



## **ISSUES**

The issues are: (1) whether appellant received a \$4,327.36 overpayment of compensation for the period June 9 through July 23, 2016; (2) whether he was at fault in the creation of the \$4,327.36 overpayment and, therefore, ineligible for waiver of recovery; and (3) whether OWCP properly found that the overpayment should be recovered by deducting \$283.00 monthly from appellant's continuing compensation payments.

## **FACTUAL HISTORY**

On October 14, 2014 appellant, then a 53-year-old automotive mechanic, filed a traumatic injury claim (Form CA-1) alleging that on October 10, 2014 he experienced pain in his back which radiated to his legs while he was removing wheels and parts off a vehicle in the performance of duty. By decision dated March 6, 2015, OWCP accepted the claim for lumbar sprain and thoracic or lumbosacral neuritis or radiculitis. The acceptance of the claim was later expanded to include intervertebral disc displacement, lumbar region. Appellant stopped work on March 24, 2016. He received wage-loss compensation on the supplemental rolls.

On March 28, 2016 appellant elected to receive his compensation benefits by direct deposit.

By letter dated May 3, 2016, OWCP advised appellant that he had been placed on the periodic rolls beginning May 1, 2016 and outlined his entitlement to compensation benefits and his responsibility to return to work in connection with the accepted employment injury. Appellant's weekly pay rate was calculated at \$941.56. In an attached Form EN1049, OWCP provided:

“In order to avoid an overpayment of compensation, NOTIFY THIS OFFICE IMMEDIATELY WHEN YOU GO BACK TO WORK. If you receive your compensation payments *via* paper check, the payment shows the period for which payment is made. If you have worked for any portion of this period, return the payment to this office, even if you have already advised the OWCP that you are working. For payments sent by electronic funds transfer (EFT), a notification of the date and amount of payment appears on the statement from your financial institution. You are expected to monitor your EFT deposits carefully, at least every two weeks. If you have worked for any portion of the period for which a deposit was made, advise OWCP immediately so that the overpayment can be collected.”

In a June 9, 2016 memorandum, the employing establishment reported that appellant returned to work full-time light duty effective that same date.

A payroll computer printout listed that appellant continued to receive wage-loss compensation from June 9 through July 23, 2016.

By letter dated December 7, 2016, OWCP made a preliminary determination that appellant received an overpayment of compensation in the amount of \$4,327.36 from June 9

through July 23, 2016, a total of 45 days, because he continued to receive disability compensation after his return to full-time work. It further found that he was at fault in creating the overpayment because he accepted payments that he knew or reasonably should have known that he was not entitled to after returning to full-time work. OWCP informed appellant of his review rights and instructed him to complete an enclosed overpayment recovery questionnaire form (OWCP-20) and submit supporting documentation within 30 days.

Appellant did not respond.

By decision dated January 20, 2017, OWCP finalized the preliminary determination finding that appellant was overpaid in the amount of \$4,327.36 from June 9 through July 23, 2016 because he continued to receive disability compensation after his return to full-time work. It found that he was at fault in the creation of the overpayment and thus, not entitled to waiver of recovery. OWCP noted that appellant failed to respond to the preliminary determination, did not contest the findings, and did not provide justification for OWCP to waive recovery of the overpayment. It determined that recovery of the overpayment would be directed by deducting \$283.00 from continuing compensation payments every 28 days beginning December 13, 2015.<sup>4</sup> The overpayment would be absorbed by approximately April 1, 2018.

### **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.<sup>5</sup>

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.<sup>6</sup> 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 or her from earning the wages earned before the work-related injury.<sup>7</sup> A claimant is not entitled to receive temporary total disability and actual earnings for the same period. OWCP's procedures provide that an overpayment of compensation is created when a claimant returns to work but continues to receive wage-loss compensation.<sup>8</sup>

Section 8129(a) of FECA provides that when an overpayment has been made to an individual because of an error of fact or law, adjustment shall be made under regulations

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<sup>4</sup> The Board notes that appellant sustained a recurrence of disability on November 3, 2016. Appellant stopped work and received wage-loss compensation for which he was placed on the periodic rolls.

<sup>5</sup> 5 U.S.C. § 8102.

<sup>6</sup> *Id.* at § 8116(a).

<sup>7</sup> 20 C.F.R. § 10.500.

<sup>8</sup> *B.H.*, Docket No. 09-0292 (issued September 1, 2009); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(a) (May 2004).

prescribed by the Secretary of Labor by decreasing later payments to which the individual is entitled.<sup>9</sup>

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

The Board finds that appellant received an overpayment of compensation in the amount of \$4,327.36 from June 9 through July 23, 2016 because he continued to receive disability compensation after his return to full-time work. OWCP accepted his claim and paid wage-loss compensation on periodic rolls beginning May 1, 2016. The record indicates that, on June 9, 2016, appellant returned to work in a full-time light-duty capacity. However, OWCP continued to pay him wage-loss compensation for total disability from June 9 through July 23, 2016, resulting in an overpayment of compensation.<sup>10</sup> A claimant is not entitled to receive temporary total disability benefits and actual earnings for the same time period.<sup>11</sup> Accordingly, the Board finds that appellant received an overpayment of compensation.<sup>12</sup>

The record shows that OWCP calculated that, from June 9 through July 23, 2016, appellant received \$4,327.36 in total net disability compensation, but was not entitled to any compensation during this period. OWCP explained that appellant was paid \$2,692.58 for 28 calendar days for the period May 29 to June 25, 2016. Dividing \$2,692.58 by 28 calendar days resulted in a daily rate of \$96.16. OWCP then properly multiplied the daily rate by the 17 days overpaid from June 9 to 25, 2016, resulting in \$1,634.78. Taking the \$1,634.78 overpayment from June 9 through 25, 2016, and adding it to the \$2,692.58 overpaid for the full 28-day period from June 26 through July 23, 2016, resulted in a net overpayment of \$4,327.36.

OWCP properly explained that the overpayment occurred because appellant had returned to full-time work, but continued to receive wage-loss compensation. Appellant did not dispute the calculation of the overpayment. The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$4,327.36 from June 9 through July 23, 2016.

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

Section 8129(b) of FECA<sup>13</sup> provides that an overpayment of compensation shall be recovered by OWCP unless 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.<sup>14</sup> Thus, OWCP may not waive the overpayment of compensation

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<sup>9</sup> 5 U.S.C. § 8129(a).

<sup>10</sup> See *J.W.*, Docket No. 15-1163 (issued January 13, 2016).

<sup>11</sup> *L.S.*, 59 ECAB 350, 352-53 (2008).

<sup>12</sup> *R.W.*, Docket No. 13-1108 (issued September 10, 2013).

<sup>13</sup> 5 U.S.C. § 8129(b).

<sup>14</sup> *Michael H. Wacks*, 45 ECAB 791, 795 (1994).

unless appellant was without fault.<sup>15</sup> Adjustment or recovery must, therefore, be made when an incorrect payment has been made to an individual who is with fault.<sup>16</sup>

On the issue of fault, section 10.433 of OWCP's regulations, provides that an individual will be found at fault if he or she has done any of the following:

“(1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect;

“(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 was incorrect.”<sup>17</sup>

With respect to whether an individual is without fault, section 10.433(b) of OWCP's regulations provide that whether or not OWCP determines that an individual was at fault with respect to the creation of an overpayment depends on 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.<sup>18</sup>

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

OWCP applied the third standard that she accepted a payment which she knew or should have known to be incorrect and determined that appellant was at fault in the creation of the overpayment because he accepted payments that he knew or should have known to be incorrect. The Board finds that he was without fault with regard to OWCP's first direct deposit following his return to work, but was at fault in creating the overpayment resulting from the second such deposit.<sup>19</sup>

In cases where a claimant receives compensation through direct deposit, the Board has held that 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>20</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 account since the acceptance of the

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<sup>15</sup> *Norman F. Bligh*, 41 ECAB 230 (1989).

<sup>16</sup> *Diana L. Booth*, 52 ECAB 370, 373 (2001); *William G. Norton, Jr.*, 45 ECAB 630, 639 (1994).

<sup>17</sup> 20 C.F.R. § 10.433(a).

<sup>18</sup> *Id.* at § 10.433(b).

<sup>19</sup> *M.L.*, Docket No. 15-1683 (issued June 20, 2016).

<sup>20</sup> *See Claude T. Green*, 42 ECAB 174, 278 (1990).

overpayment, at the time of receipt of the direct deposit, lacks the requisite knowledge.<sup>21</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>22</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>23</sup>

The Board finds that appellant was without fault for the initial direct deposit of the \$1,634.78 paid into his account for the June 9 to 25, 2016 overpayment period.<sup>24</sup> Although appellant accepted the overpayment at the time it was deposited into his account, OWCP has not shown that he knew or should have known at the time of the electronic deposit that the payment was incorrect.<sup>25</sup> He had no reason to suspect at the time of the June 25, 2016 electronic deposit that OWCP had issued an incorrect payment since this was the first incorrect payment made. Additionally, appellant was entitled to some wage-loss compensation for the period May 29 to June 25, 2016 and thus the circumstances surrounding the overpayment were more complex than usual.<sup>26</sup> As such, the Board finds that he was not at fault in either creating or accepting the overpayment for the period June 9 to 25, 2016.<sup>27</sup> A finding of no fault does not mean, however, that appellant may keep the \$1,634.78 initial payment only that OWCP must consider eligibility for waiver for this period, and the case must be remanded for OWCP to determine whether he is entitled to waiver for this portion of the overpayment.<sup>28</sup>

The Board further finds however that appellant was at fault in the creation of the \$2,692.58 overpayment resulting from the July 23, 2016 direct deposit for the period June 26 to July 23, 2016. In a May 3, 2016 letter, appellant was notified that, to avoid an overpayment of compensation, he must immediately notify OWCP of his return to work. He was required to return any check to OWCP which included a period during which he worked. Although OWCP may have been negligent in making incorrect payments, this does not excuse a claimant from accepting payments he knew or should have known to be incorrect.<sup>29</sup> In cases involving a series of incorrect payments, where the requisite knowledge is established by documentation from

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<sup>21</sup> See *Tammy Craven*, 57 ECAB 589 (2006); see also *George A. Hirsch*, 47 ECAB 520 (1996).

<sup>22</sup> *Id.*

<sup>23</sup> See *K.H.*, Docket No. 06-0191 (issued October 30, 2006).

<sup>24</sup> *J.S.*, Docket No. 12-1707 (issued June 10, 2013).

<sup>25</sup> See also *C.K.*, Docket No. 12-0746 (issued May 1, 2012).

<sup>26</sup> See *W.B.*, Docket No. 09-1440 (issued April 12, 2010).

<sup>27</sup> *V.A.*, Docket No. 12-0637 (issued August 27, 2012).

<sup>28</sup> See *P.L.*, Docket No. 16-0127 (issued May 3, 2016).

<sup>29</sup> See *C.G.*, Docket No. 15-0701 (issued December 9, 2015).

OWCP or simply with the passage of time and opportunity for discovery, the claimant will be at fault for accepting the payments subsequently deposited.<sup>30</sup> By the time of the second payment dated July 23, 2016, appellant should have known that he was not entitled to the same amount of wage-loss compensation as he had received prior to his return to work on June 9, 2016.<sup>31</sup> After his receipt of the first direct deposit following his return to work, he was on notice that OWCP was making payments to him in error and knew or should have known that he was not entitled to the benefit of the subsequent direct deposit.<sup>32</sup> When he received the second deposit on July 23, 2016 in the amount of \$2,692.58 for the period June 26 to July 23, 2016, appellant had been back at work since June 9, 2016 and would have had no expectation of that compensation. As he was at fault in creating the overpayment for this period, appellant is not eligible for waiver of recovery with respect to the portion of the overpayment from June 26 to July 23, 2016.<sup>33</sup>

The Board finds that this case is not in posture for decision regarding the issue of waiver of the recovery of the overpayment for the period June 9 to 25, 2016. The Board will remand the case for OWCP to determine whether appellant is entitled to waiver of recovery of the overpayment created for this period.<sup>34</sup> After such further development as necessary, OWCP shall issue a *de novo* decision.<sup>35</sup> Accordingly, the Board will affirm the finding of fault for the remaining June 26 to July 23, 2016 period of overpayment. As appellant was at fault under the third fault standard outlined above, recovery of the \$2,692.58 overpayment of compensation may not be waived.<sup>36</sup>

### CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$4,327.36 for the period June 9 through July 23, 2016. The Board further finds that he was without fault for the period of the overpayment from June 9 to 25, 2016 but at fault for the overpayment from June 26 to July 23, 2016. The January 20, 2017 decision is set aside in part and remanded to OWCP regarding the issue of waiver of recovery of the overpayment for the period June 9 to 25, 2016.

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<sup>30</sup> See *B.K.*, Docket No. 17-1562 (issued October 27, 2017).

<sup>31</sup> *Id.*

<sup>32</sup> See *L.D.*, Docket No. 17-1185 (issued September 18, 2017).

<sup>33</sup> *V.D.*, Docket No. 16-0578 (issued November 3, 2016).

<sup>34</sup> *D.W.*, Docket No. 14-0229 (issued April 17, 2014).

<sup>35</sup> In view of the Board's decision on fault, it is premature to address the issue of recovery of the overpayment from continuing compensation payments.

<sup>36</sup> No waiver of an overpayment is possible if the claimant is at fault in creating the overpayment. *L.J.*, 59 ECAB 264 (2007).

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 20, 2017 decision of the Office of Workers' Compensation Programs is affirmed, in part and set aside in part. The case is remanded for further action consistent with this decision of the Board.

Issued: February 8, 2018  
Washington, DC

Patricia H. Fitzgerald, Deputy 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