

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

J.H., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Cleveland, OH, Employer**

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**Docket No. 11-114
Issued: July 18, 2011**

Appearances:

Martin Kaplan, Esq., for the appellant

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge

MICHAEL E. GROOM, Alternate Judge

JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 13, 2010 appellant filed a timely appeal from the April 19, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP),¹ which found she was at fault in the creation of a \$1,213.04 overpayment. Pursuant to the Federal Employees' Compensation Act (FECA)² and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether OWCP properly found appellant at fault in creating a \$1,213.04 overpayment of compensation from September 16 to 26, 2009.

¹ Because using the date of delivery, October 19, 2010, would result in a loss of appeal rights, the appeal is considered to be timely filed as of the date of the postmark, October 13, 2010. 20 C.F.R. § 501.3(f)(1).

² 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On March 18, 2004 appellant, a 47-year-old processing clerk, sustained an injury in the performance of duty when she fell in a parking lot. OWCP accepted her claim for right leg contusion, right ankle fracture, left ankle fracture and left ankle arthritis. Appellant received compensation for temporary total disability on the periodic rolls.

Appellant returned to full-time limited duty on September 16, 2009 but received through direct deposit a periodic payment of \$3,087.74 in compensation for total disability for the period August 30 to September 26, 2009. OWCP made a preliminary determination that she was at fault in creating a \$1,213.04 overpayment from September 16 to 26, 2009 because she knew or reasonably should have known that she was not entitled to wage-loss compensation after returning to full-time work.

Appellant completed an overpayment recover questionnaire showing \$3,292.74 in monthly income, \$3,534.55 in monthly expenses, one dependent and \$39,000 in real estate assets with \$408.00 in related mortgage and homeowner's association expenses. She explained that all real properties in her name were in foreclosure proceedings and that she was running a deficit in her monthly expenses and debts, "therefore a repayment for this error would add to this hardship." Appellant added that she believed the incorrect payment was not her fault because "auto pay received on monthly basis." She requested a review of the written record.

In a decision dated April 19, 2010, OWCP finalized its preliminary findings. It noted that appellant did not contest the fact or amount of the overpayment. OWCP found that she was at fault in the matter and that she now understood the conditions of an overpayment and that a lack of communication also led to the error. It determined that repayment should be made by deducting \$50.00 from continuing compensation payments.³

On appeal, appellant contests the repayment method. She questions the expenses disallowed and OWCP's use of a consumer expenditure survey.

LEGAL PRECEDENT

FECA places limitations on the right to receive compensation: While an employee is receiving compensation, she may not receive salary, pay or remuneration of any type from the United States, with certain exceptions.⁴ It is therefore well established that an employee is not entitled to compensation for temporary total disability after returning to work.⁵ "Temporary total

³ Appellant was at that time in receipt of a schedule award.

⁴ 5 U.S.C. § 8116(a).

⁵ *E.g., Tammi L. Wright*, 51 ECAB 463, 465 (2000) (where the record established that the employee returned to work at the employing establishment for four hours per day from August 7, 1996 to January 8, 1997 but received compensation for total disability for that same period, the Board found that the employee received an overpayment of compensation).

disability” is defined as the inability to return to the position held at the time of injury or earn equivalent wages or perform other gainful employment.⁶

When an overpayment of compensation has been made 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. Section 8129(b) describes the only exception:

“Adjustment or recovery by the United States may not be made when incorrect payment had been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of [the Act] or would be against equity and good conscience.”⁷

The Office may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments she receives from the Office are proper. The recipient must show good faith and exercise a high degree of care in reporting events which may affect entitlement to or the amount of benefits. A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment: (1) Made an incorrect statement as to a material fact which she knew or should have known to be incorrect; or (2) Failed to provide information which she knew or should have known to be material; or (3) Accepted a payment which she knew or should have known to be incorrect.⁸

Whether or not the Office 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 she is being overpaid.⁹

ANALYSIS

Appellant does not contest the fact or amount of the overpayment. She returned to full-time limited duty on September 16, 2009 but received compensation for total disability through September 26, 2009. As appellant was not entitled to compensation for temporary total disability after returning to full-time work, an overpayment arose over that 11-day period. Her periodic payments were \$3,087.74 every 28 days. The overpayment amounted to \$1,213.04 ($\$3,087.74 \times 11/28 = \$1,213.04$). The Board will affirm OWCP’s April 19, 2010 decision on the issues of fact and amount of overpayment.

The record shows, however, that appellant received the payment in question through direct deposit. In cases where a claimant receives compensation through electronic fund transfers, to establish fault for accepting such payments, OWCP must show that the claimant

⁶ 20 C.F.R. § 10.400(b).

⁷ 5 U.S.C. § 8129(b).

⁸ 20 C.F.R. § 10.433(a).

⁹ *Id.* at § 10.433(b).

knew or should have known at the time of deposit that the payment was incorrect.¹⁰ The Board has held that an employee who receives payments from OWCP in the form of a direct deposit might not be at fault the first time an incorrect payment is deposited into her account.¹¹ Although appellant accepted the overpayment in this case by gaining control of the funds deposited into her account pursuant to her authorization, OWCP has not shown that she knew or should have known at the time of deposit that the September 26, 2009 payment was incorrect. The Board will therefore set aside OWCP's April 19, 2010 decision on the issues of fault and recovery. The Board will remand the case for consideration of waiver based on appellant's current financial circumstances.

CONCLUSION

The Board finds that appellant received a \$1,213.04 overpayment from September 16 to 26, 2009. The Board also finds that OWCP has not established the element of fault.

ORDER

IT IS HEREBY ORDERED THAT the April 19, 2010 decision of the Office of Workers' Compensation Programs is affirmed on the issues of fact and amount of overpayment but set aside on the issue of fault. The case is remanded for further action consistent with this opinion.

Issued: July 18, 2011
Washington, DC

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

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

¹⁰ C.S., Docket No. 10-926 (issued March 16, 2011) and cases cited therein.

¹¹ *Tammy Craven*, 57 ECAB 689 (2006).