will be remanded for OWCP to determine whether appellant is entitled to waiver for the direct deposit of compensation he received on July 2, 2011.

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation for the period June 5 through July 2, 2011. The amount of the overpayment requires recalculation. The Board finds appellant without fault in the creation of the overpayment.

⁷ 20 C.F.R. § 10.433(a).

⁸ See *L.G.*, Docket No. 12-274 issued November 20, 2012; see also *K.H.*, Docket No. 06-191 (issued October 30, 2006).

ORDER

IT IS HEREBY ORDERED THAT the July 9, 2012 decision of the Office of Workers' Compensation Programs be affirmed, in part, and modified, in part. The case is remanded for further action in conformance with this decision.

Issued: March 15, 2013
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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