

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

R.R., Appellant	)	
	)	
and	)	<b>Docket No. 15-1395</b>
	)	<b>Issued: December 11, 2015</b>
<b>DEPARTMENT OF THE TREASURY, OFFICE</b>	)	
<b>OF THE SECRETARY, Washington, DC,</b>	)	
<b>Employer</b>	)	
	)	

*Appearances:* *Case Submitted on the Record*  
Alan J. Shapiro, Esq., for the appellant,  
Office of Solicitor, for the Director

**DECISION AND ORDER**

Before:  
CHRISTOPHER J. GODFREY, Chief Judge  
COLLEEN DUFFY KIKO, Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On June 9, 2015 appellant, through counsel, filed a timely appeal of a May 26, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (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 appellant received an overpayment of compensation in the amount of \$4,247.48 for the period February 25 through April 4, 2015; and (2) whether appellant was at fault in the creation of the overpayment.

**FACTUAL HISTORY**

On August 26, 2013 appellant, then a 51-year-old painter, filed a traumatic injury claim (Form CA-1) alleging that he wrenched his lower back in the performance of duty on

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

August 22, 2013. He stopped work on August 22, 2013. OWCP accepted appellant's claim for lumbar sprain. It expanded the claim to include aggravation of lumbar spondylosis.

In a letter dated September 26, 2013, OWCP advised appellant that, in order to avoid an overpayment of compensation, he was to immediately notify OWCP of his return to work. Appellant was advised that he was required to return any check to OWCP which included a period during which he worked. He was placed on the periodic rolls effective September 21, 2014. On October 25, 2013 appellant elected to receive his payments through direct deposit.

In a letter dated April 7, 2015, Stacie Gibbs, a human resource specialist, notified OWCP that appellant had returned to full-time limited duty on February 25, 2015. However, OWCP continued to pay compensation benefits until April 4, 2015.

OWCP subsequently determined that an overpayment occurred. It determined that it paid appellant, *via* direct deposit, the net amount of \$4,247.48 in compensation for total disability for the period February 25 through April 4, 2015.<sup>2</sup> OWCP noted that it had deducted health benefits insurance, basic life insurance, and optional life. It determined that for the period February 25 to March 7, 2015, he was overpaid \$1,196.94. OWCP determined that, for the period March 8 to April 4, 2015, he was overpaid \$3,050.54.

On April 24, 2015 OWCP notified appellant of its preliminary determination that he received an overpayment of compensation in the amount of \$4,247.48 for the period February 25 through April 4, 2015 because he received compensation for total disability after he returned to full-time limited-duty work, effective February 25, 2015, without wage loss. It found that he was at fault in creating the overpayment because he accepted a payment which he knew or should have known to be incorrect. An OWCP memorandum and fiscal worksheet noted that appellant was on the periodic rolls and received gross compensation every 28 calendar days in the amount of \$3,340.00. OWCP found that he should have received no compensation during this period as he returned to work on February 25, 2015 without wage loss. Thus, it found that appellant received an overpayment of \$4,247.48 from wage-loss compensation for total disability while working with no loss of wages for a period of 39 days. OWCP informed him of his review rights and instructed him to complete an enclosed overpayment recovery questionnaire form (OWCP-20) and submit supporting documentation. No response was received.

By decision dated May 26, 2015, OWCP finalized its finding that appellant received an overpayment of compensation in the amount of \$4,247.48 for the period February 25 through April 4, 2015, based upon his receipt of compensation for disability after he returned to work. It further found that he was at fault in the creation of the overpayment, as he accepted a payment which he knew or should have known was incorrect. OWCP directed that appellant forward payment for the full amount or to contact it to make other repayment arrangements.

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<sup>2</sup> On March 7, 2015 appellant received a net compensation payment of \$3,042.72 covering the period February 8 to March 7, 2015. On April 4, 2015 a payment in the net amount of \$3,050.54 was deposited for the period March 8 to April 4, 2015.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8102 of FECA<sup>3</sup> 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.<sup>4</sup>

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 or she may not receive salary, pay, or remuneration of any type from the United States, except in limited circumstances.<sup>5</sup> OWCP regulations provide 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.<sup>6</sup>

A claimant is not entitled to receive temporary total disability and actual earnings for the same period.<sup>7</sup> OWCP procedures provide that an overpayment in compensation is created when a claimant returns to work, but continues to receive wage-loss compensation.<sup>8</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that appellant received an overpayment of compensation in the amount of \$4,247.48. The record supports, and appellant has not disputed, that he continued to receive compensation from the date that he returned to full-time employment for the period February 25 through April 4, 2015 in the amount of \$4,247.48. When an employee returns to work and ceases to have any loss of wages, he is no longer entitled to compensation for wage loss.<sup>9</sup> As appellant was not entitled to compensation after his return to work, OWCP properly found an overpayment of compensation in the amount of \$4,247.48.

### **LEGAL PRECEDENT -- ISSUE 2**

Under section 8129 of FECA and its implementing regulations, an overpayment must be recovered unless 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.<sup>10</sup> Section 10.433 of the implementing regulations provide that OWCP may consider waiving an overpayment if the individual to whom it was made was not at fault in

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<sup>3</sup> 5 U.S.C. §§ 8101-8193.

<sup>4</sup> *Id.* at § 8102.

<sup>5</sup> *Id.* at § 8116(a).

<sup>6</sup> 20 C.F.R. § 10.500(a).

<sup>7</sup> *See R.W.*, Docket No. 13-1285 (issued November 13, 2013).

<sup>8</sup> *See Danny E. Haley*, 56 ECAB 393 (2005); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2a (May 2004).

<sup>9</sup> *See Kenneth E. Rush*, 51 ECAB 116 (1999).

<sup>10</sup> 20 C.F.R. § 8129(b); 20 C.F.R. §§ 10.433, 10.434, 10.436, 10.437.

accepting or creating the overpayment.<sup>11</sup> The regulations further provide that each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from OWCP are proper.<sup>12</sup> Under the regulations, a recipient will be found to be at fault with respect to creating an overpayment if he or she accepted a payment which he or she knew or should have known to be incorrect.<sup>13</sup> Whether OWCP determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment.<sup>14</sup>

The Board has found the claimant to be at fault in cases where he is receiving compensation checks through direct deposit involving a series of payments over several months with clear knowledge that the payments were incorrect.<sup>15</sup> 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.<sup>16</sup>

### **ANALYSIS -- ISSUE 2**

OWCP found that appellant was at fault in the creation of the overpayment because he accepted a payment that he knew or should have known to be incorrect. The Board finds that he was without fault with regard to OWCP's first direct deposit following his return to work, but he was at fault in creating the overpayment resulting from the second such deposit.

OWCP records indicate that, on March 7, 2015, appellant received a net direct deposit payment of \$3,042.72 for the period February 8 to March 7, 2015, and that on April 4, 2015 he received a net direct deposit payment of \$3,050.54 for the period March 8 to April 4, 2015. As explained, since appellant returned to work without wage loss on February 25, 2015, he was not entitled to all of these payments. OWCP calculated that the March 7, 2015 payment resulted in an overpayment of \$1,196.94 for the period February 25 to March 7, 2015. It also determined that the April 4, 2015 payment resulted in an overpayment of \$3,050.54 for the period March 8 to April 4, 2015. OWCP found appellant at fault in creating the overpayment as he was aware or should have been aware that he was not entitled to the entire payment because he had been informed that an overpayment might occur if he did not report his return to work.

The Board has held that an employee who receives payments from OWCP in the form of direct deposit may not be at fault the first time incorrect funds are deposited into his or her

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<sup>11</sup> *Id.* at § 10.433(a).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at § 10.433(a)(3).

<sup>14</sup> *Id.* at § 10.433(b).

<sup>15</sup> *See Karen K. Dixon*, 56 ECAB 145 (2004).

<sup>16</sup> *Tammy Craven*, 57 ECAB 689 (2006).

account, as the acceptance of the resulting overpayment lacks the requisite knowledge.<sup>17</sup> Previous cases have held that receiving an erroneous direct deposit payment immediately following the employee's return to work does not necessarily create the requisite knowledge to find that a claimant was at fault in the creation of the overpayment.<sup>18</sup> However, the Board has found fault in cases where incorrect payments were made over longer periods of time or for substantially greater amounts than previously received.<sup>19</sup> The Board has noted that an employee's failure to return an overpayment is immaterial to the issue of whether he was at fault in its creation.<sup>20</sup>

The Board finds that appellant was without fault regarding the first direct deposit payment for which he received an overpayment of \$1,196.94 on March 7, 2015. While appellant accepted the overpayment by gaining control of the funds deposited into his account pursuant to his authorization, he did not know that he would receive an incorrect payment on that day. Unlike the situation in which a claimant receives a physical check and is aware of the amount of the payment before depositing it into his account, he was not on notice of the amount of the payment until after it was deposited electronically into his account.<sup>21</sup> The Board finds that OWCP improperly determined that appellant was at fault in the creation of the \$1,196.94 overpayment. OWCP has not presented sufficient evidence to establish that for that payment that he knew or should have known it to be incorrect. The Board will, therefore, reverse OWCP's finding of fault regarding the \$1,196.94 payment and remand the case for further development and a final decision on the issue of waiver of this portion of the overpayment.

The Board finds, however, that appellant was at fault in the creation of the overpayment resulting from the April 4, 2015 direct deposit. The record reflects that on September 26, 2013 he was notified that, in order to avoid an overpayment of compensation, he was to immediately notify OWCP of his return to work, and that he was required to return any check to OWCP which included a period during which he worked. After appellant's receipt of the first direct deposit following his return to work, he was on notice that OWCP was making payments to him in error. He knew or should have known that he was not entitled to the benefit of subsequent direct deposits. When appellant received the second deposit on April 4, 2015 in the amount of \$3,050.54 for the period March 8 through April 4, 2015, he had been back at work since February 25, 2015 and would have had no expectation of that compensation. In light of OWCP's clear mandate to provide notification of a return to work and to return any payment received, which included a period during which he worked, a reasonable person would have been aware that an overpayment had occurred. Appellant had the benefit of reviewing bank statements reflecting his receipt of this additional compensation payment. The Board finds that appellant knew or should have known that the April 4, 2015 deposit covering the period March 8 through

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<sup>17</sup> *Id.*

<sup>18</sup> *V.S.*, Docket No. 13-1278 (issued October 23, 2013); *W.P.*, 59 ECAB 514 (2008).

<sup>19</sup> *W.P.*, *id.*

<sup>20</sup> *Id.* (that appellant spent the money or had more than ample opportunity to return it before the preliminary finding of fault is immaterial to whether he was at fault in creating the overpayment).

<sup>21</sup> *W.P.*, *supra* note 18.

April 4, 2015 was in error. Therefore, appellant was at fault in creating this portion of the overpayment and is not entitled to waiver of recovery of the overpayment.<sup>22</sup>

**CONCLUSION**

The Board finds that an overpayment of compensation in the amount of \$4,247.48 was created during the period February 25 through April 4, 2015 because appellant had returned to work without wage loss, but continued to receive compensation for total disability. Appellant is found not to be at fault for the payment deposited on March 7, 2015 because there is no evidence that he knew or should have known that \$1,196.94 of the March 7, 2015 payment was incorrect at the time it was deposited, but he is found at fault with respect to the April 4, 2015 payment of \$3,050.54.

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 26, 2015 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part, and the case is remanded for action consistent with this decision.

Issued: December 11, 2015  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>22</sup> The Board does not have jurisdiction to review the recovery of the overpayment. The Board's jurisdiction is limited to reviewing those cases where OWCP seeks recovery from continuing compensation under FECA. *See* 20 C.F.R. § 10.441(a); *L.C.*, 59 ECAB 569 (2008), n.24, *citing Ronald E. Ogden*, 56 ECAB 278 (2005).