

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

D.P., Appellant)	
)	
and)	Docket No. 17-1887
)	Issued: July 16, 2018
U.S. POSTAL SERVICE, POST OFFICE,)	
Ottawa, IL, Employer)	
)	

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
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 September 6, 2017 appellant, through counsel, filed a timely appeal from an August 2, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.³

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

³ The record provided to the Board includes evidence received after OWCP issued its August 2, 2017 decision. The Board's jurisdiction is limited to the evidence that was before OWCP at the time of its final decision. The Board is, therefore, precluded from considering this additional evidence for the first time on appeal. 20 C.F.R. § 501.2(c)(1).

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$39,466.53 for the period January 4, 2014 through July 28, 2015; and (2) whether OWCP properly found that appellant was at fault in the creation of the overpayment of compensation, thereby precluding waiver of recovery of the overpayment.

FACTUAL HISTORY

On August 23, 2013 appellant, then a 40-year-old city carrier assistant, filed a traumatic injury claim (Form CA-1) alleging that he injured his right shoulder while casing mail. He stopped work on August 24, 2013.

On October 11, 2013 OWCP accepted the claim for right shoulder sprain, glenoid labrum sprain and impingement. The acceptance letter informed appellant that full compensation was available only if he was unable to perform the duties of his regular job and that he should notify OWCP if he returned to work, or obtained new employment. Appellant was also advised that, if he received compensation payments by electronic funds transfer (EFT), he should monitor his EFT deposits carefully, at least every two weeks. If he worked during a period in which he received compensation, he should notify OWCP in order that the overpayment could be collected.⁴

Effective June 1, 2014, OWCP placed appellant on the periodic (28-day cyclic) compensation rolls. Appellant's compensation was based on a pay rate of \$650.00 per week and OWCP paid him by EFT deposits. On June 13, 2014 he received two EFT payments for the period January 4 to May 31, 2014.⁵

By letter dated June 12, 2014, OWCP explained how the compensation rate was determined. It also informed appellant that, in order to minimize the possibility of an overpayment of compensation, he should notify OWCP immediately when he returned to work. OWCP noted that FECA provides that a partially disabled employee shall be paid compensation based on the difference between the monthly pay and the employee's wage-earning capacity, as determined by the employee's actual earnings or by OWCP.

The record reflects that, while appellant was receiving full-time wage-loss compensation under FECA, he was working in the private sector at USF Holland, Inc., where from January 4, 2014 to July 28, 2015 he earned \$1,134.62 per week. In a June 22, 2015 report, the U.S. Postal Inspection Service found that appellant had not made any false statements regarding his outside employment. It noted that he had listed USF Holland, Inc. as an employer on CA-7 forms filed in 2014 as well as on a January 10, 2015 Form EN1032.

⁴ Appellant was paid continuation of pay for the period August 24 to October 7, 2013. He was paid on the daily rolls beginning October 8, 2013.

⁵ One of these payments was made for appellant's child support obligation.

On July 29, 2015 appellant returned to full-duty work as a city carrier associate. OWCP terminated his wage-loss compensation, effective that same date.

On December 29, 2016 OWCP issued a preliminary determination of an overpayment of compensation finding that, for the period January 4, 2014 to July 28, 2015, appellant received \$39,466.53 in total disability compensation while he was also earning wages from his private sector employment. It also made a preliminary determination that appellant was with fault in the creation of the overpayment as he accepted payments that he knew or should have known were incorrect. Appellant was advised that he could submit evidence challenging the fact, amount, or finding of fault, and request waiver of recovery of the overpayment. OWCP also informed him that he could submit additional evidence in writing or at a precoupment hearing within 30 days of the date of the written notice of overpayment. It requested that appellant complete and return the enclosed Form OWCP-20 overpayment recovery questionnaire within 30 days even if he was not requesting waiver of recovery of the overpayment. Copies of the fiscal worksheets for the period July 4, 2014 to July 28, 2015 were attached.

On January 17, 2017 appellant requested a precoupment telephone hearing before an OWCP hearing representative.

In a January 22, 2017 OWCP-20 overpayment recovery questionnaire, appellant listed his monthly income as \$3,342.13 and \$3,185.00 in monthly expenses comprised of mortgage or rent (\$550.00), food (\$400.00), clothing (\$100.00), utilities (\$800.00), other expenses (\$1,100.00), and credit cards monthly payments of \$135.00 and \$100.00. He also indicated that he had assets of \$100.00 in checking, \$40.00 in savings, and \$2,500.00 in other property (boat, car).⁶

During the hearing held on June 28, 2017, appellant testified that, as he was unable to return to work for the employing establishment due to his injury, he sought outside employment as he needed to earn income. He testified that the CA-7 forms he filed were returned by OWCP for corrections. Appellant also testified that 20 percent of his compensation was deducted to pay child support. He further testified that he used the compensation paid to pay credit bill balances. Counsel argued that appellant should not be required to repay the overpayment debt as he had relinquished a valuable right and relied on payment of compensation in order to pay his credit card debts. Appellant was advised to submit copies of financial bills or statements documenting the income, expenses, and assets listed on the Form OWCP-20. No additional evidence was received.

In an August 2, 2017 decision, the hearing representative finalized the preliminary overpayment determination. He determined that appellant received an overpayment of compensation in the amount of \$39,466.53 for the period January 4, 2014 through July 28, 2015 at the same time he received earnings from other employment. OWCP noted that the wages appellant earned at his other employment exceeded his weekly pay rate as a city carrier associate. Thus, the hearing representative found that the entire amount of compensation paid in the subject period represented an overpayment of compensation. He also found that appellant was with fault in the creation of the overpayment as he accepted payments he knew or should have known were

⁶ In a February 15, 2017 decision, OWCP issued a schedule award for four percent right upper extremity impairment, in the amount of \$6,127.00.

incorrect. The hearing representative directed appellant to forward payment for the full amount of \$39,466.53 within 30 days as there was no basis for a repayment schedule.

LEGAL PRECEDENT -- ISSUE 1

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.⁷ A claimant is not entitled to receive temporary total disability benefits and actual earnings for the same time period.⁸ OWCP's procedures provide that an overpayment of compensation is created when a claimant returns to work, but continues to receive wage-loss compensation.⁹

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 prescribed by the Secretary of Labor by decreasing later payments to which the individual is entitled.¹⁰

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment in the amount of \$39,466.53 for the period January 4, 2014 through July 28, 2015.

The evidence of record supports that appellant received wages in his private sector employment during the period January 4, 2014 through July 28, 2015 while also receiving FECA wage-loss compensation for total disability. As previously noted, a claimant is not entitled to receive temporary total disability benefits and actual earnings for the same time period.¹¹ Therefore, OWCP properly determined that an overpayment of compensation was created.

OWCP properly calculated that the amount of the overpayment as \$39,466.53, the amount that appellant received in total disability compensation while also receiving wages for his private sector employment. Appellant has not disputed the amount of overpayment. Accordingly, the Board will affirm the fact and amount of the overpayment.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of FECA¹² 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

⁷ 5 U.S.C. § 8102.

⁸ *L.S.*, 59 ECAB 350, 352-53 (2008).

⁹ *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).

¹⁰ 5 U.S.C. § 8129(a).

¹¹ *C.F.*, Docket No. 16-1718 (issued August 21, 2017); *K.L.*, Docket No. 16-1490 (issued May 26, 2017).

¹² 5 U.S.C. § 8129(b).

equity and good conscience.” Section 10.433 of OWCP’s implementing regulations¹³ 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.¹⁴ 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.¹⁵

ANALYSIS -- ISSUE 2

Under OWCP’s regulations, waiver of the recovery of an overpayment may be considered only if the individual to whom it was made was without fault in accepting or creating the overpayment.¹⁶

The finding of fault in this case was based on the acceptance of payments that appellant knew or should have known were incorrect. Although appellant had notified OWCP that he had returned to work, the basis for finding of fault was not based on his failure to provide material information. Rather, the issue is whether appellant accepted payments he knew or should have known were incorrect.¹⁷

In the context of receiving compensation after returning to work, the Board precedent on the issue of fault clearly establishes that the first payment received must be properly considered. The Board has held that receiving an initial erroneous direct deposit payment following the employee’s return to work does not necessarily create the requisite knowledge to find that a

¹³ 20 C.F.R. § 10.433.

¹⁴ See *Tammy Craven*, 57 ECAB 689 (2006), *Order Granting Petition for Reconsideration and Reaffirming Prior Decision*, Docket No. 05-0249 (issued July 24, 2006).

¹⁵ *Id.*

¹⁶ 5 U.S.C. § 10.433(a).

¹⁷ See *D.H.*, Docket No. 16-0128 (issued April 8, 2016).

claimant was at fault in the creation of the overpayment.¹⁸ Unlike the situation where a physical check is sent to appellant with the period of compensation covered, at the time of the acceptance of the first direct deposit after a return to work, a claimant does not know that an incorrect payment would be deposited on that date.¹⁹ OWCP did not establish for the payment deposited on June 13, 2014 that appellant knew or should have known the payment was incorrect at the time of deposit. A finding that appellant was without fault with respect to the June 13, 2014 direct deposit payment does not establish that he was entitled to waiver of that portion of the overpayment and; therefore, the case shall be remanded to OWCP. On return of the case record, OWCP should properly consider the issue of waiver.

When appellant accepted the June 28, 2014 payment representing a full compensation payment for total disability, and continued to accept payments deposited every 28 days, he clearly should have known they were incorrect. Appellant had been advised in an October 11, 2013 letter that he could not receive total disability compensation after returning to work, and that he should monitor his account for EFT deposits every two weeks. When it became clear that OWCP was continuing to deposit compensation for total disability while appellant worked in the private sector, he was at fault for accepting such payments.²⁰

Since appellant was at fault for accepting the June 28, 2014 direct deposit and subsequent deposits through July 28, 2015, he is not entitled to waiver for this portion of the overpayment. OWCP properly denied waiver with respect to the overpayment amount commencing with the June 28, 2014 direct deposit.

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$39,466.53 for the period January 4, 2014 through July 28, 2015 because he received wages from private sector employment while also receiving total disability compensation. The Board further finds that OWCP properly found appellant with fault in the creation of the overpayment with regard to the direct deposits commencing June 28, 2014 and, therefore, precluded from waiver of recovery of the overpayment for those periods. The evidence of record, however, is insufficient to establish that appellant was with fault in the creation of the overpayment with respect to the June 13, 2014 direct deposit. The case is therefore remanded for consideration of waiver as to that portion of the overpayment.

¹⁸ *Id.*; see also *R.R.*, Docket No. 15-1395 (issued December 11, 2015).

¹⁹ *Id.*

²⁰ See *M.B.*, Docket No. 10-0564 (issued December 16, 2010).

ORDER

IT IS HEREBY ORDERED THAT the August 2, 2017 decision of the Office of Workers' Compensation Programs is affirmed with respect to the fact and amount of overpayment. As to the finding of fault in the creation of the overpayment, the decision is affirmed with respect to the payments from June 28, 2014 through July 28, 2015 and set aside and remanded for further action regarding waiver of the June 13, 2014 EFT payment.

Issued: July 16, 2018
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