

determined that appellant was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment.

FACTUAL HISTORY

On November 17, 2020 appellant, then a 43-year-old mail processing clerk, filed an occupational disease claim (Form CA-2) alleging that he developed hallux varus and pes planus in both feet due to factors of his federal employment, including constant standing and excessive walking. He noted that he first became aware of his condition on September 1, 1989, and realized its relation to his federal employment on July 20, 2016. OWCP accepted the claim for an aggravation of hallux varus, bilaterally, and an aggravation of pes planus, bilaterally. It paid appellant wage-loss compensation on the periodic rolls *via* paper check beginning August 1, 2021.³

In an October 5, 2021 letter, OWCP outlined appellant's entitlement to compensation benefits and his responsibility to return to work. It notified him that he was to immediately inform OWCP upon his return to work to avoid an overpayment of compensation. OWCP also noted that, if appellant worked during any period covered by a compensation payment, then he had to return the payment to OWCP.

On January 7, 2021 Dr. Jordan David Myers, a podiatrist, performed an arthrodesis of the right foot with McBride bunionectomy and arthroplasty of the second toe. He performed an OWCP-authorized arthrodesis of the left foot with bunionectomy and Akin osteotomy on October 21, 2021.

Appellant returned to full-time regular-duty work on March 12, 2022. However, OWCP continued to pay him wage-loss compensation through March 26, 2022. The record contains a copy of a March 26, 2022 paper check in the amount of \$2,517.07 covering the period February 27, 2022 through March 26, 2022, which appellant had negotiated.

On March 29, 2022 OWCP advised appellant of its preliminary overpayment determination that he had received an overpayment of compensation in the amount of \$1,357.23 for the period March 12 through 26, 2022 because he continued to receive wage-loss compensation for total disability following his return to full-time work. It made the preliminary finding that he was at fault in the creation of the overpayment, as he accepted payments that he knew or should have known to be incorrect. OWCP calculated the amount of the overpayment, explaining that appellant was paid \$2,517.07 when she was entitled to only \$1,069.48 for the period February 27 through March 26, 2022 and that this resulted in an overpayment of \$1,357.23. Additionally, it provided him with an overpayment action request form and informed him that within 30 days he could request a final decision based on the written evidence or a prerecoyment hearing. OWCP requested that appellant complete an enclosed overpayment recovery questionnaire (Form OWCP-

³ OWCP notified appellant that as of December 22, 2010 all federal payments must be made electronically through electronic funds transfer (EFT). It reported that it did not have his EFT information on file and that he must submit an enclosed Form SF-1199A, direct deposit sign-up form. The record does not contain a completed copy of this form.

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.

On April 18, 2022 appellant submitted the overpayment action request form and requested waiver of recovery of the overpayment and a decision based on the written evidence. He also submitted a completed Form OWCP-20 wherein he reported his monthly income, expenses, and assets. Appellant also provided an April 14, 2022 statement.

By decision dated April 29, 2022, OWCP finalized the preliminary overpayment determination, finding that appellant had received an overpayment of compensation in the amount of \$1,357.23 for the period March 12 through 26, 2022 because he continued to receive wage-loss compensation following his return to full-time work. It determined that he was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment. OWCP directed appellant to repay the \$1,357.23 overpayment in full within 30 days.

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.⁴ 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.⁵ A claimant is not entitled to receive 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.⁷

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$1,357.23 for the period March 12 through 26, 2022, because he continued to receive wage-loss compensation following his return to full-time work.

The evidence of record establishes that appellant returned to full-time work for the employing establishment effective March 12, 2022, but continued to receive wage-loss

⁴ *Supra* note 2 at § 8102(a).

⁵ *Id.* at § 8129(a).

⁶ See *C.T.*, Docket No. 21-1299 (issued May 13, 2022); *D.D.*, Docket No. 20-1172 (issued September 28, 2021); *M.C.*, Docket No. 19-1263 (issued March 5, 2020); *K.K.*, Docket No. 19-0978 (issued October 21, 2019); *K.E.*, Docket No. 18-0687 (issued October 25, 2018); *M.S.*, Docket No. 16-0289 (issued April 21, 2016); *L.S.*, 59 ECAB 350, 352-53 (2008).

⁷ See *C.T.*, *id.*; *L.C.*, Docket No. 20-1058 (issued June 21, 2021); *A.H.*, Docket No. 20-0442 (issued January 26, 2021); *L.H.*, Docket No. 20-0115 (issued September 4, 2020); *C.A.*, Docket No. 18-0092 (issued April 2, 2018); *Danny E. Haley*, 56 ECAB 393 (2005); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Identifying and Calculating an Overpayment*, Chapter 6.200.1.a (September 2020).

compensation for total disability through March 26, 2022. As noted above, a claimant is not entitled to receive compensation for disability during a period in which he or she had actual earnings.⁸ Therefore, an overpayment of compensation has been created in this case.

With regard to the amount of the overpayment, the Board has reviewed OWCP's calculations and finds that it properly determined that appellant received an overpayment of compensation in the amount of \$1,357.23 for the period March 12 through 26, 2022.

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

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

Section 10.433(b) of OWCP's regulations provides that whether 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

Even if 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.¹³

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly determined that appellant was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment.

⁸ *Id.*

⁹ 5 U.S.C. § 8129(b).

¹⁰ *M.T.*, Docket No. 20-1353 (issued May 9, 2022); *S.S.*, Docket No. 20-0776 (issued March 15, 2021); *B.W.*, Docket No. 19-0239 (issued September 18, 2020); *C.L.*, Docket No. 19-0242 (issued August 5, 2019).

¹¹ 20 C.F.R. § 10.433(a).

¹² *Id.* at § 10.433(b).

¹³ *See L.G.*, Docket No. 20-1342 (issued September 3, 2021); *C.G.*, Docket No. 15-0701 (issued December 9, 2015).

As noted above, an overpaid individual is found at fault if they accepted a payment which the individual knew, or should have been expected to know, was incorrect.¹⁴ 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, if he or she knows or should have known that they were not entitled to such compensation, but decides nonetheless to cash or deposit the check, the cashing or depositing of the check establishes fault.¹⁵

The case record establishes that in an October 5, 2021 letter, that, to avoid an overpayment of compensation, he must immediately notify OWCP of his return to work. It also advised him that, if he continued to receive wage-loss compensation, but had worked during the covered period, he had to return the check, even if he had reported his return to work to OWCP. Appellant returned to work on March 12, 2022, but on March 26, 2022 received a paper check in the amount of \$2,517.07 covering the period February 27, 2022 through March 26, 2022, which appellant negotiated. As OWCP had previously warned appellant to return any checks received following a return to work, appellant should have known that the March 26, 2022 payment in the amount of \$2,517.07 covering the period February 27 through March 26, 2022 was incorrect.¹⁶ Therefore, the Board finds that appellant was at fault in the creation of the overpayment and is thereby precluded from waiver of recovery of the overpayment.

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$1,357.23 for the period March 12 through 26, 2022, because he continued to receive wage-loss compensation following his return to full-time work. The Board further finds that appellant was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment.

¹⁴ *Supra* note 11.

¹⁵ *See A.W., id.; J.H., id.; William F. Salmonson, 54 ECAB 152 (2002).*

¹⁶ *A.W., id.*

ORDER

IT IS HEREBY ORDERED THAT the April 29, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 14, 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