

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

_____)	
E.C., Appellant)	
)	
and)	Docket No. 23-0992
)	Issued: January 19, 2024
U.S. POSTAL SERVICE, POST OFFICE,)	
Coppell, TX, Employer)	
_____)	

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
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On July 20, 2023 appellant filed a timely appeal from a July 7, 2023 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.²

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$29,505.95 for the period February 4 through October 8, 2022, because he continued to receive wage-loss compensation following his return to full-time work; (2) whether OWCP properly found appellant at fault in the creation of the overpayment the period February 27 through

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the July 7, 2023 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.*

October 8, 2022, thereby precluding waiver of recovery for that portion of the overpayment; (3) whether OWCP properly denied waiver of recovery of the overpayment for the period February 4 through 26, 2022.

FACTUAL HISTORY

On July 29, 2020 appellant, then a 44-year-old city carrier, filed an occupational disease claim (Form CA-2) alleging that his right knee condition was caused or aggravated by the factors of his federal employment, including 21 years of repetitive bending, walking, squatting and standing for long periods of time. He noted that he first became aware of his condition on January 24, 2018 and realized its relation to his federal employment on July 23, 2020. Appellant stopped work on July 29, 2020. OWCP accepted the claim for aggravation of unilateral primary osteoarthritis, right knee; right knee effusion; and other meniscus derangements, posterior horn of medial meniscus, right knee.³ It paid appellant wage-loss compensation on its supplemental and periodic rolls from August 13, 2020 through October 9, 2021. OWCP paid appellant on the periodic rolls from October 10, 2021 through October 8, 2022.

By letter dated November 15, 2021, OWCP advised appellant that he should notify OWCP immediately when he returned to work, and that he should return any payment covering a period after he returned to work. In the accompanying EN-1049 form, it advised him that “[f]or payments sent by Electronic Funds Transfer (EFT), a notification of the date and amount of payment will appear 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.”

A February 17, 2022 return to work status update and a February 25, 2022 closure report from a field nurse indicated that appellant returned to full-time/light-duty work on February 4, 2022.

On October 14, 2022, appellant notified OWCP that he had returned to work.

In an October 19, 2022 compensation termination sheet, OWCP determined that appellant had received an overpayment of compensation in the amount of \$29,505.95 for the period February 4 through October 8, 2022. It found that he received \$2,748.59 for the period February 4 through 26, 2022, and thereafter received \$3,344.67 for each period from February 27 through March 26, 2022; March 27 through April 23, 2022; April 24 through May 21, 2022; May 22 through June 18, 2022; June 19 through July 16, 2022; July 17 through August 13, 2022; August 14 through September 10, 2022; and September 11 through October 8, 2022, for a total overpayment of \$29,505.95. The record indicates that the EFT payments for each period were deposited into appellant’s bank account on the last day of each period noted.

In a preliminary overpayment determination dated December 13, 2022, OWCP notified appellant that he had received an overpayment of compensation in the amount of \$29,505.95 for

³ Under OWCP File No. xxxxxx834 (date of injury October 7, 2009) and OWCP File No. xxxxxx875 (date of injury December 15, 2008) OWCP accepted several right knee and right lower extremity conditions. Appellant underwent OWCP-authorized right knee surgeries.

the period February 4 through October 8, 2022, because he returned to full-time employment on February 4, 2022, but continued to receive wage-loss compensation for total disability through October 8, 2022. It further advised him of its preliminary determination that he was at fault in the creation of the overpayment, because he had received a compensation payment deposited by EFT and over 30 days had elapsed since the EFT deposit was made, allowing ample time for him to receive and review a statement from his financial institution showing the details of an improper payment. OWCP requested that appellant complete an overpayment action request form and an overpayment recovery questionnaire (Form OWCP-20), and submit supporting financial documentation, including copies of income tax returns, bank account statements, bills, pay slips, and any other records to support income and expenses. Additionally, OWCP informed him that within 30 days, he could request a final decision based on the written evidence, or a prerecoumment hearing.

On December 20, 2022 appellant requested a prerecoumment hearing before a representative of OWCP's Branch of Hearings and Review.⁴

In an April 19, 2023 letter, OWCP's hearing representative also requested that appellant complete the enclosed Form OWCP-20 so that a reasonable method of collection of the overpayment could be determined.

On May 8, 2023 OWCP received an April 29, 2023 partially-completed Form OWCP-20. Appellant reported a total of \$6,670.00 in monthly expenses. He did not report any monthly income or assets, or submit any supporting financial documentation.

OWCP subsequently converted appellant's request for a prerecoumment hearing to a request for a review of the written record.

By decision dated July 7, 2023, OWCP's hearing representative finalized the December 13, 2022 preliminary overpayment determination, finding that appellant received an overpayment of compensation in the amount of \$29,505.95 for the period February 4 through October 8, 2022. She modified the fault finding to reflect that appellant was without fault in the creation of the overpayment for the period February 4 through 26, 2022.⁵ The hearing representative denied waiver of recovery for the period February 4 through 26, 2022. She also affirmed the fault finding for the period February 27 through October 8, 2022, thereby precluding waiver of recovery of the overpayment. The hearing representative directed recovery of the overpayment in full.

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 his or her duty.⁶ Section 8129(a) of FECA provides, in pertinent part, that when

⁴ The case record indicates that appellant did not appear for the scheduled hearing.

⁵ The hearing representative reasoned that appellant was not able to immediately decline acceptance of the payment for funds deposited directly into his bank account.

⁶ *Supra* note 1 at § 8102(a).

an overpayment has been made to an individual under this subchapter 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 an individual is entitled.⁷

OWCP's regulations provide in pertinent part: "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."⁸ A claimant is not entitled to receive temporary total disability benefits and actual earnings for the same period.⁹ OWCP's procedures also provide that an overpayment of compensation is created when a claimant returns to work, but continues to receive wage-loss compensation.¹⁰

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$29,505.95 for the period February 4 through October 8, 2022 because he continued to receive wage-loss compensation following his return to full-time work.

Appellant returned to full-time work on February 4, 2022, but continued to receive wage-loss compensation from OWCP for total disability through October 8, 2022. As noted above, a claimant is not entitled to receive compensation for total disability during a period in which he or she had actual earnings. Therefore, the Board finds that an overpayment of compensation was created in this case.¹¹

In the preliminary overpayment determination dated December 13, 2022, OWCP found that appellant was overpaid \$29,505.95 for the period February 4 through October 8, 2022. It explained how it calculated the amount of the overpayment. OWCP related that appellant was receiving a net compensation payment every 28 days in the amount of \$3,346.11 for the period January 30 through February 26, 2022 and \$3,344.67 for each period from February 27 through October 8, 2022. It then calculated that \$3,346.11 divided by 28 days and then multiplied by 23 days equaled \$2,748.59 for the period February 4 through 26, 2022, and \$3,344.67 divided by 28 days and then multiplied by 224 days for the period February 27 through October 8, 2022 equaled \$26,757.36, which resulted in a total overpayment of \$29,505.95. The Board has reviewed these calculations and finds that OWCP properly determined that an overpayment of compensation in the amount of \$29,505.95 was created for the period February 4 through October 8, 2022.

⁷ *Id.* at § 8129(a).

⁸ 20 C.F.R. § 10.500.

⁹ *See Q.V.*, Docket No. 21-1188 (issued May 26, 2022); *J.L.*, Docket No. 18-1266 (issued February 15, 2019); *K.E.*, Docket No. 18-0687 (issued October 25, 2018); *L.S.*, 59 ECAB 350, 352-53 (2008).

¹⁰ *See J.S.*, Docket No. 17-0260 (issued December 28, 2017); *B.H.*, Docket No. 09-0292 (issued September 1, 2009); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Identifying and Calculating an Overpayment*, Chapter 6.200.1a (September 2020).

¹¹ *K.B.*, Docket No. 23-0139 (issued May 18, 2023).

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of FECA provides as follows 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 this subchapter or would be against equity and good conscience.¹² No waiver of recovery of an overpayment is possible if the claimant is at fault in the creation of the overpayment.¹³

On the issue of fault, 20 C.F.R. § 10.433(a) provides that an individual is with fault in the creation of an overpayment who: (1) made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; (2) failed to furnish information which the individual knew or should have known to be material; or (3) with respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect.¹⁴

With respect to whether an individual is without fault, section 10.433(b) of OWCP regulations provides 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.¹⁵

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.¹⁶ 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.¹⁷

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly found that appellant was at fault in the creation of the overpayment for the period February 27 through October 8, 2022, thereby precluding waiver of recovery for that portion of the overpayment.

¹² 5 U.S.C. § 8129(b).

¹³ *S.S.*, Docket No. 20-0776 (issued March 15, 2021); *B.W.*, Docket No. 19-0239 (issued September 18, 2020); *R.G.*, Docket No. 18-1251 (issued November 26, 2019); *C.L.*, Docket No. 19-0242 (issued August 5, 2019).

¹⁴ 20 C.F.R. § 10.433(a).

¹⁵ *Id.* at § 10.433(b); *see also R.G.*, *supra* note 13; *D.M.*, Docket No. 17-0983 (issued August 3, 2018).

¹⁶ *M.T.*, Docket No. 20-1353 (issued May 9, 2022); *C.H.*, Docket No. 19-1470 (issued January 24, 2020). *See Tammy Craven*, 57 ECAB 689 (2006); *see also A.B.*, Docket No. 18-0922 (issued January 3, 2019).

¹⁷ *Id.*

In a November 15, 2021 letter, OWCP notified appellant that to avoid an overpayment of compensation, he must immediately notify it of his return to work. Appellant was required to reimburse OWCP for compensation paid during a period in 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.¹⁸ As noted above, 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.¹⁹ By the time of the second and third payments, 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 February 4, 2022.²⁰ 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 benefits of the subsequent direct deposits. The Board therefore finds that OWCP properly found that he was with fault in the creation of the overpayment from February 27 to October 8, 2022, thereby precluding waiver of the overpayment.

LEGAL PRECEDENT -- ISSUE 3

Section 8129 of FECA provides that 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.”²¹

According to 20 C.F.R. § 10.436, recovery of an overpayment would defeat the purpose of FECA if recovery would cause hardship because the beneficiary needs substantially all of his income (including compensation benefits) to meet current ordinary and necessary living expenses, and also, if the beneficiary’s assets do not exceed a specified amount as determined by OWCP from data provided by the Bureau of Labor Statistics.²²

Section 10.437 provides that recovery of an overpayment is considered to be against equity and good conscience when an individual who received an overpayment would experience severe financial hardship attempting to repay the debt; and when an individual, in reliance on such

¹⁸ *L.W., id.; M.T., K.P., K.K., id.; C.G.*, Docket No. 15-0701 (issued December 9, 2015).

¹⁹ *Supra* note 10.

²⁰ *Id.*

²¹ 5 U.S.C. § 8129(a)-(b); *see D.L.*, Docket No. 20-1522 (issued July 27, 2023); *R.Q.*, Docket No. 18-0964 (issued October 8, 2019); *D.C.*, Docket No. 7-0559 (issued June 21, 2018).

²² 20 C.F.R. § 10.436. OWCP’s procedures provide that a claimant is deemed to need substantially all of his or her current net income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. *Supra* note 10 at *Final Overpayment Determinations*, Chapter 6.400.4a(3) (September 2020). OWCP’s procedures further provide that assets must not exceed a resource base of \$6,200.00 for an individual or \$10,300.00 for an individual with a spouse or dependent, plus \$1,200.00 for each additional dependent. *Id.* at Chapter 6.400.4a(2).

payments or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.²³

Section 10.438 of OWCP's regulations provide that the individual who received the overpayment is responsible for providing information about income, expenses, and assets as specified by OWCP. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of FECA or be against equity and good conscience. Failure to submit the requested information within 30 days of the request shall result in denial of waiver.²⁴

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly denied waiver of the recovery of the overpayment for the period February 4 through 26, 2022.

As OWCP found appellant without fault in the creation of the \$2,748.59 overpayment for the period February 4 through 26, 2022, waiver must be considered, and repayment is still required unless adjustment or recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.²⁵

In its preliminary overpayment determination dated December 13, 2022 and in a letter dated April 19, 2023, OWCP requested that appellant provide a completed Form OWCP-20 and supporting financial information. Appellant, however, only provided an incomplete Form OWCP-20, in which he did not report any assets or monthly income. OWCP, therefore, did not have the financial information necessary for it to determine if recovery of the overpayment would defeat the purpose of FECA or if recovery would be against equity and good conscience.²⁶

Consequently, the Board finds that OWCP properly denied waiver of recovery of the \$2,748.59 overpayment for the period February 4 through 26, 2022.

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$29,505.95 for the period February 4 through October 8, 2022 because he continued to receive wage-loss compensation following his return to full-time work. The Board further finds that OWCP properly found that he was at fault in the creation of the overpayment for the period February 27 through October 8, 2022, thereby precluding waiver of recovery of the overpayment. The Board also finds that OWCP properly denied waiver of recovery of the overpayment for the period February 4 through February 26, 2022.

²³ 20 C.F.R. § 10.437.

²⁴ *Id.* at § 10.438.

²⁵ *Id.*; *see also O.B.*, Docket No. 19-0034 (issued April 22, 2019).

²⁶ *See* 20 C.F.R. § 10.438. *See also T.H.*, Docket No. 23-0194 (issued July 17, 2023); *P.G.*, Docket No. 22-1073 (issued December 28, 2022); *S.M.*, Docket No. 17-1802 (issued August 20, 2018).

ORDER

IT IS HEREBY ORDERED THAT the July 7, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 19, 2024
Washington, DC

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

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

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board