

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

S.R., Appellant)	
)	
and)	Docket No. 24-0338
)	Issued: May 10, 2024
DEPARTMENT OF HOMELAND SECURITY,)	
TRANSPORTATION SECURITY)	
ADMINISTRATION, Irvine, CA, Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On February 14, 2024 appellant filed a timely appeal from a December 15, 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.

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$12,151.05, for the period April 24 through August 12, 2023, because he continued to receive wage-loss compensation for total disability following his return to full-time work; and (2) whether OWCP properly determined that appellant was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On July 28, 2021 appellant, then a 45-year-old transportation security administration officer, filed a traumatic injury claim (Form CA-1) alleging that on that date he injured his left wrist and right shoulder when lifting two items for additional screening while in the performance of duty. He did not stop work. By decision dated February 9, 2022, OWCP accepted the claim for left wrist sprain and right acromioclavicular ligament sprain. By decision dated June 23, 2022, it expanded the acceptance of the claim to include right shoulder internal impingement, traumatic partial right rotator cuff tear, and right rotator cuff tendinitis. On October 27, 2022 appellant underwent OWCP-authorized right shoulder arthroscopy with decompression and distal clavicle resection surgery. OWCP paid him wage-loss compensation on the supplemental rolls as of October 25, 2022, and on the periodic rolls as of December 4, 2022.

In a letter dated December 12, 2022, OWCP advised appellant of his responsibility to return to work if he was no longer totally disabled from work in connection with the accepted injury. It advised him 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, OWCP advised appellant 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.”

An April 25, 2023 return-to-work status update and a June 24, 2023 closure report from a field nurse indicated that appellant had returned to full-time, light-duty work on April 24, 2023.

In an August 17, 2023 compensation termination sheet, OWCP determined that appellant had received an overpayment of compensation in the amount of \$12,151.05 for the period April 24 through August 12, 2023. It found that he received \$2,955.66 for the period April 24 through May 20, 2023, and thereafter received \$3,065.13 for each period May 21 through June 17, 2023, June 18 through July 15, 2023, and July 16 through August 12, 2023, for a total overpayment of \$12,151.05. OWCP issued the first EFT direct deposit appellant received after his return to work on May 20, 2023.

In a preliminary overpayment determination dated August 17, 2023, OWCP notified appellant that he had received an overpayment of compensation in the amount of \$12,151.05 for the period April 24 through August 12, 2023, because he returned to full-time employment on April 24, 2023, but continued to receive wage-loss compensation for total disability through August 12, 2023. It further advised him of its preliminary determination that he was at fault in the creation of the overpayment. 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, it informed him that, within 30 days, he could request a final decision based on the written evidence, or a prerecoupment hearing.

In an updated preliminary overpayment determination dated October 10, 2023, OWCP informed appellant that he had received an overpayment of compensation in the amount of \$12,151.05 for the period April 24 through August 12, 2023, because he returned to full-time employment on April 24, 2023, but continued to receive wage-loss compensation for total disability through August 12, 2023. It noted the payments he had improperly received and indicated how the overpayment was calculated. OWCP further advised appellant 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. It requested that he complete an overpayment action request form and a 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 appellant that, within 30 days, he could request a final decision based on the written evidence, or a prerecoupment hearing.

In a letter dated October 25, 2023, appellant asserted that he was without fault in the creation of the overpayment, and he requested waiver of the overpayment. He related that he reached out to OWCP and was informed that the payments he received were not considered overpayments. No supporting documentation accompanied appellant's request.

By decision dated December 15, 2023, OWCP finalized its preliminary overpayment determination that appellant had received an overpayment of compensation in the amount of \$12,151.05 for the period April 24 through August 12, 2023, as he continued to receive wage-loss compensation after a return to full-time work. It also found that he was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment. OWCP 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 duty.² Section 8129(a) of FECA provides, in pertinent part, that when 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.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

² *Id.* at § 8102(a).

³ *Id.* at § 8129(a).

⁴ *Id.* at § 8116(a).

to disability is available only for 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 benefits and actual earnings for the same time period.⁶ OWCP's procedures provide that an overpayment of compensation is created when a claimant returns to work, but continues to receive wage-loss compensation for temporary total disability.⁷

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$12,151.05 during the period April 24 through August 12, 2023, because he continued to receive wage-loss compensation for total disability following his return to full-time work.

Appellant resumed full-time modified-duty employment on April 24, 2023. OWCP, however, continued to pay him wage-loss compensation for total disability following his return to work through August 12, 2023. As noted above, a claimant is not entitled to receive compensation for disability during a period in which he had actual earnings.⁸ Therefore, an overpayment of compensation was created in this case.

OWCP calculated appellant's net compensation paid for the period April 24 through August 12, 2023 as \$12,151.05. It explained how it calculated the amount of the overpayment. The Board has reviewed OWCP's calculations and finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$12,151.05 for the period April 24 through August 12, 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.⁹ No waiver of recovery of an overpayment is possible if the claimant is at fault in the creation of the overpayment.¹⁰

⁵ 20 C.F.R. § 10.500(a).

⁶ See *T.L.*, Docket No. 23-0424 (issued December 28, 2023); *S.S.*, Docket No. 20-0776 (issued March 15, 2021); *L.T.*, Docket No. 19-1389 (issued March 27, 2020); *C.H.*, Docket No. 19-1470 (issued January 24, 2020); *L.S.*, 59 ECAB 350, 352-53 (2008).

⁷ *T.L.*, *id.*; *S.S.*, *id.*; *L.T.*, *id.*; *C.H.*, *id.*; Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Identifying and Calculating an Overpayment*, Chapter 6.200.1a (September 2020).

⁸ See *supra* note 6.

⁹ 5 U.S.C. § 8129(b).

¹⁰ *T.L.*, *supra* note 6; *S.S.*, *supra* note 6; *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).

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.¹¹

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.¹²

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

ANALYSIS -- ISSUE 2

The Board finds that appellant was without fault in the creation of the overpayment for the period April 24 through May 20, 2023.

OWCP paid appellant compensation by direct deposit every 28 days. As noted, appellant returned to full-time, modified-duty work on April 24, 2023. OWCP issued the first direct deposit he received after his return to work on May 20, 2023. There is no documentation or other evidence to demonstrate that appellant had clear knowledge at the time his bank received the May 20, 2023 direct deposit that the payment was incorrect.¹⁵ The Board thus finds that he was without fault in

¹¹ 20 C.F.R. § 10.433(a).

¹² *Id.* at § 10.433(b); *see also T.L.*, *supra* note 6; *R.G.*, *supra* note 10; *D.M.*, Docket No. 17-0983 (issued August 3, 2018).

¹³ *T.L.*, *id.*; *L.W.*, Docket No. 22-1155 (issued January 19, 2023); *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).

¹⁴ *Id.*

¹⁵ *M.T.*, *supra* note 13; *C.C.*, Docket No. 18-1268 (issued April 2, 2021); *K.P.*, Docket No. 19-1151 (issued March 18, 2020); *K.K.*, Docket No. 19-0978 (issued October 21, 2019); *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).

accepting the initial direct deposit covering the period of the overpayment from April 24 through May 20, 2023.

The Board further finds that the case is not in posture for decision regarding the issue of waiver of recovery of the overpayment for the period April 24 through May 20, 2023. The Board will reverse the December 15, 2023 decision regarding the issue of fault as to the May 20, 2023 direct deposit covering the period April 24 through May 20, 2023 and will remand the case for OWCP to determine whether appellant is entitled to waiver of recovery for the portion of the overpayment covering the period April 24 through May 20, 2023.

The Board, however, also finds that appellant was at fault in the creation of the overpayment for the remaining direct deposit payment for the period May 21 through August 12, 2023.¹⁶

In a December 12, 2022 letter, OWCP notified appellant that, to avoid an overpayment of compensation, he must immediately report his return to work and reimburse OWCP for compensation paid during a period in which he worked. Although it 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.¹⁷ 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.¹⁸ By the time of the second payment, 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 April 24, 2023.¹⁹ 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 appellant was at fault in the creation of the overpayment from May 21 through August 12, 2023, thereby precluding waiver of recovery of the overpayment.

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$12,151.05 during the period April 24 through August 12, 2023. The Board further finds that appellant was without fault in the creation of the overpayment for the period April 24 through May 20, 2023, and that he was at fault in the creation of the overpayment for the period May 21 through August 12, 2023. The case will be remanded to OWCP to consider waiver of recovery of the overpayment for the period April 24 through May 20, 2023.

¹⁶ *T.L., supra* note 6; *M.T., id.*; *C.C., id.*; *D.W.*, Docket No. 15-0229 (issued April 17, 2014).

¹⁷ *T.L., id.*; *L.W., supra* note 13; *M.T., id.*; *C.G.*, Docket No. 15-0701 (issued December 9, 2015).

¹⁸ *Supra* note 14.

¹⁹ *Supra* note 17.

ORDER

IT IS HEREBY ORDERED THAT the December 15, 2023 decision of the Office of Workers' Compensation Programs is affirmed in part, and reversed in part. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: May 10, 2024
Washington, DC

Alec J. Koromilas, 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