

in the amount of \$1,322.60 had been created as appellant received compensation for the period March 3 to 8, 2014 while receiving pay for work and personal leave; (2) whether OWCP properly denied waiver of the recovery of the overpayments in the amounts of \$2,726.41 for the period June 20 to 30, 2012 and \$1,322.60 for the period March 3 to 8, 2014; and (3) whether OWCP properly found that appellant was at fault in the creation of the overpayment in the amount of \$13,879.92 for the period July 1 to August 25, 2012 and, therefore, ineligible for waiver of the recovery.

On appeal appellant contends that collection of the debt would be against equity and good conscience.

FACTUAL HISTORY

This case has previously been before the Board. On May 7, 2010 appellant, then a 43-year-old auditor, alleged that on October 11, 2009 while he was in Iraq and performing physical fitness he felt a pop in his back and his left arm went numb immediately. OWCP accepted the claim for upper infraspinatus arm and shoulder sprain, neck sprain, and C5-6, C6-7 herniated discs (left foraminal) large with left C7 cervical radiculopathy and placed appellant on the periodic rolls for temporary total disability effective July 5, 2011. It authorized cervical surgery, which was performed on July 27, 2011. Appellant returned to full-duty modified work on June 20, 2012. On April 8, 2014 the Board affirmed a March 13, 2013 OWCP nonmerit decision denying his request for a precoupment hearing on an overpayment of compensation in the amount of \$16,606.33 for the period June 20 through August 25, 2012 as being untimely filed.³ The facts and the circumstances of the Board's prior decisions are incorporated herein by reference. The relevant overpayment evidence from the prior decision is set forth below.

Appellant completed direct deposit election forms on September 21 and October 19, 2011 and the record reflects that his compensation payments were directly deposited into his bank account.

On May 12, 2013 OWCP informed appellant of its preliminary determination that he received an overpayment of compensation in the amount of \$16,606.33, because he had been paid in error for the period June 20 through August 25, 2012.⁴ It noted that he returned to work on June 20, 2012 with no loss of wages, but continued to receive compensation for total disability. OWCP found appellant was without fault in the creation of the overpayment in the amount of \$2,726.41 for the period June 20 to 30, 2012, but was at fault in the creation of the remaining amount of \$13,879.92, for the period July 1 to August 25, 2012, because he accepted payments he knew or should have known were incorrect. It requested that appellant complete the enclosed overpayment recovery questionnaire and submit supporting financial documents. Additionally, OWCP notified him that, within 30 days of the date of the letter, he could request a

³ Docket No. 13-1905 (issued April 8, 2014).

⁴ The record contains a computer printout showing compensation payments for the period June 19, 2011 through August 25, 2012, a May 15, 2013 pay rate memorandum and an amended computer printout with appellant's corrected pay rate showing compensation payments for the period June 19, 2011 through August 25, 2012.

telephone conference, a final decision based on the written evidence, or a prerecoupment hearing. No completed overpayment recovery form was submitted by appellant.

On July 19, 2013 OWCP authorized right shoulder surgery, which occurred on July 10, 2013.

On August 14, 2013 OWCP placed appellant on the periodic rolls for temporary total disability effective July 10, 2013.

On February 27, 2014 Dr. Spero Karas, appellant's treating Board-certified orthopedic surgeon, released appellant to return to full-duty work on March 4, 2014.

In a March 6, 2014 letter, the employing establishment informed OWCP that appellant requested leave for March 3, 2014 and returned to work on March 4, 2014.

On March 13, 2014 OWCP informed appellant of its preliminary determination that he received an overpayment of compensation in the amount of \$1,322.60 because he had received compensation for the period March 3 to 8, 2014 while receiving pay for work and personal leave. It found that he was without fault in the creation of the overpayment as he could not reasonably have been aware that his single compensation payment made by direct deposit was incorrect. OWCP requested that appellant complete the enclosed overpayment recovery questionnaire and submit supporting financial documents. Additionally, it notified him that, within 30 days of the date of the letter, he could request a telephone conference, a final decision based on the written evidence, or a prerecoupment hearing. No completed overpayment recovery form was received by OWCP.

By decision dated May 8, 2014, OWCP finalized the preliminary determination that an overpayment of compensation in the amount of \$1,322.60 had been created during the period March 3 to 8, 2014. It denied waiver of recovery of the overpayment as appellant had not submitted any evidence to justify waiver.

By decision dated June 18, 2014, OWCP finalized the preliminary determination that an overpayment in the amount of \$16,606.33 was created because appellant was paid compensation through August 25, 2012 after returning to work with no loss of wages on June 20, 2012. It found him without fault for a portion of the overpayment, in the amount of \$2,726.41 for the period June 20 through 30, 2012, as he could not have been aware on June 30, 2012 that the initial direct deposit was incorrect. OWCP found appellant with fault for the remaining portion of the overpayment, in the amount of \$13,879.92 for the period July 1 through August 25, 2012, as he knew or should reasonably have known that the payments he received were incorrect. With regard to the first portion of the overpayment in the amount of \$2,276.41 for the period June 20 through 30, 2012, it denied waiver of recovery as he did not submit supporting evidence. With regard to the remaining portion of the overpayment, \$13,879.92 for the period July 1 through August 25, 2012, OWCP's finding of fault precluded waiver of recovery.

LEGAL PRECEDENT -- ISSUE 1

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.⁵ Section 10.500 of Title 20 of the Code of Federal 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.

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$16,606.33 because he was paid compensation in error for the period June 20 through August 25, 2012. Appellant returned to full-time work on June 20, 2012, but continued to receive compensation for partial disability from OWCP through August 25, 2012. As he received regular full-time wages from the employing establishment from June 20 to August 25, 2012, he was not entitled to disability compensation from OWCP for this same period. OWCP determined that the amount of compensation that appellant received for the period totaled \$16,606.33. Appellant has not challenged the amount and period of the overpayment.

The Board also finds that appellant received an overpayment of compensation in the amount of \$1,322.60 which was created because he received compensation for the period March 3 to 8, 2014 while receiving pay for work and personal leave. Appellant was released to return to full-time work by his treating physician on March 3, 2014. He took personal leave for March 3, 2014 and returned to work on March 4, 2014, but continued to receive compensation for total disability from OWCP through March 8, 2014. As appellant received pay for work and personal leave from the employing establishment from March 3 to 8, 2014, he was not entitled to disability compensation from OWCP for this same period. OWCP determined that the amount of compensation that he received for the period totaled \$1,322.60. Appellant has not challenged the amount and period of the overpayment.

LEGAL PRECEDENT -- ISSUE 2

According to section 10.436,⁶ recovery of an overpayment would defeat the purpose of FECA if recovery would cause hardship because the beneficiary needs substantially all of his or her current income (including compensation benefits) to meet current, ordinary, and necessary living expenses, and also if the beneficiary's assets do not exceed a specified amount as

⁵ 5 U.S.C. § 8116(a).

⁶ 20 C.F.R. § 10.436.

determined by OWCP from data provided by the Bureau of Labor Statistics.⁷ For waiver under this standard, appellant must meet the two-pronged test and show that he both needs substantially all of his current income to meet current ordinary and necessary living expenses,⁸ and that his assets do not exceed the resource base.⁹

The burden is on the claimant to show that the expenses are reasonable and needed for a legitimate purpose.¹⁰ OWCP's regulations provide:

“(a) The individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by [OWCP]. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of [FECA] or be against equity and good conscience....

“(b) Failure to submit the requested information within 30 days of the request shall result in denial of waiver and no further request for waiver shall be considered until the requested information is furnished.”¹¹

ANALYSIS -- ISSUE 2

OWCP determined that appellant was without fault in the creation of the overpayment of \$2,726.41 for the period June 20 through 30, 2012, and without fault in the creation of the overpayment in the amount of \$1,322.60 for the period March 3 to 8, 2014 because he received his wage-loss compensation payments by direct deposit. 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.¹² All the amounts noted above were appellant's first compensation payments received by direct deposit, OWCP properly found he was without fault in the creation of overpayment in the amount of \$2,726.41 for the period June 20 through 30, 2012 and an overpayment in the amount of \$1,322.60 for the period March 3 to 8, 2014.

⁷ OWCP procedures provide that assets must not exceed a resource base of \$4,800.00 for an individual or \$8,000.00 for an individual with a spouse or dependent, plus \$960.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a) (October 2004).

⁸ An individual is deemed to need substantially all of his or her income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. *Desiderio Martinez*, 55 ECAB 245, 250 (2004).

⁹ See *supra* note 8. *W.F.*, 57 ECAB 705, 708 (2006).

¹⁰ *Id.*

¹¹ 20 C.F.R. § 10.438. See *Madelyn Y. Grant*, 57 ECAB 533 (2006).

¹² See *Tammy Craven*, 57 ECAB 689 (2006), *granting petition for recon. & reaffirming prior Board decision*, Docket No. 05-249 (issued July 24, 2006).

OWCP requested in its preliminary notices of overpayment dated May 17, 2013 and March 13, 2014 that appellant provide financial information and a completed overpayment recovery questionnaire to support waiver of recovery. Appellant, however, failed to provide any financial information or a completed overpayment questionnaire for OWCP to determine whether waiver was appropriate. The burden is on the claimant to show that waiver would defeat the purpose of FECA. Appellant has not alleged and the evidence does not demonstrate that he relinquished a valuable right or changed his position for the worse due to the payment of the erroneous amount of compensation. Because he has not shown that recovery would defeat the purpose of FECA or would be against equity and good conscience, the Board finds that OWCP properly denied waiver of recovery of the overpayment.

On appeal appellant argues that collection of the overpayment would be against equity and good conscience based on his current financial status. The regulations mandate that the failure to submit requested information results in the denial of waiver of the overpayment.¹³ Appellant failed to provide OWCP with a completed overpayment recovery questionnaire form as requested. Thus, OWCP properly denied his request for waiver of recovery of the overpayments.

LEGAL PRECEDENT -- ISSUE 3

Section 8129(b) of FECA¹⁴ 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.¹⁵

OWCP may consider waiving an overpayment of compensation 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 or she received 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; (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).¹⁶

¹³ *Id.*

¹⁴ 5 U.S.C. § 8129(b).

¹⁵ *J.K.*, Docket No. 08-1761 (issued January 8, 2009); *Joan Ross*, 57 ECAB 694 (2006); *Desiderio Martinez*, *supra* note 8.

¹⁶ 20 C.F.R. § 10.433(a),

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 or she is being overpaid.¹⁷

ANALYSIS -- ISSUE 3

OWCP determined that appellant was at fault in the creation of the overpayment of compensation in the amount of \$13,879.92 for the period July 1 to August 25, 2012 because he accepted payments that he knew or should have known to be incorrect.

Even where OWCP may have been negligent in making incorrect payments, this does not excuse a claimant from accepting payments he or she knew or should have known to be incorrect.¹⁸ In cases involving a series of incorrect payments, where the requisite knowledge is by documentation from OWCP or simply with the passage of time and opportunity for discovery, the claimant will be at fault for accepting the payments subsequently deposited.¹⁹ By the time of the second erroneous direct deposit compensation payment dated July 1, 2012, appellant knew or should have known that he was no longer entitled to compensation. Accordingly, the Board will affirm the finding of fault for the period July 1 to August 25, 2012.

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$16,606.33 for the period June 20 through August 25, 2012 because he received compensation from OWCP after he had returned to work, and that he also received an overpayment of compensation in the amount of \$1,322.60 for the period March 3 to 8, 2014, because he received personal leave and pay for actual work concurrently with OWCP wage-loss compensation. The Board further finds that OWCP properly determined that appellant was without fault in the creation of an overpayment of compensation in the amount of \$2,726.41 for the period June 20 through 30, 2012 and in the amount of \$1,322.60 for the period March 3 to 8, 2014 because appellant received these initial wage-loss compensation payments by direct deposit. The Board also finds that OWCP properly denied waiver of recovery for these overpayments. Lastly, the Board finds that OWCP properly determined that appellant was at fault in the creation of the overpayment in the amount of \$13,879.92 for the period July 1 to August 25, 2012 because he accepted payments he knew or should have known to be incorrect, thereby precluding waiver of recovery of the overpayment.

¹⁷ *Id.* at § 10.433(b).

¹⁸ *See William E. McCarty*, 54 ECAB 525 (2003).

¹⁹ *See J.W.*, Docket No. 10-1271 (issued February 3, 2011); *see also Karen Dixon*, 56 ECAB 145 (2004).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated June 18 and May 8, 2014 are affirmed.²⁰

Issued: November 24, 2015
Washington, DC

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

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

²⁰ James A. Haynes, Alternate Judge, participated in the original decision but was no longer a member of the Board effective November 16, 2015.