

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

_____)	
L.L., Appellant)	
)	
and)	Docket No. 19-1690
)	Issued: February 25, 2020
DEPARTMENT OF AGRICULTURE,)	
VETERINARY SERVICES, Wilmar, MN,)	
Employer)	
_____)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 7, 2019 appellant filed a timely appeal from a July 29, 2019 merit decision 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.

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$3,378.81 for the period February 10 through March 4, 2017; and (2) whether OWCP properly determined that appellant was at fault in the creation of the \$3,378.81 overpayment and, therefore, precluded from waiver of recovery of the overpayment.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

OWCP accepted that on May 3, 2015 appellant, then a 61-year-old veterinary medical officer, sustained: recent partial retinal detachment with single defect, left; other complications affecting other specified body systems, not elsewhere classified, left; retained (old) intraocular foreign body nonmagnetic, unspecified, left; and unspecified complication of corneal transplant vitreous degeneration, left eye when he hit his head on a post in a barn as he tried to grab chickens to test for backyard surveillance while in the performance of duty. Appellant underwent authorized left eye surgery on August 26, 2015.

On February 1, 2016 appellant filed a claim for a schedule award (Form CA-7).

By decision dated September 21, 2016, OWCP granted appellant a schedule award for 25 percent permanent impairment of the left eye. The award ran for a period of 40 weeks from May 6, 2016 to February 9, 2017. Appellant's weekly pay was computed at \$1,024.77 based on the 66 2/3 percent augmented rate for employees with no dependents, totaling \$4,099.09 in continuing payments every four weeks.

In a printout from the Automated Compensation Payment System (ACPS), OWCP documented that it paid appellant an additional sum of \$3,378.81 for the period February 10 through March 4, 2017 as appellant's schedule award compensation should have terminated on February 9, 2017. Copies of fiscal worksheets were provided.

In a preliminary determination dated January 16, 2019, OWCP notified appellant that he had received an overpayment of compensation in the amount of \$3,378.81 for the period February 10 through March 4, 2017 because he was overpaid for his schedule award. It explained that he received \$3,378.81 in error during the stated period because his schedule award expired on February 9, 2017. OWCP advised that appellant was at fault in the creation of the overpayment because he accepted a payment that he knew or reasonably should have known was incorrect. It informed him 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, in a January 23, 2019 overpayment action request, requested a prerecoupment hearing before an OWCP hearing representative, contesting the finding of fault and requesting waiver of recovery of the overpayment. He argued that he was not at fault in the creation of the overpayment because the total amount of his schedule award payments was not listed or made known to him in the September 21, 2016 schedule award decision and the funds were electronically deposited into his bank account and he had no knowledge of the transaction until the money appeared.

In an accompanying Form OWCP-20 dated January 23, 2019, appellant indicated that he had no monthly income since being furloughed on December 22, 2018. He also reported that he had no monthly expenses. Appellant had \$300.00 in funds.

A telephonic hearing was held before an OWCP hearing representative on May 13, 2019. During the hearing, appellant acknowledged that he had received an overpayment of

compensation, but argued that the overpayment occurred through no fault of his own because he did not realize it had occurred at the time he received schedule award payments.

Following the hearing, OWCP received a completed Form OWCP-20 dated June 5, 2019. Appellant noted total monthly income of \$4,844.08, monthly expenses of \$4,656.50, and \$2,133.00 in funds. He submitted a divorce decree and supporting financial documentation.

By decision dated July 29, 2019, an OWCP hearing representative finalized the preliminary overpayment determination, finding that appellant was overpaid in the amount of \$3,378.81 for the period February 10 through March 4, 2017 because he received continued schedule award compensation after his schedule award had expired on February 9, 2017. She found that he was at fault in the creation of the overpayment as he knew or should have known that the payments were incorrect and that he was, therefore, not entitled to waiver of recovery of the overpayment. The hearing representative evaluated appellant's income and expenses and found that he had \$972.48 available in monthly discretionary income. She set recovery of the overpayment at the rate of \$500.00 per month.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provisions of FECA² and its implementing regulations³ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members or functions of the body. Section 20 C.F.R. § 10.404 provides that compensation is provided for specified periods of time for the permanent loss or loss of use of certain members.⁴

OWCP's procedures provide that an overpayment is created when a schedule award expires, but compensation continues to be paid.⁵

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$3,378.81 for the period February 10 through March 4, 2017.

OWCP granted appellant a schedule award for 25 percent permanent impairment of the left eye on September 21, 2016 for the period May 6, 2016 through February 9, 2017. The evidence of record establishes that OWCP continued to pay his schedule award compensation after February 9, 2017, the date the award expired. Consequently, the \$3,378.81 payment received for the period February 10 through March 4, 2017 constituted an overpayment of compensation.

² *Id.*

³ 20 C.F.R. § 10.404.

⁴ *Id.* Effective May 1, 2009 OWCP began using the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009). See *E.V.*, Docket No. 17-2026 (issued July 11, 2018).

⁵ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(c) (May 2004).

Appellant has not contested this amount.⁶ The Board accordingly affirms the fact and amount of the overpayment.⁷

LEGAL PRECEDENT -- ISSUE 2

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.”⁸ A claimant who is at fault in the creation of the overpayment is not entitled to waiver.⁹ 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.¹⁰

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.¹¹

ANALYSIS -- ISSUE 2

The Board finds that OWCP improperly determined that appellant was at fault in the creation of the \$3,378.81 overpayment and, therefore, precluded from waiver of recovery of the overpayment.

In *Tammy Craven*,¹² the Board explained that an employee who receives payment from OWCP in the form of a direct deposit may not be at fault for the first incorrect deposit into his or her account since the acceptance of the overpayment, at the time of receipt of the direct deposit, lacks requisite knowledge. The Board has recognized that, in the case of electronic fund transfers (EFTs), an employee would not receive notification of the date and amount of payment until after

⁶ *A.B.*, Docket No. 18-0922 (issued January 3, 2019); *E.V.*, Docket No. 17-2026 (issued July 11, 2018).

⁷ *A.B.*, *id.*; *R.S.*, Docket No. 17-1985 (issued March 23, 2018).

⁸ 5 U.S.C. § 8129(b).

⁹ *See C.Y.*, Docket No. 18-0263 (issued September 14, 2018).

¹⁰ 20 C.F.R. § 10.433(a).

¹¹ *Id.* at § 10.433(b); *see also D.M.*, Docket No. 17-0983 (issued August 3, 2018).

¹² Docket No. 05-0249 (issued June 20, 2005), *Order Granting Petition for Recon. and Reaffirming Prior Decision*, Docket No. 05-0249 (issued July 24, 2006).

the deposit was made and the overpayment created.¹³ Because fault is defined by what the claimant knew or should have known at the time of acceptance, one of the consequences of EFTs is that the claimant lacks the requisite knowledge at the time of the first incorrect payment.¹⁴

In this case, appellant received one electronic deposit on March 4, 2017 in the amount of \$3,378.81. OWCP failed to establish that he was at fault in the creation of the overpayment as he could not avoid the incorrect payment sent by EFT.¹⁵ 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 direct deposit on March 4, 2017 that the payment was incorrect.¹⁶ Appellant had no reason to suspect at the time of the direct deposit that OWCP had issued an incorrect payment since this was the first and only incorrect payment made.¹⁷

The Board finds that appellant was not at fault in the creation of the \$3,378.81 overpayment received on March 4, 2017.¹⁸ The case must be remanded for OWCP to determine whether he is entitled to waiver of recovery of the overpayment, followed by an appropriate decision.¹⁹

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$3,378.81 for the period February 10 through March 4, 2017. The Board further finds that OWCP improperly determined that appellant was at fault in the creation of the \$3,378.81 overpayment.

¹³ See *J.H.*, Docket No. 15-0195 (issued March 17, 2015).

¹⁴ *George A. Hirsch*, 47 ECAB 520 (1996).

¹⁵ *J.S.*, Docket No. 12-1707 (issued June 10, 2013).

¹⁶ *V.A.*, Docket No. 12-0637 (issued August 27, 2012).

¹⁷ See *S.C.*, Docket No. 14-1730 (issued April 13, 2015).

¹⁸ *A.B.*, *supra* note 6; *E.T.*, Docket No. 15-0611 (issued June 2, 2015).

¹⁹ *A.B.*, *id.*

ORDER

IT IS HEREBY ORDERED THAT the July 29, 2019 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part and the case is remanded for further action consistent with this decision of the Board.

Issued: February 25, 2020
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board