

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

---

**B.H., Appellant**

**and**

**DEPARTMENT OF JUSTICE, BUREAU OF  
PRISONS, Inez, KY, Employer**

---

)  
)  
)  
)  
)  
)  
)  
)  
)  
)  
)  
)

**Docket No. 16-0117  
Issued: May 5, 2016**

*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 H. FITZGERALD, Deputy Chief Judge  
COLLEEN DUFFY KIKO, Judge

**JURISDICTION**

On October 27, 2015 appellant filed a timely appeal of a July 28, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>2</sup>

**ISSUES**

The issues are: (1) whether OWCP properly determined that appellant received an overpayment in the amount of \$8,452.54 for the period March 9 to May 30, 2015; and (2) whether OWCP properly determined that appellant was at fault in the creation of the overpayment, thus precluding waiver of recovery.

---

<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> The Board notes that appellant submitted new evidence with his appeal. However, since the Board's jurisdiction is limited to evidence that was before OWCP at the time of its final decision, the Board may consider this evidence for the first time on appeal. 20 C.F.R. § 501.2(c); *see Steven S. Saleh*, 55 ECAB 169 (2003).

## **FACTUAL HISTORY**

On July 18, 2013 appellant, then a 42-year-old correctional officer, injured his left knee when he turned to take a step at work. He stopped work on July 18, 2013. OWCP accepted appellant's claim for aggravation of left medial knee sprain. It placed him on the periodic rolls and paid compensation benefits. On August 19, 2013 appellant elected to receive his compensation payments through direct deposit.

When appellant was placed on the periodic rolls, by letter dated September 24, 2013, he was advised that, to avoid an overpayment of compensation, he was to immediately notify OWCP of his return to work. He was further advised that he was required to return any check to OWCP, which included a period during which he worked.

On March 9, 2015 appellant returned to a full-time light-duty position. The position was described as temporary alternative duty. On March 10, 2015 the employing establishment contacted OWCP *via* telephone advising that he returned to work on March 9, 2015. However, OWCP continued to pay compensation benefits until May 30, 2015.

OWCP determined that appellant received the following payments for the period in question: for the period March 9 through April 4, 2015, he received net compensation of \$2,749.62 on April 4, 2015; for the period April 5 to May 2, 2015, he received net compensation of \$2,851.46 on May 2, 2015; and for the period May 3 to 30, 2015, he received net compensation of \$2,851.46 on May 30, 2015.

On June 26, 2015 OWCP notified appellant of its preliminary determination that he received an \$8,452.54 overpayment of compensation for the period March 9 through May 30, 2015 because he received compensation for total disability after he returned to full-time limited-duty work, effective March 9, 2015, without wage loss. It found that he was at fault in creating the overpayment because he knew or reasonably should have been aware that he should not have continued to receive compensation due to his return to full-time work on March 9, 2015. OWCP informed appellant of his right to contest the overpayment and instructed him to complete an enclosed overpayment recovery questionnaire (Form OWCP-20) and to submit supporting documentation. It received no reply.

By decision dated July 28, 2015, OWCP finalized its finding that appellant received an overpayment of compensation in the amount of \$8,452.54 for the period March 9 to May 30, 2015. It further found that he was at fault in creating the overpayment, as he had accepted a payment which he knew or should have known was incorrect. OWCP directed that appellant forward payment for the full amount or to contact it to make other repayment arrangements.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8102 of FECA<sup>3</sup> 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.<sup>4</sup>

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.<sup>5</sup> 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.<sup>6</sup>

A claimant is not entitled to receive temporary total disability and actual earnings for the same period.<sup>7</sup> OWCP procedures provide that an overpayment in compensation is created when a claimant returns to work, but continues to receive wage-loss compensation.<sup>8</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that appellant received an overpayment of compensation in the amount of \$8,452.54 for the period March 9 May 30, 2015. The record supports, and appellant has not disputed, that he continued to receive compensation following his return to work full time on March 9 to May 30, 2015, resulting in an overpayment of \$8,452.54. When an employee returns to work and ceases to have any loss of wages, he or she is no longer entitled to compensation for wage loss.<sup>9</sup> The Board finds the entire amount of compensation paid for the period March 9 to May 30, 2015 in the amount of \$8,452.54 to be an overpayment.

### **LEGAL PRECEDENT -- ISSUE 2**

Under section 8129 of FECA and its implementing regulations, an overpayment must be recovered unless 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.<sup>10</sup> Section 10.433 of the implementing regulations provide that OWCP may

---

<sup>3</sup> 5 U.S.C. §§ 8101-8193.

<sup>4</sup> *Id.* at § 8102.

<sup>5</sup> *Id.* at § 8116(a).

<sup>6</sup> 20 C.F.R. § 10.500(a).

<sup>7</sup> *See R.W.*, Docket No. 13-1285 (issued November 13, 2013).

<sup>8</sup> *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).

<sup>9</sup> *See Kenneth E. Rush*, 51 ECAB 116 (1999).

<sup>10</sup> 20 C.F.R. § 8129(b); 20 C.F.R. §§ 10.433, 10.434, 10.436, 10.437.

consider waiving an overpayment if the individual to whom it was made was not at fault in accepting or creating the overpayment.<sup>11</sup> The regulations further provide that each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from OWCP are proper.<sup>12</sup> Under the regulations, a recipient will be found to be at fault with respect to creating an overpayment if he or she accepted a payment which he or she knew or should have known to be incorrect.<sup>13</sup> Whether OWCP determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment.<sup>14</sup>

The Board has found the claimant to be at fault in cases where he is receiving compensation checks through direct deposit involving a series of payments over several months with clear knowledge that the payments were incorrect.<sup>15</sup> It is not appropriate, 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.<sup>16</sup>

### **ANALYSIS -- ISSUE 2**

OWCP found that appellant was at fault in the creation of the overpayment because he accepted a payment that he knew or should have known to be incorrect. The Board finds that he was without fault with regard to OWCP's first direct deposit payment following his return to work, but he was at fault in creating that portion of the overpayment resulting from the subsequent direct deposits.

OWCP records indicate that, on April 4, 2015, appellant received a net direct deposit payment of \$2,749.62 for the period March 9 through April 4, 2015, and that on May 2, 2015 he received a net direct deposit payment of \$2,851.46 for the period April 5 to May 2, 2015. Additionally, on May 30, 2015 appellant received a net direct deposit of \$2,851.46. Since he returned to work without wage loss on March 9, 2015, he was not entitled to any of these payments. OWCP calculated that these payments resulted in an overpayment of \$8,452.54 for the above-noted period and found appellant at fault in creating the overpayment as he was aware or should have been aware that he was not entitled to such compensation after he returned work.

The Board has held that an employee who receives payments from OWCP in the form of direct deposit is not at fault the first time incorrect funds are deposited into his or her account, as

---

<sup>11</sup> *Id.* at § 10.433(a).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at § 10.433(a)(3).

<sup>14</sup> *Id.* at § 10.433(b).

<sup>15</sup> See *Karen K. Dixon*, 56 ECAB 145 (2004).

<sup>16</sup> *Tammy Craven*, 57 ECAB 689 (2006).

the acceptance of the resulting overpayment lacks the requisite knowledge.<sup>17</sup> The Board has held that receiving one direct deposit payment immediately following the employee's return to work does not necessarily create the requisite knowledge to find that a claimant was at fault in the creation of the overpayment.<sup>18</sup> However, 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.<sup>19</sup> The Board has noted that an employee's failure to return an overpayment is immaterial to the issue of whether he was at fault in its creation.<sup>20</sup>

The Board finds that appellant was without fault in the creation of the overpayment with regard to the first direct deposit payment for which he received an overpayment of \$2,749.62 on April 4, 2015. Unlike the situation in which a claimant receives a physical check and is aware of the amount of the payment before depositing it into his account, he was not on notice of the amount of the payment until after it was deposited electronically into his account.<sup>21</sup> The Board finds that OWCP improperly determined that appellant was at fault in the creation of that portion of the overpayment. OWCP has not presented sufficient evidence to establish that for that first payment, he knew or should have known it to be incorrect. The Board will, therefore, reverse OWCP's finding of fault with regard to the \$2,749.62 payment and remand the case for further development and a final decision on the issue of whether waiver of this portion of the overpayment is appropriate.

The Board finds, however, that appellant was at fault in the creation of the overpayment resulting from the remaining direct deposits. The record reflects that on September 24, 2013 appellant was advised that, to avoid an overpayment of compensation, he was to immediately notify OWCP of his return to work, and that he was required to return any check to OWCP which included a period during which he worked. After his receipt of the first direct deposit following his return to work, he knew or should have known that he was not entitled to the benefit of subsequent direct deposits. Appellant received a second direct deposit on May 2, 2015 in the amount of \$2,851.46 for the period April 5 to May 2, 2015, and a third direct deposit on May 30, 2015, in the net amount of \$2,851.46 for the period May 3 to 30, 2015. He had returned to full-time work on March 9, 2015. In light of OWCP's clear mandate to provide notification of a return to work and to return any payment received, which included a period during which appellant worked, a reasonable person would have been aware that an overpayment had occurred. By this time, appellant had the benefit of reviewing bank statements reflecting his receipt of this additional compensation payment. The Board finds that he knew or should have known that these two deposits covering the period April 5 to May 30, 2015 were in error.

---

<sup>17</sup> *Id.*

<sup>18</sup> *V.S.*, Docket No. 13-1278 (issued October 23, 2013); *W.P.*, 59 ECAB 514 (2008).

<sup>19</sup> *W.P.*, *id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

Therefore, appellant was at fault in creating this portion of the overpayment and is not entitled to waiver of recovery of the overpayment.<sup>22</sup>

On appeal, appellant contends that he did notify OWCP that he returned to light duty. The Board notes that even if OWCP may have been negligent in issuing his checks for temporary total disability, it does not excuse his acceptance of such checks, which he knew or should have been expected to know should be returned to OWCP.<sup>23</sup>

### **CONCLUSION**

The Board finds that appellant received an overpayment of compensation in the amount of \$8,452.54. The Board finds that appellant is not at fault in creating that portion of the overpayment that was direct deposited on April 4, 2015, and that OWCP must consider his eligibility for waiver for this portion of the overpayment. The Board further finds that appellant was at fault in creating the remainder of the overpayment of compensation.

---

<sup>22</sup> The Board does not have jurisdiction to review the recovery of the overpayment. The Board's jurisdiction is limited to reviewing those cases where OWCP seeks recovery from continuing compensation under FECA. *See* 20 C.F.R. § 10.441(a); *L.C.*, 59 ECAB 569 (2008), n.24, citing *Ronald E. Ogden*, 56 ECAB 278 (2005).

<sup>23</sup> *See Robert W. O'Brien*, 36 ECAB 541 (1985).

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 28, 2015 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part, and the case is remanded for action consistent with this decision.

Issued: May 5, 2016  
Washington, DC

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

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board