

FACTUAL HISTORY

On August 3, 2016 appellant, then a 52-year-old city carrier assistant, filed a traumatic injury claim (Form CA-1) alleging that on the previous day, he sustained fractures to his lower back when he slipped and fell while shielding himself from a dog attack while in the performance of duty. OWCP initially accepted the claim for sprain of the ligaments of the lumbar spine, and later expanded the acceptance of his claim to include closed fracture of thoracic vertebrae, wedge compression fracture of the T11-T12 vertebra with delayed healing, ankylosing spondylitis of the thoracic region, and acute pyelonephritis. Appellant stopped work on the date of injury and has not returned. OWCP paid appellant wage-loss compensation on the supplemental rolls from September 17 through October 15, 2016, and on the periodic rolls as of October 16, 2016.

In a March 30, 2018 letter, OWCP advised appellant that a third party may be liable for his work-related injury. It informed him that he had an obligation to pursue an action against the responsible third party and that should the claim against one or more responsible third parties result in a recovery of money or property, including a settlement, he had to pay a portion of the recovery to OWCP for benefits paid under FECA.

By letter dated October 31, 2018, OWCP advised appellant's then-representative that a third party may be liable for his work-related injury and enclosed a Long Form Statement of Recovery (Form CA-1108) for the then-representative's completion in order to calculate the refund due OWCP and to calculate any surplus related to the claim.

OWCP received the Form CA-1108, signed by appellant on November 14, 2018. The form noted a gross recovery of \$1,050,000.00 and with the Federal Government's statutory right to refund in the amount of \$147,530.61, and a surplus credit against future FECA benefits in the amount of \$332,954.99.

In a November 21, 2018 letter, the Department of Labor, Office of the Solicitor of Labor (SOL) requested repayment of the \$147,530.61 refund within 30 days and noted that if payment was not received within 30 days, interest would begin to accrue as of the date of the letter. In a December 21, 2018 letter, SOL notified appellant's then-representative that the \$147,530.61 refund had not been paid and that according to the regulations implementing FECA, if the required refund was not paid within 30 days of the request for payment, OWCP could, in its discretion, collect the refund by withholding all or part of any payments currently payable to appellant under FECA with respect to any injury.²

On January 22, 2019 appellant's then-representative enclosed a check in the amount of \$147,530.61, the full amount of the lien.

In a January 4, 2019 letter, OWCP advised appellant's representative that the third-party settlement resulted in a third-party surplus of \$332,954.99. It advised that, until the surplus had been exhausted, he was not entitled to further wage-loss compensation or medical benefits under FECA.

² See 20 C.F.R. § 10.716.

On January 4, 2019 SOL closed the third-party aspect of appellant's case. It advised OWCP that a surplus of \$332,954.99 remained.

Appellant continued to receive compensation payments under FECA after the third-party notice was placed in the file by SOL indicating a third-party surplus of \$332,954.99. He received compensation in the gross amount of \$1,123.00 for the periods December 9, 2018 through January 5, 2019 and January 6 through February 2, 2019; in the gross amount of \$1,124.79 for the period February 3 through March 2, 2019; in the gross amount of \$1,143.00 for the 28-day period from March 3, 2019 through February 29, 2020; and in the gross amount of \$1,169.00 for the 28-day period from March 1 through July 18, 2020.

In a July 20, 2020 letter, OWCP advised appellant that the third-party settlement resulted in a credit against his future FECA benefits, resulting in a third-party surplus. It advised him that, until the surplus had been exhausted, he was not entitled to further wage-loss compensation or medical benefits under FECA. As appellant was no longer eligible to receive compensation and medical benefits from OWCP, OWCP stopped his benefits effective July 19, 2020.

On August 19, 2020 OWCP issued a preliminary overpayment determination of an overpayment of compensation in the amount of \$144,233.05 for the period January 4, 2019 through July 18, 2020 because appellant received wage-loss compensation and medical benefits during a period of a third-party surplus. It found that he was at fault in the creation of the overpayment because he knowingly accepted payments which he knew or reasonably should have known were incorrect. The preliminary overpayment determination included a worksheet, which provided an explanation of the calculation of the \$144,233.05 overpayment, which was the gross amount of wage-loss and medical compensation received during the stated period. It indicated that appellant received \$23,032.00 of wage-loss compensation from January 4, 2019 through July 18, 2020, and medical benefits in the amount of \$121,201.05. OWCP requested that appellant complete the enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documentation. Additionally, it provided him with an overpayment action request form and notified him that, within 30 days of the date of the letter, he could request a telephone conference, a final decision based on the written evidence, or a precoupment hearing.

On August 26, 2020 appellant requested that OWCP make a decision based on the written evidence on the issues of fault and possible waiver of the overpayment. In an enclosed Form OWCP-20, appellant indicated that he had a monthly household income of \$1,433.00, monthly expenses totaling \$1,200.00, and total funds/assets of \$135.00.

By decision dated September 22, 2020, OWCP finalized that the preliminary overpayment determination that appellant had received an overpayment of compensation in the amount of \$144,233.05 for the period January 4, 2019 through July 18, 2020 because he accepted wage-loss compensation and medical benefits when a third-party surplus was outstanding. It found that he was at fault in the creation of the overpayment because he knew or reasonably should have known that he was not entitled to compensation benefits "until the surplus was exhausted." Consequently, waiver of recovery of the overpayment was precluded. OWCP requested that appellant repay the overpayment in \$150.00 monthly installments.

LEGAL PRECEDENT -- ISSUE 1

Section 8102 of 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.³ Section 8132 of FECA outlines that where an injury or death for which compensation is payable is caused under circumstances creating a legal liability in a person other than the United States to pay damages and a beneficiary entitled to compensation from the United States for that injury or death receives money or other property in satisfaction of that liability as a result of suit or settlement by him or her in his or her behalf, the beneficiary, after deducting therefrom the costs of suit and a reasonable attorney's fee, shall refund to the United States the amount of compensation paid by the United States and credit any surplus on future payments of compensation to him or her for the same injury.⁴ The applicable regulations reiterate that, after the refund owed to the United States is calculated, FECA beneficiary retains any surplus remaining and this amount is credited, dollar for dollar, against future compensation for the same injury.⁵ OWCP will resume the payment of compensation only after FECA beneficiary has been awarded compensation, which exceeds the amount of the surplus.⁶ Where a beneficiary who has received a third-party recovery has made the required refund, but subsequent events result in payment of compensation benefits, including medical benefits, this may result in an overpayment of compensation.⁷ Such an overpayment of compensation should be adjudicated and processed by OWCP according to the usual overpayment procedures.⁸

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$144,233.05 for the period January 4, 2019 through July 18, 2020 as he continued to receive wage-loss compensation and medical benefits while a third-party surplus was outstanding.

Appellant received a third-party recovery of \$1,050,000.00. He signed a Form CA-1108 on November 14, 2018, which provided the calculations of the amount that needed to be refunded directly to OWCP. After appropriate deductions for the costs of the third-party suit and attorney

³ *Id.* at § 8102.

⁴ *Id.* at § 8132. See *R.M.*, Docket No. 20-0686 (issued May 20, 2020); *E.K.*, Docket No. 18-0599 (issued February 26, 2020); see also *T.D.*, Docket No. 16-0565 (issued May 5, 2016).

⁵ 20 C.F.R. § 10.712.

⁶ *Id.*

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Third-Party Subrogation Guidelines*, Chapter 2.1100.10 (March 2006).

⁸ *Id.*

fees, a surplus was created against future compensation in the amount of \$332,954.99. Future compensation payments are to be charged against a surplus until it has been exhausted.⁹

For the period January 4, 2019 through July 18, 2020, appellant continued to receive compensation benefits in the amount of \$144,233.05 from his FECA claim. This amount was required to be credited against the remaining surplus rather than paid to him.¹⁰

Therefore, the Board finds that OWCP properly found an overpayment of compensation in the amount of \$144,233.05.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of FECA provides that, when an overpayment of compensation has been made because of an error of fact or law, adjustment shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is when an incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of FECA or be against equity and good conscience.¹¹ No waiver of payment is possible if appellant is with fault in helping to create the overpayment.¹²

In determining whether an individual is at fault, section 10.433(a) of OWCP's regulations provides in relevant part:

“An individual is with fault in the creation of an overpayment who--

Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or

Failed to provide information which he or she knew or should have known to be material; or accepted a payment which he or she knew or should have known to be incorrect.”¹³

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly determined that appellant was at fault in the creation of the overpayment of compensation, thereby precluding waiver of recovery of the overpayment.

OWCP found that appellant was at fault in the creation of the overpayment because he accepted payments he knew or should have known were incorrect. In a letter dated January 4, 2019, OWCP advised appellant's then-representative of record that the third-party settlement

⁹ 20 C.F.R. § 10.712; *E.K.*, Docket No. 18-0599 (issued February 26, 2020).

¹⁰ *E.K., id.*; *see B.G.*, Docket No. 14-0850 (issued September 17, 2014).

¹¹ 5 U.S.C. § 8129(b).

¹² *E.K., supra* note 9; *Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

¹³ 20 C.F.R. § 10.433(a).

resulted in a third-party surplus of \$332,954.99. It further advised that, until the surplus had been exhausted, he was not entitled to further wage-loss compensation or medical benefits under FECA. Following receipt of the January 4, 2019 letter, appellant received payments for wage-loss compensation and reimbursement for medical payments in the amount of \$144,233.05.

Although OWCP may have erred in not applying the third-party surplus when issuing the wage-loss compensation and medical reimbursement payments, this does not relieve appellant from his obligation to repay the overpayment. Fault can be established if the circumstances show that the claimant accepted a payment he should have known was incorrect.¹⁴ The Board finds that OWCP provided a specific explanation regarding the nature and amount of the surplus and the resultant impact on appellant's entitlement to further compensation payments until the surplus had been absorbed. Therefore, appellant should have known that the wage-loss compensation benefits and medical reimbursements were incorrect.¹⁵ Thus, OWCP properly found him at fault in the creation of the overpayment, thereby precluding 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 \$144,233.05 during the period January 4, 2019 through July 18, 2020, as he continued to receive wage-loss compensation while a third-party surplus was outstanding; and that appellant was at fault in the creation of the overpayment of compensation, thereby precluding waiver of recovery of the overpayment.

¹⁴ *P.B.*, Docket No. 17-1046 (issued January 2, 2018); *B.G.*, Docket No. 14-0850 (issued September 17, 2014).

¹⁵ *E.K.*, Docket No. 18-0599 (issued February 26, 2020).

ORDER

IT IS HEREBY ORDERED THAT the September 22, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 25, 2021
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