

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

T.R., Appellant

and

DEPARTMENT OF JUSTICE, BUREAU OF
PRISONS, Beaumont, TX, Employer

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**Docket No. 15-1374
Issued: September 16, 2016**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 5, 2015 appellant filed a timely appeal from a May 6, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$4,708.79 during the period August 24 through December 13, 2014; and (2) whether OWCP properly found appellant was at fault in creating the overpayment thereby precluding waiver of recovery of the overpayment.

FACTUAL HISTORY

On April 25, 2014 appellant, then a 55-year-old maintenance worker supervisor/general foreman, filed a claim for a March 15, 2014 traumatic injury (Form CA-1) when he slipped and fell on his right side while in the performance of his duties. He claimed injury to his right hand, right elbow, right shoulder, right knee, and lower back. OWCP administratively handled the claim to allow for payment of a limited amount of medical expenses. On July 7, 2014 it formally adjudicated the claim as the medical bills exceeded \$1,500.00. The claim was accepted for right

closed fracture of base of other metacarpal bones and benign neoplasm of connective and other soft issue of right upper limb, including right shoulder. The record reflects that appellant used sick leave from May 8 to June 29, 2014 and leave without pay for the period June 30 to August 23, 2014.

By e-mail dated August 26, 2014, the employing establishment informed OWCP that appellant had filed two claims for the same date of injury, March 15, 2014. Appellant had received continuation of pay from March 24 through May 7, 2014 pursuant to the first claim, OWCP File No. xxxxxx243. OWCP further noted that appellant had received wage-loss compensation from June 30 until August 10, 2014. Appellant remained off work as of August 11, 2014.

In a September 3, 2014 letter, OWCP notified appellant that he would be receiving compensation payments through the periodic compensation rolls. To minimize the possibility of an overpayment of compensation, appellant was instructed to notify OWCP immediately when he returns to work. OWCP noted that the first payment was for the period June 30 to July 12, 2014 for a net amount of \$2,048.99. Regular payments on the periodic compensation rolls would be paid every 28 days, with the first payment commencing for the period August 24 to September 20, 2014 for a net amount of \$4,708.79. For payments sent by electronic funds transfer (EFT), a notification of the date and amount of payment will appear on the statement from his financial institution. Appellant was expected to monitor his EFT deposits carefully, at least every two weeks.

On September 20, 2014 appellant received his first periodic rolls payment for the period August 24 to September 20, 2014.

On November 17, 2014 OWCP received notification from appellant that he would be using his available sick leave while undergoing medical treatment, therefore he should be removed from the periodic rolls. It also received a Form CA-3, Report of Termination of Disability/and or Payment, from the employing establishment on November 20, 2014. The employing establishment noted that appellant had been using sick leave since August 24, 2014. It advised that since appellant had been paid sick leave by the employing establishment and wage-loss compensation from OWCP, appellant wanted to repay the compensation benefits that it had issued. Appellant continued to receive compensation on the periodic compensation rolls through December 13, 2014.¹

Appellant received compensation *via* direct deposit for the period August 24 through December 13, 2014, in the amount of \$18,467.48. In a compensation calculation worksheet, OWCP noted that appellant started using his own leave as of August 24, 2014. It found that for the period August 24 through December 13, 2014, appellant had an overpayment in the amount of \$18,467.48. For the period August 24 through September 20, 2014, he received a net amount of \$4,708.79; for the period September 21 through October 18, 2014, appellant received a net amount of \$4,616.87; for the period October 19 through November 15, 2014, he received a net amount of \$4,541.65; for the period November 16 through December 13, 2014, appellant received a net amount of \$4,600.17.

¹ On November 18, 2014 OWCP expanded appellant's claim to include additional conditions of sprain of shoulder and upper arm, supraspinatus right; other affections of shoulder region not elsewhere classified, right.

By letter dated February 6, 2015, OWCP advised appellant of a preliminary determination of an overpayment of compensation in the amount of \$18,467.48 for the period August 24 through December 13, 2014 as he had been drawing pay through sick leave while receiving compensation for total disability on the periodic rolls. It also determined that he was at fault in the creation of the overpayment as he had accepted payments that he knew or should have known were incorrect as he should have reasonably been aware that he was not entitled to total disability compensation for eight hours a day while being on paid sick leave. OWCP advised appellant to complete an OWCP-20 overpayment recovery questionnaire and submit supporting financial documents, as this was necessary information concerning the issues of waiver and recovery of the overpayment.

On February 17, 2015 appellant indicated that the initial payment of \$4,708.79 for the period August 24 through September 20, 2014 was “just” compensation. He contended that the correct overpayment amount was \$13,758.69 and attached a check in that amount. Appellant argued that he had not received compensation for the period July 27 through August 23, 2014 and thus he was entitled to the first payment of compensation that he received on September 20, 2014. He submitted copies of OWCP’s benefit statements, copies of earning and leave details for periods June 29 to July 12; July 13 to July 26; and July 27 to August 23, 2014. Appellant also submitted Web TA certified time and attendance summaries which validated that he used 160 hours of leave without pay from July 27 through August 23, 2014. He noted that he notified his employing establishment and asked OWCP to remove him from the periodic rolls for workers’ compensation. Appellant stated that he would retire on December 31, 2014. He did not submit a completed Form OWCP-20.

On March 26, 2015 OWCP received a check from appellant in the amount \$13,758.69.

By decision dated May 6, 2015, OWCP finalized its preliminary determination that an overpayment for the period August 24 through December 13, 2014 in the amount of \$4,708.79 had occurred for which appellant was with fault because he knew or reasonably should have known that the payment was incorrect. The original overpayment of \$18,467.48 was adjusted to \$4,708.79 as appellant had repaid \$13,758.69.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) 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.² FECA, however, also places limitations on an employee’s right to receive compensation benefits. Section 8116 provides that, while an employee is receiving benefits, he may not receive salary, pay or remuneration of any type from the United States, except in limited circumstances.³ The Board determined that if an employee receives sick leave from the employing establishment at the same time he is being paid compensation, this will cause an overpayment.⁴

² 5 U.S.C. § 8102(a).

³ *Id.* at § 8116(a).

⁴ *E.V.*, Docket No. 10-1284 (issued February 3, 2011).

ANALYSIS -- ISSUE 1

Appellant is not entitled to receive wage-loss compensation under FECA if he is receiving sick leave from the employing establishment. The record establishes that appellant began using and receiving sick leave from the employing establishment on August 24, 2014. OWCP determined that appellant received an overpayment of compensation for the period August 24 through December 13, 2014 as he received sick leave from the employing establishment at the same time he received wage-loss compensation under FECA. In its preliminary overpayment determination OWCP found the entire amount of compensation he received for this time period, \$18,467.48, to be an overpayment. Before issuance of the final overpayment decision, appellant repaid OWCP \$13,758.69. OWCP therefore concluded in its final overpayment decision that appellant had been overpaid in the amount of \$4,708.79.

The record substantiates that for the period August 24 through December 13, 2014, appellant received \$18,467.48 in compensation while on the periodic compensation rolls. For the period August 24 through September 20, 2014, appellant received a net amount of \$4,708.79; for the period September 21 through October 18, 2014, he received a net amount of \$4,616.87; for the period October 19 through November 15, 2014, appellant received a net amount of \$4,541.65; for the period November 16 through December 13, 2014, he received a net amount of \$4,600.17, for a total amount of \$18,467.48. Appellant has not disputed the fact of overpayment. He conceded the overpayment and repaid OWCP \$13,758.69. The final amount of overpayment was therefore \$4,708.79. The Board finds that OWCP properly determined that an overpayment of \$4,708.79 was created in this case.

Appellant alleges that the amount of \$4,708.79 was not an overpayment because he did not receive compensation during the period July 27 through August 23, 2014. The record indicates that appellant used leave without pay during the period July 27 through August 23, 2014. The record, however, remains unclear as to whether appellant received compensation during this time period. The record in this regard is complicated by the fact that appellant was also in receipt of compensation for the same date of injury under another OWCP claim number. Appellant can pursue the issue of entitlement to compensation for the period July 27 through August 23, 2014 with OWCP. The record is clear that this appeal pertains to compensation appellant received during the period August 24 to December 13, 2014, and OWCP properly determined that amount of overpayment for this period, in question.

LEGAL PRECEDENT -- ISSUE 2

5 U.S.C. § 8129(b) provides: 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 FECA or would be against equity and good conscience.⁵ A claimant who is at fault in creating the overpayment is not entitled to waiver.⁶ On the issue of fault, 20 C.F.R. § 10.433 provides that an individual will be found at fault if he or she has done any of the following: (1) made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; (2) failed to provide information which he or

⁵ 5 U.S.C. § 8129(b).

⁶ See *Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

she knew or should have known to be material; or (3) accepted a payment which he or she knew or should have known was incorrect.

Whether or not OWCP determines that individual was at fault with respect to the creation of the overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of the circumstances and the individual's capacity to realize that he is being overpaid.⁷

ANALYSIS -- ISSUE 2

OWCP determined that appellant was at fault in the creation of the overpayment because he accepted payments he knew or should have known to be incorrect.

The Board finds that appellant was at fault in creating the overpayment in the amount of \$4,708.79. Appellant acknowledged, and the record establishes, that he received compensation for the period August 24 to December 13, 2014 while he also requested and was paid sick leave from the employing establishment. OWCP informed appellant by letter dated September 3, 2014 that he would receive periodic rolls payments, with the regular first payment to be paid for the period August 24 to September 20, 2014. Appellant wrote to OWCP on November 17, 2014 noting that he should be taken off the periodic compensation rolls because he was using his sick leave. He was thus aware or reasonably should have been aware that he was not entitled to receive both wage-loss compensation and leave pay for the same period of time, *i.e.*, that he was not entitled to be paid twice for the same period of time.⁸ The Board finds that appellant is at fault in the creation of the overpayment from August 24 through December 13, 2014 because he accepted payments that he knew or should have known to be incorrect. That OWCP may have been negligent in issuing the compensation check to appellant does not mitigate this finding.⁹ Its finding that appellant was at fault in the creation of the overpayment is proper under the facts and the circumstances of this case. As appellant is at fault in the creation of the overpayment from January 13 to February 28, 2005, he is not eligible for waiver.

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation during the period August 24 through December 13, 2014 in the amount of \$4,708.79. The Board further finds that OWCP properly determined that he was at fault in creating the overpayment of compensation, thereby precluding waiver of recovery of the overpayment.

⁷ *C.D.*, Docket No. 12-193 (issued August 2, 2013).

⁸ *R.D.*, Docket No. 08-1340 (issued January 6, 2009).

⁹ *See* 20 C.F.R. § 10.435(a); *William E. McCarty*, 54 ECAB 525 (2003).

ORDER

IT IS HEREBY ORDERED THAT the May 6, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 16, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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