

FACTUAL HISTORY

On November 15, 2004 appellant, then a 42-year-old driver/carrier, filed a traumatic injury claim (Form CA-1) alleging that he injured his back on November 8, 2004 in the performance of duty. He stopped work on November 9, 2004. OWCP accepted the claim for acquired spondylolisthesis and paid appellant compensation for total disability beginning December 30, 2004. In May 2012, it referred him for vocational rehabilitation and on November 11, 2013 he began working in private employment.

On November 16, 2013 OWCP paid compensation for total disability through electronic funds transfer for the period October 20 through November 16, 2013. On December 14, 2013 it paid compensation for the period November 17 through December 14, 2013 and on January 11, 2014 it paid compensation for the period December 15, 2013 through January 11, 2014.

OWCP informally reduced appellant's compensation benefits on June 12, 2014 based on his earnings in private employment as a user support analyst with weekly wages of \$461.54.² It applied the formula set forth in *Albert C. Shadrick*³ and determined that he had the capacity to earn 42 percent of his previous wages. Beginning June 13, 2014 OWCP paid compensation retroactive to January 12, 2014 based on his wage-earning capacity in his position in private employment.

In a worksheet dated February 10, 2015, OWCP calculated appellant's wage-earning capacity based on his part-time actual earnings for the period November 12, 2013 to January 11, 2014. It divided his actual earnings of \$461.54 per week by the current pay rate of the position he held when injured of \$1,097.56 per week to find a 42 percent wage-earning capacity. OWCP multiplied the pay rate at the time of injury of \$882.81 by the 42 percent wage-earning capacity percentage. The resulting amount of \$370.78 was subtracted from appellant's date-of-injury pay rate of \$882.81, which provided a loss of wage-earning capacity of \$512.03 per week. OWCP multiplied this amount by the appropriate compensation rate of three-fourths to find \$384.02, which after adjustments yielded a compensation rate of \$1,902.00 every four weeks. It concluded that it owed appellant gross compensation of \$4,122.80 for the period November 12, 2013 to January 11, 2014. OWCP deducted premiums for health and life insurance to find a net amount owed for the period of \$2,278.86. It noted that the monies appellant received for the applicable period was \$5,197.20.

OWCP notified appellant on February 25, 2015 of its preliminary determination that he received an overpayment of compensation in the amount of \$2,918.34 for the period November 12, 2013 through January 11, 2014 because he returned to work, but continued to receive compensation for total disability. The overpayment arose because, as noted, it paid him \$5,197.20 for that period when he was only entitled to \$2,278.86 based on his loss of wage-

² On June 12, 2014 appellant advised OWCP that he had obtained another position at a higher salary. On August 18, 2014 OWCP notified him of its proposed reduction of his compensation to zero based on his earnings as a user support analyst. On September 23, 2014 it advised that it was reconsidering the proposed reduction of compensation.

³ 5 ECAB 376 (1953); codified by regulation at 20 C.F.R. § 10.403.

earning capacity. OWCP further notified appellant of its preliminary determination that he was at fault in creating 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 prerecoupment hearing.

On March 18, 2015 appellant requested a prerecoupment hearing. He challenged the existence and amount of the overpayment and requested waiver of recovery. Appellant asserted that OWCP, had based the overpayment on incorrect calculations. In an accompanying March 12, 2015 statement, he related that he notified OWCP and his rehabilitation counselor 10 days before he began work. Appellant asserted, "OWCP's breakdown of any statements and calculations, have been so confusing to me, throughout the 10 years that I have been receiving benefits, that the only time that I have questioned any amount, was when payments stopped for six months." He maintained that he did not know that he had received an incorrect payment and that the rehabilitation counselor told him that nothing would change for 60 days. Appellant also noted that the government shut down in October 2013 resulted in communication issues. He completed an overpayment recovery questionnaire and provided his income and expenses.

At the telephone hearing, held on September 30, 2015, appellant related that he did not understand how OWCP calculated his benefits. He asked OWCP many times how returning to work would affect his benefits, but was only told that there was a formula. Appellant advised that he resumed work on November 11, 2013 and believed that OWCP would adjust his compensation later if it made an overpayment. He submitted financial information with supporting documentation.

In a decision dated November 30, 2015, an OWCP hearing representative determined that appellant had received an overpayment of compensation in the amount of \$2,979.42. She modified the period of the overpayment as he had returned to work on November 11, 2013 rather than November 12, 2013. The hearing representative calculated that, for the 62 days from November 11, 2013 through January 11, 2014, appellant had received net compensation of \$5,282.40, but due to the wage-earning capacity decision was only entitled to receive net compensation of \$2,302.98, which yielded an overpayment of \$2,979.42. She found that he received three disability payments after returning to work covering the period November 12 to 16, and November 17 to December 14, 2013, and December 15, 2013 to January 11, 2014. The hearing representative determined that appellant was at fault in creating the overpayment as he accepted a payment that he reasonably should have been aware he was not entitled. She found that OWCP should recover the overpayment by deducting \$255.00 per month from continuing compensation.

On appeal appellant argues that he did not know that he had received an overpayment because he did not understand how OWCP calculated the formula to determine the amount of his compensation. He notes that the amount changed numerous times over the years and that he advised OWCP of his return to work two weeks before he started. Appellant maintains that he submitted evidence showing that his expenses were more than his income and requests waiver of recovery of the overpayment.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of FECA provides that the United States shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.⁴ A claimant, however, is not entitled to receive temporary total disability and actual earnings for the same period.⁵ OWCP procedures provide that an overpayment in compensation is created when a claimant returns to work, but continues to receive wage-loss compensation.⁶

Section 8106(a) provides in pertinent part, "If the disability is partial, the United States shall pay the employee during the disability monthly monetary compensation equal to 66 2/3 percent of the difference between his monthly pay and his monthly wage-earning capacity after the beginning of the partial disability, which is known as his basic compensation for partial disability."⁷

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation for the period November 11, 2013 through January 11, 2014 because he had actual earnings during a period in which he received compensation for total disability. When an employee has earnings from employment, he is not entitled to receive temporary total disability benefits and actual earnings for the same time period.⁸ Under these circumstances, OWCP offsets actual earnings pursuant to the *Shadrick* formula.⁹

In determining the amount of the overpayment, OWCP found that appellant's actual earnings for the period November 12, 2013 through January 11, 2014 were \$461.54 per week. Using the *Shadrick* formula, it found that he was entitled to net compensation of \$2,278.86 during this period based on his actual earnings. OWCP subtracted the amount of compensation owed appellant, \$2,278.86, from the amount of net compensation received, \$5,197.20, to find an overpayment of \$2,918.34. OWCP's hearing representative modified the period of overpayment as he returned to work on November 11, 2013 rather than November 12, 2013, and correspondingly adjusted the amount of the overpayment to \$2,979.42. Appellant has not submitted any evidence challenging fact or amount of the overpayment.

⁴ 5 U.S.C. § 8102(a).

⁵ *Danny E. Haley*, 56 ECAB 393 (2005).

⁶ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(a) (May 2004).

⁷ 5 U.S.C. § 8106(a).

⁸ *See Daniel Rendard*, 51 ECAB 466 (2000); 20 C.F.R. § 10.403(c).

⁹ *See supra* note 3.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of FECA¹⁰ 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 regulations¹¹ 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 deposit 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.¹² The Board has 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.¹³ 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.¹⁴

ANALYSIS -- ISSUE 2

OWCP found that appellant was at fault in creating the overpayment of compensation because he accepted payments that he knew or should have known were incorrect. Appellant returned to work in private employment on November 11, 2013 with a loss of wage-earning capacity. OWCP paid compensation for total disability through electronic funds transfer on November 16, 2013 for the period October 20 through November 16, 2013, on December 14, 2013 for the period November 17 through December 14, 2013, and on January 11, 2014 for the period December 15, 2013 through January 11, 2014.

¹⁰ 5 U.S.C. § 8129(b).

¹¹ 20 C.F.R. § 10.433.

¹² *Tammy Craven*, 57 ECAB 689 (2006), *Order Granting Petition for Reconsideration and Reaffirming Prior Decision* (issued July 24, 2006).

¹³ *Id.*

¹⁴ *See D.B.*, Docket No. 15-0258 (issued February 1, 2016); *V.S.*, Docket No. 13-1278 (issued October 23, 2013); *W.P.*, 59 ECAB 514 (2008).

As discussed, in cases where a claimant receives compensation through direct deposit, OWCP must establish that at the time he received the direct deposit in question he knew or should have known that the payment was incorrect.¹⁵ 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.¹⁶ One of the consequences of electronic fund transfers is that the claimant lacks the requisite knowledge at the time of the first incorrect payment.¹⁷ 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.¹⁸ 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.¹⁹

On appeal appellant contends that he did not understand how OWCP calculated his compensation and thus was not aware of the overpayment. The Board finds that OWCP failed to establish that, at the time he accepted the payment of compensation on November 16, 2013, covering the period October 20 through November 16, 2013, he knew or should have known that the payment was incorrect. There is no documentation or other evidence to demonstrate that appellant had clear knowledge at the time he accepted this payment that it was incorrect or that a reasonable period of time had passed during which he could have reviewed bank statements or been informed of the incorrect payment.²⁰ Additionally, appellant was entitled to some wage-loss compensation for the periods in question and thus the circumstances surrounding the overpayment were more complex than usual.²¹

Although 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.²² 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.²³ By the time of the second and third payments dated December 14, 2013 and January 11, 2014,

¹⁵ See *C.K.*, Docket No. 12-0746 (issued May 1, 2012).

¹⁶ See *supra* note 12; see also *George A. Hirsch*, 47 ECAB 520 (1996).

¹⁷ *Id.*

¹⁸ *Id.*; see also *K.D.*, Docket No. 13-0451 (issued April 12, 2013).

¹⁹ See *K.H.*, Docket No. 06-191 (issued October 30, 2006).

²⁰ See *D.B.*, Docket No. 15-0258 (issued February 1, 2016).

²¹ See *W.B.*, Docket No. 09-1440 (issued April 12, 2010).

²² See *C.G.*, Docket No. 15-0701 (issued December 9, 2015).

²³ *Id.*

appellant should have known that he was not entitled to the same amount of wage-loss compensation as he had received prior to his return to work on November 11, 2013. As he was at fault in creating the overpayment for these periods, he is not eligible for waiver of recovery with respect to the portion of the overpayment from November 17, 2013 through January 11, 2014.

The Board finds that this case is not in posture for decision regarding the issue of waiver of the recovery of the overpayment for the period November 11 through 16, 2013. The Board will remand the case for OWCP to determine whether appellant is entitled to waiver of recovery of the overpayment created for this period. After such further development as necessary, OWCP shall issue a *de novo* appropriate decision.²⁴

On appeal appellant contends that he advised OWCP of his return to work. Even if an overpayment resulted from negligence by OWCP, however, this does not excuse the employee from accepting a payment which he knew or should have known was incorrect.²⁵

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$2,979.42 for the period November 11, 2013 through January 11, 2014 because he returned to work, but continued to receive compensation for total disability. The Board further finds that OWCP improperly found that he was at fault for the period of the overpayment from November 11 through 16, 2013 and properly found that he was at fault for the overpayment created from November 17, 2013 through January 11, 2014. The case will be remanded for consideration of waiver of recovery of the overpayment from November 11 through 16, 2013.

²⁴ In view of the Board's decision on fault, it is premature to address the issue of recovery of the overpayment from continuing compensation payments.

²⁵ See *Diana L. Booth*, 52 ECAB 370 (2001).

ORDER

IT IS HEREBY ORDERED THAT the November 30, 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: November 3, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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