

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

J.H., Appellant

and

**DEPARTMENT OF THE NAVY,
MARINE CORPS RECRUIT DEPOT,
Parris Island, SC, Employer**

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**Docket No. 15-195
Issued: March 17, 2015**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On November 4, 2014 appellant filed a timely appeal from the September 15, 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 to review the merits of this case.

ISSUES

The issues presented on appeal are: (1) whether appellant received a \$1,651.15 overpayment of compensation; and (2) whether he was at fault in creating the overpayment, thereby rendering him ineligible for consideration of waiver of recovery.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On February 5, 2010 appellant, a 46-year-old electrician (high voltage), sustained a traumatic injury in the performance of duty when an outrigger was set down on his foot. OWCP accepted his claim for a crushing injury of the right foot, reflex sympathetic dystrophy of the right foot, and localized primary osteoarthritis (talonavicular) of the right foot, and ankle.

Appellant received compensation for temporary total disability on the periodic rolls. When OWCP placed him on the periodic rolls by direct deposit, it provided the following guidance to avoid overpayments:

“To minimize the possibility of an overpayment of compensation, notify this office immediately when you go back to work. If you receive your compensation payments *via* paper check, the payment shows the period for which payment is made. If you have worked for any portion of this period, return the payment to this office, even if you have already advised the OWCP that you are working. For payments sent by electronic funds transfer (EFT), a notification of the date and amount of payment appears on the statement from your financial institution. If you have worked for any portion of the period for which a deposit was made, advise OWCP immediately so that the overpayment can be collected.” (Emphasis deleted.)

The employing establishment confirmed that appellant returned to full-time duty on October 1, 2013. OWCP nonetheless issued a payment of compensation on October 19, 2013 for the period September 22 to October 19, 2013.

On November 4, 2013 OWCP made a preliminary determination that appellant received a \$1,651.15 overpayment of compensation for the period October 1 through 19, 2013 because he returned to work on October 1, 2013 and received compensation for total disability through October 19, 2013. It found that he was at fault in creating this overpayment because he accepted a payment that he knew or should have known was incorrect. OWCP explained how it calculated the amount of the overpayment. As appellant had received a check for \$2,433.27 in net compensation over a 28-day period, it divided the net compensation by 28 and multiplied by 19, the number of days he was overpaid.

In a decision dated September 5, 2014, an OWCP hearing representative finalized the overpayment determination. The decision held that, since appellant returned to work on October 1, 2013, he was not entitled to the compensation he received for the period October 1 to 19, 2013. It further held that he was at fault in creating the overpayment because he was aware or reasonably should have been aware that he was not entitled to wage-loss compensation after returning to full-time work. As appellant was at fault, he was not eligible for waiver of recovery of the overpayment. As he was no longer receiving compensation from OWCP, the hearing representative found that appellant should forward a check for the full amount of the debt.

LEGAL PRECEDENT -- ISSUE 1

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.² “Disability” means the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury. It may be partial or total.³

Compensation for wage loss due to disability is available only for any periods during which an employee’s work-related medical condition prevents him from earning the wages earned before the work-related injury.⁴

When an overpayment has been made to an individual because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.⁵

ANALYSIS -- ISSUE 1

OWCP accepted appellant’s claim and paid wage-loss compensation for his incapacity, because of his February 5, 2010 employment injury. Appellant returned to full-time work on October 1, 2013. As of that date, the accepted employment injury no longer caused wage loss, and he was no longer entitled to wage-loss compensation.

After appellant returned to work, OWCP made an automatic payment that covered a period after the injury-related wage loss ceased. It issued a payment of compensation on October 19, 2013 by direct deposit covering the period September 22 to October 19, 2013. The direct deposit of this compensation created an overpayment of compensation from October 1 to 19, 2013, as appellant was not entitled to compensation for total disability after returning to work.

OWCP explained in its preliminary determination how it calculated the amount of the overpayment. The Board will therefore affirm OWCP’s September 15, 2014 decision on the issues of fact and amount of overpayment.

LEGAL PRECEDENT -- ISSUE 2

OWCP may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he received

² 5 U.S.C. § 8102(a).

³ 20 C.F.R. § 10.5(f).

⁴ *Id.* at § 10.500(a); *see, e.g., Tammi L. Wright*, 51 ECAB 463 (2000) (where the record established that the employee returned to work at the employing establishment for four hours per day from August 7, 1996 to January 8, 1997, but she received compensation for total disability for that same period, the Board found that the employee received an overpayment of compensation).

⁵ *Id.* at § 8129(a).

from OWCP are proper. The recipient must show good faith and exercise a high degree of care in reporting events which may affect entitlement to or the amount of benefits. A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment: (1) made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or (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 (this provision applies only to the overpaid individual).⁶

Whether or not OWCP determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that he is being overpaid.⁷

ANALYSIS -- ISSUE 2

OWCP found appellant at fault in creating the overpayment of compensation because he accepted a payment which he knew or should have known to be incorrect. However, OWCP failed to provide any explanation of how he was at fault in creating the overpayment when it was OWCP that directly deposited the incorrect payment into his account without prior notice of the amount or period covered.

OWCP made appellant aware what he could do to avoid the creation of an overpayment if he received an incorrect paper check. Such payments showed the period for which the payment was made. If appellant worked for any portion of that period, he was to return the check to OWCP.

In the case of EFTs, however, the notification of the date and amount of payment would appear on the statement from appellant's financial institution. In other words appellant would receive notification only after the deposit was made and the overpayment created. In such a case, OWCP's instructions to appellant were simply to "advise OWCP immediately." It did not tell him what he could do to avoid the creation of an overpayment when an incorrect payment was sent by EFT.

The Board fully addressed this issue in the case of *Tammy Craven*.⁸ The Board explained 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 her account because she may lack the requisite knowledge at the time of acceptance, which is necessarily the time of deposit.

As OWCP did not address how appellant was at fault in creating the overpayment when it was OWCP that directly deposited the incorrect payment into his account, the Board will set aside OWCP's September 15, 2014 decision on the issue of fault and will remand the case for

⁶ 20 C.F.R. § 10.433(a).

⁷ *Id.* at § 10.433(b).

⁸ Docket No. 05-249 (issued June 20, 2005), *order granting petition for recon. and reaffirming prior decision* (issued July 24, 2006).

further consideration. Giving due regard to the case of *Tammy Craven*, OWCP and shall issue a merit decision on whether appellant was at fault in creating the overpayment that occurred when OWCP directly deposited an incorrect payment into his account on October 19, 2013.

CONCLUSION

The Board finds that appellant received a \$1,651.15 overpayment of compensation. The Board further finds that this case is not in posture for decision on whether he was at fault in creating the overpayment. Further action is warranted.

ORDER

IT IS HEREBY ORDERED THAT the September 15, 2014 decision of the Office of Workers' Compensation Programs is affirmed on the issues of fact and amount of overpayment and is set aside on the issue of fault. The case is remanded for further action.

Issued: March 17, 2015
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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