

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

M.O., Appellant

and

U.S. POSTAL SERVICE, POST OFFICE,
Pittsburgh, PA, Employer

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**Docket No. 14-1133
Issued: September 22, 2014**

Appearances:

*Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On April 17, 2014 appellant, through his representative, filed a timely appeal from an April 9, 2014 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 found an overpayment of \$3,456.72 was created; (2) whether OWCP properly found that appellant was at fault in creating the overpayment; and (3) whether OWCP properly determined the overpayment would be recovered from appellant's schedule award.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

The case was before the Board on a prior appeal. By decision dated May 4, 2007, the Board affirmed an October 3, 2006 schedule award decision for a nine percent right leg impairment.² The Board noted that the claim had been accepted for a right knee sprain and a medial meniscus tear incurred while in the performance of duty on June 4, 2002. The medical evidence established that appellant had a nine percent right leg impairment based on reduced cartilage interval in the right knee and a partial medial meniscectomy. The history of the case as set forth in the Board's May 4, 2002 decision is incorporated herein by reference.³

On April 16, 2012 appellant underwent arthroscopic surgery on the right knee, performed by Dr. Jon Tucker, a Board-certified orthopedic surgeon. He began receiving compensation for wage loss as of April 16, 2012. Appellant completed a direct deposit bank form on April 6, 2012 and the record reflects that his compensation payments were direct deposited into his bank account. On July 30, 2012 he underwent patellofemoral joint replacement surgery. Appellant underwent additional right knee surgery on August 22, 2012.

By letter dated July 10, 2012, OWCP advised appellant that he would be receiving continuing wage-loss compensation covering a 28-day period. Appellant was advised that he must notify OWCP immediately upon his return to work and, if he worked for any portion of the period covered by a payment, he must return the payment to OWCP.

In a memorandum of telephone call (Form CA-110) dated July 26, 2013, appellant advised OWCP that he returned to light-duty work on July 26, 2013 at eight hours a day.

On July 27, 2013 appellant received a deposit of \$3,226.27, representing his wage-loss compensation from June 30 to July 27, 2013. On August 24, 2013 he received a deposit of \$3,226.27 for the period July 28 to August 24, 2013.

By letter dated August 27, 2013, OWCP advised appellant of a preliminary determination that an overpayment of \$3,456.72 had occurred because he was paid compensation after his return to work at full salary. The calculations indicated that an overpayment of \$230.45 occurred from the July 27, 2013 payment and the entire amount of the August 24, 2013 payment constituted an overpayment. OWCP found that appellant was at fault in creating the overpayment as he knew or should have known that he could not receive wage-loss compensation after his return to work. In addition, it advised him to complete an OWCP-20 questionnaire and submit supporting financial documents, as this was necessary information on the issues of waiver and recovery of the overpayment.

Appellant requested a prerecoupment hearing before an OWCP hearing representative, which was held on February 10, 2014. At the hearing, he noted that he would have paid the overpayment amount to OWCP, but he did not agree with the finding that he was at fault.

² Docket No. 07-82 (issued May 4, 2007).

³ The Board notes that appellant has a pending appeal with the Board regarding an April 1, 2014 schedule award decision.

By decision dated April 9, 2014, the hearing representative finalized the overpayment determinations. The hearing representative found that appellant was paid two electronic transfer payments after his return to work on July 26, 2013 and he knew or should have known that payments were incorrect as OWCP had advised him that he must return payments if he worked for any period covered by the payment. The hearing representative noted that appellant stated at the hearing that he could repay the overpayment and found that it should be recovered by deducting \$3,456.72 from his next two schedule award payments.

LEGAL PRECEDENT -- ISSUE 1

5 U.S.C. § 8116 defines the limitations on the right to receive compensation benefits. This section of FECA provides that, while an employee is receiving compensation, he or she may not receive salary, pay or remuneration of any type from the United States, except in limited circumstances.⁴ 20 C.F.R. § 10.500 provides that “compensation for wage loss due to disability is available only for any periods during which an employee’s work-related medical condition prevents him or her from earning the wages earned before the work-related injury.” A claimant is not entitled to receive compensation for temporary total disability and actual earnings for the same period.⁵

ANALYSIS -- ISSUE 1

The record reflects that appellant received wage-loss compensation on the periodic rolls. He returned to full-time work on July 26, 2013. As noted, appellant is not entitled to wage-loss compensation upon his return to work at full salary. The record establishes that he received wage-loss compensation through August 24, 2013. Appellant received a compensation payment by direct deposit of \$3,226.27 on July 27, 2013, covering the period June 30 to July 27, 2013. He received an additional direct deposit payment of \$3,226.27 on August 24, 2013 covering the period July 28 to August 24, 2013. OWCP determined that appellant was overpaid \$230.45 for two days in the July 27, 2013 payment, as he had worked July 26 and 27, 2013.

The resulting overpayment is therefore \$230.45 plus \$3,226.27 received on August 24, 2013, for a total overpayment of \$3,456.72. On appeal, appellant did not contest the fact or amount of the overpayment. The Board finds that an overpayment of \$3,456.72 was created in this case.

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

⁴ 5 U.S.C. § 8116(a).

⁵ *Daniel Renard*, 51 ECAB 466, 469 (2000).

conscience.”⁶ A claimant who is at fault in creating the overpayment is not entitled to waiver.⁷ 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.”

ANALYSIS -- ISSUE 2

OWCP found that appellant was at fault in the creation of the overpayment because he accepted payments he knew or should have known to be incorrect. Appellant returned to work on July 26, 2013. He received direct deposit payments on July 27 and August 24, 2013 for temporary total disability. In reviewing cases regarding whether a claimant receives direct deposited wage-loss compensation after a return to work, the Board has drawn a distinction on this issue of fault between the first payment received and subsequent payments. 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.⁸

In *D.B.*,⁹ the claimant returned to work on March 13, 2012 and received a direct deposit on April 7, 2012 covering the period March 11 to April 7, 2012. The Board found that OWCP improperly found appellant at fault for accepting this payment, as it was direct deposited and he was not in a position to be aware of an incorrect payment or decline acceptance at that time. For subsequent 28-day wage-loss compensation deposits, however, appellant should have known that the payments were incorrect as he could not continue to receive wage loss for total disability compensation after his return to work at full salary.

The Board finds that appellant is not at fault in accepting the July 27, 2013 payment, as he was not in a position to be aware that this payment was incorrect. OWCP must consider the issue of waiver with respect to the \$230.45 overpayment created by the July 27, 2013 payment. For the subsequent August 24, 2013 payment, however, appellant is found to be at fault. At that point, he knew or should have known that the payment representing total disability following his return to work on July 26, 2013 at full salary was incorrect.

Appellant raised the argument regarding the first payment after return to work and cited the case of *V.A.*¹⁰ In that case, the overpayment was based only on a single payment following a return to work and the Board found that he was not at fault. To the extent appellant is arguing that the entire overpayment in this case should be eligible for waiver, the *V.A.*, case is

⁶ 5 U.S.C. § 8129(b).

⁷ See *Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

⁸ See *Tammy Craven*, 51 ECAB 689 (2006).

⁹ Docket No. 14-397 (issued June 3, 2014).

¹⁰ Docket No. 13-1433 (issued December 13, 2013).

distinguishable from the facts in this appeal. After the first deposit, he may be found at fault for subsequent 28-day compensation payments deposited, as discussed.

LEGAL PRECEDENT -- ISSUE 3

When an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to OWCP the amount of the overpayment as soon as the error is discovered or his or her attention is called to same. If no refund is made, OWCP shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize any hardship.¹¹

ANALYSIS -- ISSUE 3

As the discussion regarding fault notes, OWCP must consider waiver with respect to \$230.45 of the overpayment. On appeal, appellant noted that he is pursuing an increased schedule award and therefore OWCP should not collect the overpayment from his current schedule award. The issue of a possible increased schedule award does not impact the recovery of the overpayment in this case. The Board has held that OWCP may properly collect an overpayment from the amount of compensation owed a claimant through a schedule award.¹² Appellant was advised to submit relevant financial evidence in the preliminary determination of overpayment, but there is no evidence that he submitted an OWCP-20 or other financial documentation. It is his responsibility to submit relevant financial information with respect to recovery of the overpayment.¹³ There was no evidence of any financial hardship from collecting the overpayment from two schedule award payments. The Board finds that OWCP properly determined that the overpayment could be recovered from the schedule award payments in this case.

CONCLUSION

The Board finds that OWCP properly found an overpayment of \$3,456.72 was created. As to fault, OWCP properly found that appellant was at fault with respect to \$3,226.27 deposited on August 24, 2013. The finding of fault is set aside with respect to an overpayment of \$230.45 deposited on July 27, 2013 and the case remanded for consideration of waiver. The Board further finds that OWCP may properly recover the overpayment from schedule award compensation.

¹¹ 20 C.F.R. § 10.441(a).

¹² See *D.S.*, Docket No. 14-378 (issued June 11, 2014).

¹³ 20 C.F.R. § 10.438.

ORDER

IT IS HEREBY ORDERED THAT the decision dated April 9, 2014 is affirmed with respect to fact and amount of a \$3456.72 overpayment, affirmed with respect to a finding of fault regarding \$3,226.27 of the overpayment, set aside and remanded for consideration for waiver of \$230.45 and affirmed with respect to recovery of the overpayment.

Issued: September 22, 2014
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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