

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

C.B., Appellant)

and)

DEPARTMENT OF HOMELAND SECURITY,)
CUSTOMS & BORDER PROTECTION,)
Imperial, CA, Employer)

**Docket No. 14-536
Issued: June 10, 2014**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA HOWARD FITZGERALD, Acting Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 9, 2014 appellant filed a timely appeal from a December 12, 2013 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.

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$1,026.82 from October 10 through 23, 2008; and (2) whether OWCP properly found that appellant was at fault in the creation of the overpayment and therefore not entitled to waiver of the recovery.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On November 5, 2007 appellant, then a 34-year-old instructor, filed a traumatic injury claim (Form CA-1) alleging burning and aching in his arms and shoulders as a result of an incident that occurred during a training exercise dealing with resisting arrest. On May 16, 2008 OWCP accepted his claim for a bilateral sprain of the shoulder and upper arm involving the rotator cuff. It paid medical and compensation benefits. Appellant's compensation was deposited directly into his bank account.

On September 25, 2008 appellant claimed compensation for the period October 10 through 24, 2008; and on October 16, 2008 he claimed compensation as of October 24, 2008.

In a report dated October 20, 2008, Dr. Robert E. Pennington, Board-certified in physical medicine and rehabilitation, noted that appellant's left shoulder arthroscopy and subacromial decompression procedure had been rescheduled to October 24, 2008. Appellant underwent these procedures on that date.

An examination of appellant's compensation history reveals that on November 21, 2008 OWCP paid his disability compensation for the period October 10 through November 5, 2008 in the amount of \$3,192.39.

Appellant stopped work on October 24, 2008, the date of his surgery. On November 6, 2008 he returned to work on full-time light duty.

On July 19, 2013 OWCP made a preliminary determination that appellant received an overpayment of compensation in the amount of \$1,026.82. Appellant stopped work on October 24, 2008 and returned to work on November 6, 2008, but received compensation for the period October 10 through 23, 2008. As he was overpaid from October 10 through 23, 2008, he received an overpayment of compensation in the amount of \$1,026.82. OWCP also found that appellant was at fault, as he accepted compensation to which he knew or reasonably should have known he was not entitled.

By decision dated December 12, 2013, OWCP finalized the overpayment in the amount of \$1,026.82. It determined that waiver of overpayment was not appropriate, as appellant knowingly accepted wage-loss compensation to which he was not entitled while he continued full-time work.

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.² 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

² 5 U.S.C. § 8102(a).

limited circumstances.³ OWCP's 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.⁴ A claimant is not entitled to receive temporary total disability and actual earnings for the same period.⁵ OWCP's procedures provide that an overpayment in compensation is created when a claimant works and has earnings but continues to receive wage-loss compensation.⁶

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$1,026.82. The record reflects that he received wage-loss compensation for the period October 10 through 23, 2008, but received wages from the employing establishment during this period. OWCP determined that the amount of compensation appellant received for the period October 10 through 23, 2008 totaled \$1,026.82. Because appellant received regular full-time wages from the employing establishment for this period, the Board finds that his receipt of dual payments created an overpayment of compensation. He has not submitted any evidence showing that he did not receive an overpayment of compensation or contesting the amount of the overpayment. The Board finds that OWCP properly determined that appellant received an overpayment in the amount of \$1,026.82 for the period October 10 through 23, 2008.

On appeal, appellant argues that he did not receive an overpayment because no payment from OWCP appeared on his earnings and leave statements. The record, however, clearly substantiates that he received the overpayment in question.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of FECA provides that 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.⁷ No waiver of an overpayment is possible if the claimant is at fault in creating the overpayment.⁸

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; or (2) failed to furnish information which the individual knew or should have known to be material; or (3) with respect to the overpaid

³ *Id.* at § 8116(a).

⁴ 20 C.F.R. § 10.500(a).

⁵ *Supra* note 3.

⁶ *See L.S.*, 59 ECAB 350, 353-54 (2008); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(d) (May 2004).

⁷ 5 U.S.C. § 8129(b).

⁸ *Gregg B. Manston*, 45 ECAB 344, 354 (1994).

individual only, accepted a payment which the individual knew or should have been expected to know was incorrect.⁹

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.¹⁰

ANALYSIS -- ISSUE 2

OWCP applied the third standard in this case, finding that appellant accepted a compensation payment on November 21, 2008 that he knew or should have known was incorrect. Appellant accepted wage-loss compensation payment for the period October 10 through November 5, 2008, encompassing the period October 10 through 23, 2008 when he continued to work with no wage loss. The Board finds, however, that OWCP failed to establish that, at the time appellant accepted the payment of compensation, he knew or should have known that the payment was incorrect.

In cases where a claimant receives compensation through direct deposit, the Board has held that OWCP must establish that at the time a claimant received the direct deposit in question that he or she knew or should have known that the payment was incorrect.¹¹ The Board has held that an employee who receives payments from OWCP in the form of a direct deposit may not be at fault for the first incorrect deposit into his or her account, since the acceptance of the overpayment, at the time of receipt of the direct deposit, lacks the requisite knowledge.¹² Because the 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 the claimant lacks the requisite knowledge at the time of the first incorrect payment.¹³ Whether or not OWCP determines that an individual is at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment.¹⁴ It is not appropriate, however, to make a finding that a claimant has accepted an overpayment by 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 documentations 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.¹⁵

⁹ 20 C.F.R. § 10.433(a). See *Kenneth E. Rush*, 51 ECAB 116, 118 (1999).

¹⁰ *Id.* at § 10.433(b).

¹¹ See *C.K.*, Docket No. 12-746 (issued May 1, 2012).

¹² See *Tammy Craven*, 57 ECAB 689, 692 (2006).

¹³ *J.S.*, Docket No. 12-1707 (issued June 10, 2013).

¹⁴ *Id.*, see also *K.D.*, Docket No. 13-451 (issued April 12, 2013).

¹⁵ See *K.H.*, Docket No. 13-451 (issued April 12, 2013).

The Board finds that appellant was not at fault in the creation of the overpayment. Appellant's surgery was rescheduled to October 24, 2008, and OWCP was informed of this fact by November 14, 2008 prior to the November 21, 2008 payment. However, he worked and received regular full-time wages during the period that the overpayment was created, October 10 through 23, 2008. Appellant's check was deposited electronically into his account and this was the first incorrect payment made to him. There is no documentation or other evidence to demonstrate that he had clear knowledge that at the time he received a direct deposit from OWCP on November 21, 2008, covering the period October 10 through November 5, 2008, that a portion of the payment was incorrect or that a reasonable period of time passed during which he could have reviewed bank statements or been informed of the incorrect payment. Accordingly, OWCP improperly determined that he was at fault in the creation of the overpayment.

The Board finds that this case is not in posture for decision regarding the issue of waiver of recovery of overpayment for the direct deposit on November 21, 2008 covering the overpayment from October 10 through 23, 2008. The Board will set aside the December 12, 2013 decision regarding the issue of fault as to the November 21, 2008 direct deposit and will remand the case to OWCP to determine whether appellant is entitled to waiver of recovery for the direct deposit of compensation covering the period October 10 through 23, 2008.

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$1,026.82 for the period October 10 through 23, 2008 because he received dual payments of regular full-time wages and wage-loss compensation from OWCP. The Board further finds that he was without fault for this period of overpayment. The case will be remanded for consideration of waiver of the recovery of the overpayment from October 10 through 23, 2008.

ORDER

IT IS HEREBY ORDERED THAT the December 12, 2013 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part and the case is remanded for further action consistent with this decision of the Board.

Issued: June 10, 2014
Washington, DC

Patricia Howard Fitzgerald, Acting Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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