

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

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**J.B., Appellant**

**and**

**U.S. POSTAL SERVICE, CONYERS POST  
OFFICE, Conyers, GA, Employer**

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**Docket No. 24-0359  
Issued: May 28, 2024**

*Appearances:*

*Alan J. Shapiro, Esq., for the appellant<sup>1</sup>  
Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

JANICE B. ASKIN, Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge  
JAMES D. MCGINLEY, Alternate Judge

**JURISDICTION**

On February 21, 2024 appellant, through counsel, filed a timely appeal from a January 16, 2024 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>3</sup>

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<sup>1</sup> In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The Board notes that, following the January 16, 2024 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.*

## **ISSUES**

The issues are: (1) whether an overpayment of compensation in the amount of \$5,611.10 was created for the period April 12 through May 20, 2023, because appellant continued to receive wage-loss compensation following his return to full-time work; and (2) whether OWCP properly found that appellant was at fault in the creation of the overpayment, thereby precluding waiver of recovery.

## **FACTUAL HISTORY**

On April 13, 2021 appellant, then a 56-year-old rural carrier, filed an occupational disease claim (Form CA-2) alleging that he developed bilateral rotator cuff syndrome with tears causally related to factors of his federal employment. OWCP accepted the claim for bilateral shoulder impingement syndrome and bilateral incomplete rotator cuff tears. It paid appellant wage-loss compensation on the supplemental rolls as of March 14, 2021.

On June 20, 2022 appellant underwent left shoulder arthroscopy, rotator cuff repair, subacromial decompression, distal clavicle excision, and labral debridement. On November 28, 2022 he underwent right shoulder arthroscopy, rotator cuff repair, subacromial decompression, and labral debridement.

In a December 13, 2022 letter, OWCP notified appellant that he had been placed on the periodic rolls for wage-loss compensation, with his first regular payment covering the period December 4 through 31, 2022. It advised him that he was expected to return to work, including available light-duty or part-time work, if he was no longer totally disabled because of his accepted injury. OWCP also advised appellant that once he had been medically cleared to return to work, he should report the change to the employing establishment. It further advised that if he received an offer of light or limited duty from the employing establishment, he should notify OWCP in writing of his decision either to accept or refuse the position offered at that time. OWCP advised that if appellant's condition improved such that he was able to engage in any type of work activity, he was expected to report this improvement to his physician and to OWCP; and that any change in work restrictions recommended by his physician was expected to be reported to OWCP. Additionally, it advised him that once he returned to work he should notify OWCP and return payment for any period worked to prevent an overpayment of compensation. OWCP notified appellant that, if he worked during any portion of the covered period and compensation payments were received *via* paper check or *via* payments sent by electronic funds transfer (EFT), he was to return the payment to OWCP even if he had already advised OWCP that he was working.

OWCP issued a payment by EFT on April 22, 2023 in the net amount of \$4,028.48, for the period March 26 through April 22, 2023. It issued another payment by EFT on May 20, 2023 in the net amount of \$4,028.48, for the period April 23 through May 20, 2023.

On April 19, 2023 appellant notified OWCP that he returned to work, in a limited-duty assignment, on April 12, 2023. On June 2, 2023 the employing establishment confirmed that he returned to full-time work with medical restrictions as of April 12, 2023.

In an automated compensation payment system (ACPS) worksheet dated June 2, 2023, OWCP calculated that appellant's overpayment amount for the period April 12 through May 20, 2023 was \$5,611.10. It noted that he had returned to work without wage loss on April 12, 2023.

OWCP further noted that appellant was received compensation payments in the net amounts of \$1,582.62 for the period April 12 through 22, 2023, and \$4,028.48 for the period April 23 through May 20, 2023.

In a preliminary overpayment determination dated July 28, 2023, OWCP advised appellant that an overpayment of compensation in the amount of \$5,611.10 had been created because he returned to work full time on April 12, 2023 but continued to receive wage-loss compensation through May 20, 2023. Appellant's 28-day net compensation payment for the periods March 26, 2023 through April 22, 2023 and April 23, 2023 through May 20, 2023 was \$4,028.48 for each period. OWCP determined that he was entitled to compensation from March 26 through April 11, 2023 but not entitled to compensation from April 12 through 22, 2023. It provided its computation of the amount of the overpayment for the periods April 12 through 22, 2023 and April 23 through May 20, 2023, dividing his 28-day compensation during the relevant periods by 28 to arrive at a daily rate, then multiplying the daily rate by the number of days appellant was overpaid. OWCP made the preliminary finding that appellant was at fault in the creation of the overpayment, as he accepted payments he knew or should have known to be incorrect. It requested that he submit a completed overpayment recovery questionnaire (Form OWCP-20) to determine a reasonable payment method and advised that he could request waiver of recovery of the overpayment. OWCP further requested that appellant provide supporting financial documentation, including copies of income tax returns, bank account statement, bills, and canceled checks, pay slips, and any other records supporting income and expenses. Additionally, it provided an overpayment action request form and notified him that, within 30 days of the date of the letter, he could request a final decision based on the written evidence, or a prerecoupment hearing. OWCP afforded appellant 30 days to submit additional evidence/argument and to request a hearing.

On August 8, 2023 appellant requested a prerecoupment hearing before a representative of OWCP's Branch of Hearings and Review. He checked a box indicating his belief that the overpayment occurred through no fault of his own and requested waiver of recovery of the overpayment.

The prerecoupment hearing took place on November 2, 2023, at which appellant was represented by counsel. The representative of OWCP's Branch of Hearings and Review afforded appellant 30 days to submit additional evidence and financial documentation. No response was received.

By decision dated January 16, 2024, OWCP's hearing representative finalized the preliminary overpayment determination of July 28, 2023, finding that an overpayment of compensation in the amount of \$5,611.10 for the period April 12 through May 20, 2023 was created because he continued to receive wage-loss compensation following his return to full-time work on April 12, 2023. The hearing representative found him at fault in the creation of the overpayment and required recovery in full.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8102(a) of FECA<sup>4</sup> provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the

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<sup>4</sup> *Supra* note 2.

performance of his duty.<sup>5</sup> 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.<sup>6</sup>

A claimant is not entitled to receive temporary total disability and actual earnings for the same period.<sup>7</sup> OWCP regulations provide that 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.<sup>8</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that an overpayment of compensation was created in the amount of \$5,611.10 for the period April 12 through May 20, 2023 because appellant continued to receive wage-loss compensation following his return to full-time work.

Appellant returned to full-time work on April 12, 2023 while continuing to receive wage-loss compensation from OWCP through May 20, 2023. A claimant is not entitled to receive temporary total disability benefits and actual earnings for the same time period.<sup>9</sup> Accordingly, the Board finds that appellant received an overpayment of compensation.<sup>10</sup>

The record reflects OWCP's calculations that, from April 12 through May 20, 2023, appellant received \$5,611.10 in total net compensation. OWCP explained that appellant was paid \$1,582.62 for the period April 12 through 22, 2023 and \$4,028.48 for the period April 23 through May 20, 2023, for a total of \$5,611.10. The Board has reviewed OWCP's calculations and finds that an overpayment of compensation in the amount of \$5,611.10 was created for the period April 12 through May 20, 2023.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8129(b) of FECA provides 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.<sup>11</sup> No waiver of an overpayment is possible if the claimant is at fault in creating the overpayment.<sup>12</sup>

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<sup>5</sup> *Id.* at § 8102(a).

<sup>6</sup> *Id.* at § 8129(a).

<sup>7</sup> *See M.S.*, Docket No. 16-0289 (issued April 21, 2016); *D.B.*, Docket No. 15-0258 (issued February 1, 2016).

<sup>8</sup> *See C.V.*, Docket No. 16-0986 (issued September 1, 2016); 20 C.F.R. § 10.500.

<sup>9</sup> *Supra* note 7.

<sup>10</sup> *J.M.*, Docket No. 17-1574 (issued February 8, 2018).

<sup>11</sup> 5 U.S.C. § 8129(b).

<sup>12</sup> *Gregg B. Manston*, 45 ECAB 344, 354 (1994).

Section 10.433(a) of OWCP's regulations provides that an individual is at 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.<sup>13</sup> With respect to whether an individual is not at fault, section 10.433(b) 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.<sup>14</sup>

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 or second time that incorrect funds are deposited into his or her account, as he or she lacks the requisite knowledge in accepting payment.<sup>15</sup>

### **ANALYSIS -- ISSUE 2**

The Board finds that OWCP improperly determined that appellant was at fault in the creation of the overpayment for the period April 12 through May 20, 2023.

Appellant returned to work on April 12, 2023, but continued to receive compensation *via* EFT every 28 days. The first EFT deposit following his return to work was made by OWCP on April 22, 2023 and covered the period March 26 through April 22, 2023. The second EFT deposit following appellant's return to work was made by OWCP on May 20, 2023 and covered the period April 23 through May 20, 2023.

As noted above, the Board has held that an employee who receives payments from OWCP in the form of a direct deposit may not be at fault for the first or second time incorrect funds are deposited into his or her account as he or she lacks the requisite knowledge in accepting payment.<sup>16</sup> Given the short period of time following appellant's return to work, there is no documentation to demonstrate that appellant had knowledge at the time his bank received direct deposits from OWCP on April 22 and May 20, 2023 that the payments were incorrect.<sup>17</sup> The Board thus finds that he was without fault in accepting the two direct deposits covering the period of the overpayment from April 12 through May 20, 2023.<sup>18</sup>

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<sup>13</sup> 20 C.F.R. § 10.433(a); *see C.L.*, Docket No. 19-0242 (issued August 5, 2019); *see also* 20 C.F.R. § 10.430.

<sup>14</sup> *Id.* at § 10.433(b); *C.L.*, *id.*; *see also* Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Determinations in an Overpayment*, Chapter 6.300.4d (September 2020).

<sup>15</sup> *See R.S.*, Docket No. 20-0177 (issued September 3, 2021); *L.G.*, Docket No. 20-1342 (issued September 3, 2021); *M.J.*, Docket No. 19-1665 (issued July 29, 2020); *Tammy Craven*, 57 ECAB 689 (2006).

<sup>16</sup> *See M.J.*, *id.*; *see also George A. Hirsch*, 47 ECAB 520 (1996).

<sup>17</sup> *See M.T.*, Docket No. 20-1353 (issued May 9, 2022); *B.W.*, Docket No. 19-0239 (issued September 18, 2020); *K.E.*, Docket No. 19-0978 (issued October 25, 2018).

<sup>18</sup> *See L.G.*, *supra* note 15.

As the case is not in posture for decision regarding the issue of waiver of recovery of the overpayment for the period April 12 through May 20, 2023, the case must be remanded for OWCP to determine whether appellant is entitled to waiver of recovery of the overpayment covering that period.<sup>19</sup> On remand, OWCP shall request updated financial information from appellant to evaluate his current financial situation.<sup>20</sup> Following this and other such further development as deemed necessary, it shall issue a *de novo* decision regarding waiver.

**CONCLUSION**

The Board finds that an overpayment of compensation in the amount of \$5,611.10 was created for the period April 12 through May 20, 2023, because appellant continued to receive wage-loss compensation following his return to full-time work. The Board further finds that appellant was without fault in the creation of the overpayment. The case will be remanded to OWCP to consider waiver of recovery of the overpayment for the period April 12 through May 20, 2023.

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 16, 2024 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 28, 2024  
Washington, DC

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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

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

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<sup>19</sup> *D.R.*, Docket No. 21-0234 (November 17, 2022); *C.C.*, Docket No. 19-1268 (issued April 2, 2021).

<sup>20</sup> *See C.C.*, Docket No. 18-0079 (issued May 2, 2018); *E.H.*, Docket No. 15-0848 (issued July 6, 2016).