

FACTUAL HISTORY

On April 3, 2012 appellant, then a 43-year-old mail processing clerk, filed an occupational disease claim alleging that his work on the delivery bar code sorter (DBCS) machine aggravated his right shoulder. OWCP accepted the claim for supraspinatus strain of the right shoulder and paid appropriate benefits, including a right shoulder surgery which appellant underwent on October 3, 2012. Appellant began receiving compensation benefits on the periodic compensation rolls as of November 18, 2012. He returned to work in a full-time, limited-duty capacity on December 8, 2012. Appellant received wage-loss compensation on the periodic rolls through January 12, 2013.

In a November 14, 2012 letter, OWCP notified appellant that he would be receiving compensation payments through the periodic compensation rolls. To minimize the possibility of an overpayment of compensation, appellant was instructed to notify OWCP immediately when he went back to work. OWCP noted that, if he received his compensation payments *via* paper check, the payment showed the period for which payment is made. If appellant worked for any portion of that period, he was to return the payment to OWCP, even if he had already advised OWCP that he was working. For payments sent by electronic funds transfer (EFT), a notification of the date and amount of payment appeared on the statement from his financial institution. Appellant was expected to monitor his EFT deposits carefully, at least every two weeks. If he worked for any portion of the period for which a deposit was made, he was to advise OWCP immediately so that the overpayment could be collected. OWCP noted that appellant's first payment would be for the period October 3 to November 17, 2012.

In a check dated December 15, 2012, appellant received a compensation payment in the amount of \$3,135.98 for the period November 18 to December 15, 2012. In a check dated January 12, 2013, appellant received a compensation payment in the amount of \$3,135.98 for the period December 16, 2012 to January 12, 2013.

In a compensation termination calculation worksheet, OWCP noted that for the compensation period December 8 to 15, 2012, by check dated December 15, 2012, appellant received overpayment of \$895.99 and for the compensation period December 16, 2012 to January 12, 2013, by check dated January 12, 2013, appellant received overpayment of \$3,135.98 for a total overpayment of \$4,031.97.

By letter dated January 23, 2013, OWCP advised appellant of a preliminary determination that an overpayment of \$4,031.97 had occurred during the period December 8, 2012 to January 12, 2013 as he was paid compensation after his return to full duty on December 8, 2012. It noted that the total compensation paid for the period December 8, 2012 to January 12, 2013 was \$6,271.96. OWCP found that for the period November 18 to December 7, 2012, a period of 20 days, appellant was owed \$2,239.99. It subtracted the total received of \$6,271.96 from the \$2,239.99 and found the amount of overpayment was \$4,031.97. 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 returning to full-time work. It advised appellant 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 returned to work in a full-time limited-duty capacity on December 8, 2012.

By letter dated January 29, 2013, appellant requested a prereducement hearing on the issues of fault and a possible waiver of the overpayment. He stated that he was not at fault for the overpayment.

OWCP indicated that appellant completed an Overpayment Recovery Questionnaire.² It indicated that on the questionnaire, appellant stated that OWCP withheld his payments for five months and he was entitled to this payment and any payment. Appellant indicated that he was told early on by OWCP that payments were automatic and he had a decision letter dated December 18, 2012 denying benefits for September 8 through October 5, 2012. He thought the payment was for disability compensation because after he filed his claim in April he had not received any compensation until November 1, 2012. Appellant stated that he thought the compensation he received was that what was owed him. He also stated that he had a field nurse assigned to him for recovery back to work and that he was under the impression that the nurse notified OWCP of back to work document as well as doing any necessary paperwork to forward to OWCP on his behalf.

On February 11, 2014 appellant indicated that he no longer desired a hearing and requested immediate cancellation from the Branch of Hearings and Review. On March 18, 2014 OWCP accepted his request for withdrawal of the hearing.

By decision dated February 2, 2015, OWCP finalized the overpayment determination that an overpayment in the amount of \$4,031.97 was created for the period December 8, 2012 through January 12, 2013 for which appellant was at fault as he accepted compensation payments he knew or reasonably should have known he was not entitled to.

LEGAL PRECEDENT -- ISSUE 1

Section 8102 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

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.⁴ Section 10.500 of 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.⁵

² This is not of record.

³ 5 U.S.C. § 8102(a).

⁴ *Id.* at § 8116(a); see *Danny E. Haley*, 56 ECAB 393 (2005).

⁵ 20 C.F.R. § 10.500.

ANALYSIS -- ISSUE 1

Appellant was not entitled to wage-loss compensation after he returned, to work at full salary. The record establishes that appellant returned to full-time, limited-duty work on December 8, 2012. He continued to receive wage-loss compensation until January 12, 2013. By check dated December 15, 2012, appellant received compensation for the period November 18 to December 15, 2012 in the amount of \$3,135.98. He was entitled to compensation for the period November 18 to December 7, 2012 for a total of \$2,239.99. The remaining amount of \$895.99 represents an overpayment for the period December 8 to 15, 2012. By check dated January 12, 2013, appellant also received a compensation payment in the amount of \$3,135.98 for the period December 16, 2012 to January 12, 2013. The resulting overpayment is \$895.99 plus \$3,135.98 for a total of \$4,031.97. Thus, the Board finds that an overpayment of \$4,031.97 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 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 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 in a full-time, limited-duty capacity on December 8, 2012. He received compensation payments by checks dated December 15, 2012 and January 12, 2013 for temporary total disability after returning to work. With respect to whether an individual is with fault, section 10.433(b) of OWCP regulations provide that whether or not OWCP determines that individual was without fault with respect to the creation of the overpayment depends on the circumstances surrounding the overpayment. The degree of care expected could vary with the complexity of the circumstances and the individual's capacity to realize that he or she is being overpaid. The Board has also noted that in applying the tests to determine fault, OWCP should apply a reasonable person test.⁸

⁶ 5 U.S.C. § 8129(b).

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

⁸ *C.D.*, Docket No. 12-193 (issued August 2, 2013).

The Board finds that appellant was at fault in the creation of the overpayment. When appellant returned to full-time, limited-duty capacity on December 8, 2012, he knew he was no longer totally disabled. Appellant was informed of his reporting responsibilities to avoid overpayments in OWCP's November 14, 2012 letter. The checks appellant received on December 15, 2012 and January 12, 2013 clearly noted the period for which wage-loss compensation covered. Even though OWCP incorrectly continued to issue appellant checks for wage-loss compensation after December 8, 2013, this does not excuse his acceptance of such checks which he knew or should have known were incorrect.⁹ Appellants do not get to keep monies erroneously paid merely because they received it. For these reasons, OWCP properly found appellant at fault in the creation of the \$4,031.97 overpayment, thereby precluding waiver of recovery of the overpayment.¹⁰ As appellant is no longer receiving FECA wage-loss compensation, the Board does not have jurisdiction with respect to recovery of the overpayment.¹¹

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation during the period December 8, 2012 through January 12, 2013 in the amount of \$4,031.97. The Board further finds that OWCP properly determined that he was at fault in creating the overpayment of compensation, thereby precluding waiver of recovery of the overpayment.

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

¹⁰ 5 U.S.C. § 8129(b); *L.J.*, 59 ECAB 264 (2007).

¹¹ See *Desiderio Martinez*, 55 ECAB 245 (2004).

ORDER

IT IS HEREBY ORDERED THAT the February 2, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 7, 2015
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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

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