

On appeal appellant asserts that an OWCP hearing representative did not consider all evidence of record which showed that the employing establishment had properly notified OWCP that he returned to work, and that he promptly informed the employing establishment of the overpayment.

FACTUAL HISTORY

In a claim adjudicated by OWCP under file number xxxxxx045, on February 11, 2010 appellant, a 46-year-old electrician, filed a traumatic injury claim (Form CA-1) alleging that on February 10, 2010 he injured his right shoulder and right wrist when a coworker dropped a conduit onto his shoulder. OWCP accepted contusions of the right shoulder and wrist. Appellant was on modified duty until July 20, 2010, when he returned to regular duty. In the August 11, 2010 acceptance letter, he was advised of his responsibility to notify OWCP immediately upon his return to work.

On August 27, 2010 appellant filed a second traumatic injury claim, alleging that he injured his left wrist while opening a generator door on August 25, 2010 in his capacity as an electrician. OWCP adjudicated the August 2010 claim under file number xxxxxx831. Appellant continued regular duty until October 12, 2010, when he began a modified position. On July 14, 2011 OWCP accepted this claim for a left wrist sprain. Appellant was again informed of his responsibility to notify OWCP immediately upon his return to work.²

On May 10, 2011 OWCP proposed to terminate appellant's medical and wage-loss benefits due to the right wrist and right shoulder file number xxxxxx045, based on the opinion of Dr. Ronald N. Lampert, a Board-certified orthopedic surgeon and OWCP referral physician, who advised that appellant had no residuals of the accepted right upper extremity conditions. The termination of medical benefits and eligibility for wage-loss benefits was finalized on June 13, 2011. Appellant, through counsel, timely requested a hearing before an OWCP hearing representative.

Under file number xxxxxx045, on July 27, 2011 Dr. Robert D. Beckenbaugh, Board-certified in orthopedic and hand surgery, performed right wrist surgery. Pre- and postoperative diagnoses were post-traumatic Kienbock's disease of the right wrist. On October 7, 2011 a hearing was held regarding the termination of benefits under this claim. By decision dated December 27, 2011, an OWCP hearing representative found that a conflict in medical evidence had been created between Dr. Beckenbaugh, who submitted a report after the hearing, and Dr. Lambert, OWCP referral physician, regarding whether the diagnosed right wrist Kienbock's disease was employment related. The hearing representative reversed the termination decision.

In March 2012 OWCP referred appellant to Dr. Eric N. Novack, a Board-certified orthopedic surgeon, for an impartial evaluation. In an April 27, 2012 report, Dr. Novack advised that the diagnosed right wrist Kienbock's disease was employment related. He provided permanent work restrictions. On May 16, 2012 OWCP accepted right Kienbock's disease. Appellant accepted a full-time modified-duty position on June 25, 2012.

² In December 2011 file number xxxxxx831 was expanded to include left wrist de Quervain's tendinitis.

Under file number xxxxxx831, on July 19, 2012 Dr. Vimala Ramachandran, a Board-certified orthopedic surgeon, performed left wrist arthroscopy with de Quervain's release and debridement of the scapholunate ligament. Appellant returned to four hours of modified-duty daily on August 1, 2012. He worked four hours daily and received four hours of compensation until January 24, 2013 when Dr. Ramachandran performed another left scapholunate ligament repair. Appellant received total disability compensation until March 25, 2013, when he began working a four-hour day, and received compensation for four hours daily. He stopped work on October 22, 2013 when Dr. Ramachandran performed left carpal tunnel release. Appellant received compensation.

On November 6, 2013 appellant was placed on the periodic compensation rolls. In OWCP's notification letter of that date, he was advised to notify them immediately if he returned to his former job or if he obtained other work, in order to minimize the possibility of an overpayment. The first electronic periodic rolls payment was for the period October 22 to November 16, 2013. The second periodic rolls payment covered the period November 17 through December 14, 2013.

On December 10, 2013 Margaret Bokelman, a human resources official at the employing establishment, informed OWCP that appellant had returned to full-time modified duty. The claims were combined on January 28, 2014, with the file number xxxxxx831 claim becoming the master file. Appellant received two additional electronic periodic rolls payments, for the period December 15, 2013 through January 11, 2014, and for the period January 12 through February 8, 2014, when his monetary compensation was terminated. He began a four-hour workday on July 15, 2014, based on restrictions provided by Dr. Ramachandran.

On September 11, 2014 OWCP issued a preliminary determination that appellant received a \$6,754.92 overpayment of compensation. It explained that the overpayment was created because he returned to full-time work on December 10, 2013 and continued to receive FECA wage-loss compensation through February 8, 2014. OWCP found appellant at fault because he did not contact OWCP when he returned to work and accepted compensation when he should have known he was not entitled to the payments. The preliminary determination provided an explanation of the overpayment calculation. Appellant was provided an overpayment action request and an overpayment questionnaire (Form CA-20) and was asked to attach supporting documentation, including copies of income tax returns, bank account statements, bills, cancelled checks, pay slips, and any other record which supported the income and expenses listed. He was informed of the actions he could take and was allotted 30 days to respond.

Appellant, through counsel, timely requested a prerecoupment hearing. In a September 18, 2014 statement, he related that he had informed Ms. Bokelman on January 13, 2014 that he was continuing to receive wage-loss compensation after his return to work, and that she reported to him on January 16, 2014 that she had spoken with someone at OWCP who informed her that it was working on a payback plan, and that he again informed her on February 25, 2014 that he continued to receive FECA compensation. Appellant attached e-mail correspondence between him and the employing establishment as to his return to work. He began receiving compensation for four hours daily effective July 14, 2014. Appellant stopped all

work on March 4, 2015 when Dr. Ramachandran performed revision of the left carpal tunnel release. He received appropriate wage-loss compensation thereafter.

At the hearing, held on March 23, 2015 appellant testified that he informed the employing establishment that he continued to receive wage-loss compensation after he returned to work in December 2013. He stated that his house was struck by lightning and that OWCP withheld compensation for four months and he used the overpaid compensation for expenses. The hearing representative directed appellant to provide the overpayment questionnaire with financial records and documentation that supported his income and expenses. Appellant was given 30 days to provide the requested information. On April 2, 2015 OWCP forwarded a copy of the hearing transcript to him at his address of record.

On April 14, 2015 appellant forwarded an overpayment questionnaire. He stated that the overpayment was used “due to expenses caused by circumstances that were beyond our control” and for basic living expenses, noting that on July 13, 2014 his house was struck by lightning and insurance did not cover all damage. Appellant reported a monthly income of \$2,696.00 and monthly expenses of \$7,169.86. This included rent/mortgage of \$928.00, food \$500.00, clothing \$50.00, utilities, \$339.96, other expenses \$1,759.00, and monthly installment debt of \$3,592.90. Appellant listed assets of \$71,681.00. He attached a list of monthly installment debt payments. The only financial documentation submitted were two invoices from Drill Tech, Inc., for service due to lightning strike. In April 7, 2015 correspondence from appellant to counsel, appellant asserted that he was not at fault for the overpayment as OWCP did not promptly pay wage-loss compensation and waited too long to address its mistake. He argued that these circumstances, including the lightning strike, caused severe financial hardship. Appellant also submitted page three of an unidentified document that appears to be from an insurance policy, and employing establishment notifications and e-mail correspondence regarding his return to work on December 10, 2013.

In a May 7, 2015 decision, an OWCP hearing representative found that appellant was at fault in creating a \$6,754.92 overpayment of compensation. He noted that appellant acknowledged that being aware of OWCP paying compensation to which he was not entitled and relied on employing establishment personnel to stop the payments. The hearing representative noted appellant’s hearing testimony and found him at fault in creating the overpayment because he acknowledged accepting electronic compensation deposits to which he was not entitled. He stated that, although appellant provided an overpayment questionnaire, he did not document his monthly expenses. The hearing representative noted appellant’s monthly household income, including wage-loss compensation, appellant’s allowed ordinary living expenses, and set recovery at \$300.00 each compensation period.

LEGAL PRECEDENT -- ISSUE 1

Section 8102 of FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.³

³ 5 U.S.C. § 8102(a).

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 Section 10.500 of OWCP's regulations provides 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."⁵

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$6,754.92. The record supports the fact that he returned to work on December 10, 2013. He also received wage-loss compensation as a periodic rolls payment for the period December 10, 2013 through February 8, 2014. As noted, both FECA and implementing regulations of OWCP provide that a claimant may not receive wage-loss compensation concurrently with a federal salary or other remuneration.⁶ The record indicates that appellant received compensation of \$6,754.92 for the period after his return to work on December 10, 2013. This yielded an overpayment of compensation in that amount.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA provides that an overpayment in compensation shall be recovered by OWCP 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."⁷

Section 10.433(a) of OWCP regulations provides that OWCP:

"[M]ay 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 or she receives 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 in 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;

⁴ *Id.* at § 8116(a); see *Danny E. Haley*, 56 ECAB 393 (2005).

⁵ 20 C.F.R. § 10.500.

⁶ 5 U.S.C. § 8116(a); *id.*

⁷ *Id.* at § 8129.

(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).”⁸

To determine if an individual was at fault with respect to the creation of an overpayment, OWCP examines 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.⁹

Even if an overpayment resulted from negligence by OWCP, this does not excuse the employee from accepting payment, which the employee knew or should have been expected to know he was not entitled.¹⁰

ANALYSIS -- ISSUE 2

In finding appellant at fault in the creation of the \$6,754.92 overpayment, OWCP relied on the third standard, finding that he knew or should have known that the payments he received by direct deposit after his return to work on December 10, 2013 through February 8, 2014 were incorrect.

Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives are proper.¹¹ As well the recipient must show good faith and exercise a high degree of care in reporting events that may affect entitlement to or the amount of benefits.¹² Even though 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.¹³ The Board has found the claimant to be at fault in cases where he or she is receiving compensation checks through direct deposit which involve a series of payments over several months with clear knowledge that the payments are incorrect.¹⁴ 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 known that this overpayment had occurred. This awareness could be established either through documentation such as a bank

⁸ 20 C.F.R. § 10.433(a); *see Sinclair L. Taylor*, 52 ECAB 227 (2001); *see also* 20 C.F.R. § 10.430.

⁹ *Id.* at 10.433(b); *Neill D. Dewald*, 57 ECAB 451 (2006).

¹⁰ *Diana L. Booth*, 52 ECAB 370 (2001).

¹¹ *Danny E. Haley*, *supra* note 4.

¹² *Sinclair L. Taylor*, *supra* note 8.

¹³ *William E. McCarty*, 54 ECAB 525 (2003).

¹⁴ *See Karen K. Dixon*, 56 ECAB 145 (2004).

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.¹⁵

Appellant received wage-loss compensation by direct deposit after his return to work from December 10, 2013 through February 8, 2014. Since OWCP regulations define fault by what the claimant knew or should have known at the time of acceptance, one of the consequences of electronic fund transfers is that in many cases the claimant will not be at fault for accepting the first incorrect payment because the requisite knowledge is lacking at the time of deposit and the Board so finds in this case as there is no evidence of record to show the period covered by this direct deposit.¹⁶ A finding of no fault does not mean, however, that the claimant may keep the money, only that OWCP must consider eligibility for waiver for this period. The record in this case shows that appellant received a compensation payment by direct deposit for the period December 10, 2013 through February 8, 2014. The case must therefore be remanded for OWCP to determine whether he is entitled to waiver of the recovery of the overpayment for the first incorrect compensation payment made covering the period after he returned to work on December 10, 2013 the period that ended on December 14, 2013.¹⁷

Regarding the remainder of the overpayment period, by a November 6, 2013 letter, OWCP notified appellant that he was placed on the periodic compensation rolls and advised him that he was to immediately inform OWCP of his return to work to avoid an overpayment of compensation. Moreover, in the decisions accepting his claims, it advised him that he was to notify it immediately upon his return to work. Although appellant informed the employing establishment on January 13, 2014 that he continued to receive FECA compensation, at no point did he inform OWCP. Contrary to his assertion on appeal, it was his obligation to inform OWCP, not the employing establishment's. At no point did appellant make any attempt to return the overpaid FECA compensation.

After appellant's receipt of the first direct deposit following his return to work, he was on notice that he was receiving compensation payments after he had returned to work. By his own admission at the hearing, he testified that he informed the employing establishment on January 14, 2014 that he continued to receive FECA compensation after his return to work. Thus, appellant knew at that time that he was not entitled to the benefit of subsequent direct deposits after his return to work on December 10, 2013. In light of OWCP's clear mandate to provide notification of a return to work and to return any payment received during a period in which he worked, a reasonable person would have been aware that an overpayment occurred. Moreover, appellant had the benefit of reviewing bank statements reflecting his receipt of the additional compensation payments. The Board finds that he knew or should have known that the direct deposits covering the period December 15, 2013 through February 8, 2014 were in error.

¹⁵ See *K.H.*, Docket No. 06-191 (issued October 30, 2006).

¹⁶ See *supra* note 14.

¹⁷ See *S.H.*, Docket No. 10-0499 (issued November 29, 2010).

Appellant was therefore at fault in creating this portion of the overpayment and is not entitled to waiver of recovery of the overpayment for this period.¹⁸

The Board finds that, under these circumstances, appellant should have known that he was accepting incorrect payments. Appellant did not have a reasonable expectation that he would continue to receive compensation following his return to full duty on December 10, 2013.¹⁹ He had an obligation to return a payment that he knew or should have known was incorrect.²⁰ Under section 10.433(a) of OWCP regulations, appellant is at fault and is not entitled to waiver of recovery of the overpayment of compensation for the period December 15, 2013 through February 8, 2014.²¹

Finally, as appellant's eligibility for waiver for a portion of the overpayment cannot yet be determined, the repayment issue will not be considered on the present appeal. On remand, appellant will have an opportunity to submit and have OWCP consider relevant financial evidence on this issue. Following this and all other development deemed necessary, OWCP shall issue a *de novo* decision in the case.²²

CONCLUSION

The Board finds that OWCP properly determined that an overpayment of compensation in the amount of \$6,754.92 had been created and that appellant was at fault for the overpayment period commencing subsequent to the first direct deposit after his return to work on December 10, 2013. The Board further finds that appellant was not at fault for the first direct deposit of compensation, covering the period November 17 through December 14, 2013. The case is remanded for a determination of whether he is entitled to waiver of recovery of the overpayment for this period.

¹⁸ *See id.*

¹⁹ *J.R.*, Docket No. 08-1107 (issued June 15, 2009).

²⁰ *Neill D. Dewald*, *supra* note 9.

²¹ *Id.*

²² *E.W.*, Docket No. 15-0544 (issued July 16, 2015). Appellant made additional arguments on appeal, including that he did not receive a copy of the March 23, 2015 hearing transcript or a November 2013 letter. A review of the record indicates that on November 6, 2013 OWCP mailed him a letter advising him that he was being placed on the periodic rolls. It forwarded a copy of the hearing transcript to appellant on April 2, 2015. Both were sent to his address of record and there is no evidence that they were returned as undeliverable. The mailbox rule provides that the appearance of a properly addressed copy in the case record, together with the mailing custom or practice of the sender, will raise a presumption that the original was received by the addressee. *Cresenciano Martinez*, 51 ECAB 322 (2000). As such, the Board finds that the mailbox rule raises the presumption that the November 6, 2013 letter and the March 23, 2015 hearing transcript were received by appellant. Appellant also asserted that he was not informed that he had to submit specific documentation regarding expenses. A review of the September 11, 2014 preliminary overpayment determination shows that it advised appellant to attach supporting documents to the overpayment questionnaire (OWCP-20), including copies of income tax returns, bank account statements, bills and canceled checks, pay slips, and any other record which supported the income and expenses listed. Furthermore, at the March 23, 2015 hearing, the hearing representative informed appellant to submit financial records that supported his income and assets.

ORDER

IT IS HEREBY ORDERED THAT the May 7, 2015 decision of the Office of Workers' Compensation Programs is affirmed in part, and set aside in part. The case is remanded to OWCP for further proceedings consistent with this opinion of the Board.

Issued: May 3, 2016
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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