

On appeal, appellant contends that he was not at fault in creating the overpayment as it was OWCP's responsibility to calculate his payments. He further contends that he cannot afford to repay the overpayment of compensation.

FACTUAL HISTORY

On April 30, 2012 appellant, then a 42-year-old full-time clerk, filed a traumatic injury claim (Form CA-1) alleging that he sustained a knee injury that same day while walking up and down a flight of stairs. OWCP accepted his claim for internal derangement of the right knee and authorized two surgeries, which he underwent on September 12, 2012 and February 18, 2013. Appellant stopped work on June 17, 2012.

In a letter dated August 3, 2012, OWCP advised that appellant had been placed on the periodic rolls and outlined his entitlement to compensation benefits and his responsibility to return to work in connection with the accepted injury. In an attached EN1049 form, OWCP provided:

“To minimize the possibility of an overpayment of compensation, NOTIFY THIS OFFICE IMMEDIATELY WHEN YOU GO BACK TO WORK. If you receive your compensation payment *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 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. You are expected to monitor your EFT deposits carefully, at least every two weeks. 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.”

In an e-mail message dated June 23, 2014, the employing establishment advised that appellant returned to full-time, light-duty work on June 12, 2014. It submitted a duty status report (Form CA-17) dated June 3, 2014 indicating that appellant was released to full-time work with restrictions.

Appellant returned to work on June 12, 2014. However, for the period June 12 to 28, 2014 he was paid compensation in the amount of \$1,069.27. OWCP calculated this amount by taking the gross compensation paid from June 12 to 28, 2014, which was \$1,742.50, and subtracting \$106.64 for health benefits insurance (HBI), \$10.20 for basic life insurance (BLI), and \$16.39 for optional life insurance (OLI).

In a June 30, 2014 letter, OWCP informed appellant that it had made a preliminary determination that he received an overpayment of compensation in the amount of \$1,069.27 from June 12 to 28, 2014 because he received compensation benefits after he returned to work full time on June 12, 2014, but was not entitled to compensation for this period of time. In a memorandum attached to the preliminary notice, it notified him that it had calculated the overpayment of compensation using the following formula: “\$2,650.56 divided by 28-day OWCP Pay Cycle multiplied by 17 days overpaid.” OWCP found that appellant was at fault in

creating the overpayment because he accepted payment that he knew or reasonably should have known to be incorrect. It informed him that he had the right to submit evidence or argument if he disagreed with its finding. OWCP also informed appellant that he had a right to a precoupment hearing before an OWCP hearing representative. It instructed him to complete an enclosed overpayment recovery Form OWCP-20 and submit supporting documentation. No additional information was submitted.

In a decision dated August 13, 2014, OWCP found that appellant received a \$1,069.27 overpayment of compensation from June 12 to 28, 2014 for which he was at fault in creating. It advised that the overpayment occurred because he returned to full-time work on June 12, 2014 and continued to receive compensation for total disability until June 28, 2014. OWCP found that appellant was at fault in creating the overpayment because he reasonably should have been aware that he was not entitled to compensation benefits for total disability while working full time. It stated that he should forward a check for the full amount within 30 days.

LEGAL PRECEDENT -- ISSUE 1

A claimant is not entitled to receive temporary total disability and actual earnings for the same period.³ OWCP procedures provide that an overpayment in compensation is created when a claimant returns to work but continues to receive wage-loss compensation.⁴

ANALYSIS -- ISSUE 1

The record establishes that appellant returned to full-time work at the employing establishment on June 12, 2014. However, appellant received wage-loss compensation for total disability through June 28, 2014. As noted, he is not entitled to receive compensation for total disability after he has returned to work.⁵ Thus, an overpayment of compensation occurred.

The evidence establishes that appellant returned to full-time work without wage loss on June 12, 2014. Therefore, appellant was not entitled to total disability compensation after that date. In a compensation termination worksheet dated June 25, 2014, OWCP stated that for the period June 12 to 28, 2014 he was paid compensation in the amount of \$1,069.27. It calculated this amount by taking the gross compensation paid from June 12 to 28, 2014, \$1,742.50, and subtracting \$106.64 for HBI, \$10.20 for BLI, and \$16.39 for OLI, which yielded \$1,069.27. OWCP stated that the overpayment amount was \$1,069.27 when it should have been \$1,609.27 (\$1,742.50 - \$106.64 - \$10.20 - \$16.39). Nevertheless, the Board finds that although the formula OWCP utilized was correct, it failed to provide sufficient notice to appellant of the higher

³ See *R.W.*, Docket No. 13-1285 (issued November 13, 2013).

⁴ 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).

⁵ See *supra* notes 3 and 4.

amount. Thus, as appellant did not receive a due process notice under the Debt Collection Act of the additional \$540.00 (\$1,609.27 - \$1,069.27), the Board cannot affirm the higher amount.⁶

In a memorandum attached to the preliminary notice, OWCP notified appellant that it had calculated the overpayment of compensation using the following formula: “\$2,650.56 divided by 28[-]day OWCP Pay Cycle multiplied by 17 days overpaid,” equaling \$1,069.27. OWCP’s application of the formula resulted in the following: \$2,650.56 divided by 28 multiplied by 17 = \$1,609.27. Similarly, the Board finds that although the formula OWCP utilized was correct, it failed to provide appellant sufficient notice of this higher amount. Thus, as appellant did not receive a due process notice under the Debt Collection Act of the additional \$540.00 (\$1,609.27 - \$1,069.27), the Board cannot affirm this amount.⁷

Appellant received regular full-time wages from the employing establishment during the period June 12 to 28, 2014. He was not entitled to disability compensation from OWCP during that period. Appellant’s receipt of wage-loss payments created an overpayment of compensation. There is no contrary evidence regarding the amount or period of the overpayment. Thus, the Board finds that appellant received an overpayment of compensation in the amount of \$1,069.27 for the period June 12 to 28, 2014.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of FECA provides as follows that 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 this subchapter or would be against equity and good conscience.⁸ No waiver of an overpayment is possible if the claimant is at fault in creating the overpayment.⁹

On the issue of fault, 20 C.F.R. § 10.433(a) provides that an individual is with fault in the creation of an overpayment who: (1) made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or (2) failed to furnish information which the individual knew or should have known to be material; or (3) with respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect.¹⁰

With respect to whether an individual is without fault, section 10.433(b) of OWCP regulations provide that 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

⁶ See 20 C.F.R. § 10.431 (regarding the requirements of OWCP when it identifies an overpayment); see also Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.4a (May 2004, June 2009).

⁷ *Id.*

⁸ 5 U.S.C. § 8129(b).

⁹ See *Gregg B. Manston*, 45 ECAB 344 (1994).

¹⁰ 20 C.F.R. § 10.433(a).

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.¹¹

Section 10.430(a) of OWCP regulations advise that OWCP includes on each periodic check a clear indication of the period for which payment is being made. A form is sent to the recipient with each supplemental check which states the period for which payment is being made.¹² Section 10.430(b) notes that, by these means, OWCP puts the recipient on notice that a payment was made and the amount of the payment.¹³

ANALYSIS -- ISSUE 2

OWCP found that appellant was at fault in the creation of the overpayment because he accepted a payment which he knew or should have known to be incorrect, applying the third criterion listed above.¹⁴ To establish that appellant was at fault, it must establish that at the time he accepted the compensation check in question he knew or should have known that the payment was incorrect.

When a disabled employee is placed on the periodic compensation rolls, OWCP routinely advises the employee of this fact and issues a Form CA-1049 identifying the weekly pay rate, the compensation rate, the gross payment, any applicable deductions, and the net amount to be disbursed.¹⁵ The Form CA-1049 is generally accompanied by a Form EN1049, which explains the employee's rights and responsibilities with respect to the receipt of compensation.¹⁶ This latter document provides pertinent information regarding returning to work and how to avoid an overpayment of benefits. It also includes a certification that the benefits recipient has read and understands the terms and conditions under which he may receive compensation.¹⁷ OWCP provided appellant this same information by letter dated August 3, 2012.

In this case, appellant received wage-loss compensation for total disability by check and also received wages from the employing establishment for the period June 12 to 28, 2014. The period of the payment was listed on each check that he received. In the August 3, 2012 letter, OWCP properly advised appellant of his responsibilities to immediately inform OWCP upon his return to work to avoid an overpayment of compensation and that, if he worked during any period covered by a compensation payment, he was obligated to return the payment to OWCP. Under these circumstances, the Board finds that appellant knew or should have known that he

¹¹ *Id.* at § 10.433(b).

¹² *Id.* at § 10.430(a).

¹³ *Id.* at § 10.430(b).

¹⁴ *Id.* at § 10.433(a)(3).

¹⁵ See *R.W.*, *supra* note 3; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Periodic Review of Disability Cases*, Chapter 2.812.4 (May 2012).

¹⁶ See *R.F.*, Docket No. 12-1646 (issued March 26, 2013).

¹⁷ *Id.*

could not receive wage-loss compensation during any period that he worked or continued to receive wages from the employing establishment.¹⁸ OWCP was notified that appellant returned to work on June 12, 2014. Appellant did not return the compensation check for the period June 12 to 28, 2014. The Board finds that he knew or should have known at the time he returned to work on June 12, 2014 and began to receive wages from employment that he was not entitled to concurrently receive wage-loss compensation for the same period. Under section 10.433(a) of OWCP regulations,¹⁹ appellant is at fault and is not entitled to waiver of recovery of the overpayment of compensation in the amount of \$1,069.27.

On appeal, appellant contends that he was not at fault in creating the overpayment as it was OWCP's responsibility to calculate his payments. The Board has held that, even if OWCP was at fault for issuing compensation checks after appellant returned to full-time work, on June 12, 2014, this fact does not relieve him from responsibility for repayment of the debt if he was at fault for accepting the payment he knew to be incorrect.²⁰ As found, appellant knew or should have known that the check he received represented wage-loss payment after the date of his return to work. Since he is at fault on the issue of overpayment, recovery cannot be waived.

Appellant further contends on appeal that he cannot afford to repay the overpayment of compensation. The Board notes that it does not have jurisdiction to review OWCP's determination of recovery by monthly payment. The Board's jurisdiction is limited to reviewing those cases where OWCP seeks recovery from continuing compensation under FECA.²¹ As appellant was not in receipt of continuing compensation benefits at the time the final decision was entered in this matter, the Board lacks jurisdiction to review recovery of the overpayment.

CONCLUSION

The Board finds that OWCP properly determined that appellant received a \$1,069.27 overpayment of compensation for the period June 12 to 28, 2014. The Board further finds that OWCP properly found that appellant was at fault in the creation of the overpayment and is not entitled to waiver of recovery of the overpayment of compensation.

¹⁸ See *Neill D. Dewed*, 57 ECAB 451 (2006).

¹⁹ See *supra* note 10.

²⁰ See *R.H.*, Docket No. 09-1981 (issued June 11, 2010); *M.J.*, Docket No. 09-469 (issued August 24, 2009).

²¹ See *Judith A. Cardio*, 55 ECAB 348, 353 (2004).

ORDER

IT IS HEREBY ORDERED THAT the August 13, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 16, 2015
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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