

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

J.H., Appellant)

and)

**DEPARTMENT OF THE NAVY, NORFOLK)
NAVAL SHIPYARD, Portsmouth, VA, Employer**)

**Docket No. 17-0592
Issued: May 1, 2018**

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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 23, 2017 appellant filed a timely appeal from a December 16, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP).¹ Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.³

¹ Appellant filed a timely request for oral argument in this case. By order dated July 25, 2017, the Board, after exercising its discretion, denied his request for oral argument as the issues could adequately be addressed based on a review of the case record. *Order Denying Request for Oral Argument*, Docket No. 17-0592 (issued July 25, 2017).

² 5 U.S.C. § 8101 *et seq.*

³ The record provided to the Board includes evidence received after OWCP issued its December 16, 2016 decision. The Board's jurisdiction is limited to the evidence that was before OWCP at the time of its final decision. Therefore, the Board is precluded from considering this additional evidence for the first time on appeal. 20 C.F.R. § 501.2(c)(1).

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$603.77 for the period April 1 through 6, 2013; and (2) whether appellant was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment.

FACTUAL HISTORY

On August 25, 2011 appellant, then a 46-year-old shipwright, filed a traumatic injury claim (Form CA-1) alleging that, on August 24, 2011, he stepped into a hole in the flight deck and injured his right knee in the performance of duty. OWCP accepted the claim for a tear of the medial meniscus, tear of the lateral meniscus, tear of anterior cruciate ligament and loose body in the right knee. It subsequently expanded acceptance of the claim to include osteoarthritis right knee. Appellant stopped work on February 28, 2012 to undergo OWCP-approved right knee arthroscopy. OWCP paid him wage-loss compensation on the supplemental rolls commencing February 2, 2012.

Effective September 1, 2012, OWCP paid appellant wage-loss compensation benefits through its periodic compensation rolls every 28 days. In a September 25, 2012 letter, it outlined appellant's entitlement to compensation benefits and his responsibility to return to work. OWCP notified appellant that he was to immediately inform OWCP upon his return to work to avoid an overpayment of compensation. It also noted that, if he worked during any period covered by a compensation payment, then he had to return the payment to OWCP.

By letter dated March 27, 2013, OWCP advised appellant that on December 22, 2010 the Treasury Department issued a regulation that required all federal payments to be made electronically. Since appellant received his compensation payments by paper check, OWCP requested that he sign up to receive his payments by direct deposit by June 1, 2013.

Appellant returned to full-time modified work with restrictions on April 1, 2013. However, wage-loss compensation was paid through May 4, 2013. The record reflects that appellant was paid \$603.77 for the period April 1 through 6, 2013 and \$2,817.60 for the period April 7 through May 4, 2013.

In a preliminary determination dated June 26, 2013, OWCP determined that appellant received a \$3,421.37 overpayment of compensation because he returned to full-time work on April 1, 2013, but received compensation for total disability from April 1 through May 4, 2013. It noted that appellant had received temporary total disability benefits in the amount of \$5,635.20 for the period March 10 through May 4, 2013, but was only entitled to receive temporary total disability benefits for the period March 10 through 31, 2013 in the amount of \$2,213.83. OWCP calculated that for the period April 1 through May 4, 2013, appellant was overpaid \$3,421.37 (\$5,635.20-\$2,213.83). A fiscal worksheet indicated that appellant received a check dated April 6, 2013 for the period April 1 through 6, 2013 in the amount of \$603.77. Appellant also received a check dated May 4, 2013 for the period April 7 through May 4, 2013 in the amount of \$2,817.60. The overpayment amount was calculated as \$3,421.37. OWCP further found that he was with fault as he knew or should have known that he was not entitled to wage-loss compensation

following his return to work. It provided appellant with an overpayment recovery questionnaire (Form OWCP-20) for his completion, along with appeal rights.

On July 18, 2013 appellant requested a hearing before an OWCP hearing representative. He indicated that the overpayment occurred through no fault of his own and that he had returned the check for the period April 7 through May 4, 2013 in the amount of \$2,817.60. A telephonic hearing was held January 14, 2014. During the hearing, appellant testified that he had returned the check for \$2,817.60, which an employing establishment representative confirmed. The hearing representative then addressed the outstanding overpayment of \$603.77 for the period April 1 through 6, 2013.

Appellant testified that he did not think he was overpaid the \$603.77. He asserted that OWCP should have deducted that amount from the check that was sent to him on April 6, 2013. Appellant explained that he believed that he was entitled to the money because of “everything I’ve had to go through for the last two and a half years putting up with this after getting hurt.” He also stated that because of his injury, he could no longer do side work to earn money.

With regard to his finances, appellant testified that he earned \$1,413.00 every two weeks. Appellant’s expenses were: \$1,100.00 for mortgage; \$91.67 for property tax; \$600.00 for food; \$250.00 for utilities; \$850.00 for gas and car expenses; \$30.00 for dog food. He indicated that, while he was supposed to pay a rental fee of \$700.00 per month, he only pays it when he can. The hearing representative requested documentation of the expenses, noting that the amount claimed for food was higher than the average.

By decision dated March 26, 2014, an OWCP hearing representative determined that appellant received a \$603.77 overpayment of compensation because he returned to full-time work on April 1, 2013, but he was paid compensation for total disability through April 6, 2013.⁴ The hearing representative further found that appellant was at fault in the creation of the overpayment as he accepted a payment that he knew or should have known was incorrect. The hearing representative found that, as appellant’s monthly income exceeded his expenses by \$139.83, he could make monthly repayments in the amount of \$50.00 until the overpayment debt was fully satisfied.

By decision dated December 16, 2016, OWCP finalized its determination that appellant had received an overpayment of compensation in the amount of \$603.77, as he had returned to work on a full-time basis on April 1, 2013, but continued to receive compensation for total disability through April 6, 2013. It found that he was at fault in the creation of the overpayment as he had accepted a payment he knew or reasonably should have known was incorrect. OWCP further found that the overpayment debt could be recovered in \$50.00 per month repayments, as ordered in the hearing representative’s decision.

⁴ The hearing representative noted that, following the hearing, appellant had submitted a copy of the check dated May 4, 2013 with the word “VOID” written across it. OWCP received the check on August 13, 2014.

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.⁵

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.⁶ OWCP's regulations state 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.⁷ A claimant is not entitled to receive temporary total disability and actual earnings for the same period.⁸ OWCP's procedures provide that an overpayment of compensation is created when a claimant returns to work, but continues to receive wage-loss compensation.⁹

ANALYSIS -- ISSUE 1

OWCP placed appellant on the periodic compensation rolls as of September 1, 2012. Appellant continued to receive compensation for total disability every 28 days, through May 4, 2013. The record indicates, however, that he had returned to full-time, modified work on April 1, 2013. Appellant does not contest and the record reflects that he returned to full-time, modified work on that date. A claimant is not entitled to receive compensation for total disability during a period in which he or she had actual earnings.¹⁰ Therefore, the Board finds that an overpayment of compensation was created in this case.

The amount of the overpayment was originally calculated to be \$3,421.37 for the period April 1 through May 4, 2013. However, appellant returned a check in the amount of \$2,817.60 for the period April 7 through May 4, 2013. Thus, the overpayment amount was properly reduced to \$603.77 for the period April 1 through 6, 2013. This represented the net compensation appellant was paid for the six calendar days from April 1 to 6, 2013. No contrary evidence was submitted. The Board accordingly finds that OWCP properly found that an overpayment of compensation in the amount of \$603.77 was created during the period April 1 through 6, 2013.

⁵ 5 U.S.C. § 8102.

⁶ *Id.* at § 8116(a).

⁷ 20 C.F.R. § 10.500.

⁸ *L.S.*, 59 ECAB 350, 352-53 (2008).

⁹ *B.H.*, Docket No. 09-0292 (issued September 1, 2009); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(a) (May 2004).

¹⁰ *See M.S.*, Docket No. 16-0289 (issued April 21, 2016); *D.B.*, Docket No. 15-0258 (issued February 1, 2016).

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of FECA¹¹ provides that, where an overpayment of compensation has been made because of an error or fact of law, adjustment shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): 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.¹² Accordingly, no waiver of an overpayment is possible if the claimant is with fault in helping to create the overpayment.

In determining whether an individual is with fault, section 10.433(a) of OWCP's regulations¹³ provides in relevant part:

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

- (1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or
- (2) Failed to furnish 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.”¹⁴

To determine if an individual was at fault with respect to the creation of an overpayment, OWCP examines 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

Even if an overpayment resulted from negligence by OWCP, this does not excuse the employee from accepting payment, which the employee knew or should have been expected to know she was not entitled.¹⁶

¹¹ 5 U.S.C. § 8129(a).

¹² *Id.* at § 8129(b).

¹³ 20 C.F.R. § 10.433(a).

¹⁴ *Id.*

¹⁵ *Id.* at § 10.433(b); *Neill D. Dewald*, 57 ECAB 451 (2006); *Y.Z.*, Docket No. 15-1704 (issued February 4, 2016).

¹⁶ *Diana L. Booth*, 52 ECAB 370 (2001).

ANALYSIS -- ISSUE 2

OWCP applied the third standard, as set forth above, in determining that appellant was at fault in creating the overpayment. In order for it to establish that appellant was at fault in the creation of the overpayment of compensation, OWCP must establish that, at the time appellant received the compensation check in question, he knew or should have known that the payment was incorrect.¹⁷

Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives are proper¹⁸ and the recipient must show good faith and exercise a high degree of care in reporting events that may affect entitlement to or the amount of benefits.¹⁹ In the September 25, 2012 acceptance letter, OWCP clearly advised appellant that he was to immediately inform it upon his return to work to avoid an overpayment of compensation and that, if he worked during any period covered by a compensation payment, he had to return the payment to OWCP.

Thus, appellant should have known that he could not receive wage-loss compensation after his return to work.²⁰ Although the employing establishment or OWCP may have been notified of appellant's pending return to work, appellant did not return the compensation check he received.

The Board has explained that when a claimant returns to work and subsequently receives a compensation check in the mail covering a period of employment, knows or should know that he is not entitled to such compensation, but decides nonetheless to cash or deposit the check, the cashing or depositing of the check has established the acceptance necessary to establish fault.²¹

Therefore the Board concludes that appellant should have known that, at the time he returned to work on April 1, 2013, he was not entitled to continue to receive compensation and had an obligation to return payments he knew or should have known were incorrect.²² Under section 10.433(a) of OWCP's regulations, appellant is at fault. As he was at fault in the creation of the overpayment, appellant is not eligible for waiver of recovery of the overpayment of compensation.²³

With respect to recovery of the overpayment in compensation, the Board's jurisdiction is limited to reviewing those cases where OWCP seeks recovery from continuing compensation benefits under FECA. As appellant was no longer receiving wage-loss compensation when he

¹⁷ *Linda E. Padilla*, 45 ECAB 768, 772 (1994).

¹⁸ *C.V.*, Docket No. 16-0986 (issued September 1, 2016); *Y.Z.*, *supra* note 15.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *See William F. Salmonson*, 54 ECAB 152 (2002).

²² *Supra* note 18.

²³ *Id.*

returned to work, the Board does not have jurisdiction with respect to the recovery of the overpayment under the Debt Collection Act.²⁴

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$603.77 for the period April 1 through 6, 2013 because he continued to receive compensation after his return to work. The Board further finds that appellant was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the December 16, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 1, 2018
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

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

²⁴ Cheryl Thomas, 55 ECAB 610 (2004).