

FACTUAL HISTORY

On February 3, 2009 appellant, then a 54-year-old maintenance mechanic, filed a traumatic injury claim alleging that he fell off a stool and injured his neck, right shoulder, right hand and back. OWCP accepted his claim for cervical sprain/strain, lumbar sprain/strain, right shoulder sprain/strain, back contusion, aggravation of lumbar radiculopathy and aggravation of cervical radiculopathy. Appellant elected to receive his compensation benefits through direct deposit. OWCP entered him on the periodic rolls on May 19, 2009. Appellant returned to modified duty on July 13, 2009. He accepted a second modified-duty position on November 15, 2010.

OWCP entered appellant on the periodic rolls on February 9, 2012 following a shoulder surgery on October 18, 2011. Appellant elected to receive his compensation through direct deposit. OWCP accepted the additional conditions of left shoulder sprain, left rotator cuff injury and left tendon injury on May 7, 2012. Appellant underwent a third shoulder surgery on June 14, 2012. On August 1, 2012 OWCP accepted the additional conditions of bilateral adhesive capsulitis of the shoulders and bilateral disorder of the bursae and tendons in the shoulder region. Appellant requested a schedule award on August 9, 2013.

By decision dated October 1, 2013, OWCP denied appellant's claim for a schedule award. Appellant requested an oral hearing before an OWCP hearing representative regarding this issue on October 3, 2013.²

In a letter dated July 30, 2013, appellant informed OWCP that he had applied for retirement benefits and elected to stop FECA benefits. He elected to receive benefits from the Office of Personnel Management (OPM) on August 22, 2013 effective July 31, 2013. In a letter dated August 27, 2013, OWCP requested that OPM reimburse it for benefits paid during the period July 31 through August 24, 2013 in the amount of \$2,667.45. On September 20, 2013 it transferred appellant's health benefits effective July 30, 2013.

OWCP issued a preliminary finding of overpayment on October 9, 2013. It determined that appellant had received an overpayment in the amount of \$2,667.45 for the period July 31 through August 24, 2013 as he elected to receive retirement benefits from OPM while receiving compensation for disability from OWCP for the same period. OWCP noted that the 28-day cycle for receiving compensation benefits ended on August 24, 2013. It allowed appellant 30 days for a response.

By decision dated November 14, 2013, OWCP determined that appellant had received an overpayment of compensation in the amount of \$2,667.45 for the period July 31 through August 24, 2013. It further determined that he was at fault in the creation of the overpayment as he accepted a payment which he knew or reasonably should have known was incorrect. OWCP requested payment of the full amount within 30 days.

² Appellant's schedule award claim is not currently before the Board on appeal as he did not appeal this decision before the Board. See 20 C.F.R. § 501.3. Appellant is currently pursuing other appeal rights before OWCP.

LEGAL PRECEDENT -- ISSUE 1

Section 8102 of FECA³ provides that the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.⁴

Section 8116 of FECA defines the limitations on the right to receive compensation benefits. This section of FECA provides that, while an employee is receiving compensation, he may not receive salary, pay or remuneration of any type from the United States, except for services actually performed or for certain payments related to service in the Armed Forces, including benefits administered by the Department of Veterans Affairs unless such benefits are payable for the same injury or the same death being compensated for under FECA.⁵ The implementing regulations provide that a beneficiary may not receive wage-loss compensation concurrently with a federal retirement or survivor annuity.⁶ The beneficiary must elect the benefit that he or she wishes to receive.⁷

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$2,667.45 for the period July 31 through August 24, 2013.

Appellant began receiving OPM benefits *via* direct deposit effective July 31, 2013. As such, any wage-loss compensation he received from OWCP after July 30, 2013 constitutes an overpayment of compensation.⁸ The record shows that OWCP continued to pay appellant compensation in the amount of \$2,667.45 until August 24, 2013. Consequently, any wage-loss compensation appellant received from OWCP for a period beginning on or after July 31, 2013 constitutes an overpayment of benefits. He is not eligible to receive wage-loss compensation and disability retirement benefits from OPM for the same period. OWCP determined that the entire amount of OWCP compensation appellant had received during that period constituted an overpayment because he had received retirement benefits from OPM for the same period. Appellant has not disputed the amount of the overpayment.

On appeal, counsel argued that appellant paid the overpayment after receiving the preliminary notification and that therefore OWCP should not have issued the final decision.⁹

³ 5 U.S.C. §§ 8101-8193, 8102.

⁴ *Id.*

⁵ *Id.* at § 8116(a).

⁶ 20 C.F.R. § 10.421(a).

⁷ *Id.*

⁸ *A.L.*, Docket No. 09-1529 (issued January 13, 2010); *Franklin L. Bryan*, 56 ECAB 310 (2005).

⁹ The record does contain a copy of an October 9, 2013 check in the amount of \$2,667.45 received on November 19, 2013 after the November 14, 2013 decision and not before the Board on this appeal.

The fact that appellant repaid the debt does not render OWCP's final decision on the fact of overpayment unnecessary or inappropriate.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of FECA¹⁰ provides that, where an overpayment of compensation has been made "because of an error or fact of law," adjustment shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): "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 FECA or would be against equity and good conscience."¹¹ Accordingly, no waiver of an overpayment is possible if the claimant is with fault in helping to create the overpayment.

In determining whether an individual is with fault, section 10.320(b) of OWCP's regulations¹² provide in relevant part:

"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; or
- (2) Failed to furnish information which the individual knew or should have known to be material; or
- (3) With respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect."

The Board has found the claimant to be at fault in cases where he or she is receiving compensation checks through direct deposit which involve a series of payments over several months with clear knowledge that the payments were incorrect.¹³ It is not appropriate, however, 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 could be established either through documentation such as a bank statement or notification from OWCP or where a reasonable period of time has passed during which a claimant could have reviewed independent confirmation of the incorrect payment.¹⁴

¹⁰ 5 U.S.C. § 8101-8193, 8129(a).

¹¹ *Id.* at § 8129(b).

¹² 20 C.F.R. § 10.320(b).

¹³ See *Karen K. Dixon*, 56 ECAB 145 (2004).

¹⁴ See *K.H.*, Docket No. 06-191 (issued October 20, 2006).

ANALYSIS -- ISSUE 2

OWCP found that appellant was at fault in creating the overpayment under the third standard noted above, that he knew or should have known that he accepted a payment that was not correct. The Board finds that appellant was not at fault in the creation of a \$2,667.45 overpayment for the period July 31 through August 24, 2013.

An overpayment of compensation occurred in this case when appellant elected to receive OPM benefits effective July 30, 2013 and received compensation for temporary total disability for the period July 31¹⁵ through August 24, 2013. The compensation check thus covered two periods: a period of total disability through July 30, 2013, for which appellant remained entitled to compensation and a period of dual benefits from July 31 through August 24, 2013 for which he was not entitled to compensation. It is during this latter period that the overpayment occurred.

OWCP determined that appellant was at fault in the creation of the overpayment because he accepted payments that he knew or reasonably should have known to be incorrect. In cases where a claimant receives compensation through direct deposit, however, OWCP must establish that at the time a claimant received the direct deposit in question he knew or should have known that the payment was incorrect.¹⁶ The Board has held that an employee who receives payments from OWCP in the form of a direct deposit might not be at fault the first time an incorrect payment is deposited into his or her account since the acceptance of the overpayment, at the time of receipt of the direct deposit, lacks the requisite knowledge.¹⁷ OWCP's regulations, effective August 29, 2011, place claimants on notice that good faith and exercise of a high degree of care in regard to receipt of benefits require review of electronic bank statements. This regulation does not diminish the effect of the Board's previous decisions, as in *Tammy Craven*,¹⁸ that the deposit of compensation into appellant's bank account marks the moment that the claimant gains control of the funds from the U.S. Treasury and the overpayment was created. As explained in *Craven*, because fault is defined by what the claimant knew or should have known at the time of acceptance, one of the consequences of electronic fund transfers is that a claimant may not be at fault for accepting the first incorrect payment because the requisite knowledge is lacking at the time of deposit.

In this case, appellant received a payment electronically for a period ending August 24, 2013. Although he accepted the overpayment in this case by gaining control of the funds deposited into his account, OWCP has not shown that he knew or should have known at the time of the electronic deposit of August 24, 2013 that the payment was incorrect.¹⁹ It has not

¹⁵ The 28-day period for the periodic rolls payment began prior to July 30, 2013. The 28th day prior to August 24, 2013 is July 27, 2013, a Saturday, appellant's compensation included premium pay for Sunday, July 28, 2013.

¹⁶ *C.K.*, Docket No. 12-746 (issued May 1, 2012); *J.H.*, Docket No. 11-114 (issued July 18, 2011); *R.C.*, Docket No. 10-2113 (issued July 6, 2011); *C.S.*, Docket No. 10-926 (issued March 16, 2011).

¹⁷ *Tammy Craven*, 57 ECAB 689 (2006); see also *George A. Hirsch*, 47 ECAB 520 (1996).

¹⁸ *Id.*

¹⁹ *R.G.*, Docket No. 07-472 (issued July 3, 2008).

presented sufficient evidence to establish that he accepted a payment which he knew or should have known to be incorrect. The Board finds that OWCP improperly determined that appellant was at fault in the creation of the July 31 through August 24, 2013 overpayment. The Board will set aside OWCP's November 14, 2013 decision on the issues of fault and recovery with respect to the August 24, 2013 electronic payment and remand the case for consideration of waiver based on appellant's current financial circumstances.

CONCLUSION

The Board finds that appellant received an overpayment in the amount of \$2,667.45. The Board finds that appellant was without fault in accepting or creating the overpayment of compensation. The case is remanded to OWCP for a determination of whether appellant is entitled to waiver of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the November 14, 2013 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part. The case is remanded for further development consistent with this decision of the Board.

Issued: June 25, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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