

FACTUAL HISTORY

On January 20, 2011 appellant, then a 42-year-old full-time letter carrier, filed a claim that he injured his left index finger and left shoulder when he was bitten by a dog on January 14, 2011 while delivering mail. OWCP accepted his claim for contusion of the left shoulder, left shoulder strain and open wound of the left index finger, healed. Appellant stopped work on January 15, 2011.

In a letter dated April 15, 2011, OWCP advised that appellant had been placed on the periodic rolls and outlined his entitlement to compensation benefits and his responsibility to return to work in connection with the accepted injury. In an attached EN-1049 OWCP provided:

“In order to avoid an overpayment of compensation, NOTIFY THIS OFFICE IMMEDIATELY WHEN YOU GO BACK TO WORK. Each payment made through the Office’s automated system will include the period for which payment is made. If you have worked for any portion of this period, you must return the check to this Office. Otherwise, an overpayment of compensation may result.”

In a telephone log dated January 2, 2013, OWCP contacted appellant and noted that a November 20, 2013 medical report advised that he could return to work without restrictions after January 1, 2013. In a telephone log dated March 5, 2013, the employing establishment advised that he had returned to full-time work on January 2, 2013. In a compensation termination sheet dated March 5, 2013, OWCP noted that appellant returned to work on January 2, 2013.

In a March 11, 2013 letter, OWCP informed appellant that it had made a preliminary determination of a \$5,823.95 overpayment of compensation from January 2 to March 9, 2013 because he received compensation benefits for temporary total disability from January 2 to March 9, 2013 after he returned to work full time on January 2, 2013. It explained that he was paid \$5,823.95 in compensation from January 2 to March 9, 2013.² OWCP noted that appellant was not entitled to any wage-loss compensation during this period. It found that he was at fault in creating the overpayment because he accepted payments that he knew or reasonably should have known to be incorrect. OWCP found that appellant was issued checks, which clearly listed the dates of the payment on the check and therefore he should have known he was overpaid compensation after he returned to work on January 2, 2013. Additionally, it noted that the amount of the checks was the same as previous disability checks, so he should have known that he was not entitled to be paid disability for the whole 28-day period. OWCP also noted that appellant accepted two more checks for the time periods from January 13 to February 9, 2013

² OWCP calculated this amount by taking the net compensation paid from December 16, 2012 to January 12, 2013, \$2,447.60, dividing this by the 28 calendar days that are in a compensation period, which equals \$87.41 a day and multiplying this by the 11 days for which appellant received compensation while he also worked, which yielded \$961.56. It further noted that, for the payment cycle beginning January 13 to March 9, 2013, he was paid compensation at the net amount of \$2,422.60 every 28 days. Appellant was paid through March 9, 2013, which is two periodic rolls payment cycles totally 56 calendar days. Dividing \$2,442.84 by 28 calendar days, which equals \$86.53 a day and multiplying this by 56 days for which he received compensation while also working, which yielded \$4,845.68, plus a \$16.71 cost-of-living increase that took effect March 1, 2013, for an overpayment of \$5,823.95.

and from February 10 to March 9, 2013. It informed him of his review rights and instructed him to complete an enclosed overpayment recovery form and submit supporting documentation.

On March 14, 2013 appellant requested a review of the written record and waiver of the overpayment. He disagreed that an overpayment occurred, disputed the amount of the overpayment and disagreed that he was at fault in the creation of the overpayment. Appellant acknowledged that he returned to work on January 2, 2013 and referenced telephone records in which he called OWCP informing it of his return to work. He submitted an overpayment questionnaire dated March 14, 2013, which noted total monthly income of \$3,400.00 and total monthly expenses of \$4,400.00. Appellant submitted bank statements from Chase dated November 30 to December 21, 2012 and January 31 to February 21, 2013. He stated that he called OWCP and informed his supervisors that he would be returning to work in the beginning of 2013. Appellant asserted that an OWCP representative advised him that, by swiping his time card, he would automatically trigger the return-to-work process. He contended that his supervisors should have prepared the proper return-to-work paperwork. Appellant noted that he was informed that, after he returned to work, OWCP would issue a final payment. He noted that he did not receive a third check in March 2013 as noted in the preliminary overpayment notice argued and that the total amount of overpayment was incorrect. Appellant asserted that it would be a hardship for him to repay the overpayment as his home is in foreclosure.

In an e-mail dated April 5, 2013, OWCP requested that a tracer be placed on appellant's compensation check for the period February 10 to March 9, 2013, with an issue date of March 9, 2013 in a net amount of \$2,439.55. In a report dated April 9, 2013, it cancelled the compensation check for the period February 10 to March 9, 2013.

In a decision dated April 16, 2013, OWCP amended the overpayment amount and found that appellant received a \$3,384.40 overpayment of compensation from January 2 to February 9, 2013, for which he was at fault. The overpayment occurred because he returned to work full time for eight hours a day on January 2, 2013 but continued to receive compensation for total disability until February 9, 2013. OWCP explained that appellant was paid \$5,823.95 in compensation from January 2 to March 9, 2013. It noted that the check for the period February 10 to March 9, 2013, \$2,439.55, was not cashed and was cancelled. The amount of the cancelled check, \$2,439.55, was deducted from the total overpayment amount that included for the period January 2 to March 9, 2013. It found that appellant was at fault in creating the overpayment because he reasonably knew or should have known that he was not entitled to compensation benefits for total disability while working full time. OWCP noted that he was issued checks in the mail, which clearly stated the period dates of the payments on the checks. Therefore, appellant should have known that he was overpaid compensation when he received the checks in the mail after he returned to work. OWCP also noted that he accepted one more check for the time periods from January 13 to February 9, 2013. It directed appellant to repay \$89.00 a month until the overpayment was collected or contact OWCP to make other arrangements.

LEGAL PRECEDENT -- ISSUE 1

A claimant is not entitled to receive temporary total disability and actual earnings for the same period. OWCP's procedures provide that an overpayment in compensation is created when a claimant returns to work but continues to receive wage-loss compensation.³

ANALYSIS -- ISSUE 1

The record establishes that appellant returned to work full time, eight hours a day, at the employing establishment on January 2, 2013. He received wage-loss compensation for total disability through February 9, 2013. As noted, appellant is not entitled to receive compensation for total disability after he has returned to work. Thus, an overpayment occurred.

The evidence indicated that appellant returned to full-time work without wage loss on January 2, 2013. He was not entitled to total disability compensation beginning that date. OWCP calculated that, from January 2 to February 9, 2013, he received \$3,384.40 in total disability compensation but was not entitled to compensation during this period. It explained how the overpayment occurred and provided this information to appellant with the preliminary notice. There is no evidence that the overpayment did not occur as found by OWCP. The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$3,384.40 for the period January 2 to February 9, 2013.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of FECA provides as follows:

“Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience.”⁴

No waiver of an overpayment is possible if the claimant is at fault in creating the overpayment.⁵

On the issue of fault, 20 C.F.R. § 10.433(a) provides that an individual is with fault in the creation of an overpayment who: (1) made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; (2) failed to furnish information which the individual knew or should have known to be material; or (3) with respect to the overpaid

³ *Danny E. Haley*, 56 ECAB 393 (2005); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(a) (May 2004).

⁴ 5 U.S.C. § 8129(b).

⁵ *Gregg B. Manston*, 45 ECAB 344 (1994).

individual only, accepted a payment which the individual knew or should have been expected to know was incorrect.⁶

With respect to whether an individual is without fault, section 10.433(b) of OWCP's regulations provide that 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 or she is being overpaid.⁷

Section 10.430(a) of OWCP's regulations advise that OWCP includes on each periodic check a clear indication of the period for which payment is being made. A form is sent to the recipient with each supplemental check which states the period for which payment is being made. Section 10.430(b) notes that, by these means, OWCP puts the recipient on notice that a payment was made and the amount of the payment.⁸

ANALYSIS -- ISSUE 2

OWCP applied the third standard in determining that appellant was at fault in creating the overpayment. For it to establish that he was at fault in creating the overpayment of compensation, OWCP must establish that, at the time he accepted the compensation checks in question, he knew or should have known the payments were incorrect.⁹

As noted, OWCP erroneously issued wage-loss compensation for total disability for the period January 2 to February 9, 2013. Appellant was not entitled to disability compensation for this period as he returned to work at full salary. Even if the overpayment resulted from negligence on the part of OWCP, this does not excuse him from accepting payments which he knew or should have known to be incorrect.¹⁰ On April 15, 2011 OWCP advised appellant: "In order to avoid an overpayment of compensation, NOTIFY THIS OFFICE IMMEDIATELY WHEN YOU GO BACK TO WORK. Each payment made through the Office's automated system will include the period for which payment is made. If you have worked for any portion of this period, you must return the check to this Office. Otherwise, an overpayment of compensation may result."

In response to the preliminary overpayment notice, appellant stated that he called OWCP and his supervisors and informed them that he would be returning to work in the beginning of 2013. He asserted that an OWCP representative advised him that, by swiping his time card, he would automatically trigger the return to work process. Appellant also contended that his supervisors should have prepared the proper return to work paperwork. He advised it would be a

⁶ 20 C.F.R. § 10.433(a). See *Kenneth E. Rush*, 51 ECAB 116 (1999).

⁷ *Id.* at § 10.433(b).

⁸ *J.R.*, Docket No. 08-1107 (issued June 15, 2009). 20 C.F.R. § 10.430.

⁹ See *Claude T. Green*, 42 ECAB 174, 278 (1990).

¹⁰ See *Russell E. Wageneck*, 46 ECAB 653 (1995).

hardship for him to repay the overpayment. The Board notes that OWCP includes on each periodic check a clear listing of the period for which payment is being made. By doing this, OWCP puts the recipient on notice that a payment was made and the amount of the payment.¹¹ This, together with the strongly worded August 15, 2011 warning, establishes that appellant should have known that he was not entitled to accept wage-loss compensation for total disability for any period after he returned to work.

For these reasons, OWCP properly found that appellant accepted wage-loss compensation from January 2 to February 9, 2013, which he knew or should have known was incorrect. As appellant was at fault under the third fault standard, outlined above, recovery of the \$3,384.40 overpayment of compensation may not be waived.¹²

On appeal, appellant reiterated that he called OWCP and his supervisors and informed them that he would be returning to work in the beginning of 2013, he indicated that he was advised by swiping his time card the return-to-work process would automatically be triggered and that he expected to receive a final compensation payment. He further asserted that it would be a hardship for him to repay the overpayment. However, as noted above, even though the overpayment may have resulted from negligence on the part of OWCP, this does not excuse appellant from accepting payment to which he knew or should have known that he was not entitled.¹³ While appellant returned to work he did not return the compensation as OWCP had previously instructed. The evidence supports that he knew or should have known that he accepted an incorrect amount.

CONCLUSION

The Board finds that appellant received an overpayment of compensation from January 2 to February 9, 2013 and that he was at fault in creating the overpayment.

¹¹ See *J.R.*, *supra* note 8.

¹² As OWCP did not direct recovery of the overpayment from continuing compensation payments, the Board does not have jurisdiction over the recovery of the overpayment. See *Desiderio Martinez*, 55 ECAB 245 (2004).

¹³ See *Russell E. Wageneck*, *supra* note 10.

ORDER

IT IS HEREBY ORDERED THAT the April 16, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 13, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board