United States Department of Labor
Employees' Compensation Appeals Board

G.P., Appellant	)	
and	)	**Docket Nos. 17-0873; 17-1018**
	)	**Issued: April 16, 2018**
DEPARTMENT OF THE ARMY, CENTER FOR HEALTH PROMOTION & PREVENTATIVE MEDICINE, Aberdeen, MD, 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
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 10 and April 10, 2017 appellant filed timely appeals from merit decisions of the Office of Workers' Compensation Programs (OWCP) dated December 22, 2016, January 6, March 15 and 16, 2017. Pursuant to the Federal Employees' Compensation Act[1] (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 OWCP properly suspended appellant's compensation benefits for failing to attend a scheduled medical examination; (2) whether OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective August 11, 2016; (3) whether appellant has met his burden of proof to establish any continuing disability or medical residuals causally related to his February 14, 1996 employment injury on or after August 11, 2016; (4) whether appellant received an overpayment of compensation in the amount of $20,180.16

[1] 5 U.S.C. § 8101 *et seq.*

during the period August 11, 2016 through January 7, 2017 for which OWCP found he was at fault; (5) whether appellant received an overpayment of compensation in the amount of $6,201.72 for the period June 26 through August 10, 2016 for which OWCP found he was at fault; and (6) whether OWCP properly denied waiver of recovery of the overpayments because appellant was at fault in their creation.

FACTUAL HISTORY

On February 14, 1996 appellant, then a 49-year-old safety and occupational health specialist, was climbing stairs in the performance of duty when he slipped on snow and ice twisting his knee, as well as hitting his low back, neck, and head on steps. He stopped work on that day. OWCP accepted his claim for cervical sprain, lumbosacral sprain with contusions, and left knee contusions and authorized compensation benefits.[2] OWCP placed appellant on the periodic rolls on November 25, 1996. It subsequently accepted the claim for aggravation of torn left meniscus and authorized left knee arthroscopy. Appellant declined to undergo this authorized surgical procedure. On August 10, 2009 OWCP also accepted additional conditions of aggravation of degenerative disc disease of the lumbar and cervical spines.

Dr. C. Gregory Kang, a Board-certified physiatrist, completed a report on March 4, 2016. He noted appellant's history of injury on February 14, 1996 and diagnosed lumbar degenerative disc disease, lumbosacral ligament sprain, neck sprain, medial meniscus tear, degenerative disc disease of both the cervical and lumbar spines, and osteoarthritis of the knees. Dr. Kang opined that appellant was totally disabled and in chronic daily pain.

On May 2, 2016 OWCP referred appellant for a second opinion evaluation with Dr. James A. Maultsby, a Board-certified orthopedic surgeon, scheduled for May 25, 2016. The March 24, 2016 statement of accepted facts (SOAF), which was provided to Dr. Maultsby, listed accepted conditions as left knee contusion, cervical sprain, lumbar sprain with contusions, and aggravation of torn left meniscus as well as aggravation of lumbar and cervical disc disease.

In a May 10, 2016 letter, OWCP referred appellant for a functional capacity evaluation (FCE) on May 25, 2016. In a May 18, 2016 letter, the FCE provider cancelled the May 25, 2016 FCE appointment. She noted that during her third conversation with appellant he threatened to sue if he was touched. In a May 24, 2016 telephone memorandum, the FCE provider informed OWCP that appellant called and advised in a threatening tone that he would sue the provider if touched. She alleged that appellant called three or four times and sent pages of documents. As a result, the FCE provider cancelled the appointment.

OWCP, in a May 31, 2016 letter, proposed to suspend appellant's compensation pursuant to 5 U.S.C. § 8123(d) as he did not report for the May 25, 2016 FCE. It afforded him 14 days to provide "good cause" for his obstruction of the FCE, his threatening demeanor to sue, repetitive calls, and pages of documentation. OWCP directed appellant to fully cooperate with any rescheduled examination and contact OWCP immediately so that it could reschedule the examination.

[2] Appellant requested direct deposit of his wage-loss compensation on August 19, 1996.

In his May 25, 2016 report, Dr. Maultsby noted that appellant was one hour late for his appointment. He noted that he lightly touched appellant on the top of the head, which resulted in a report of severe pain. Appellant had a positive Waddell's test and cogwheel motion in his neck and back. A Jamar test was performed with barely 10 pounds of pressure. Appellant showed very poor effort. Dr. Maultsby found that appellant's findings documented symptom magnification and lack of effort. He reported that appellant was able to get on the examining table without difficulties, but indicated that he could not extend his knees. Appellant had full range of motion of his knee and could walk without support. Appellant had excellent muscle definition despite assertions of weakness. Dr. Maultsby opined that appellant was at maximum medical improvement (MMI) from his February 14, 1996 work injury. He found that appellant could perform light-to-moderate work eight hours a day. Dr. Maultsby concluded that appellant had no residuals despite continued treatment and advised that he could return to his date-of-injury job full time with no restrictions.

On June 8, 2016 appellant disputed that he obstructed the May 25, 2016 FCE as the provider cancelled the appointment and he never refused to attend the scheduled evaluation. Appellant admitted that he called the provider to offer his MRI scans at two different numbers twice for a total of four calls. He also admitted that he informed the provider that given his medical conditions he could be paralyzed if improperly manipulated and that, if this happened, he would sue everyone involved. Appellant concluded that he did not refuse to submit to the evaluation and that he had a right to submit documentation and to sue if injured.

In a June 15, 2016 letter, OWCP proposed to terminate appellant's wage-loss compensation and medical benefits based on Dr. Maultsby's findings. It afforded appellant 30 days to submit evidence or argument if he disagreed with the proposed termination.

By decision dated June 23, 2016, OWCP finalized its suspension of appellant's wage-loss compensation and medical benefits under 5 U.S.C. § 8123(d) effective June 26, 2016. On July 22, 2016 appellant requested a review of the written record from OWCP's Branch of Hearings and Review.

On July 15, 2016 appellant disagreed with the proposed termination of his wage-loss compensation and medical benefits. He submitted a July 11, 2016 report from Dr. William L. Mills, a Board-certified orthopedic surgeon. Dr. Mills had previously diagnosed spinal stenosis with a recommendation for decompression and arthrodesis in 2013. He reviewed appellant's cervical and lumbar magnetic resonance imaging (MRI) scans which indicated spinal stenosis at L3-4 and L4-5 as well as multilevel cervical spondylosis. On examination, appellant had very little lumbar flexion/extension and very little cervical spine range of motion. He had normal motor strength and normal reflexes. Dr. Mills diagnosed chronic cervical and lumbar pain with lumbar spinal stenosis and cervical and lumbar radiculopathy as well as a torn meniscus in the left knee. He reviewed appellant's FCE and found that appellant could perform sedentary work, but not his date-of-injury position due to the requirements of climbing ladders, and crawling through hospitals and elevator shafts. Dr. Mills completed a work capacity evaluation (OWCP-5) on July 13, 2016 and found that appellant could sit, walk, and stand for more than two hours each. Appellant could occasionally reach above the shoulder, twist, bend, stoop, perform repetitive movements with his wrists and elbows, push, pull, lift, and kneel. He could not squat or climb. Dr. Mills reported that while standing or walking appellant must use a cane or other assistive device.

Dr. Kang completed a work capacity evaluation (OWCP-5) on July 12, 2016 and indicated that appellant could perform all activities less than two hours a day, except operating a motor vehicle which he could perform for two to three hours a day. He provided appellant with a seven-pound weight limit for pushing, pulling, and lifting.

On July 19, 2016 appellant submitted a July 8, 2016 FCE. This testing found that appellant demonstrated consistent and maximal effort and was a reliable indication of his true functional abilities. The testing found that appellant's lifting capabilities were in the sedentary physical demand category lifting up to 10 pounds for 33 percent of the workday. The FCE found that appellant was not capable of performing his date-of-injury position as he could not lift 20 pounds occasionally, could not stand or walk constantly and could not reach, crawl, climb, or twist to the extent required by his date-of-injury position.

By decision dated August 11, 2016, OWCP terminated appellant's wage-loss compensation and medical benefits effective that date. It found that Dr. Maultsby's report was entitled to the weight of the medical evidence and established that appellant's disability and medical residuals had resolved. Appellant requested a review of the written record before an OWCP hearing representative on September 12, 2016.

By decision dated December 22, 2016, OWCP's hearing representative found that OWCP properly suspended appellant's compensation benefits beginning June 26, 2016. He further noted that OWCP had mistakenly not halted appellant's compensation benefits as intended. The hearing representative found that although appellant alleged that he was restricted from traveling for the examination, he provided no compelling medical evidence to support this assertion. He further noted that appellant had not provided any evidence of intended cooperation with a new FCE and that his continued comments and action "only reinforce the impression that he is unwilling to fully participate in the medical examination process."

In a letter dated December 23, 2016, appellant alleged that he underwent an FCE on July 8, 2016 and provided this to OWCP on July 15, 2016. He alleged that Dr. Maultsby examined the wrong knee, that he failed to carry out deep tendon reflexes, and that he failed to complete a sensory examination.

Dr. Kang examined appellant on April 28, 2016 and October 25, 2016 due to pain in the neck, shoulder, and low back. He also noted appellant's left knee was still painful from his prior meniscal injury. Appellant reported difficulty with bending, stooping, walking, and standing. Dr. Kang diagnosed cervical degenerative disc disease, lumbar degenerative disc disease, osteoarthritis, and left meniscal tear. In a December 19, 2016 work capacity evaluation (OWCP-5), he found that appellant could not work more than two hours a day.

On January 4, 2017 appellant contacted OWCP and agreed to attend an FCE.

By decision dated January 6, 2017, OWCP's hearing representative found that OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits. He noted that Dr. Maultsby represented the weight of the medical evidence as he provided an accurate history, examination findings, and medical rationale for his opinion that appellant's disability and residuals due to the February 14, 1996 work injury had ceased.

On February 7, 2017 OWCP made a preliminary determination that appellant received a $20,180.16 overpayment of compensation for the period August 11, 2016 through January 7, 2017 because he was paid for wage-loss compensation after the ordered termination of his benefits. It found that he was at fault in creating the overpayment as he accepted payments that he knew or reasonably should have known were incorrect. OWCP requested that appellant complete an overpayment recovery questionnaire and provided him 30 days to respond if he disagreed with the overpayment determination.

On February 8, 2017 OWCP made a preliminary determination that appellant received a $6,201.72 overpayment of compensation for the period June 26 through August 10, 2016, or 46 days. Appellant received $3,774.96 every 28 days for a total of $6,201.72 for the period at issue because he was paid disability compensation after the formal suspension of his benefits. OWCP found that he was at fault in creating this overpayment as he accepted payments that he knew or reasonably should have known were incorrect. It requested that appellant complete an overpayment recovery questionnaire and provided him 30 days to respond if he disagreed with the overpayment determination.

Appellant did not respond to either of the preliminary overpayment determinations.

By decision dated March 15, 2017, OWCP finalized the preliminary determination of an overpayment of compensation in the amount of $20,180.16 for the period August 11, 2016 through January 7, 2017 for which appellant was at fault.

By decision dated March 16, 2017, OWCP finalized the preliminary determination of an overpayment of compensation in the amount of $6,201.72 for the period June 26 through August 10, 2016.

LEGAL PRECEDENT -- ISSUE 1

Section 8123(a) of FECA and section 10.320 of OWCP's regulations authorize OWCP to require an employee, who claims disability as a result of federal employment to undergo a physical examination as it deems necessary.[3] The determination of the need for an examination, the type of examination, the choice of locale and the choice of medical examiners are matters within the province and discretion of OWCP.[4] FECA further provides in section 8123(d) that if the employee refused to or obstructs an examination his or her right to compensation is suspended until the refusal or obstruction stops and that the period of refusal or obstruction is deducted from the period for which compensation is payable.[5] The Board has held that a time must be set for a medical examination and the employee must fail to appear for the appointment, without an acceptable excuse or reason, before OWCP can suspend or deny the employee's entitlement to compensation because the employee failed to submit to or obstructed a medical examination.[6] OWCP's

[3] 5 U.S.C. § 8123(a); 20 C.F.R. § 10.320.

[4] *S.B.*, 58 ECAB 267 (2007).

[5] 5 U.S.C. § 8123(d).

[6] *Margaret M. Gilmore*, 47 ECAB 718 (1996).

procedures provide that if the claimant does not report for a scheduled appointment, he or she should be asked in writing to provide an explanation within 14 days.[7] If good cause is not established, entitlement to compensation should be suspended in accordance with 5 U.S.C. § 8123(d) until the claimant reports for examination.[8]

ANALYSIS -- ISSUE 1

OWCP scheduled an FCE on May 25, 2016. In a May 18, 2016 letter, the FCE provider notified OWCP that she had cancelled appellant's May 25, 2016 FCE appointment. She noted that during her third conversation with appellant he threatened to sue if he was touched. In a telephone memorandum dated May 24, 2016, the FCE provider informed OWCP that appellant had called and suggested in a threatening tone that he would sue the practice if he was touched. She advised that appellant called three or four times and forwarded pages of documentation. As a result the FCE provider cancelled the appointment. On May 31, 2016 OWCP advised appellant of its intention to suspend compensation benefits pursuant to 5 U.S.C. § 8123(d) and afforded him 14 days to provide a "good cause" explanation for his obstruction of the FCE. Appellant responded on June 8, 2016 and disputed that he had obstructed the May 25, 2016 appointment. He asserted that the provider cancelled the appointment and that he never refused to attend the scheduled evaluation. On June 23, 2016 OWCP suspended appellant's benefits under 5 U.S.C. § 8123(d) effective June 26, 2016. The Board finds that OWCP properly suspended appellant's entitlement to compensation for obstruction of the May 25, 2016 FCE.

The determination of the need for an examination, the type of examination, the choice of locale, and the choice of medical examiners are matters within the province and discretion of OWCP. The only limitation on OWCP's authority, with regard to instructing a claimant to undergo a medical examination, is that of reasonableness.[9] The Board has interpreted the plain meaning of section 8123(d) to provide that compensation is not payable while a refusal or obstruction of an examination continues.[10]

OWCP directed appellant to attend an FCE on May 25, 2016. Appellant was advised of the need for the examination and the time and place for the scheduled appointment. He admitted that he called the FCE provider to offer his MRI scans at two different numbers twice for a total of four calls. He further admitted that he informed the provider that given his medical conditions he could be paralyzed if improperly manipulated, and that if this happened he would sue everyone involved. In *Linda L. Wagner*,[11] the Board found that the physicians selected by OWCP declined to examine appellant because of the intimidating nature of letters submitted by her representative

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.13(d) (June 2015).

[8] *Id.; see Scott R. Walsh*, 56 ECAB 353 (2005); *Raymond C. Dickinson*, 48 ECAB 646 (1997).

[9] *Supra* note 4; *B.W.*, Docket No. 17-0847 (issued July 18, 2017); *Lynn C. Huber*, 54 ECAB 281 (2002).

[10] *B.W., id.*; *T.W.*, Docket No. 16-1524 (issued February 6, 2017).

[11] *Linda L. Wagner*, Docket No. 03-0354 (issued June 5, 2003) (finding that threatening letters to physicians which resulted in the physician's cancelling the scheduled examination constituted obstruction on the part of the claimant).

and that this constituted obstruction of the FCE. As in *Wagner*, appellant did not refuse to attend the scheduled appointment, but instead through his actions made the medical examiner so uncomfortable that she was unwilling to treat appellant. Thus the Board finds that OWCP properly suspended entitlement to compensation in accordance with 5 U.S.C. § 8123(d) effective June 26, 2016 until January 4, 2017 when appellant contacted OWCP and agreed to attend a FCE. When appellant actually reports for examination, payment retroactive to the date on which he agreed to attend the examination may be made.[12]

LEGAL PRECEDENT -- ISSUE 2

Once OWCP accepts a claim and pays compensation, it has the burden of proof to justify modification or termination of an employee's benefits.[13] It may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.[14] OWCP's burden of proof in terminating compensation includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[15]

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.[16] To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.[17]

When there are opposing reports of virtually equal weight and rationale, the case will be referred to an impartial medical specialist pursuant to section 8123(a) of FECA which provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination and resolve the conflict of medical evidence.[18] This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[19]

ANALYSIS -- ISSUE 2

The Board finds that OWCP did not meet its burden of proof to justify termination of appellant's wage-loss compensation and medical benefits because a conflict in medical evidence

[12] *B.W., supra* note 9.

[13] *P.C.*, Docket No. 16-1714 (issued October 18, 2017); *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

[14] *Id.*

[15] *P.C., supra* note 13; *Jaja K. Asaramo,* 55 ECAB 200 (2004).

[16] *See T.P.*, 58 ECAB 524 (2007); *Furman G. Peake*, 41 ECAB 361, 364 (1990).

[17] *See I.J.*, 59 ECAB 408 (2008); *Furman G. Peake, id.*

[18] 5 U.S.C. § 8123; *B.C.*, 58 ECAB 111 (2006); *M.S.*, 58 ECAB 328 (2007).

[19] *R.C.*, 58 ECAB 238 (2006).

had been created between the opinions of appellant's treating physicians, Drs. Mills and Kang, and OWCP's second opinion physician, Dr. Maultsby, regarding whether appellant remained disabled due to his accepted employment injuries and requires further medical treatment.

OWCP accepted appellant's February 14, 1996 employment injury for cervical sprain, lumbosacral sprain with contusions, left knee contusions, aggravation of torn left meniscus, and of aggravation of degenerative disc disease of the lumbar and cervical spines.

In a March 4, 2016 report, Dr. Kang noted appellant's history of injury on February 14, 1996 and diagnosed lumbar degenerative disc disease, lumbosacral ligament sprain, neck sprain, medial meniscus tear, cervical and lumbar spine degenerative disc disease, and osteoarthritis of the knees. He opined that appellant was totally disabled and had chronic daily pain. Several months later, Dr. Kang completed a work capacity evaluation form (OWCP-5) on July 12, 2016 and indicated that appellant could perform all activities less than two hours a day, except operating a motor vehicle which he could perform for two to three hours a day. He provided appellant with a seven-pound weight limit for pushing, pulling, and lifting. On July 11, 2016 Dr. Mills diagnosed chronic cervical and lumbar pain with lumbar spinal stenosis and cervical and lumbar radiculopathy as well as a torn left knee meniscus. He reviewed appellant's FCE and found that appellant could perform sedentary work, but not his date-of-injury position due to the requirements of climbing ladders, and crawling through hospitals and elevator shafts.

Dr. Maultsby completed a second opinion report on May 25, 2016 and found a positive Waddell's test, cogwheel motion in his neck and back, and 10 pounds of pressure on the Jamar device with very poor effort. He found that appellant's findings documented symptom magnification and lack of effort. Dr. Maultsby found that appellant could perform light-to-moderate work eight hours a day and indicated that appellant could return to his date-of-injury position eight hours a day without restrictions and no further medical treatment.

Appellant's physicians and OWCP's second opinion physician disagreed regarding his ability to return to his full-duty position and his need for ongoing medical treatment. The Board finds that OWCP should have resolved the conflict of medical opinion evidence before terminating compensation.[20] As OWCP failed to resolve the conflicting medical opinion evidence, the Board finds that it did not meet its burden of proof to terminate wage-loss compensation and medical benefits.[21]

[20] *P.C., supra* note 13.

[21] Due to the resolution of this issue, the issue of continuing disability and overpayment of compensation in the amount of $20,180.16 during the period August 11, 2016 through January 7, 2017 resulting from the August 11, 2016 termination are moot and will not be addressed in this appeal.

LEGAL PRECEDENT -- ISSUE 5

Under FECA at 5 U.S.C. § 8123(d), if an employee refuses to submit to or obstructs an examination, his right to compensation under this subchapter is suspended until the refusal or obstruction stops. OWCP regulations state:

> "Should the employee subsequently agree to attend the examination or cease obstruction (as expressed in writing or by telephone documented on Form CA-110), OWCP will restore any periodic benefits to which the employee is entitled when the employee actually reports for and cooperates with the examination. Payment is retroactive to the date the employee agreed to attend or cease obstruction of the examination.[22] (Emphasis added.)

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.[23] When an overpayment has been made to an individual because of 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.[24]

ANALYSIS -- ISSUE 5

OWCP found that an overpayment of compensation in the amount of $6,201.72 occurred from June 26 through August 10, 2016 because appellant received wage-loss compensation after his compensation had been suspended under 5 U.S.C. § 8123(d). As previously noted, the Board finds that appellant had obstructed a medical examination and that OWCP properly suspended his compensation benefits beginning June 26, 2016. Appellant agreed to submit to an OWCP directed FCE on January 4, 2017. When appellant attends the FCE, payment is retroactive to the date that he agreed to attend and cease obstruction of the examination or January 4, 2017.[25]

The Board finds that appellant received an overpayment of compensation in the amount of $6,201.72 during the period June 26 through August 10, 2016 as he was not entitled to receive compensation after his wage-loss compensation was suspended.

[22] 20 C.F.R. § 10.323. *See also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medial Evidence*, Chapter 2.810.13(e) (June 2014).

[23] 5 U.S.C. § 8102(a).

[24] 5 U.S.C. § 8129(a); *N.L.*, Docket No. 08-0076 (issued April 10, 2008).

[25] *C.T.*, Docket No. 14-1175 (issued October 27, 2014); *D.J.*, Docket No. 13-0064 (issued August 5, 2013) (the employee will forfeit compensation otherwise paid or payable under FECA for the period of obstruction and any compensation already paid for that period will be declared an overpayment and will be subject to recovery pursuant to 5 U.S.C. § 8129).

LEGAL PRECEDENT -- ISSUE 6

Section 8129(a) of FECA[26] provides that, when 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 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.[27]

In determining whether an individual is with fault, section 10.320(b) of OWCP's regulations[28] provides that an individual is with fault in the creation of an overpayment who made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or failed to furnish information which the individual knew or should have known to be material; or with respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was 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.[29] 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.[30]

ANALYSIS -- ISSUE 6

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 time he received the direct deposit in question he knew or reasonably should have known that the payment was incorrect.[31] 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.[32] One of the consequences of electronic funds transfer is that the claimant lacks the requisite knowledge

[26] 5 U.S.C. § 8129(a).

[27] *Id.* at § 8129(b); *M.N.*, Docket No. 17-0764 (issued December 12, 2017).

[28] 20 C.F.R. § 10.320(b).

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

[30] *Id.*

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

[32] *See supra* note 29.

at the time of the first incorrect payment.[33] 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.[34] 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.[35]

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 OWCP suspended his compensation benefits effective June 26, 2016, 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 July 23, 2016, covering the period June 26 to July 23, 2016, that 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.[36] Appellant, therefore, is not at fault in the acceptance of the direct deposit covering the period of the overpayment from June 26 to July 23, 2016.

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.[37] By the time of the second direct deposit, on August 20, 2016 covering the period July 24 through August 20, 2016, appellant should have known that he was no longer entitled to FECA wage-loss compensation after his compensation benefits were suspended. Accordingly, the Board will affirm the finding of fault for the remaining period of overpayment from July 24 to August 10, 2016.[38]

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 July 23, 2016. 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 July 23, 2016 compensation covering the June 26 to July 23, 2016 period of the overpayment as well as

[33] *Id.*

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

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

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

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

[38] *Supra* note 36.

determining the method of recovery of the remaining overpayment from July 23 through August 10, 2016.[39]

CONCLUSION

The Board finds that OWCP properly suspended appellant's compensation benefits for failing to attend a scheduled medical examination, pursuant to 5 U.S.C. § 8123(d). The Board further finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective August 11, 2016. The Board finds that appellant received a $6,201.72 overpayment of compensation for the period June 26 through August 10, 2016. The case is remanded for determination of waiver of recovery of the $6,201.72 overpayment in accordance with this decision.

ORDER

IT IS HEREBY ORDERED THAT the March 16, 2017 decision of the Office of Workers' Compensation Programs is affirmed in part and remanded in part. The January 6, 2017 decision of the Office of Workers' Compensation Programs is reversed.[40] The December 22, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 16, 2018
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

[39] *E.V.*, Docket No. 17-1328 (issued December 11, 2017).

[40] Due to the Board's reversal of the January 6, 2017 decision, the March 15, 2017 OWCP decision is moot.