



## **FACTUAL HISTORY**

Appellant, then a 61-year-old mailman, injured his right knee while in the performance of duty on February 10, 2015. He was dismounting his vehicle and proceeding down the side of the truck to open the back to retrieve a tray of mail when after the third or fourth step on the pavement when he heard a pop and his knee buckled and gave way.

OWCP accepted appellant's claim for rupture of the right quadriceps tendon and chondromalacia of right patella. Appellant underwent a knee arthroscopy on April 10, 2015.<sup>2</sup> He stopped work on February 11, 2015. OWCP paid wage-loss compensation for temporary total disability and placed appellant on the periodic rolls beginning March 27, 2015.

On September 9, 2015 appellant was notified that, in order to avoid an overpayment of compensation, he was to immediately notify OWCP of "any improvement in [his] medical condition, any employment, any change in the status of claimed dependents, any third-party settlement, and any income or change in income from federally-assisted disability or benefit programs." He was advised that he was required to return any check to OWCP which included a period during which he worked.

OWCP received a Form CA-3 worksheet on December 11, 2015. The worksheet revealed that appellant had returned to full-time employment with modified duties on November 14, 2015.

In a July 5, 2016 manual adjustment form, OWCP determined that appellant returned to full-time employment on November 14, 2015, with no loss of earnings, but he did not inform OWCP of his return to work and continued to receive compensation through December 12, 2015. Using direct deposit, it paid appellant the net amount of \$3,143.90 in compensation for total disability from November 14 to December 12, 2015 as follows: check dated November 14, 2015 in the net amount of \$108.41 for the period November 14, 2015; check dated December 12, 2015 in the net amount of \$3,035.49 for the period November 15 to December 12, 2015. OWCP deducted the following amounts from the gross amount of \$124.70: health benefits (HBI) -- 8.39; basic life insurance (BLI) -- \$.68; and optional life insurance (OLI) -- \$4.72 and miscellaneous of \$2.50. It deducted the following amounts from the gross amount of \$3,491.55: HBI -- \$234.84; BLI -- \$18.90; and OLI -- \$132.28 and miscellaneous of \$70.04. OWCP made calculations showing that appellant should have been paid the amount of \$2,996.42 for the period October 18 to November 13, 2015, the date prior to his return to work. It calculated that the difference between the amount paid for the entire period and the amount to which appellant was entitled, which resulted in a total overpayment of \$3,143.90 ( $\$6,140.32 - \$2,996.42 = \$3,143.90$ ).

On July 5, 2016 OWCP notified appellant of its preliminary determination that he received an overpayment of compensation in the amount of \$3,143.90 for the period November 14 to December 12, 2015 because he received compensation for total disability after he returned to work on November 14, 2015. Further, it found that he was at fault in the creation of the overpayment because he was aware or should have reasonably been aware that he was not entitled to receive compensation for the described period. OWCP explained that appellant received two checks from

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<sup>2</sup> Appellant had preexisting arthritis of the knees.

OWCP after he returned to work and did not return either one of them. It noted that appellant did not call OWCP to report his return to work. OWCP further informed appellant that he had 30 days to request a telephone conference, a final decision based on the written evidence, or a prereducement hearing on the issues of fault and a possible waiver.

On August 1, 2016 OWCP received a statement from appellant which indicated that he was informed that there was no work for him and to take the day off on “worker’s comp.” Appellant related that he was instructed to come to work each day, and if there was nothing for him to do, for him to “charge the time to workers’ compensation.”

On August 2, 2016 OWCP received a statement from appellant who indicated that he was responding to the July 5, 2016 notice. Appellant explained that he notified both OWCP and the employing establishment about his return to work. He also explained that he worked for a few days and reinjured himself. Appellant also explained that he was not aware of the check, until he received the letter from OWCP. Furthermore, he was incapacitated and being discriminated against because he was old, walked with a cane, and the employing establishment just wanted him “gone.”

On August 2, 2016 OWCP also received medical documentation and statements from appellant indicating that he suffered an injury such that he was placed off work effective December 1, 2015. The December 1, 2015 work capacity evaluation from Geoffrey Riggs, M.D., an individual whose specialty was not identified, indicated that appellant was able to work with restrictions. A December 23, 2015 report, from Julianna Tovar, an individual whose specialty is unclear, indicated that appellant was unable to work. Appellant completed the overpayment recovery questionnaire on July 26, 2016. He requested a decision on the written evidence and indicated that he kept OWCP apprised “of all events as they took place, including my return to work.” The monthly income totaled \$3,450.00 and the expenses totaled \$3,300.00.

By decision dated November 30, 2016, OWCP finalized its finding that appellant received an overpayment of compensation in the amount of \$3,143.90 for the period November 14 through December 13, 2015 based on his receipt of compensation for disability after his return to work. It further found that he was at fault in the creation of the overpayment, as he accepted a payment which he knew or should have known was incorrect. OWCP determined that appellant had monthly funds in the amount of \$50.00 dollars available for debt repayment.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8102 of FECA<sup>3</sup> 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>4</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

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<sup>3</sup> 5 U.S.C. §§ 8101-8193.

<sup>4</sup> *Id.* at § 8102.

not receive salary, pay, or remuneration of any type from the United States, except in limited circumstances.<sup>5</sup> OWCP's regulations provide that 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>6</sup>

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

The Board finds that appellant received an overpayment of compensation in the amount of \$3,143.90. The record supports in the form of direct deposit, and appellant has not disputed, that he continued to receive compensation from the date that he returned to full-time employment on November 14 through December 12, 2015 in the amount of \$3,143.90. When an employee returns to work and ceases to have any loss of wages, he is no longer entitled to compensation for wage loss.<sup>7</sup> As appellant was not entitled to compensation after his return to work, OWCP properly found an overpayment of compensation in the amount of \$3,143.90.

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

Under section 8129 of FECA and its implementing regulations, an overpayment must be recovered 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>8</sup> Section 10.433 of the implementing regulations provides that OWCP may consider waiving an overpayment if the individual to whom it was made was not at fault in accepting or creating the overpayment.<sup>9</sup> The regulation further provides that each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from OWCP are proper.<sup>10</sup> Under the regulations, a recipient will be found to be at fault with respect to creating an overpayment if he or she accepted a payment which he or she knew or should have known to be incorrect.<sup>11</sup> Whether OWCP determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment.<sup>12</sup>

The Board has found the claimant, to be at fault in cases where he is receiving compensation checks through direct deposit involving a series of payments over several months,

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<sup>5</sup> *Id.* at § 8116(a).

<sup>6</sup> 20 C.F.R. § 10.500(a).

<sup>7</sup> *See Kenneth E. Rush*, 51 ECAB 116 (1999).

<sup>8</sup> 20 C.F.R. § 8129(b); 20 C.F.R. §§ 10.433, 10.434, 10.436, 10.437.

<sup>9</sup> *Id.* at § 10.433(a).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at § 10.433(a)(3).

<sup>12</sup> *Id.* at § 10.433(b).

and must have clear knowledge that the payments were incorrect.<sup>13</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>14</sup>

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

OWCP found that appellant was at fault in the creation of the overpayment because he accepted a payment that he knew or should have known to be incorrect. The Board finds that appellant was without fault with regard to OWCP's first direct deposit following his return to work, but he was at fault in the creation of the overpayment resulting from the second such deposit.

The Board finds that appellant was without fault regarding the deposit of \$108.41 into his account on November 14, 2015. While appellant accepted the overpayment by gaining control of the funds deposited into his account pursuant to his authorization, he did not know that he would receive an incorrect payment on that day. Unlike the situation in which a claimant receives a physical check and is aware of the amount of the payment before depositing it into his account, appellant was not on notice of the amount of the payment until after it was deposited electronically into his account.<sup>15</sup> The Board finds that OWCP improperly determined that appellant was at fault in the creation of the \$108.41 overpayment. OWCP has not presented sufficient evidence to establish that appellant accepted a payment which he knew or should have known to be incorrect. The Board will, therefore, reverse OWCP's finding of fault regarding the \$108.41 payment and remand the case for further development and a final decision on the issue of waiver of this portion of the overpayment.

The Board finds that appellant was at fault in the creation of the overpayment resulting from the \$3,035.49 for the period November 15 to December 12, 2015 on December 12, 2015. The record reflects that on September 9, 2015 he was notified that, in order to avoid an overpayment of compensation, he was to immediately notify OWCP of his return to work, and that he was required to return any check to OWCP which included a period during which he worked. After appellant's receipt of the first direct deposit following his return to work, he was on notice that OWCP was making payments to him in error. He knew or should have known that he was not entitled to the benefit of subsequent direct deposits. When appellant received the second deposit on December 12, 2015, in the amount of \$3,035.49 for the period November 15 to December 12, 2015, he had worked for approximately four weeks. In light of OWCP's clear mandate to provide notification of a return to work and to return any check received which included a period during which he worked, a reasonable person would have been aware that an overpayment had occurred. Appellant had the benefit of reviewing bank statements reflecting his receipt of these compensation payments. Furthermore, general logic would dictate that a claimant ought not

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<sup>13</sup> See *Karen K. Dixon*, 56 ECAB 145 (2004); see *Tammy Craven*, 57 ECAB 689 (2006).

<sup>14</sup> See *K.H.*, Docket No. 06-0191 (issued October 30, 2006).

<sup>15</sup> *W.P.*, 59 ECAB 514 (2008); see also *id.*

to be entitled to compensation for a disabling injury when he is not disabled, but rather is receiving full wages for time worked.

Appellant has not argued that these payments for temporary total disability were incorrect. Rather, he contends that he notified OWCP that he returned to work. Appellant also indicated that he worked until December 1, 2015, when he allegedly sustained a new injury. The Board notes that the December 1, 2015 work capacity evaluation indicates appellant was able to work with restrictions. The Board also notes that the December 23, 2015 report, from Dr. Tovar, indicates that appellant was unable to work. However, this is after the November 14 to December 12, 2015 period. A reasonable person would have known that he was not entitled to receive those benefits during the aforementioned time period. Moreover, appellant's argument that he sustained a new injury and his possible entitlement to compensation under his traumatic injury claim is not relevant to an overpayment under the instant claim. The Board finds that appellant knew or should have known that the December 12, 2015 deposit covering the period November 15 to December 12, 2015 was in error. Therefore, appellant was at fault in creating this portion of the overpayment and is not entitled to waiver.<sup>16</sup>

### CONCLUSION

The Board finds that an overpayment of compensation in the amount of \$3,143.90 was created during the period November 14 to December 12, 2015 because appellant had returned to work, but continued to receive compensation for total disability. Appellant is found not to be at fault with respect to the payment deposited on November 14, 2015, because there is no evidence that he should have known the payments were incorrect. However, he is found to be at fault with respect to the December 12, 2015 payment.

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<sup>16</sup> The Board does not have jurisdiction to review the recovery of the overpayment. The Board's jurisdiction is limited to reviewing those cases where OWCP seeks recovery from continuing compensation under FECA. *See* 20 C.F.R. § 10.441(a); *L.C.*, 59 ECAB 569 (2008), n.24, *citing Ronald E. Ogden*, 56 ECAB 278 (2005). On appeal appellant does not challenge the recovery amount. He argues that he was only paid two weeks of work and he should only have to repay \$1,571.95. However, as found above, appellant received compensation for the period November 14 to December 12, 2015. To the extent he is arguing entitlement to compensation for his new injury that is not relevant to the finding of overpayment and fault in this case. Appellant also made an argument regarding the amount of his monthly income, and indicated that it should be \$3,400.00. The Board notes his argument. However, it does not have jurisdiction to review the amount of recovery of the overpayment.

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 30, 2016 decision of the Office of Workers' Compensation Programs is affirmed in part, set aside in part, and remanded for further action consistent with this decision.

Issued: June 22, 2018  
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