

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

N.L., Appellant)

and)

DEPARTMENT OF HOMELAND SECURITY,)
IMMIGRATION & CUSTOMS)
ENFORCEMENT, Long Beach, CA, Employer)

Docket No. 14-7
Issued: March 25, 2014

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge

JURISDICTION

On September 30, 2013 appellant filed a timely appeal of a September 11, 2013 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.

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$4,544.41 from October 3 through 20, 2012 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.

On appeal, appellant contends that he was not at fault in the creation of the overpayment.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On June 14, 2011 appellant, then a 42-year-old special agent, filed a traumatic injury claim (Form CA-1) alleging a torn ligament in his right shoulder and back pain as a result of an incident involving an automobile. On March 14, 2012 OWCP accepted his claim for sprain of the shoulder and upper arm and sprain of the neck.² It paid medical and compensation benefits. Appellant's compensation was deposited directly into his bank account. OWCP suspended his compensation on August 23, 2012 due to his failure to respond to a Form CA-1032 reporting earnings from remunerative employment. Appellant submitted this form and his compensation benefits were subsequently reinstated.

On October 3, 2012 appellant returned to work on full-time regular duty.

On June 17, 2013 OWCP made a preliminary determination that appellant received an overpayment of compensation in the amount of \$4,544.41. Appellant returned to work on October 3, 2012, but received compensation for the period September 23 through October 20, 2012. He received compensation every 28 days in the gross amount of \$7,448.94. As appellant was overpaid from October 3 through 20, 2012, he received an overpayment of compensation in the amount of \$4,544.41. It also found that he was at fault, as he accepted compensation to which he knew he was not entitled.

In a record of a telephone conversation dated June 24, 2013, appellant proposed a payment schedule of \$150.00 per pay period to recoup his overpayment and stated that he would like to have any outstanding balance deducted from a future schedule award.

By decision dated September 11, 2013, OWCP finalized the overpayment in the amount of \$4,544.41. It determined that waiver of overpayment was not appropriate, as appellant knowingly accepted wage-loss compensation to which he was not entitled after he returned to 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.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'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.⁵ A claimant

² OWCP initially denied appellant's claim for compensation by decision dated August 12, 2011, but this decision was overturned on reconsideration dated March 14, 2012.

³ 5 U.S.C. § 8102(a).

⁴ *Id.* at § 8116(a).

⁵ 20 C.F.R. § 10.500(a).

is not entitled to receive temporary total disability and actual earnings for the same period.⁶ OWCP's 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 \$4,544.41. The record reflects that he returned to full-time work at the employing establishment on October 3, 2012, but that he received wage-loss compensation benefits for disability through October 20, 2012. OWCP determined that the amount of compensation appellant received for the period October 3 through 20, 2012 totaled \$4,544.41. 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 did not contest the amount or period of the overpayment. The Board finds that OWCP properly determined that appellant received an overpayment in the amount of \$4,544.41 for the period October 3 through 20, 2012.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of FECA provides that, when an overpayment of compensation has been made because of an error of fact or law, adjustment shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is when an incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of FECA or be against equity and good conscience.⁸ No waiver of payment is possible if appellant is with fault in helping to create the overpayment.⁹ In determining whether an individual is with fault, section 10.433(a) of OWCP's regulations provide that an individual is with fault in the creation of an overpayment who: (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.¹⁰

ANALYSIS -- ISSUE 2

OWCP applied the third standard in this case, finding that appellant accepted a compensation payment on October 20, 2012 that he knew or should have known was incorrect. Appellant accepted compensation payment for the period September 23 through October 20,

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 5 U.S.C. § 8129(b).

⁹ See *Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

¹⁰ 20 C.F.R. § 10.433(a).

2012, encompassing the period October 3 through 20, 2012, after he returned 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 payments were 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

The Board finds that appellant was not at fault in the creation of the overpayment. Appellant returned to work on October 3, 2012 and the overpayment was created during the period September 23 through October 20, 2012. His 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 appellant had clear knowledge at the time he received a direct deposit from OWCP on October 20, 2012, covering the period September 23 through October 20, 2012, 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 October 20, 2012 covering the part of the overpayment from October 3 through 20, 2012. The Board will set aside the September 11, 2013 decision regarding the issue of fault as to the October 20, 2012 direct deposit and will remand the case to OWCP to determine whether appellant is entitled to waiver of recovery for the direct

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

¹² See *Tammy Craven*, 57 ECAB 689 (2006); see also *George A. Hirsch*, 47 ECAB 520, 525 (1996).

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).

deposit of compensation covering the period of the overpayment from October 3 through 20, 2012.

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$4,544.41 for the period October 3 through 20, 2012 because he received compensation from OWCP after he returned to work. 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 3 through 20, 2012.

ORDER

IT IS HEREBY ORDERED THAT the September 11, 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: March 25, 2014
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board