

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

C.V., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
West Sacramento, CA, Employer)

**Docket No. 16-0986
Issued: September 1, 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
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 8, 2016 appellant filed a timely appeal of a March 10, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$662.71 for the period September 26 through October 2, 2015; and (2) whether appellant was at fault in the creation of the overpayment such that repayment is not subject to waiver of recovery.

FACTUAL HISTORY

On July 20, 2015 appellant, then a 46-year-old letter carrier filed an occupational disease claim (Form CA-2) alleging that he developed stiffness and pain in his right knee with swelling.

¹ 5 U.S.C. § 8101 *et seq.*

On September 4, 2015 OWCP accepted his claim for sprain of the right knee and leg as well as tear of the right medial meniscus. In the September 4, 2015 letter, it notified appellant that he was to immediately inform it upon his return to work to avoid an overpayment of compensation. OWCP also noted that, if he worked during any period covered by a compensation payment that he had to return the payment to OWCP.

Appellant filed a claim for compensation (Form CA-7) requesting compensation for leave without pay from August 29 through September 18, 2015. His attending physician released him to return to full work on September 24, 2015. Appellant returned to full duty on September 26, 2015. He filed a second CA-7 form on September 29, 2015 requesting leave without pay from September 19 through 25, 2015. The September 29, 2015 Form CA-7 indicated that appellant returned to full duty on September 26, 2015.

On October 1, 2015 OWCP issued appellant compensation benefits from August 29, through October 2, 2015 in the amount of \$4,276.01. It determined on October 23, 2015 that he was not entitled to compensation from September 26 through October 23, 2015 in the amount of \$797.40. On October 28, 2015 OWCP determined that appellant was entitled to compensation from September 26 through October 2, 2015 for 6.30 hours of leave without pay in the amount of \$134.69 for this period.

In a preliminary determination dated February 8, 2016, OWCP determined that appellant received a \$662.71 overpayment because he returned to full-time work on September 26, 2015, but received compensation for total disability through October 2, 2015. It reported that the amount of the overpayment did not include a total of 6.3 hours of leave without pay that he utilized for physical therapy visits on September 26 and October 1, 2015. OWCP provided appellant with an overpayment recovery questionnaire, (OWCP-20) as well as his appeal rights.

By decision dated March 10, 2016, OWCP found that appellant had received an overpayment of compensation in the amount of \$662.71 as he returned to work on a full-time basis on September 26, 2015, but continued to receive compensation for total disability through October 2, 2015. It found that he was at fault in the creation of the overpayment as he accepted a payment that he knew or reasonably should have known was incorrect.

LEGAL PRECEDENT -- ISSUE 1

Section 8102 of FECA² 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 When an overpayment has been made to an individual because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which the individual is entitled.⁴

² 5 U.S.C. § 8102.

³ *Id.*

⁴ 5 U.S.C. § 8129(a).

A claimant is not entitled to receive temporary total disability and actual earnings for the same period.⁵ 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.⁶

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$662.71 because he had been paid in error for the period September 26 through October 2, 2015. Appellant had returned to full duty on September 26, 2015, but received compensation for disability from OWCP through October 2, 2015 except for 6.3 hours of leave without pay that he utilized for physical therapy visits on September 26 and October 1, 2015. As he received full-time wages for an eight-hour position job for the period September 26 through October 2, 2015, he was not entitled to disability compensation from OWCP for this same period. Therefore, appellant received an overpayment of compensation as calculated by OWCP.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of FECA⁷ provides that, where an overpayment of compensation has been made "because of an error or fact of law," adjustment shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): "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."⁸ Accordingly, no waiver of an overpayment is possible if the claimant is with fault in helping to create the overpayment.

In determining whether an individual is with fault, section 10.433(a) of OWCP's regulations⁹ provides in relevant part:

"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 furnish information which he or she knew or should have known to be material; or

⁵ See *M.S.*, Docket No. 16-0289 (issued April 21, 2016); *D.B.*, Docket No. 15-0258 (issued February 1, 2016).

⁶ See *Danny E. Haley*, 56 ECAB 393 (2005); 20 C.F.R. § 10.500.

⁷ 5 U.S.C. § 8129(a).

⁸ *Id.* at § 8129(b).

⁹ 20 C.F.R. § 10.433(a).

(3) Accepted a payment which he or she knew or should have known was incorrect.”¹⁰

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 or she is being overpaid.¹¹

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 she was not entitled.¹²

ANALYSIS -- ISSUE 2

In this case, OWCP applied the third standard in determining that appellant was at fault in creating the overpayment. In order for it to establish that appellant was at fault in creating the overpayment of compensation, OWCP must establish that, at the time appellant received the compensation check in question, he knew or should have known that the payment was incorrect.¹³

Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives are proper¹⁴ and 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.¹⁵ In the September 4, 2015 acceptance letter, OWCP clearly advised appellant that he was to immediately inform it upon his return to work to avoid an overpayment of compensation and that, if he worked during any period covered by a compensation payment, he had to return the payment to OWCP.

Thus, appellant should have known that he could not receive wage-loss compensation after his return to work.¹⁶ Although the employing establishment notified OWCP of appellant’s return to full duty on September 25, 2015, he did not return the compensation he received.

The Board therefore finds that appellant should have known that, at the time he returned to work, he was not entitled to continue to receive compensation and had an obligation to return payments he knew or should have known were incorrect.¹⁷ Under section 10.433(a) of OWCP’s

¹⁰ *Id.*

¹¹ *Id.* at § 10.433(b); *Neill D. Dewald*, 57 ECAB 451 (2006); *Y.Z.*, Docket No. 15-1704 (issued February 4, 2016).

¹² *Diana L. Booth*, 52 ECAB 370 (2001).

¹³ *Linda E. Padilla*, 45 ECAB 768, 772 (1994).

¹⁴ *Y.Z.*, *supra* note 11.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

regulations, appellant is at fault. As he was at fault in creating the overpayment, appellant is not eligible for waiver of recovery of the overpayment of compensation.¹⁸

With respect to recovery of the overpayment in compensation, the Board's jurisdiction is limited to reviewing those cases where OWCP seeks recovery from continuing compensation benefits under FECA. As appellant is no longer receiving wage-loss compensation, the Board does not have jurisdiction with respect to the recovery of the overpayment under the Debt Collection Act.¹⁹

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$662.71 for the period September 26 through October 2, 2015 because he continued to receive compensation after his return to work. The Board further finds that OWCP properly found him at fault, and thus, he was not entitled to waiver of recovery of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the March 10, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 1, 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

¹⁸ *Id.*

¹⁹ *Cheryl Thomas*, 55 ECAB 610 (2004).