

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

E.S., Appellant)
and) Docket No. 17-0718
U.S. POSTAL SERVICE, POST OFFICE,) Issued: August 23, 2017
Jackson, MS, Employer)

)

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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On February 10, 2017 appellant filed a timely appeal from a January 25, 2017 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 over the merits of this case.²

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$4,031.14 during the period October 31 to December 12, 2015 because he returned to work, but continued to receive wage-loss compensation for total disability; and (2) whether

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that appellant submitted new evidence following the January 25, 2017 decision. However, as the Board's jurisdiction is limited to evidence that was before OWCP at the time it issued its final decision, the Board may not consider this evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c)(1); *Sandra D. Pruitt*, 57 ECAB 126 (2005).

OWCP properly denied waiver of recovery of the overpayment because appellant was at fault in creating the overpayment.

FACTUAL HISTORY

On December 15, 2014 appellant, then a 63-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that on November 1, 2014 he sustained a left leg injury when he hit his left leg on a guard rail while in the performance of duty. He did not stop work. OWCP accepted appellant's claim for left knee contusion.

Appellant received medical treatment from Dr. Louis J. Saddler, a Board-certified internist. In a May 11, 2015 examination note and duty status report (Form CA-17), Dr. Saddler related appellant's complaints of left knee pain. He noted that on November 1, 2014 appellant hit his left knee on a guard rail at work. Dr. Saddler reported diagnoses of left knee pain, left knee contusion, degenerative arthritis, hypertension, and diabetes mellitus. In a May 27, 2015 letter, he indicated that, due to appellant's knee injury, appellant could only work four hours per day and was unable to stoop, bend, kneel, or climb.

Effective May 30, 2015, appellant began part-time modified duty working four hours per day. OWCP paid wage-loss compensation for the remaining four hours of his shift.

OWCP expanded appellant's claim to include left knee medial meniscus tear.

On August 4, 2015 appellant submitted an electronic funds transfer (EFT) enrollment form to receive compensation benefits *via* direct deposit.

Appellant underwent authorized left knee arthroscopy surgery on August 12, 2015. He stopped work and received wage-loss compensation for total disability. Appellant was placed on the periodic rolls effective September 20, 2015.

By letter dated October 5, 2015, OWCP advised appellant that he would be paid compensation every 28 days commencing September 20, 2015 in the amount of \$2,624.93. It advised him that he must immediately notify OWCP upon his return to work. In an enclosed Form EN1049, OWCP further informed appellant that he must monitor his EFT deposits carefully, at least every two weeks. It advised him that if he worked for any portion of the period covered by a deposit, he must notify OWCP immediately so that the overpayment could be collected.

In an October 29, 2015 return to work note, Dr. George V. Russell, Jr., a Board-certified orthopedic surgeon, indicated that appellant could return to light duty with restrictions.

On November 17, 2015 the employing establishment informed OWCP that appellant had returned to full-time modified duty on October 31, 2015, performing mail handler duties with restrictions.

In a November 17, 2015 report, Eileen Duddleston, a nurse, noted that appellant had returned to light duty on October 31, 2015.

The record indicates that on November 14, 2015, appellant received a direct deposit in the amount of \$2,624.93, representing his wage-loss compensation from October 18 to November 14, 2015. He continued to receive wage-loss compensation in this amount every 28 days.

On December 16, 2015 OWCP terminated appellant's periodic rolls wage-loss compensation payments, effective December 12, 2015. In a compensation termination report, it indicated that he had received an overpayment of compensation in the amount of \$1,406.21 for the period October 31 to November 14, 2015 and an overpayment of \$2,624.93 for the period November 15 to December 12, 2015 for a total overpayment amount of \$4,031.14.

On February 17, 2016 OWCP issued a preliminary determination that appellant received an overpayment of compensation in the amount of \$4,031.14 for the period October 31 through December 12, 2015 because he returned to work full time on October 31, 2015, but continued to receive wage-loss compensation for total disability until December 12, 2015. It found that he was at fault in the creation of the overpayment because he knowingly accepted payments which he knew or should have known were incorrect. The preliminary determination provided an explanation of the calculation of the overpayment. OWCP requested that appellant respond and complete an attached overpayment action request and an overpayment recovery questionnaire form (OWCP Form 20) within 30 days. Appellant was informed of the required financial documentation he should provide and actions he could take.

On March 15, 2016 appellant requested a prerecoupment hearing before an OWCP hearing representative. He contended that the overpayment was not his fault because he notified the employing establishment and his rehabilitation nurse of his return to work. Appellant also noted that he could not get through to speak to a person regarding the periodic payrolls.

In an overpayment recovery questionnaire, appellant reported a monthly income of \$5,761.00. He noted total monthly expenses of \$3,345.00, which included \$2,245.00 for rent or mortgage, \$400.00 for food, \$100.00 for clothing, \$400.00 for utilities, and \$200.00 for other expenses. Appellant indicated other debts with monthly payments of \$413.00 for Ally Financial, \$400.00 for Chrysler, \$357.00 for the Postal Employment Credit Union, and \$211.00 for a Tower Loan. He reported assets of \$25,000.00 for two acres of land. Appellant alleged that he was without fault in the creation of the overpayment because he had notified the employing establishment and his rehabilitation nurse in advance of his return to work date. He noted that they should have notified OWCP of his return to work. Appellant also explained that he called OWCP several times to provide information, but he could not obtain information on his specific case because he was on the periodic rolls. He submitted various financial documents, including a 2015 W2 form, a February 2016 federal credit union statement, a March 2016 utilities bill, a March 2016 mortgage statement, a March 2016 Ally Financial bill, a January 2016 hospital bill, a December 2015 Chrysler car loan bill, and a February 2016 radiology bill.

On November 17, 2016 a telephonic hearing was held by an OWCP hearing representative. Appellant related that he agreed with the fact and amount of the overpayment, but he disagreed with the finding of fault. He reported that he notified the employing establishment and his OWCP field nurse of his return to work date. Appellant alleged that they should have notified OWCP. He also noted that he applied for a waiver and submitted all

requested documents. Appellant described that he had lost \$23,384.00 in income this past year and that he was behind in various payments. He alleged that recovery of the overpayment would defeat the purpose of FECA and be against equity and good conscience. Appellant also testified that he checked his bank statements at least weekly. The hearing representative indicated that after appellant returned to work on October 31, 2015, he received two periodic rolls payments that were directly deposited into his bank account. Appellant acknowledged that he knew that he was still being paid by OWCP after he returned to work on October 31, 2015. The hearing representative requested that appellant complete another overpayment action questionnaire form with more current information.

Appellant submitted an updated overpayment recovery questionnaire form dated October 29, 2015. He reported a monthly income of \$4,616.00, property assets of \$13,283.40, monthly expenses of \$2,672.79, and monthly payments for other debts of \$5,496.79. Appellant again alleged that OWCP knew in advance of his return to work, but did not stop his periodic rolls compensation payments. He submitted additional supporting financial documentation.

By decision dated January 25, 2017, OWCP's hearing representative finalized the preliminary overpayment determination, finding an overpayment of compensation in the amount of \$4,031.14 for the period October 31 through December 12, 2015. She also found that appellant was at fault in the creation of the overpayment because he knowingly accepted payments he knew or should have known were incorrect.

LEGAL PRECEDENT -- ISSUE 1

Section 8102 of FECA 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 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 A claimant is only entitled to receive wage-loss compensation due to disability for those periods during which his or her work-related medical condition prevents him or her from earning the wages earned before the work-related injury.⁵ OWCP procedures provide that an overpayment of compensation is created when a claimant returns to work, but continues to receive wage-loss compensation.⁶

ANALYSIS -- ISSUE 1

Appellant stopped work and began receiving wage-loss compensation for total disability beginning August 12, 2015. OWCP placed him on the periodic compensation rolls, effective

³ 5 U.S.C. § 8102.

⁴ *Id.* at § 8116(a).

⁵ 20 C.F.R. § 10.500.

⁶ *Danny E. Haley*, 56 ECAB 393 (2005); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Action*, Chapter 6.200.2(a) (May 2004).

September 20, 2015. Appellant received compensation for total disability every 28 days, through December 12, 2015. The record indicates, however, that he had returned to full-time modified duty on October 31, 2015.

As noted above, a claimant is only entitled to receive disability compensation when his work-related medical condition prevents him from earning wages. He is not entitled to receive compensation for total disability during a period that he had actual earnings.⁷ Accordingly, the Board finds that an overpayment of compensation was created in this case for the period October 31 through December 12, 2015.

The overpayment compensation worksheet indicated that appellant received \$2,624.93 in compensation on the periodic rolls every 28 calendar days. It noted that he was overpaid for 43 calendar days from October 31 through December 12, 2015. OWCP calculated that \$2,624.93 divided by 28 days, multiplied by 43 calendar days totaled \$4,031.14. The Board finds that OWCP properly calculated the amount of overpayment to be \$4,031.14. Appellant does not dispute the fact or amount of overpayment.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of FECA provides that, when an overpayment of compensation has been made because of an error of fact or law, adjustment shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is when an incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of FECA or be against equity and good conscience.⁸ No waiver of payment is possible if appellant is with fault in helping to create the overpayment.⁹

In determining whether an individual is not without fault or alternatively, with fault, section 10.433(a) of OWCP's regulations provide 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 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.”¹⁰

⁷ *Supra* note 5.

⁸ 5 U.S.C. § 8129(b).

⁹ *Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

¹⁰ 20 C.F.R. § 10.433(a).

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 were incorrect. The Board notes that a complete analysis of the fault issue, when a claimant has returned to work and continues to receive compensation, must properly consider the first payment after return to work. In this case, after appellant returned to work on October 31, 2015, he received a deposit on November 14, 2015 of his regular compensation payment of \$2,624.93. The question is whether he had, at the time of the first deposit, accepted a payment he knew or should have known was incorrect.

The Board has held that the claimant may not have the requisite knowledge with respect to the first deposit payment after a return to work.¹¹ The Board finds that the evidence of record does not establish that appellant was at fault in accepting the initial payment deposited on November 14, 2015. The Board has held that 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 or her account since the acceptance of the overpayment, at the time of receipt of the direct deposit, lacks the requisite knowledge.¹² The Board has explained that the employee is generally not in a position to be aware of an incorrect payment or decline acceptance at the actual time that the initial incorrect direct deposit is made.¹³

A finding that appellant was not at fault with respect to the initial November 14, 2015 direct deposit payment does not establish that he was entitled to waiver of recovery of that portion of the overpayment. On remand, OWCP should properly consider the issue of waiver of this limited portion of the overpayment.¹⁴

The Board has held, however, that for subsequent payments through a direct deposit, a claimant may be found to have accepted payments that he knew or should have known to be incorrect.¹⁵ OWCP had advised appellant in the October 5, 2015 letter that he could not receive compensation for total disability during a period he had returned to work. By the time it issued its second deposit on December 12, 2015, he should have been aware that a deposit of compensation representing total disability was incorrect since he had returned to work on October 31, 2015. The Board has found that each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives are proper.¹⁶ 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.¹⁷ In this case, appellant testified

¹¹ *Tammy Craven*, 57 ECAB 689 (2006).

¹² *M.O.*, Docket No. 14-1133 (September 22, 2014).

¹³ *Id.*

¹⁴ See *M.L.*, Docket No. 15-1683 (issued June 20, 2016).

¹⁵ *Id.*

¹⁶ *Danny E. Haley*, 56 ECAB 393 (2005).

¹⁷ *Sinclar L. Taylor*, 52 ECAB 227 (2001).

at his telephonic hearing that he checked his bank account weekly, and did not dispute that he was aware that he was incorrectly receiving wage-loss compensation for total disability after October 31, 2015 even though he had returned to work. The Board finds, therefore, that OWCP properly found him at fault for compensation direct deposits accepted for the period November 15 to December 12, 2015, and thus, is not entitled to waiver of recovery of this portion of the overpayment.¹⁸

On appeal appellant reiterates that he notified his employing establishment and the OWCP field nurse of his return to work date. He further notes that he complied with all OWCP rules and regulations. As explained above, however, OWCP clearly informed appellant that he was not entitled to wage-loss compensation for the same period that he returned to work. Thus, appellant should have been aware that, as of October 31, 2015, he was not entitled to wage-loss compensation. The fact that OWCP may have been negligent in issuing the payments does not mitigate this finding.¹⁹ For the reasons discussed above, the Board finds that OWCP properly found that appellant was at fault in creating the overpayment for all deposits from November 15 to December 12, 2015. For the portion of the November 14, 2015 deposit that represents an overpayment of compensation from October 31 to November 14, 2015, the case is remanded for consideration of waiver of recovery of the overpayment.

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$4,031.14 for the period October 31 to December 12, 2015. The Board further finds that he was not at fault regarding the portion of the overpayment for the period October 31 to November 14, 2015, and the case is remanded to OWCP to determine whether waiver of the recovery of the overpayment is warranted. The Board further finds that OWCP properly found that appellant was at fault for the remaining portion of the \$4,031.14 overpayment of compensation for the period November 15 to December 12, 2015 and, therefore, ineligible for waiver of the recovery.

¹⁸ Recovery of the overpayment is not an issue in this case, as appellant is not in receipt of continuing total disability payment. With respect to the recovery of the overpayment, the Board's jurisdiction is limited to those cases where OWCP seeks recovery from continuing compensation benefits under FECA. 20 C.F.R. § 10.441(a); *see Albert Pineiro*, 51 ECAB 310 (2000); *Lorenzo Rodriguez*, 51 ECAB 295 (2000).

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

ORDER

IT IS HEREBY ORDERED THAT the January 25, 2017 decision of the Office of Workers' Compensation Programs is affirmed with respect to fact and amount of a \$4,031.14 overpayment, and affirmed, as to a finding of fault for compensation payments accepted for the period November 15 to December 12, 2015. The decision is set aside with respect to a finding of fault as to the compensation payment received on November 14, 2015, and remanded for further action consistent with this decision of the Board.

Issued: August 23, 2017
Washington, DC

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

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

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