

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

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**B.K., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Los Angeles, CA, Employer**

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**Docket No. 17-1562  
Issued: October 27, 2017**

*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 July 10, 2017 appellant filed a timely appeal from a June 27, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 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 OWCP properly determined that appellant received an overpayment of compensation in the amount of \$957.87 for the period April 20 to 30, 2016; and (2) whether OWCP properly determined that appellant was at fault in the creation of the overpayment of compensation, thereby precluding waiver of recovery of the overpayment.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On December 2, 2014 appellant, then a 45-year-old city letter carrier, filed an occupational disease claim (Form CA-2) alleging that he sustained injuries to his feet, including bilateral plantar fasciitis, due to the performance of his work duties over a period of time. He indicated that he first became aware of his claimed condition on October 7, 2014 and first realized on the same date that it was caused or aggravated by his federal employment. Appellant stopped work on October 7, 2014 and began performing modified duty on January 31, 2015.

OWCP accepted appellant's claim for bilateral plantar fasciitis, and he received wage-loss compensation on the daily rolls beginning January 31, 2015 for intermittent periods of work stoppage.

Appellant stopped work on December 4, 2015 and, on that date, he underwent OWCP-approved plantar fasciectomy of his right foot.

Appellant received wage-loss compensation on the periodic rolls effective January 10, 2016. In conjunction with being placed on the periodic rolls, OWCP informed appellant that he needed to report immediately any return to work in order to minimize the possibility of an overpayment of compensation.

On April 6, 2016 appellant telephoned an OWCP official and advised him that he would be returning to work for the employing establishment on April 9, 2016. The record reflects that appellant actually returned to work on April 20, 2016.

In an August 12, 2016 letter, OWCP advised appellant of its preliminary determination that he received an overpayment of compensation in the amount of \$957.87 for the period April 20 to 30, 2016 because he received total disability compensation for that period despite returning to work on April 20, 2016.<sup>2</sup> It also made a preliminary determination that he was at fault in the creation of the overpayment because he accepted a payment which he knew or reasonably should have known to be incorrect. OWCP advised appellant that he could submit evidence challenging the fact, amount, or finding of fault, and request waiver of recovery of the overpayment. It informed him that he could submit additional evidence in writing or at a prerecoupment hearing, but that a prerecoupment hearing must be requested within 30 days of the date of the written notice of overpayment. OWCP requested that appellant complete and return an enclosed financial information questionnaire (Form OWCP-20) within 30 days even if he was not requesting waiver of recovery of the overpayment.

By letter dated August 21, 2016, appellant requested a prerecoupment hearing by telephone with a representative of OWCP's Branch of Hearings and Review.

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<sup>2</sup> The record reflects that on April 30, 2016 appellant received, through direct electronic deposit into his bank account, \$2,856.68 in wage-loss compensation covering the period April 3 to 30, 2016. OWCP provided a worksheet showing that the portion of the deposit covering the period April 20 to 30, 2016 was \$957.87.

Appellant submitted a financial information questionnaire (Form OWCP-20), signed on August 21, 2016, in which he discussed his monthly income, monthly expenses, and assets.<sup>3</sup> He also submitted financial documents in support of the questionnaire. Appellant requested waiver of the \$957.87 overpayment noting that he had timely reported his return to work to OWCP.

During the telephonic prerecoument hearing held on April 20, 2017, appellant indicated that he felt he was without fault in the creation of the \$957.87 overpayment because he telephoned and notified OWCP about his return to work. He advised that the financial information questionnaire he completed was basically still accurate. Appellant was provided 30 days to report any changes to his financial situation, but he did not submit a response within the allotted period.

In a June 27, 2017 decision, OWCP's hearing representative finalized the overpayment of compensation in the amount of \$957.87 for the period April 20 to 30, 2016 because he received total disability compensation for that period despite returning to work on April 20, 2016. He further found that appellant was at fault in the creation of the overpayment because he accepted a payment which he knew or reasonably should have known to be incorrect. The hearing representative discussed the financial information submitted by appellant and determined that the \$957.87 overpayment was due in full.

### **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 his duty.<sup>4</sup> Section 8129(a) of FECA provides, in pertinent part:

“When an overpayment has been made to an individual under this subchapter 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 an individual is entitled.”<sup>5</sup>

Section 8116(a) of FECA provides that, while an employee is receiving compensation or if he or she has been paid a lump sum in commutation of installment payments until the expiration of the period during which the installment payments would have continued, the employee may not receive salary, pay, or remuneration of any type from the United States, except in limited specified instances.<sup>6</sup>

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<sup>3</sup> Appellant indicated that he had \$2,248.00 in monthly income, \$4,214.00 in monthly expenses, and \$32,893.79 in assets.

<sup>4</sup> *Supra* note 1 at § 8102(a).

<sup>5</sup> *Id.* at § 8129(a).

<sup>6</sup> *Id.* at § 8116(a).

### **ANALYSIS -- ISSUE 1**

The Board finds that appellant received a \$957.87 overpayment of compensation for the period April 20 to 30, 2016. Appellant received wage-loss compensation during this period despite the fact that he returned to work on April 20, 2016.<sup>7</sup> He was not entitled to receive both a salary and wage-loss compensation for temporary total disability for the period April 20 to 30, 2016.<sup>8</sup> Accordingly, the Board finds that appellant received a \$957.87 overpayment of compensation.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8129(b) of FECA provides that 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 this subchapter or would be against equity and good conscience.<sup>9</sup> Section 10.433(a) of OWCP's implementing regulations 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.”<sup>10</sup>

The Board has held that an employee who receives payments from OWCP in the form of a direct electronic 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.<sup>11</sup> 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.<sup>12</sup> Previous cases have held that receiving one erroneous direct

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<sup>7</sup> *Supra* note 2.

<sup>8</sup> *See supra* note 6.

<sup>9</sup> 5 U.S.C. § 8129(b).

<sup>10</sup> 20 C.F.R. § 10.433(a).

<sup>11</sup> *See Tammy Craven*, 57 ECAB 689 (2006).

<sup>12</sup> *Id.*

deposit payments does not necessarily create the requisite knowledge to find that a claimant was at fault in the creation of the overpayment.<sup>13</sup>

### **ANALYSIS -- ISSUE 2**

OWCP determined that appellant was at fault in the creation of the overpayment because he accepted a payment that he knew or reasonably should have known to be incorrect. The Board finds, however, that OWCP failed to establish that, at the time he accepted the initial (and sole) payment of compensation following his return to work, appellant knew or reasonably should have known the payment was incorrect.

As discussed, in cases where a claimant receives compensation through direct deposit, OWCP must establish that, at the time, a claimant received the direct deposit in question that he or she knew or should have known that the payment was incorrect.<sup>14</sup> 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.<sup>15</sup> Because fault is defined by what the claimant knew or should have known at the time of acceptance, one of the consequences of electronic fund transfers is that the claimant lacks the requisite knowledge at the time of the first incorrect payment.<sup>16</sup> 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.<sup>17</sup> 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.<sup>18</sup>

Appellant received FECA wage-loss compensation by direct deposit every 28 days. The evidence of record does not establish that, as of the first direct deposit of compensation after he returned to work on April 20, 2016, he knew or 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 April 30, 2016, covering the period April 3 to 30, 2016, 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. Therefore, he is not at fault in the

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<sup>13</sup> *V.S.*, Docket No. 13-1278 (issued October 23, 2013).

<sup>14</sup> *See C.K.*, Docket No. 12-746 (issued May 1, 2012).

<sup>15</sup> *See Tammy Craven*, *supra* note 11; *see also George A. Hirsch*, 47 ECAB 520 (1996).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*; *see also K.D.*, Docket No. 13-451 (issued April 12, 2013).

<sup>18</sup> *See K.H.*, Docket No. 06-191 (issued October 30, 2006).

acceptance of the direct deposit covering the period of the overpayment from April 20 to 30, 2016.<sup>19</sup>

The Board will reverse OWCP's June 27, 2017 finding of fault, and remand the case for consideration of whether appellant is entitled to waiver of recovery of the overpayment.

**CONCLUSION**

The Board finds that OWCP properly determined that appellant received a \$957.87 overpayment of compensation for the period April 20 to 30, 2016. The Board further finds that OWCP improperly determined that appellant was at fault in the creation of the overpayment of compensation. The case shall be remanded for consideration of waiver of recovery of the overpayment.

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 27, 2017 decision of the Office of Workers' Compensation Programs is affirmed in part and reversed in part, and the case is remanded for further action consistent with this decision.

Issued: October 27, 2017  
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

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<sup>19</sup> See *supra* notes 14 through 18.