

FACTUAL HISTORY

On March 10, 2009 appellant, then a 62-year-old letter carrier, filed an occupational claim (Form CA-2) alleging that he sustained a bilateral knee condition as a result of his federal employment. OWCP accepted the claim for bilateral knee degenerative joint disease on March 17, 2009. On March 24, 2010 it accepted a permanent aggravation of degenerative joint disease. Appellant received wage-loss compensation for intermittent disability. On February 7, 2011 he underwent right knee total arthroplasty surgery. Appellant stopped work and received wage-loss compensation on the periodic rolls as of March 3, 2011.

By letter dated August 5, 2013, the employing establishment offered appellant a light-duty job. Appellant initially indicated that he was accepting the position. In an August 23, 2013 personnel form, the employing establishment advised that he had elected to retire from federal employment.

On September 21, 2013 appellant received a direct deposit of \$3,029.62, representing his 28-day wage-loss compensation for total disability from August 25 to September 21, 2013. According to the record on October 11, 2013, OWCP received a form from the Office of Personnel Management (OPM) stating that appellant elected to receive compensation benefits. On October 17, 2013 appellant submitted to OWCP an election of benefits form reflecting his election of OPM benefits. He elected OPM benefits as of September 1, 2013. With respect to wage-loss compensation, on October 19, 2013, a direct deposit of \$3,029.62 was made for compensation from September 22 to October 19, 2013.

By letter dated October 23, 2013, OWCP advised appellant of a preliminary determination that an overpayment of \$5,301.84 had occurred. Appellant had elected OPM benefits effective September 1, 2013, therefore \$2,272.22 in compensation paid from September 1 to 22, 2013 was an overpayment as was the \$3,029.62 paid from September 22 to October 19, 2013. OWCP made a preliminary determination that appellant was at fault in creating the overpayment, as he knew or should have known he could not receive wage-loss compensation for the same period as OPM retirement benefits.

In a letter dated November 6, 2013, OPM advised that retirement payments were made to appellant effective September 1, 2013. By decision dated November 25, 2013, OWCP finalized its determination that an overpayment of \$5,301.84 occurred for which he was at fault. On December 3, 2013 it reissued the overpayment decision.³

LEGAL PRECEDENT -- ISSUE 1

Section 8116 of FECA defines the limitations on the right to receive compensation benefits. This section provides:

“While an employee is receiving compensation under this subchapter or if he has been paid a lump sum in commutation of installment payments until the

³ The payment instructions now indicated that, if appellant could not send in a payment of \$5,301.84, he would request OPM to deduct an amount from his annuity payments until the overpayment was recovered.

expiration of the period during which the installment payments would continue, he may not receive salary, pay or remuneration of any type from the United States, except--

- (1) in return for service actually performed;
- (2) pension for service in the Army, Navy, or Air Force;
- (3) other benefits administered by the Veterans' Administration unless such benefits are payable for the same injury or the same death; and
- (4) retired pay, retirement pay, retainer pay, or equivalent pay for service in the Armed Forces or the uniformed services, subject to the reduction of such pay in accordance with section 5532(b) of Title 5, United States Code.”

ANALYSIS -- ISSUE 1

In the present case, the record establishes that appellant received wage-loss compensation commencing March 13, 2011 through October 19, 2013. On October 16, 2013 appellant elected OPM retirement benefits effective September 1, 2013. According to OPM, he was paid annuity benefits as of September 1, 2013. As noted, appellant cannot receive both compensation under FECA and retirement pay from OPM for the same period. Therefore, an overpayment of compensation was created from September 1 to October 19, 2013.

OWCP calculated that appellant was paid \$5,301.84 in wage-loss compensation from September 1 to October 19, 2013. Appellant received \$3,029.62 on September 21, 2013 for the period August 25 to September 21, 2013, of which he was entitled to only \$757.40. The difference of \$2,272.22 and the payment of \$3,029.62 on October 19, 2013 for the period September 22 to October 19, 2013 resulted in the overpayment of \$5,301.84. The Board finds an overpayment of \$5,301.84 was created from September 1 to October 19, 2013.

LEGAL PRECEDENT -- ISSUE 2

5 U.S.C. 8129(b) provides: “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.”⁴ A claimant who is at fault in creating the overpayment is not entitled to waiver.⁵ On the issue of fault 20 C.F.R. § 10.433 provides that an individual will be found at fault 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 was incorrect.”

⁴ 5 U.S.C. § 8129(b).

⁵ See *Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

ANALYSIS -- ISSUE 2

OWCP made a finding of fault on the grounds that appellant accepted a payment he knew or should have known was incorrect. To support this finding, it makes a general finding that he should have known that he could not receive compensation for wage loss and OPM benefits for the same period. A proper analysis of the fault issue requires a review of the specific payments made to appellant that constitute the overpayment and a clear explanation of what he knew or should have known at the time of the acceptance of each payment.

The record indicates that on September 21, 2013 appellant received a direct deposit into his bank account of \$3,029.62, representing his wage-loss compensation from August 25 to September 21, 2013. As the Board explained in *Tammy Craven*,⁶ when a compensation payment is direct deposited into a bank account, the issue of fault is determined at the time of the deposit. The issue is whether, at that time, the evidence establishes that the claimant knew or should have known the payment was incorrect.

There is no basis for finding that, on September 21, 2013, appellant knew or should have known the payment was incorrect. According to the record, appellant did not elect OPM benefits until October 16, 2013 and no evidence was presented that he should have known the September 21, 2013 payment was incorrect. As to the October 19, 2013 deposit, this represents the first deposit after OPM benefits have been elected. In *R.M.*,⁷ the claimant elected OPM benefits on August 22, 2013 effective July 31, 2013. Similar to the present case, OWCP issued a direct deposit payment on August 24, 2013, two days after the election of OPM benefits. The Board explained that OWCP improperly found that the claimant was at fault, because there was no evidence that on August 24, 2013 appellant knew or should have known that the payment was incorrect. In the present case, the deposit is three days after the election of OPM benefits and no specific evidence was presented that appellant knew or should have known the payment was incorrect.

The Board accordingly finds that the record does not support a finding of fault with respect to the overpayment in this case. Since appellant is not at fault in creating the overpayment, the waiver issue must be considered.⁸ The case will be remanded to OWCP for proper findings with respect to waiver of the overpayment. After such further development as is deemed necessary, OWCP should issue an appropriate decision.

CONCLUSION

The Board finds that an overpayment of \$5,301.84 was created. The Board further finds that the record does not support a finding of fault in creating the overpayment and the case is remanded for consideration of waiver of the overpayment.

⁶ 57 ECAB 689 (2006).

⁷ Docket No. 14-428 (issued June 25, 2014).

⁸ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 3, 2013 is affirmed with respect to fact and amount of overpayment and set aside and remanded with respect to the finding of fault and denial of waiver.

Issued: November 21, 2014
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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