

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

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B.R., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Beachwood, OH, Employer)

Docket No. 18-0339
Issued: January 24, 2019

Appearances:
Appellant, pro se
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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On September 5, 2017 appellant filed a timely appeal from June 29 and July 24, 2017 merit decisions of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

ISSUES

The issues are: (1) whether appellant has met his burden of proof to establish total disability for the period September 9, 2016 to February 3, 2017 causally related to his accepted February 25, 2015 employment injury; (2) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$11,235.14 for the period July 26 through November 12, 2016; and (3) whether OWCP properly determined that appellant was at

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¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that following the July 24, 2017 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment.

FACTUAL HISTORY

On February 25, 2015 appellant, then a 48-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that, on that date, he injured his low back and knee when he slipped while walking on snow in the performance of his federal employment duties. He stopped work on the date of injury. OWCP accepted the claim for lumbar sprain/strain. It paid appellant wage-loss compensation on the periodic rolls from June 28, 2015 through November 12, 2016.³

In a letter dated July 7, 2015, OWCP outlined appellant's entitlement to compensation benefits and his responsibility to return to work in connection with the accepted injury. An attached Form EN1049 instructed that, if appellant worked during any portion of the covered period, and compensation payments were received *via* either paper check or for payments sent by electronic funds transfer (EFT), he was to return the payment to OWCP even if he had already advised OWCP that he was working. It noted that appellant was expected to monitor his EFT deposits carefully, at least every two weeks.

Appellant returned to limited-duty work on July 19, 2016. However, during the period July 19 to 25, 2016 full-time work was not available within his restrictions.⁴ Effective August 12, 2016, appellant accepted a limited-duty job offer. He stopped work on September 9, 2016. Appellant filed claims for compensation (Form CA-7) claiming disability from work through February 3, 2017.⁵

Evidence received in support of appellant's disability compensation claim included several reports from Dr. Kimberly Togliatti-Trickett, a Board-certified physiatrist. In her August 3, 2016 report, Dr. Togliatti-Trickett indicated that appellant had returned to work within the provided medical restrictions on July 19, 2016 and that he appeared to be having pain due to facet disease in the lumbosacral spine. On duty status reports (Form CA-17) dated August 3 and September 6, 2016, she advised that appellant was to continue working with restrictions.

In a September 12, 2016 report, Dr. Togliatti-Trickett noted that appellant did not work on Friday, September 9, 2016 due to increased back pain. As his back pain did not improve over the weekend, appellant remained off work on Saturday, September 10 and Monday, September 12, 2016. Dr. Togliatti-Trickett reported objective findings and provided an assessment of lumbar spine ligament sprain. A magnetic resonance imaging (MRI) scan of the lumbar spine was ordered due to ongoing pain despite treatment and therapy. Dr. Togliatti-Trickett advised that appellant was to remain off work.

³ While on the periodic compensation rolls, appellant received payments of \$2,348.66 every 28 days.

⁴ On December 5, 2016 Form CA-7a time analysis forms, the employing establishment initially determined that appellant had 26.6 hours of intermittent wage loss for the period July 19 to 25, 2016.

⁵ Appellant returned to work on February 7, 2017. He filed a notice of recurrence (Form CA-2a) alleging a recurrence of total disability commencing July 28, 2017. The recurrence issue is not presently before the Board.

In a September 22, 2016 report, Dr. Togliatti-Trickett reviewed the September 21, 2016 MRI scan and indicated that appellant had L5-S1 spondylolisthesis and degenerative disc disease. She diagnosed lumbar spine ligament sprain and continued to hold appellant off work.

In a September 22, 2016 note, Dr. Togliatti-Trickett noted that appellant was incapacitated and unable to work from September 22 to 28, 2016. In September 22 and 29, and October 6, 2016 duty status reports, she opined that appellant was unable to work.

In an October 19, 2016 report, Dr. Roger Goomber, Board-certified in anesthesiology and pain management, indicated that appellant's back injury occurred in February "2014" when he fell into a hole while carrying mail. He noted that appellant was off work due to his pain. Dr. Goomber diagnosed: lumbar disc herniation; intervertebral disc degeneration, lumbar region; acquired spondylolisthesis of lumbosacral region; lumbosacral neuritis; and chronic low back pain. Further diagnostic testing was recommended and treatment options were discussed.

In a November 2, 2016 report, Dr. James S. Anderson, a Board-certified neurosurgeon, reported that appellant's low back pain radiating into the left leg initially began on February 25, 2015 after he stepped into a hole at work. His condition improved enough to return to work in July, but his pain returned in September due to repetitive bending on a mail route. Dr. Anderson noted that appellant had bilateral pars fractures at L5, which were healed on one side and a fibrous union on the other side. He noted that appellant had a preexisting back injury that occurred when he was a child and that the tissue that was once providing back support may have torn and was no longer compensating. Dr. Anderson also indicated that appellant had severe foraminal stenosis bilaterally at L5 left greater than the right side. He opined that appellant had an exacerbation of his preexisting pars fracture at L5 resulting in a grade 1 spondylolisthesis at L5 on S1 and that additional testing was needed.

In a December 15, 2016 letter, OWCP advised appellant of its preliminary determination that an overpayment of compensation in the amount of \$11,777.28 had been created during the period July 19 through November 12, 2016, as he was paid compensation after his return to full-time limited-duty work on July 19, 2016. It noted that appellant was entitled to intermittent wage-loss compensation in the net amount of \$448.97 for the period July 19 through 25, 2016. OWCP calculated the total amount of overpayment finding that appellant returned to full-time limited-duty work on July 19, 2015 and was paid on the periodic rolls receiving net wage-loss compensation of \$2,925.94 every 28 days. For the period July 19 through November 12, 2016, or 117 calendar days, appellant received total compensation of \$12,226.25. As appellant was entitled to intermittent wage-loss compensation between July 19 through 25, 2016 in the net amount of \$448.97, OWCP subtracted that amount from \$12,226.25 to find the final overpayment of \$11,777.28.

OWCP further noted that as appellant had stopped work on September 9, 2016, entitlement to total wage-loss compensation on and after September 9, 2016 would be developed and established separately. It found that he was at fault in the creation of the overpayment as he knew or should have known that he was not entitled to receive wage-loss compensation after returning to full-time work. OWCP informed appellant that he had a right to a precoupment hearing before an OWCP hearing representative. It also advised appellant to complete the enclosed Form OWCP-20 overpayment recovery questionnaire and submit supporting financial documentation, as this was necessary information on the issues of waiver of recovery of the overpayment and recoupment.

A manual adjustment form dated December 9, 2016 indicated that for the period July 19 to November 12, 2016, appellant received gross compensation in the amount of \$13,626.32 or net compensation of \$12,226.25. For the period July 19 to 25, 2016, OWCP found that appellant was entitled to \$448.97 of wage-loss compensation for the intermittent hours missed, which resulted in an overpayment of compensation in the amount of \$11,777.28. Copies of compensation worksheets were also of record.

In a December 20, 2016 report, Dr. Togliatti-Trickett indicated that appellant's left L5 radiculopathy was improving with conservative management.

By development letter dated January 17, 2017, OWCP informed appellant that it had received his claim for wage-loss compensation. It requested additional evidence to establish that he was unable to work effective July 19, 2016 as a result of his accepted February 25, 2015 employment injury. OWCP requested medical evidence from appellant's physician which included a history of the injury and a thorough explanation, with objective findings, as to how his accepted condition had worsened such that he was no longer able to perform his modified duties when he stopped work. It indicated that a medical slip removing appellant from work or a duty status report (Form CA-17) was insufficient if it did not contain the necessary medical explanation and objective findings. OWCP noted that a limited-duty assignment was available within his medical restrictions for the period of claimed lost time and therefore he was to provide evidence to support why he did not work the light-/limited-duty assignment. Appellant was afforded 30 days to submit this evidence.

In a January 24, 2017 report, Dr. Goomber reviewed the results of diagnostic testing. He diagnosed lumbar disc herniation, lumbosacral neuritis, acquired spondylolisthesis of lumbosacral region, chronic low back pain, and lumbar sprain.

OWCP continued to receive medical evidence addressing appellant's disability status after February 3, 2017.

On January 18, 2017 OWCP received appellant's January 13, 2017 overpayment recovery questionnaire (Form OWCP-20), which listed his monthly expenses and additional funds with no supporting documentation. Appellant requested a telephone conference on the issues of fault and a possible waiver of recovery of the overpayment with OWCP's Branch of Hearings and Review. He stated that he disagreed that the overpayment had occurred through any fault of his own as he tried to contact OWCP, but his calls were not returned.

In a June 6, 2017 letter, OWCP advised appellant that it could not schedule a conference to address any outstanding issue relative to the \$11,777.28 overpayment as no supporting financial information had been received when he submitted his completed Form CA-20 overpayment recovery questionnaire. Appellant was afforded an additional 20 days to submit the requested financial information. No supporting financial information was received.

By decision dated June 29, 2017, OWCP determined that appellant had received an overpayment of compensation in the amount of \$11,235.14 for the period July 19 through November 12, 2016 for which he was determined to be at fault. It noted that initially it was determined that he had been overpaid in the amount of \$11,777.28, following his return to work on July 19, 2016. Appellant had worked intermittent hours on July 19, 20, 23, and 25, 2016, but he had not worked at all on July 21 and 22, 2016.

The employing establishment, by telephone conversation with OWCP on June 29, 2017, advised that no work was available within his restrictions on those six days. As such, appellant was entitled to additional wage-loss compensation for the period July 19 through 25, 2016. The total amount of appellant's additional wage-loss entitlement was \$542.14. The total overpayment amount was reduced by \$542.14, leaving an overpayment balance of \$11,235.14.⁶ OWCP further found that appellant was at fault in the creation of the overpayment as he knowingly accepted wage-loss compensation to which he was not entitled. Appellant had not provided justification to waive recovery of the overpayment and therefore OWCP requested that the overpayment be recovered in full within 30 days.

By decision dated July 24, 2017, OWCP amended its May 26, 2017 decision to find that appellant was entitled to wage-loss compensation for total disability from July 11 through 25, 2016. It denied his claim for wage-loss compensation for the period September 9, 2016 to February 3, 2017, as the medical evidence of record was insufficient to establish that he was disabled from work during the claimed period causally related to the accepted February 25, 2015 employment injury.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA⁷ has the burden of proof to establish the essential elements of his or her claim, including that any disability or specific condition for which compensation is claimed is causally related to the employment injury.⁸ The term disability is defined as the incapacity because of an employment injury to earn the wages the employee was receiving at the time of the injury.⁹

Whether a particular injury causes an employee to be disabled from employment and the duration of that disability are medical issues which must be proven by a preponderance of the reliable, probative, and substantial medical evidence.¹⁰ Findings on examination are generally needed to support a physician's opinion that an employee is disabled from work.¹¹ When the physician's statements regarding an employee's ability to work consist only of repetition of the employee's complaints that he or she was unable to work, without objective findings of disability being shown, the physician has not presented a medical opinion, supported by medical rationale, on the issue of disability or a basis for payment of compensation.¹²

When an employee, who is disabled from the job he or she held when injured due to employment-related residuals, returns to a light-duty position or the medical evidence establishes

⁶ OWCP noted that appellant was also entitled to wage-loss compensation for July 11 and 18, 2016, which had been previously denied.

⁷ *Supra* note 1.

⁸ *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁹ 20 C.F.R. § 10.5(f); *see e.g.*, *Cheryl L. Decavitch*, 50 ECAB 397 (1999).

¹⁰ *Amelia S. Jefferson*, 57 ECAB 183 (2005); *William A. Archer*, 55 ECAB 674 (2004).

¹¹ *Dean E. Pierce*, 40 ECAB 1249 (1989).

¹² *See Fereidoon Kharabi*, 52 ECAB 291 (2001).

that, light duty can be performed, the employee has the burden of proof to establish by the weight of reliable, probative, and substantial evidence a recurrence of total disability. As part of this burden of proof, the employee must show either a change in the nature and extent of the injury-related condition, or a change in the nature and extent of the light-duty requirements.¹³ OWCP's procedures require that where recurrent disability from work is claimed within 90 days of the first return to duty, the focus is on disability rather than causal relationship.¹⁴

The Board will not require OWCP to pay compensation for disability in the absence of any medical evidence addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow an employee to self-certify his or her disability and entitlement to compensation.¹⁵

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met his burden of proof to establish total disability for the period September 9, 2016 to February 3, 2017 causally related to the accepted February 25, 2015 employment injury.

OWCP accepted that appellant sustained a lumbar sprain/strain on February 25, 2015 while in the performance of duty. Appellant stopped work on the date of injury and received wage-loss compensation. He returned to limited-duty work on July 19, 2016 and received intermittent wage-loss compensation for the period July 19 to 25, 2016 because work was not available within his restrictions. Appellant subsequently accepted a limited-duty job offer, effective August 12, 2016, and worked until September 9, 2016, when he stopped work. He returned to work on February 7, 2017.

As noted, OWCP's procedures require that where recurrent disability from work is claimed within 90 days of the first return to duty, the focus is on disability rather than causal relationship.¹⁶

During appellant's claimed period of total disability, he received medical treatment from Dr. Togliatti-Trickett. In medical reports dated September 12 and 22, 2016, Dr. Togliatti-Trickett noted objective findings and held appellant off work due to the accepted condition of lumbar spine ligament sprain. These reports, however, are insufficient to establish disability from September 9 to 22, 2016 as Dr. Togliatti-Trickett does not explain how appellant's accepted condition precluded him from performing the duties of the modified position. She did not provide clear physical findings supporting appellant's disability from work during the period in question and did not provide rationale explaining how or why appellant's limitations resulted from the accepted injury.¹⁷

Subsequent evidence received from Dr. Togliatti-Trickett is also insufficient to establish disability during the claimed period as a result of the accepted condition. In her September 22,

¹³ C.G., Docket No. 16-1503 (issued May 17, 2017).

¹⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.5 (June 2013).

¹⁵ *Amelia S. Jefferson*, *supra* note 10.

¹⁶ *Supra* note 14.

¹⁷ *See J.M.*, Docket No. 16-0306 (issued May 5, 2016).

2016 note, Dr. Togliatti-Trickett noted, without providing objective findings, that appellant was unable to work from September 22 to 28, 2016. In her September 22 and 29, October 6, and December 20, 2016 duty status reports, she again opined that appellant was unable to work without providing objective findings. This evidence is therefore insufficient to establish disability from September 23, 2016 onward.¹⁸

In reports dated October 19, 2016 and January 24, 2017, Dr. Goomber did not provide an opinion on appellant's ability to work due to the accepted back strain/sprain. While he indicated that appellant had an exacerbation of his preexisting pars fracture at L5 resulting in a grade 1 spondylolisthesis at L5 on S1, he based this opinion on an inaccurate history of injury, which he reported occurred in "February 2014." The Board has held that medical reports must be based on a complete and accurate factual and medical background; medical opinions based on an incomplete or inaccurate history are of diminished probative value.¹⁹

In a November 2, 2016 report, Dr. Anderson noted that appellant had returned to work in July. He also noted that appellant had a preexisting back injury that occurred when appellant was a child and that tissue that was once giving back support may have torn and was no longer compensating. Dr. Anderson indicated that appellant had an exacerbation of his preexisting pars fracture at L5 resulting in a grade 1 spondylolisthesis at L5 on S1. However, he provided no rationalized opinion regarding appellant's ability to work the modified position based upon objective findings of the accepted condition. As such, Dr. Anderson's report is insufficient to establish appellant's claim.²⁰

The Board thus finds that appellant has not met his burden of proof to establish total disability for the period September 9, 2016 to February 3, 2017 causally related to his accepted February 25, 2015 employment injury.

LEGAL PRECEDENT -- ISSUE 2

5 U.S.C. § 8102 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.²¹

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.²² 20 C.F.R. § 10.500 of OWCP regulations provide that compensation for wage loss due to disability is available only for any periods during which an employee's work-related

¹⁸ See *M.M.*, Docket No. 16-0541 (issued April 27, 2010).

¹⁹ *N.C.*, Docket No. 15-1855 (issued June 3, 2016).

²⁰ See *William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

²¹ 5 U.S.C. § 8102(a).

²² *Id.* at § 8116(a); see *Danny E. Haley*, 56 ECAB 393 (2005).

medical condition prevents him or her from earning the wages earned before the work-related injury.²³

5 U.S.C. § 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.²⁴

ANALYSIS -- ISSUE 2

The Board finds that an overpayment of compensation was created in the amount of \$11,235.14 for the period July 26 through November 12, 2016 because appellant continued to receive wage-loss compensation for total disability after he returned to work on July 19, 2016.

OWCP accepted appellant's claim and paid wage-loss compensation on the periodic compensation rolls as of June 28, 2015. Appellant returned to limited-duty work on July 19, 2016. However work was not available within his restrictions for the period July 19 to 25, 2016. On those six days, OWCP initially determined that he was entitled to wage-loss compensation in the net amount of \$448.97. However, upon further review, it determined that he was entitled to additional hours of wage-loss compensation in the amount of \$542.14.²⁵ While OWCP had initially found an overpayment in the amount of \$12,226.25, it subsequently reduced the amount of the overpayment to \$11,235.14 to reflect the amount of wage-loss compensation appellant was entitled to receive for the period July 19 to 25, 2016.

Appellant also claimed total disability beginning September 9, 2016. However, as previously noted, OWCP properly denied his claim for additional wage-loss compensation. Appellant continued to receive temporary total wage-loss compensation for the period July 26 through November 12, 2016, resulting in an overpayment of compensation.²⁶ A claimant is not entitled to receive temporary total disability and actual earnings for the same period. OWCP procedures provide that an overpayment in compensation is created when a claimant returns to work, but continues to receive wage-loss compensation.²⁷

Accordingly, the Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$11,235.14 for the period July 26 through November 12, 2016 as he had returned to work and had not established that he was totally disabled during this period.²⁸

²³ 20 C.F.R. § 10.500.

²⁴ 5 U.S.C. § 8129(a).

²⁵ 20 C.F.R. § 10.500.

²⁶ See *J.S.*, Docket No. 17-0260 (issued December 28, 2017); see also *J.W.*, Docket No. 15-1163 (issued January 13, 2016).

²⁷ See *E.V.*, Docket No. 17-1328 (issued December 11, 2017); *Danny E. Haley*, 56 ECAB 393 (2005); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(a) (May 2004).

²⁸ See *C.R.*, Docket No. 17-0117 (issued April 4, 2018); *S.K.*, Docket No. 08-0961 (issued April 7, 2009); *V.G.*, Docket No. 07-0916 (issued November 15, 2007).

LEGAL PRECEDENT -- ISSUE 3

5 U.S.C. § 8129(b) provides: 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 FECA or would be against equity and good conscience.²⁹ A claimant who is at fault in the creation of the overpayment is not entitled to waiver.³⁰ On the issue of fault, 20 C.F.R. § 10.433(a) 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.

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.³¹ 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.³² Previous cases have held that receiving one or two erroneous direct deposit payments does not necessarily create the requisite knowledge to find that a claimant was at fault in the creation of the overpayment.³³

ANALYSIS -- ISSUE 3

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 subsequent deposits.

OWCP paid appellant compensation by EFT every 28 days. Appellant returned to work on July 19, 2016. OWCP paid him compensation for the period July 19 through 25, 2016. On August 20, 2016 appellant received compensation in the amount of \$2,291.02 for the period July 24 through August 20, 2016. There is no documentation or other evidence to demonstrate that appellant had clear knowledge at the time the bank received the August 20, 2016 EFT that the payment was incorrect.³⁴ The Board thus finds that appellant was without fault in accepting the initial direct deposit covering the period of the overpayment July 26 through August 20, 2016.

²⁹ 5 U.S.C. § 8129(b).

³⁰ See *K.E.*, Docket No. 18-0687 (issued October 25, 2018); *Gregg B. Manston*, 45 ECAB 344, 354 (1994); *Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

³¹ See *Tammy Craven*, 57 ECAB 689 (2006); *Order Granting Petition for Reconsideration and Reaffirming Prior Decision* (issued July 24, 2006).

³² *Id.*

³³ See *D.B.*, Docket No. 16-0258 (issued February 1, 2016); *W.P.*, 59 ECAB 514 (2008).

³⁴ See *C.Y.*, Docket No. 18-0263 (issued September 14, 2018); see also *M.M.*, Docket No. 15-0265 (issued May 27, 2015); *Danny E. Haley*, 56 ECAB 393 (2005); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(a) (May 2004).

The Board finds that the case is not in posture for decision regarding the issue of waiver of recovery of the overpayment for the period July 26 to August 20, 2016. The Board will set aside the June 29, 2017 decision regarding the issue of fault for that period and remand the case for OWCP to determine whether appellant is entitled to waiver of recovery of the overpayment covering the period July 26 to August 20, 2016.

The Board further finds that appellant was at fault in the creation of the overpayment resulting from the remaining EFT payments for the period August 21 to November 12, 2016.³⁵

In a July 7, 2015 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 or she knew or should have known to be incorrect.³⁶ 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, a claimant will be at fault for accepting the payments subsequently deposited. By the time of the second payment, 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 July 19, 2016.³⁷ After his receipt of the first direct deposit following his return to work, he was on notice that OWCP began to make payments to him in error and knew or should have known that he was not entitled to the benefit of the subsequent direct deposit.

Finally, as appellant's eligibility for waiver for a portion of the overpayment cannot yet be determined, the issue of recovery will not be considered in the present appeal. On remand he will have an opportunity to submit and have OWCP consider relevant financial evidence on this issue. Following this and all other development deemed necessary, OWCP shall issue a *de novo* decision in the case.³⁸

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish total disability for the period September 9, 2016 to February 3, 2017 causally related to his accepted February 25, 2015 employment injury. The Board also finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$11,235.14 for the period July 26 through November 12, 2016. However, the Board finds that he was without fault in the creation of the overpayment for the period July 26 to August 20, 2016, but that he was at fault in the creation of the overpayment for the period August 21 through November 12, 2016. The case will be remanded for OWCP to consider waiver of recovery of the overpayment from July 26 to August 20, 2016.

³⁵ See *C.Y., id.; D.W.*, Docket No. 14-0229 (issued April 17, 2014).

³⁶ See *C.G.*, Docket No. 15-0701 (issued December 9, 2015).

³⁷ *Id.*

³⁸ *P.L.*, Docket No. 16-0127 (issued May 3, 2016).

ORDER

IT IS HEREBY ORDERED THAT the July 24 and June 29, 2017 decisions of the Office of Workers' Compensation Programs are affirmed in part and set aside in part. The case is remanded for further action consistent with this decision of the Board.

Issued: January 24, 2019
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