

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

C.H., Appellant)

and)

DEPARTMENT OF HOMELAND SECURITY,)
CUSTOMS & BORDER PROTECTION,)
Blythe, CA, Employer)

**Docket No. 19-1470
Issued: January 24, 2020**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 28, 2019 appellant filed a timely appeal from a June 6, 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 to consider the merits of this case.²

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$1,792.94 for the period March 5 through 30, 2019; and (2) whether OWCP properly

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that following the June 6, 2019 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.*

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

FACTUAL HISTORY

On August 30, 2018 appellant, then a 28-year-old border patrol agent, filed a traumatic injury claim (Form CA-1) alleging that, on August 22, 2018, he sustained left shoulder strain when participating in physical training while in the performance of duty. OWCP accepted the claim for left shoulder superior glenoid labrum lesion and left shoulder bicipital tendinitis. Appellant received continuation of pay from September 1 through October 15, 2018. OWCP paid wage-loss compensation for temporary total disability beginning October 16, 2018, and it placed him on the periodic compensation rolls effective November 11, 2018.

By letter dated November 13, 2018, OWCP advised appellant that he had been placed on the periodic rolls, outlined his entitlement to compensation benefits, and advised him of his responsibility to return to work in connection with the accepted injury. In an attached EN1049 form, OWCP provided:

“To minimize the possibility of 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 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.”
(Emphasis in the original.)

Effective March 5, 2019, appellant resumed full-time, regular-duty work. On or about March 27, 2019 OWCP terminated appellant’s wage-loss compensation for temporary total disability. However, on March 30, 2019 it disbursed payment *via* direct deposit in the amount of \$1,930.86 (net) for the period March 3 through 30, 2019. As appellant was only entitled to compensation for two days (\$137.92) of the 28-day period, OWCP calculated that he had been overpaid \$1,792.94 for the period March 5 through 30, 2019.

In an April 16, 2019 preliminary overpayment determination, OWCP advised appellant that he had been overpaid \$1,792.94 for the period March 5 through 30, 2019 because he returned to full-duty work on March 5, 2019, but continued to receive compensation for temporary total disability through March 30, 2019. It also determined that appellant was at fault in the creation of the overpayment because he had accepted payment that he knew or reasonably should have known to be incorrect. OWCP informed appellant that he had the right to submit evidence or argument if he disagreed with its findings. It also informed him that he had a right to a precoupment hearing before an OWCP hearing representative. Additionally, OWCP instructed appellant to complete an enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documentation.

By decision dated June 6, 2019, OWCP finalized its preliminary determination that appellant received an overpayment of compensation in the amount of \$1,792.94 for the period March 5 through 30, 2019. It determined that appellant was at fault in the creation of the overpayment, and therefore, he was not entitled to waiver of recovery of the overpayment. OWCP required recovery in full within 30 days.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) 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.³

Section 8116(a) of FECA provides that, while an employee is receiving compensation or if he or she has been paid a lump sum in commutation of installment payments until the expiration of the period during which the installment payments would have continued, the employee may not receive salary, pay, or remuneration of any type from the United States, except in limited specified instances.⁴ Section 10.500 of OWCP's regulations provides 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.⁵ A claimant is not entitled to receive temporary total disability (TTD) benefits and actual earnings for the same time period.⁶ OWCP procedures provide that an overpayment of compensation is created when a claimant returns to work, but continues to receive wage-loss compensation for TTD.⁷

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$1,792.94 for the period March 5 through 30, 2019.

On March 5, 2019 appellant returned to full-time, regular-duty work. However, OWCP continued to pay him wage-loss compensation for total disability through March 30, 2019. As noted above, appellant was not entitled to receive compensation for total disability after he returned to work.⁸ His March 30, 2019 direct deposit payment of \$1,930.86 (net) covered the 28-day period from March 3 through 30, 2019. Because he was only entitled to two days of compensation

³ 5 U.S.C. § 8102(a).

⁴ *Id.* at § 8116(a).

⁵ 20 C.F.R. § 10.500(a).

⁶ *See K.K.*, Docket No. 19-0978 (issued October 21, 2019); *C.L.*, Docket No. 19-0242 (issued August 5, 2019); *K.E.*, Docket No. 18-0687 (issued October 25, 2018); *M.S.*, Docket No. 16-0289 (issued April 21, 2016); *L.S.*, 59 ECAB 350, 352-53 (2008).

⁷ *K.K.*, *id.*; *B.H.*, Docket No. 09-0292 (issued September 1, 2009); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Determinations in an Overpayment*, Chapter 6.300.4(g) (September 2018).

⁸ *See supra* notes 4-7.

(\$137.92) during that 28-day period,⁹ OWCP correctly calculated that appellant was overpaid \$1,792.94 for the period March 5 through 30, 2019.¹⁰ Appellant has not contested the fact or amount of the overpayment. The Board thus finds that he received an overpayment of compensation in the amount of \$1,792.94 for the period March 5 through 30, 2019.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) provides that 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.¹¹ A claimant who is at fault in the creation of the overpayment is not entitled to waiver.¹² 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.¹³ 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.¹⁴ Previous cases have held that receiving one erroneous direct deposit payment does not necessarily create the requisite knowledge to find that a claimant was at fault in the creation of the overpayment.¹⁵

ANALYSIS -- ISSUE 2

The Board finds that appellant was not at fault with regard to the overpayment.

OWCP paid appellant compensation by direct deposit every 28 days. Appellant returned to work on March 5, 2019. It paid him compensation for the period March 5 through 30, 2019. There is no documentation or other evidence to demonstrate that appellant had clear knowledge at

⁹ $\$1,930.86 \div 28 = \$68.96 \times 2 = \$137.92$.

¹⁰ $\$1,930.86 - \$137.92 = \$1,792.94$

¹¹ 5 U.S.C. § 8129(b).

¹² See *B.R.*, Docket No. 18-0339 (issued January 24, 2019); *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).

¹³ See *Tammy Craven*, 57 ECAB 689 (2006); see also *A.B.*, Docket No. 18-0922 (issued January 3, 2019).

¹⁴ See *Tammy Craven*, *id.*; see also *S.D.*, Docket No. 17-0309 (issued August 7, 2018).

¹⁵ See *D.B.*, Docket No. 15-0258 (issued February 1, 2016); *W.P.*, 59 ECAB 514 (2008).

the time the bank received the March 30, 2019 direct deposit that the payment was incorrect.¹⁶ The Board thus finds that appellant was without fault in the creation of the overpayment in the amount of \$1,792.94 from March 5 through 30, 2019.

As such, the Board will set aside the June 6, 2019 decision regarding the issue of fault, and remand the case to OWCP to determine whether appellant is entitled to waiver of recovery of the overpayment.

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$1,792.94 for the period March 5 through 30, 2019. The Board further finds that appellant was without fault in the creation of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the June 6, 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: January 24, 2020
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

¹⁶ 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).