

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

R.W., Appellant)
)
and) **Docket No. 13-1108**
) **Issued: September 10, 2013**
U.S. POSTAL SERVICE, POST OFFICE,)
Tuscaloosa, AL, Employer)

)

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

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge

JURISDICTION

On April 4, 2013 appellant filed a timely appeal of the March 22, 2013 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 the case.

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received a \$1,140.30 overpayment of compensation for the period January 30 to February 9, 2013; and (2) whether OWCP properly determined that appellant was at fault in creating the overpayment of compensation, thereby precluding waiver of recovery of the overpayment.

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On July 8, 2002 appellant, then a 42-year-old part-time flexible clerk, injured his right shoulder and elbow when he was replacing a belt on a delivery bar code sorter. OWCP accepted his claim for right rotator cuff tear and traumatic arthritis of the right shoulder. It authorized arthroscopic surgery on the right shoulder which was performed on July 31, 2002. Appellant stopped work on July 10, 2002 and returned to full-time light duty on October 24, 2002 and worked intermittently thereafter.

In an October 31, 2012 telephone log, appellant advised that he underwent right shoulder surgery on October 29, 2012 which was authorized by OWCP. The claims examiner instructed appellant to file a Form CA-7, claim for compensation, for any periods of disability due to the surgery. In a telephone log dated November 26, 2012, appellant notified OWCP that his period of disability began on October 26, 2012. On November 29, 2012 the employing establishment confirmed the date disability began was October 26, 2012 and that appellant's pay at that time was \$53,102.00.

In a letter dated December 3, 2012, OWCP outlined appellant's entitlement to compensation benefits and his responsibility to return to work in connection with the injury accepted by OWCP. Appellant was placed on the periodic compensation rolls. In an attached EN1049 form OWCP provided:

“OVERPAYMENTS. 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.”

In a telephone log dated January 31, 2013, the employing establishment advised that appellant returned to full-time light-duty work on January 30, 2013. In a Personnel Action Request -- LWOP OWCP Return to Duty form, the employing establishment noted that appellant returned to work on January 30, 2013. In a compensation termination sheet dated February 6, 2013, OWCP noted that appellant returned to work on January 30, 2013. It noted that for the period January 30 to February 9, 2013 appellant was paid compensation in the amount of \$1,140.30.

In a telephone log dated February 6, 2013, OWCP noted receipt of the January 30, 2013 return to work document, verified appellant's pay rate and noted that appellant returned to work without any loss of pay.

The employing establishment submitted an offer of modified limited-duty assignment dated January 30, 2013 for a modified mail processing clerk position effective January 30, 2013. It noted that the position was full time, 8:00 a.m. to 4:30 p.m., with a salary of \$53,633.00. On January 30, 2013 appellant accepted the position and returned to work. In a Report of Termination of Disability and/or Payment dated January 30, 2013, OWCP noted that he stopped work on October 26, 2012 and returned to work in a limited-duty job on January 30, 2013. It noted that appellant must be removed from the periodic rolls. In a February 6, 2013 compensation termination sheet, OWCP noted that for 11 days from January 30 to February 9, 2013, he received gross compensation of \$1,279.92 and, after deducting amounts for health benefits and life insurance, net compensation of \$1,140.30.

The record indicates that, on February 9, 2013, OWCP issued appellant a net payment of \$2,902.57 for wage-loss compensation from January 13 to February 9, 2013.

In an February 11, 2013 letter, OWCP informed appellant that it made a preliminary determination of \$1,140.30 overpayment of compensation from January 30 to February 9, 2013 because he received compensation benefits for temporary total disability from January 30 to February 9, 2013 after he returned to work full time on January 30, 2013. It explained that he was paid \$1,140.30 in compensation from January 30 to February 9, 2013,² but was entitled to no compensation. OWCP found that appellant was at fault in creating the overpayment because he accepted payment that he knew or reasonably should have known to be incorrect. It informed him that he had the right to submit evidence or argument if he disagreed with its finding. OWCP also informed appellant that he had a right to a prerecoumpment hearing before an OWCP hearing representative. It instructed him to complete an enclosed overpayment recovery form and submit supporting documentation. No additional information was submitted.

In a decision dated March 22, 2013, OWCP found that appellant received a \$1,140.30 overpayment of compensation from January 30 to February 9, 2013 for which he was at fault in creating. It advised that the overpayment occurred because he returned to work full time, eight hours per day, on January 30, 2013 and continued to receive compensation for total disability until February 9, 2013. OWCP found that appellant was at fault in creating the overpayment because he reasonably should have been aware that he was not entitled to compensation benefits for total disability while working full time. It stated that he should forward a check for the full amount of \$1,140.30 per month.

LEGAL PRECEDENT -- ISSUE 1

A claimant is not entitled to receive temporary total disability and actual earnings for the same period. OWCP procedures provide that an overpayment in compensation is created when a claimant returns to work but continues to receive wage-loss compensation.³

² OWCP calculated this amount by taking the net compensation paid from January 13 to February 9, 2013, \$2,902.57, dividing this by the 28 calendar days that are in a compensation period, which equals \$103.66 a day, and multiplying this by the 11 days for which he received compensation while he also worked, which yielded \$1,140.30.

³ *Danny E. Haley*, 56 ECAB 393 (2005); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(a) (May 2004).

ANALYSIS -- ISSUE 1

The record indicates that appellant returned to work full time, eight hours per day, at the employing establishment on January 30, 2013. He continued to receive wage-loss compensation for total disability through February 9, 2013. As noted above, appellant is not entitled to receive compensation for total disability after he has returned to work. Thus, an overpayment occurred.

Since the evidence indicated that appellant returned to full-time work without wage loss on January 30, 2013, he was not entitled to total disability compensation after that date. The record shows that OWCP calculated that, from January 30 to February 9, 2013, appellant received \$1,140.30 in total net disability compensation but was not entitled to any compensation during this period. OWCP explained how the overpayment occurred and provided this to appellant with the preliminary notice of overpayment. There is no evidence that the overpayment did not occur as found by OWCP. The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$1,140.30 for the period January 30 to February 9, 2013.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of FECA provides as follows:

“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.”⁴ No waiver of an overpayment is possible if the claimant is at fault in creating the overpayment.⁵

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; or (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.⁶

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.⁷

⁴ 5 U.S.C. § 8129(b).

⁵ *Gregg B. Manston*, 45 ECAB 344 (1994).

⁶ 20 C.F.R. § 10.433(a). See *Kenneth E. Rush*, 51 ECAB 116 (1999).

⁷ *Id.* at § 10.433(b).

Section 10.430(a) of OWCP's regulations advise that OWCP includes on each periodic check a clear indication of the period for which payment is being made. A form is sent to the recipient with each supplemental check which states the period for which payment is being made. Section 10.430(b) notes that, by these means, OWCP puts the recipient on notice that a payment was made and the amount of the payment.⁸

ANALYSIS -- ISSUE 2

OWCP applied the third standard in determining that appellant was at fault in creating the overpayment. For OWCP to establish that appellant was with fault in creating the overpayment of compensation, OWCP must establish that, at the time appellant accepted the compensation checks in question, he knew or should have known the payments were incorrect.⁹

As noted, OWCP erroneously issued wage-loss compensation for total disability for the period January 30 to February 9, 2013 while appellant was not entitled to disability compensation for this period. However, even if the overpayment resulted from negligence on the part of OWCP, this does not excuse the employee from accepting payment to which he or she knew or should have known that he or she was not entitled.¹⁰ On December 3, 2012 OWCP advised appellant: "OVERPAYMENT. 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."

Appellant did not respond to the preliminary overpayment determination issued on February 11, 2013. The Board notes that he received the December 3, 2012 cautionary notices from OWCP shortly before the check in question was issued. Additionally, OWCP includes on each periodic check a clear indication of the period for which payment is being made. By doing this, it puts the recipient on notice that a payment was made and the amount of the payment.¹¹ All of this evidence establishes that appellant should have been aware that, when he accepted the compensation for the period in question, he was not entitled to receive wage-loss compensation for total disability for a period when he worked.

For these reasons, OWCP properly found that appellant accepted wage-loss compensation from January 30 to February 9, 2013 which he knew or should have known was incorrect. As appellant was at fault under the third fault standard, outlined above, recovery of the \$1,140.30 overpayment of compensation may not be waived.¹²

⁸ *J.R.*, Docket No. 08-1107 (issued June 15, 2009). 20 C.F.R. § 10.430.

⁹ See *Claude T. Green*, 42 ECAB 174, 278 (1990).

¹⁰ See *Russell E. Wageneck*, 46 ECAB 653 (1995).

¹¹ See *J.R.*, *supra* note 8.

¹² As OWCP did not direct recovery of the overpayment from continuing compensation payments, the Board does not have jurisdiction over the recovery of the overpayment. See *Desiderio Martinez*, 55 ECAB 245 (2004).

On appeal, appellant asserts that the amount of the overpayment was incorrect as he was not scheduled to work on one day that was included in the period of the overpayment calculation. This assertion is without merit as the record reflects that appellant was on the periodic compensation rolls at the time in question. Periodic rolls compensation payments are made on a calendar day basis for which OWCP procedures provide that the claimant receives pay for every day of the week during the period of disability, at the rate of one-seventh of the weekly compensation rate for each day.¹³ Appellant further noted that although he accepted an obvious overpayment he had no choice as he had past due bills. He further asserted that he did everything possible to prevent the overpayment including informing his assigned nurse who indicated that she would inform OWCP that he returned to work. However, as noted above, even though the overpayment may have resulted from negligence on the part of OWCP, this does not excuse the employee from accepting payment to which he or she knew or should have known that he or she was not entitled.¹⁴ While appellant returned to work he did not return the compensation as OWCP had previously instructed. The evidence supports that he knew or should have known that he accepted an incorrect amount.

CONCLUSION

The Board finds that appellant received an overpayment of compensation from January 30 to February 9, 2013 and that he was at fault in creating the overpayment.

¹³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Compensation Claims*, Chapter 2.901.8(b) (February 2013).

¹⁴ See *Russell E. Wageneck, supra* note 10.

ORDER

IT IS HEREBY ORDERED THAT the March 22, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 10, 2013
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board