

FACTUAL HISTORY

On March 13, 2013 appellant, then a 34-year-old correctional officer, filed a traumatic injury claim (Form CA-1) alleging that on that date he injured his right knee in the performance of duty. OWCP accepted the claim for a sprain of the lateral collateral ligament of the right knee, a pathologic fracture of other specified parts of the right femur, a tear of the right medial meniscus, a right neoplasm of uncertain behavior of the right connective and other soft tissue, and chondromalacia patellae of the right knee. Appellant stopped work on March 14, 2014.

In a May 13, 2014 letter, OWCP informed appellant that, in order to avoid an overpayment of compensation, he should immediately notify it of a return to work. It further advised him to return any check or direct deposit that covered a period in which he earned wages.

OWCP paid appellant compensation for total disability beginning April 28, 2014. On November 17, 2014 he underwent a right tibial subchondroplasty.

OWCP referred appellant on August 29, 2014 for vocational rehabilitation.

On February 9, 2015 appellant underwent surgery for an osteochondral lesion on the lateral femoral trochlea of the right knee.

By letter dated April 22, 2015, the employing establishment advised appellant that it had a temporary position for him within his restrictions. Appellant accepted the position and returned to work effective April 23, 2015.

On May 2, 2015 OWCP paid appellant compensation for total disability from April 5 to May 2, 2015 by electronic funds transfer. It continued to pay him compensation on the periodic rolls until July 25, 2015.

An OWCP rehabilitation specialist, on June 16, 2015, noted that the rehabilitation counselor indicated that appellant's physician had released him to sedentary employment. The specialist changed to plan development from interrupt status and approved vocational testing. Appellant underwent vocational resting on June 30, 2015.

On August 5, 2015 the rehabilitation counselor advised the OWCP rehabilitation specialist that the employing establishment confirmed that appellant had returned to work on April 23, 2015 as a telephone monitor.

OWCP, by letter dated August 17, 2015, notified appellant of its preliminary determination that he received an overpayment of compensation in the amount of \$8,405.72 because he returned to work on April 23, 2015, but continued to receive wage-loss compensation until July 25, 2015. It calculated the overpayment by dividing the net compensation paid each compensation period, \$2,503.83 by the 28 days in each period to find a daily total of \$89.42. OWCP multiplied \$89.42 by 94, the number of days in the period of the overpayment, to find a total overpayment of \$8,405.72. It further advised appellant of its preliminary determination that he was at fault in the creation of the overpayment. It requested that he complete the enclosed overpayment recovery questionnaire and submit supporting financial documents. Additionally,

OWCP notified appellant 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 prereducement hearing.

The rehabilitation counselor, in a report dated August 28, 2015, indicated that on August 6, 2015 appellant verified by telephone that he resumed work on April 23, 2015. Appellant did not inform her of his return to work because it was not to his usual position.

On September 29, 2015 appellant requested a telephone conference. He challenged fact and amount of overpayment as well as the finding of fault. Appellant related that he was still on light duty which was “[t]he same status I was on when receiving benefits from OWCP.” He provided information regarding his income and expenses.

By letter dated October 21, 2015, OWCP informed appellant that it had scheduled a telephone conference for 1:30 p.m. on November 2, 2015. It asked that he notify it immediately if he could not participate in the conference at that time. OWCP telephoned appellant twice on November 2, 2015 at the scheduled time, but he did not answer.

In a decision dated November 2, 2015, OWCP found that appellant received an overpayment of compensation in the amount of \$8,405.72 for the period April 23 to July 25, 2015 because he returned to work, but continued to receive wage-loss compensation. It determined that he was at fault in the creation of the overpayment and requested that he submit \$250.00 each month as repayment.

On appeal appellant contends that he informed the rehabilitation counselor that he was resuming work. He also maintains that he was entitled to receive continued compensation because he was working light duty. Finally, appellant alleges that the amount of the overpayment is incorrect.

LEGAL PRECEDENT -- ISSUE 1

Section 8102 of the FECA 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.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 OWCP’s regulations state in pertinent part: “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.”⁵

³ 5 U.S.C. § 8102.

⁴ *Id.* at § 8116(a).

⁵ 20 C.F.R. § 10.500.

ANALYSIS -- ISSUE 1

OWCP paid appellant compensation for total disability beginning April 28, 2014 due to his March 13, 2014 employment injury. Appellant returned to work on April 23, 2015 in a limited-duty position with no wage loss, but received compensation for total disability from OWCP until July 25, 2015. A claimant is not entitled to receive total disability compensation and actual earnings for the same period.⁶ Appellant, consequently, received an overpayment of compensation for the period April 23 through July 25, 2015.

On appeal appellant generally challenges the amount of the overpayment. OWCP calculated the overpayment of compensation by dividing the net compensation it paid appellant each period by 28, the days in the period, to find a daily compensation rate of \$89.42, which it multiplied by the 94 days in the period of the overpayment to find a total overpayment of \$8,405.72. It explained how the overpayment occurred and provided the information to appellant with the preliminary determination of overpayment. The Board finds that OWCP properly determined that he received an overpayment of compensation in the amount of \$8,405.72 for the period April 23 through July 25, 2015.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of FECA⁷ provides that “[a]djustment 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.” Section 10.433 of OWCP’s implementing regulations⁸ provides that in determining whether a claimant is at fault, it will consider all pertinent circumstances. An individual is with fault in the creation of an overpayment who:

“(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.”

The Board has held that an employee who receives payments from OWCP in the form of direct deposition may not be at fault the first time incorrect funds are deposited into his account, as the acceptance of the resulting overpayment lacks the requisite knowledge.⁹ The Board has

⁶ See *M.M.*, Docket No. 15-0265 (issued May 27, 2015); *Danny E. Haley*, 56 ECAB 393 (2005); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(a) (May 2004).

⁷ 5 U.S.C. § 8129(b).

⁸ 20 C.F.R. § 10.433.

⁹ See *Tammy Craven*, 57 ECAB 689 (2006).

also held in cases involving a series of incorrect payments, where the requisite knowledge is established by a letter or telephone call from OWCP or simply with the passage of time and a greater opportunity for discovery, the claimant will be at fault for accepting the payments subsequently deposited.¹⁰ Previous cases have held that receiving one or two erroneous direct deposit payments does not necessarily create the requisite knowledge to find that a claimant was at fault in the creation of the overpayment.¹¹ 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.¹²

ANALYSIS -- ISSUE 2

OWCP determined that appellant was at fault in the creation of the overpayment because he accepted payments that he knew or should have known were incorrect. The Board finds, however, that it failed to establish that he knew or should have known that the initial payment he received after he resumed work on April 23, 2015 was erroneous. As discussed, in cases where a claimant receives compensation through direct deposit, OWCP must establish that at the time a claimant received the direct deposit in question that he knew or should have known that the payment was incorrect.¹³ 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 account since the acceptance of the overpayment, at the time of receipt of the direct deposit, lacks the requisite knowledge.¹⁴ Because fault is defined by what the claimant knew or should have known at the time of acceptance, one of the consequences of electronic fund transfers is that the claimant lacks the requisite knowledge at the time of the first incorrect payment.¹⁵ Whether or not OWCP determines that an individual is at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment.¹⁶ It is inappropriate, 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.¹⁷

OWCP paid appellant compensation by electronic funds transfer every 28 days. He returned to work on April 23, 2015. On May 2, 2015 OWCP paid appellant compensation for

¹⁰ *Id.*

¹¹ *V.S.*, Docket No. 13-1278 (issued October 23, 2015).

¹² *See R.R.*, Docket No. 15-1395 (issued December 11, 2015).

¹³ *See C.K.*, Docket No. 12-746 (issued May 1, 2012).

¹⁴ *See Tammy Craven, supra* note 9.

¹⁵ *Id.*

¹⁶ *Id.*; *see also K.D.*, Docket No. 13-0451 (issued April 12, 2013).

¹⁷ *See V.S.*, *supra* note 11.

the period April 5 through May 2, 2015. There is no documentation or other evidence to demonstrate that appellant had clear knowledge at the time he received the May 2, 2015 direct deposit that a portion of the payment was incorrect.¹⁸ The Board thus finds that appellant was not at fault in accepting the initial direct deposit covering the period of the overpayment from April 23 to May 2, 2015.

In cases involving a series of incorrect payments, where the requisite knowledge is established 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 Thus, by the time of the second payment dated May 30, 2015, covering the period May 3 to 30, 2015, appellant should have known that he was no longer entitled to disability compensation after his return to work with no wage loss on April 23, 2015. Accordingly, the Board will affirm the finding of fault for the remaining May 3 to July 25, 2015 period of overpayment.

On appeal appellant argues that he informed the rehabilitation counselor that he was returning to work. The evidence, however, does not support his contention. In an August 28, 2015 report, the rehabilitation counselor advised that appellant told her on August 6, 2015 that he had returned to work and did inform her previously because he did not resume his regular employment.

Appellant also contends that he thought that he could continue to receive compensation after he returned to work because he was working limited duty. OWCP, however, clearly advised him on May 13, 2014 to notify it of any type of return to work to avoid an overpayment of compensation and return any checks or direct deposits received which included a period during which he worked, which is sufficient to put a reasonable person on knowledge that he should not continue to accept compensation for total disability after a return to employment.²⁰

The Board finds that the case is not in posture for decision regarding the issue of waiver of recovery of the overpayment for the period April 23 to May 2, 2015. The Board will set aside the November 2, 2015 decision regarding the issue of fault for this period and remand the case for OWCP to determine whether appellant is entitled to waiver of recovery of the overpayment covering the period April 23 to May 2, 2015.²¹

CONCLUSION

The Board finds that OWCP properly found that appellant received an overpayment of compensation in the amount of \$8,405.72 from April 23 through July 25, 2015 because he returned to work, but continued to receive compensation for total disability. The Board further

¹⁸ See *M.M.*, *supra* note 6.

¹⁹ See *V.S.*, *supra* note 12.

²⁰ See *R.R.*, *supra* note 12.

²¹ The Board does not have jurisdiction to review the recovery of the overpayment as its jurisdiction is limited to reviewing those cases where OWCP seeks recovery from continuing compensation under FECA. See 20 C.F.R. § 10.441(a); *Ronald E. Ogden*, 56 ECAB 278 (2005).

finds that he was without fault for the period of the overpayment from April 23 to May 2, 2015, but at fault for the overpayment from May 3 to July 25, 2015. The case will be remanded for OWCP to consider waiver of recovery of the overpayment from April 23 to May 2, 2015.

ORDER

IT IS HEREBY ORDERED THAT the November 2, 2015 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: July 21, 2016
Washington, DC

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

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

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