

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

S.R., Appellant

and

**DEPARTMENT OF JUSTICE, BUREAU OF
PRISONS, Fort Dix, NJ, Employer**

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**Docket No. 13-473
Issued: June 19, 2013**

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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 26, 2012 appellant filed a timely appeal of a December 7, 2012 decision of the Office of Workers' Compensation Programs (OWCP) concerning an overpayment. 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.²

ISSUES

The issues are: (1) whether OWCP properly found that an overpayment in compensation in the amount of \$726.96 had been created because appellant received compensation after returning to work on September 4, 2012; and (2) whether OWCP properly denied waiver of recovery of the overpayment as it found appellant to be at fault in the creation of the overpayment.

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that appellant submitted additional evidence in her appeal to the Board. However, the Board may only review evidence that was in the record at the time OWCP issued its final decision. *See* 20 C.F.R. § 501.2(c)(1); *M.B.*, Docket No. 09-176 (issued September 23, 2009); *J.T.*, 59 ECAB 293 (2008); *G.G.*, 58 ECAB 389 (2007); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

On appeal appellant does not contest the amount of the overpayment or that she has been found at fault in the creation of the overpayment. She contends that OWCP erred in issuing its decision on December 7, 2012 as she had paid the overpayment in full following the preliminary determination of overpayment.

FACTUAL HISTORY

On May 22, 2012 appellant,³ then a 32-year-old social science employee, filed a traumatic injury claim alleging that she sustained a left knee sprain during a training exercise. OWCP accepted the claim for left medial meniscus tear and left anterior cruciate ligament tear and authorized left knee arthroscopic surgery, which occurred on July 31, 2012. It also accepted appellant's recurrence of disability claim due to her July 31, 2012 surgery.

On September 4, 2012 appellant accepted an offer of light-duty work and returned to work that day.

On September 6, 2012 appellant filed a claim for wage-loss compensation for the period August 26 to September 8, 2012.

The record contains a computer printout dated September 17, 2012 indicating a payment of wage-loss compensation for the period August 26 to September 8, 2012 in the amount of \$2,054.09.

On October 12, 2012 OWCP issued a preliminary determination that appellant had received an overpayment of \$726.96 because she returned to work on September 4, 2012 and continued to receive compensation for temporary total disability through September 8, 2012. An accompanying worksheet indicated that appellant was paid \$2,054.09 in compensation from the compensation check dated September 17, 2012. OWCP calculated that appellant was overpaid by \$726.96, based on her return to work. It concluded that appellant was at fault because she knowingly provided false information when she filed a CA-7 form dated September 6, 2012 claiming wage-loss compensation for the period August 26 to September 8, 2012. OWCP requested that she provide financial information. Appellant did not respond.

By decision dated December 7, 2012, OWCP determined that appellant received an overpayment for the period September 4 to 8, 2012 in the amount of \$726.96 for which she was at fault. It noted that she had not responded to the preliminary determination with the requested financial information and requested full payment within 30 days.

LEGAL PRECEDENT -- ISSUE 1

Section 8116 of FECA defines the limitations on the right to receive compensation benefits. This section of FECA provides that, while an employee is receiving compensation, he may not receive salary, pay or remuneration of any type from the United States, except in limited circumstances.⁴ 20 C.F.R. § 10.500 provides that compensation for wage loss due to disability is

³ The record contains evidence that appellant's married name is Byram.

⁴ 5 U.S.C. § 8116(a).

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.

ANALYSIS -- ISSUE 1

Appellant returned to work on September 4, 2012. She filed claims for wage-loss compensation and received compensation benefits for total disability through September 8, 2012. Any wage-loss compensation appellant received from OWCP after September 3, 2012 constitutes an overpayment of compensation.⁵ The record shows that OWCP paid her wage-loss compensation until September 8, 2012. Thus, appellant received an overpayment in the amount of \$726.96. The Board will affirm the fact and amount of the overpayment.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of FECA⁶ provides: "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 FECA or would be against equity and good conscience."⁷ Waiver of an overpayment is not permitted unless the claimant is without fault in creating the overpayment.⁸

On the issue of fault, 20 C.F.R. § 10.433 provides that an individual will be found at fault if he or she has done any of the following: (1) made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; (2) failed to provide information which he or she knew or should have known to be material; or (3) accepted a payment which he or she knew or should have known was incorrect.⁹

ANALYSIS -- ISSUE 2

The record reveals that appellant accepted a disability payment which included the period September 4 to 8, 2012 and that she returned to work on September 4, 2012. OWCP found that appellant received an overpayment of compensation and that she was at fault. The finding of fault by OWCP was made on the making of an incorrect statement based on her filing a claim for wage-loss compensation on September 6, 2012 for the period August 26 to September 8, 2012, which included compensation following her return to work. The Board concurs with this finding. At the time appellant filed her claim for wage-loss compensation on September 6, 2012 she had returned to work and that she was not entitled to wage-loss compensation following her return to work on September 4, 2012. As noted above, the record establishes that she returned to work on September 4, 2012, filed a claim for wage-loss compensation on September 6, 2012 for the period August 26 to September 8, 2012 and received wage-loss compensation for the period

⁵ See *A.L.*, Docket No. 09-1529 (issued January 13, 2010); *Franklin L. Bryan*, 56 ECAB 310 (2005).

⁶ 5 U.S.C. § 8129(b).

⁷ *J.K.*, Docket No. 08-1761 (issued January 8, 2009); *Joan Ross*, 57 ECAB 694 (2006); *Desiderio Martinez*, 55 ECAB 245 (2004).

⁸ *R.H.*, Docket No. 09-1981 (issued June 11, 2010); *W.P.*, 59 ECAB 514 (2008); *Joan Ross*, *id.*

⁹ 20 C.F.R. § 10.433.

requested. Since appellant filed a claim for wage-loss compensation which included days after she had returned to work, she made a statement that she knew was materially incorrect. Thus, OWCP properly found her to be at fault and thus denied waiver of recovery of the overpayment.

On appeal appellant argues that OWCP erred in the issuance of the overpayment decision as she had remitted a check to OWCP following the preliminary determination of an overpayment. The Board is limited to reviewing evidence in the record at the time of OWCP's decision. As this evidence was not in the record, as of December 7, 2012, the Board cannot consider it.¹⁰

CONCLUSION

The Board finds that an overpayment of \$726.96 was created and that OWCP properly denied waiver of recovery as appellant was not without fault in creating the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 7, 2012 is affirmed.

Issued: June 19, 2013
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹⁰ *Supra* note 2.