

FACTUAL HISTORY

On August 1, 2016 appellant, then a 61-year-old maintenance mechanic, filed a traumatic injury claim (Form CA-1) alleging that on July 28, 2016 he injured his left arm and wrist, left lower back, and left leg when he slipped on a puddle on the floor. He stopped work on July 28, 2016. OWCP accepted the claim for a left shoulder sprain, a contusion of the lower back and coccyx, and a left rotator cuff tear.

On September 20, 2016 OWCP informed appellant that he must immediately notify it of any return to work in order to avoid an overpayment of compensation. It further advised that if he received compensation through electronic funds transfer (EFT), he was expected to monitor the deposits and notify it if he worked during any part of the period for which a deposit was made.

Appellant returned to part-time work in September 2016 and to full-time limited-duty employment in November 2016.

OWCP accepted that appellant sustained a recurrence of disability beginning November 28, 2016 and paid him compensation on the periodic rolls *via* EFT effective that date.

On December 7, 2016 appellant underwent a left rotator cuff repair with a subacromial decompression and glenohumeral debridement.

OWCP paid appellant net wage-loss compensation for total disability *via* EFT of \$3,381.84 on February 4, 2017 covering the period January 8 to February 4, 2017 and \$3,381.84 on March 4, 2017 covering the period February 5 through March 4, 2017.

Appellant, on February 6, 2017, filed a claim for compensation (Form CA-7) for seven hours of time used from January 23 to February 2, 2017 for physical therapy. The employing establishment advised on the form that he had returned to full-time limited duty on January 23, 2017. In a March 23, 2017 report of work status form (Form CA-3), the employing establishment notified OWCP that on January 23, 2017 appellant returned to full-time work with restrictions.

By letter dated March 27, 2017, OWCP notified appellant of its preliminary determination that he received an overpayment of compensation in the amount of \$4,545.48 for the period January 23 to March 4, 2017 because he returned to work, but continued to receive compensation benefits for total disability. It calculated the overpayment by determining the net amount of compensation that it paid him from January 23 to March 4, 2017, \$4,951.98, and subtracting from this figure the amount it owed him for time lost due to medical appointments during this period, to find a total overpayment of \$4,545.48. OWCP further advised appellant of its preliminary finding 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 precoupment hearing.

In a decision dated May 2, 2017, OWCP found that appellant received a \$4,545.38 overpayment of compensation from January 23 to March 4, 2017 because it paid him compensation for total disability after he returned to work. It further determined that he was at fault for creating the overpayment and thus not entitled to waiver of recovery of the overpayment. OWCP found that appellant should submit the entire amount as repayment or contact it to make arrangements for repayment. It noted that he had not responded to the preliminary overpayment determination.

On May 5, 2017 OWCP received an overpayment recovery questionnaire. It also received appellant's request for a prerecoupment hearing, which was postmarked May 1, 2017.

By decision dated May 24, 2017, OWCP denied appellant's request for a hearing as he did not request a prerecoupment hearing within 30 days of the preliminary overpayment finding. It also noted that a final overpayment decision was not subject to the hearing provisions of 5 U.S.C. § 8124(b).

On appeal appellant asserted that the overpayment occurred by direct deposit and that he notified the employing establishment when he realized that it was inaccurate. He requested additional information about the amount of overpayment and a payment plan.

LEGAL PRECEDENT -- ISSUE 1

OWCP regulations provide that a claimant may request a prerecoupment hearing with respect to an overpayment.² The date of the request is determined by the postmark or other carrier's date marking.³ Failure to request the prerecoupment hearing within 30 days shall constitute a waiver of the right to a hearing.⁴ The only right to a review of a final overpayment decision is with the Board.⁵ The hearing provisions of section 8124(b) of FECA do not apply to final overpayment decisions.⁶

ANALYSIS -- ISSUE 1

OWCP issued a preliminary overpayment determination on March 27, 2017. It advised appellant that he had 30 days to request a prerecoupment hearing. In correspondence postmarked May 1, 2017, OWCP received his request for a prerecoupment hearing. The timeliness of the request for a prerecoupment hearing is determined by the postmark date or other carrier's marking.⁷ Since the request was made on May 1, 2017, more than 30 days after

² 20 C.F.R. § 10.432.

³ *Id.* at §§ 10.439, 10.616(a); *see also* C.R., Docket No. 15-0525 (issued July 20, 2015).

⁴ *Id.*; *see also* Willie C. Howard, 55 ECAB 564 (2004).

⁵ 20 C.F.R. § 10.440(b).

⁶ *Id.*

⁷ *See* C.W., Docket No. 15-0554 (issued May 27, 2015); 20 C.F.R. §§ 10.439, 10.616(a).

March 27, 2017, it is untimely. As noted, the hearing provisions of section 8124(b) are not applicable to final overpayment decisions.⁸ OWCP thus properly denied the request.⁹

LEGAL PRECEDENT -- ISSUE 2

Section 8102 of the 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.¹⁰

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 may not receive salary, pay or remuneration of any type from the United States, except in limited circumstances.¹¹ OWCP's regulations state in pertinent part: "compensation for wage loss due to disability is available only for any periods during which an employee's work-related medical condition prevents him from earning the wages earned before the work-related injury."¹²

ANALYSIS -- ISSUE 2

Appellant returned to a full-time modified position with the employing establishment on January 23, 2017, but received wage-loss compensation for total disability through March 4, 2017. A claimant is not entitled to receive temporary total disability and actual earnings for the same period. OWCP procedures provide that an overpayment in compensation is created when a claimant returns to work, but continues to receive wage-loss compensation.¹³

On appeal appellant questions how OWCP calculated the overpayment. As he returned to full-time work without wage loss on January 23, 2017, he was not entitled to wage-loss compensation beginning that date. OWCP calculated that it paid appellant a daily rate of \$120.78 for the 41 days from January 23 through March 4, 2017, for total net compensation of \$4,951.98. It subtracted from this amount his entitlement to wage-loss compensation of \$135.50 for physical therapy appointments on February 21 and 23, 2017 and his entitlement to wage-loss compensation of \$271.00 for time lost from work for medical appointments from March 6 to 9, 2016, to find a total overpayment of \$4,545.48. OWCP explained how the overpayment occurred and provided the information to appellant with the preliminary notice of overpayment.

⁸ See *supra* note 5.

⁹ See *R.U.*, Docket No. 16-0027 (issued March 24, 2017).

¹⁰ 5 U.S.C. § 8102.

¹¹ *Id.* at § 8116(a).

¹² 20 C.F.R. § 10.500.

¹³ *Danny E. Haley*, 56 ECAB 393 (2005); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(a) (May 2004).

The Board finds that OWCP properly determined that he received an overpayment of compensation in the amount of \$4,545.48 for the period January 23 through March 4, 2017.¹⁴

LEGAL PRECEDENT -- ISSUE 3

Section 8129(b) of FECA¹⁵ 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 regulations¹⁶ 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 a direct deposit may not be at fault the first time incorrect funds are deposited into his or her account, as the acceptance of the resulting overpayment lacks the requisite knowledge.¹⁷ 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.¹⁸ 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.¹⁹

ANALYSIS -- ISSUE 3

OWCP determined that appellant was at fault in creating the overpayment because he accepted a payment which he knew or should reasonably have known was incorrect. In cases where a claimant receives compensation through direct deposit, OWCP must establish that at the

¹⁴ See *M.M.*, Docket No. 15-0265 (issued May 27, 2015).

¹⁵ 5 U.S.C. § 8129(b).

¹⁶ 20 C.F.R. § 10.433.

¹⁷ See *Tammy Craven*, 57 ECAB 689 (2006); *Order Granting Petition for Reconsideration and Reaffirming Prior Decision* (issued July 24, 2006).

¹⁸ *Id.*

¹⁹ See *D.B.*, Docket No. 16-0258 (issued February 1, 2016); *W.P.*, 59 ECAB 514 (2008).

time he received the direct deposit in question he knew or reasonably should have known that the payment was incorrect.²⁰ 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.²¹ One of the consequences of EFT's is that the claimant lacks the requisite knowledge at the time of the first incorrect payment.²² 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.²³ It is not appropriate 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.²⁴

Appellant received compensation by direct deposit payments every 28 days. The evidence does not establish that, as of the first direct deposit of compensation after he returned to work on January 23, 2017, he knew or reasonably should have known that he was accepting a direct deposit to which he was not entitled. There is no documentation or other evidence to demonstrate that appellant had clear knowledge at the time he received a direct deposit from OWCP on February 4, 2017, covering the period January 8 to February 4, 2017, that a portion of the payment was incorrect, or that a reasonable period of time passed during which he could have reviewed bank statements or been informed of the incorrect payment.²⁵ Appellant, therefore, is not at fault in the acceptance of the direct deposit covering the period of the overpayment from January 23 to February 4, 2017.

On appeal appellant contends that he notified the employing establishment when he realized that the direct deposit was incorrect. Although OWCP may have been negligent in making incorrect payments, this does not excuse a claimant from accepting payments he knew or reasonably should have known to be incorrect.²⁶ 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.²⁷ By the time of the second direct deposit, covering the period February 5 to March 4, 2017, appellant should have known that he was no

²⁰ See *C.K.*, Docket No. 12-0746 (issued May 1, 2012).

²¹ See *supra* note 17.

²² *Id.*

²³ See *K.D.*, Docket No. 13-0451 (issued April 12, 2013).

²⁴ See *K.H.*, Docket No. 06-0191 (issued October 30, 2006).

²⁵ See *supra* note 14.

²⁶ See *William E. McCarty*, 54 ECAB 525 (2003).

²⁷ See *V.S.*, Docket No. 13-1278 (issued October 23, 2013).

longer entitled to FECA wage-loss compensation after he returned to work on January 23, 2017. Accordingly, the Board will affirm the finding of fault for the remaining period of overpayment from February 5 to March 4, 2017.²⁸

On appeal appellant requests a payment plan. The Board's jurisdiction over recovery of the overpayment, however, is limited to reviewing those cases where OWCP seeks recovery from continuing compensation benefits under FECA.²⁹

The Board finds that this case is not in posture for decision regarding the issue of waiver of recovery of the overpayment for the direct deposit on February 4, 2017, covering the part of the overpayment from January 23 to February 4, 2017. As appellant was not at fault for the creation of this portion of the overpayment, the Board will remand the case for OWCP to determine whether he is entitled to waiver of recovery for the direct deposit of compensation covering the period of the overpayment from January 23 to February 4, 2017.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for a prerecoupment hearing and properly found that he received a \$4,545.48 overpayment of compensation for the period January 23 through March 4, 2017. The Board further finds that he was without fault in the creation of the overpayment covering the period January 23 to February 4, 2017, but was at fault in the creation of the overpayment from February 5 to March 4, 2017. The case will be remanded for OWCP to consider waiver of recovery of the overpayment from January 23 to February 4, 2017.

²⁸ See *supra* note 14.

²⁹ See *T.G.*, Docket No. 16-1379 (issued August 4, 2017); *Cheryl Thomas*, 55 ECAB 610 (2004).

ORDER

IT IS HEREBY ORDERED THAT the May 24, 2017 decision of the Office of Workers' Compensation Programs is affirmed; and the May 2, 2017 decision 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: December 11, 2017
Washington, DC

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

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

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