

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

R.F., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Cleveland, OH, Employer**

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**Docket No. 12-1646
Issued: March 26, 2013**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 30, 2012 appellant filed a timely appeal of a June 4, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP). 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.²

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$1,759.68 for the period June 13 through July 2, 2011; and (2) whether OWCP properly found that appellant was at fault in the creation of the overpayment and not entitled to waiver of recovery of the overpayment.

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the issuance of the June 4, 2012 OWCP decision, appellant submitted new evidence. The Board is precluded from reviewing evidence which was not before OWCP at the time it issued its final decision. See 20 C.F.R. § 501.2(c)(1).

On appeal, appellant contends that the overpayment was not his fault as he acted in good faith. He requested a waiver of recovery of the overpayment or a reduction of the overpayment amount.

FACTUAL HISTORY

OWCP accepted that appellant, then a 40-year-old rural carrier, sustained left knee and leg sprain, tear of left medial meniscus and pulmonary embolism and infarction while in the performance of duty on February 7, 2011. It authorized left knee arthroscopic surgery which he underwent on March 31, 2011. OWCP paid wage-loss compensation for total disability by check and placed appellant on the periodic rolls effective April 10, 2011.

By letter dated April 29, 2011, OWCP informed appellant about his entitlement to compensation benefits and his responsibility upon return to work. Appellant was advised that compensation benefits were only payable when he could not perform his job duties due to his injury and to immediately notify OWCP when he returned to work. OWCP explained that he was to immediately return any payments that he received for any portion of the period after he returned to work in order to prevent an overpayment of compensation.

Appellant returned to work in a full-time, full-duty capacity effective June 13, 2011. Despite his return to full-time employment, OWCP paid him wage-loss compensation for total disability through July 2, 2011. The period of the payment was listed on each check that he received.

On September 23, 2011 OWCP issued a preliminary determination that an overpayment of \$1,759.68 arose because appellant received wage-loss compensation for total disability for the period June 13 to July 2, 2011, after he returned to full-time work on June 13, 2011. It found that appellant received \$1,878.49 in gross compensation for the period June 13 to July 2, 2011 and after deducting health benefits insurance (HBI) of \$108.53 and basic life insurance (BLI) of \$10.29, or a net overpayment of compensation in the amount of \$1,759.68. OWCP found that appellant was with fault in creating the overpayment because he was advised in the April 29, 2011 letter that he was not entitled to compensation for total disability after he returned to work. Appellant was informed of his options if he wished to challenge the fact of overpayment or to request waiver of recovery of the overpayment. He was advised to submit, within 30 days, financial information by completing an overpayment recovery questionnaire (Form OWCP-20).

On October 18, 2011 appellant requested a prerecoupment hearing before an OWCP hearing representative. He contended that the overpayment occurred through no fault of his own and requested waiver. Appellant submitted an October 18, 2011 overpayment recovery questionnaire (Form OWCP-20) outlining his monthly income and expenses. He also provided documentation supporting the various reported expenses. As to the issue of fault, appellant stated that he submitted a pay form for each missed workday up to June 13, 2011 and was going through an unexpected marital separation and relocation. When he received the check, he assumed it was correct as there was no reason for OWCP to overpay him. Appellant indicated that his supervisor was informed of his return to work date well in advance.

At the March 13, 2012 hearing, appellant reiterated that he was not at fault in the creation of the overpayment. Subsequently, he submitted additional financial documentation.

By decision dated June 4, 2012, an OWCP hearing representative found that appellant received an overpayment in the amount of \$1,759.68. Appellant was found at fault in creating the overpayment because he accepted payments that he knew or reasonably should have known were incorrect. Because he was at fault, he was not entitled to waiver of recovery of the overpayment. OWCP ordered payment in the amount of \$150.00 per month until the \$1,759.68 overpayment was repaid.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of FECA 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.³ FECA, however, also places limitations on an employee's right to receive compensation benefits. Section 8116 provides that, while an employee is receiving benefits he or she may not receive salary, pay or remuneration of any type from the United States, except in limited circumstances.⁴ OWCP regulations further state that compensation for wage loss due to disability is available only for the period where an employee's work-related medical condition prevents him or her from earning the wages earned before the work-related injury.⁵ A claimant is not entitled to receive temporary total disability and actual earnings for the same period.⁶ OWCP procedures provide that an overpayment in compensation is created when a claimant returns to work and has earnings but continues to receive wage-loss compensation.⁷

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$1,759.67. The record reflects that he returned to full-time work at the employing establishment on June 13, 2011; however, he received wage-loss compensation benefits for total disability until July 2, 2011. OWCP determined that the amount of compensation he received for the period June 13 through July 2, 2011 totaled \$1,878.49 and, after deducting HBI of \$108.53 and BLI of \$10.29, an overpayment existed in the amount of \$1,759.68. However, it incorrectly calculated the overpayment amount as \$1,759.68 instead of \$1,759.67.⁸ With this adjustment, his outstanding balance is \$1,759.67, rather than \$1,759.68 as noted by OWCP in its June 4, 2012 decision. The June 4, 2012 OWCP decision will be modified to reflect an overpayment balance of \$1,759.67.

³ 5 U.S.C. § 8102(a).

⁴ *Id.* at § 8116(a).

⁵ 20 C.F.R. § 10.500(a).

⁶ *See Daniel Renard*, 51 ECAB 466, 469 (2000).

⁷ *See L.S.*, 59 ECAB 350 (2008); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(a) (September 2010).

⁸ \$1,878.49 - \$108.53 - \$10.29 = \$ 1,759.67.

Because appellant received regular full-time wages from the employing establishment during the period June 13 through July 2, 2011, he was not entitled to disability compensation from OWCP. His receipt of wage-loss payments created an overpayment of compensation. There is no contrary evidence nor does appellant contest the amount and period of the overpayment. Thus, the Board finds that he received an overpayment in the amount of \$1,759.67 for the period June 13 through July 2, 2011.

LEGAL PRECEDENT -- ISSUE 2

According to section 8129(a) of FECA, adjustment or recovery shall be made under regulations prescribed by the Secretary of Labor when an overpayment of compensation was made because of an error of fact or law.⁹ The only exception is if the individual is without fault in the creation of the overpayment and when adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.¹⁰ Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from OWCP are proper.¹¹ A recipient is at fault in the creation or acceptance of an overpayment if he or she has done any of the following: (1) made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; (2) failed to provide information which he or she 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.¹²

ANALYSIS -- ISSUE 2

OWCP found that appellant was at fault in the creation of the overpayment because he accepted a payment which he knew or should have known to be incorrect, applying the third criterion listed above.¹³ To establish that he was at fault, OWCP must establish that at the time appellant accepted the compensation check in question he knew or should have known that the payment was incorrect.

When a disabled employee is placed on the periodic compensation rolls, OWCP routinely advises the employee of this fact and issues a CA-1049 identifying the weekly pay rate, the compensation rate, the gross payment, any applicable deductions, and the net amount to be disbursed.¹⁴ The CA-1049 is generally accompanied by an EN1049, which explains the employee's rights and responsibilities with respect to the receipt of compensation.¹⁵ This latter

⁹ 5 U.S.C. § 8129(a).

¹⁰ *Id.* at § 8129(b).

¹¹ 20 C.F.R. § 10.433(a). *See K.C.*, Docket No. 11-1307 (issued January 10, 2012).

¹² *Id.* *See B.H.*, Docket No. 09-292 (issued September 1, 2009).

¹³ 20 C.F.R. § 10.433(a)(3).

¹⁴ *See K.C.*, *supra* note 12; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Periodic Review of Disability Cases*, Chapter 2.812.4 (March 2010).

¹⁵ *Id.*

document provides pertinent information regarding returning to work and how to avoid an overpayment of benefits. It also includes a certification that the benefits recipient has read and understands the terms and conditions under which he or she may receive compensation. OWCP provided appellant this same information by letter dated April 29, 2011.

In this case, appellant received wage-loss compensation for total disability by check and also received wages from the employing establishment for the period June 13 through July 2, 2011. The period of the payment was listed on each check that he received. In the April 29, 2011 letter, OWCP properly advised appellant of his responsibilities to immediately inform OWCP upon his return to work to avoid an overpayment in compensation and that, if he worked during any period covered by a compensation payment, he was obligated to return the payment to OWCP. Under these circumstances, appellant knew or should have known that he could not receive wage-loss compensation during any period that he worked or continued to receive wages from the employing establishment.¹⁶ OWCP was notified that he returned to work on June 13, 2011. Appellant did not return the compensation check for the period June 13 through July 2, 2011. The Board finds that he knew or should have known at the time he returned to work on June 13, 2011 and began to receive wages from employment that he was not entitled to concurrently receive wage-loss compensation for the same period.¹⁷ Under section 10.433(a) of OWCP regulations, appellant is at fault and is not entitled to waiver of recovery of the overpayment of compensation in the amount of \$1,759.67.¹⁸

On appeal appellant contends that the overpayment was not his fault as he acted in good faith and requests a waiver of recovery of the overpayment. The Board has held that, even if OWCP was at fault for issuing compensation checks after appellant returned to full-time work, on June 13, 2011, this fact does not relieve him from responsibility for repayment of the debt if he was at fault for accepting the payment he knew to be incorrect.¹⁹ As noted, appellant knew or should have known that the check he received represented wage-loss payment after the date of his return to work. Since he is at fault on the issue of overpayment, recovery cannot be waived.

Alternatively, appellant requests a reduction of the overpayment amount. The Board notes that it does not have jurisdiction to review OWCP's determination of recovery by monthly payment. The Board's jurisdiction is limited to reviewing those cases where OWCP seeks recovery from continuing compensation under FECA.²⁰ As appellant was not in receipt of continuing compensation benefits at the time the final decision was entered in this matter, the Board lacks jurisdiction to review recovery of the overpayment.

¹⁶ See *K.C.*, *supra* note 12; *G.S.*, Docket No. 11-459 (issued October 27, 2011); *Neill D. Dewed*, 57 ECAB 451 (2006).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ See *R.H.*, Docket No. 09-1981 (issued June 11, 2010); *M.J.*, Docket No. 09-469 (issued August 24, 2009).

²⁰ See *Judith A. Cardio*, 55 ECAB 348, 353 (2004).

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$1,759.67 for the period June 13 through July 2, 2011. The Board further finds that OWCP properly found that he was at fault in the creation of the overpayment and is not entitled to waiver of recovery of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the June 4, 2012 decision of the Office of Workers' Compensation Programs is affirmed, as modified.

Issued: March 26, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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