

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

W.Z., Appellant

and

**U.S. POSTAL SERVICE, SOUTH SHORE
ANNEX, Staten Island, NY, Employer**

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**Docket No. 14-508
Issued: June 6, 2014**

Appearances:
Stephen Larkin, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA HOWARD FITZGERALD, Acting Chief Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On January 7, 2014 appellant, through her representative, filed a timely appeal from the September 9, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP), which found her at fault in creating an overpayment resulting from the forfeiture of her compensation. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this case.

ISSUE

The issue is whether appellant was at fault in creating the \$33,161.07 overpayment that arose from the forfeiture of her compensation.

FACTUAL HISTORY

On the prior appeal,² the Board issued an August 23, 2013 decision affirming OWCP's December 18, 2012 overpayment decision on the issues of fact and amount of overpayment.

¹ 5 U.S.C. § 8101 *et seq.*

² Docket No. 13-873 (issued August 23, 2013).

Appellant forfeited her right to compensation from September 16, 2009 to September 3, 2010 because she failed to report all of her earnings during the period, in particular, the \$500.00 she earned on May 6, 2010 for a singing engagement at a birthday party. The Board set aside the December 18, 2012 decision, however, on the issue of fault. The Board found that OWCP did not apply a proper standard under 20 C.F.R. § 10.433(a).³

In a decision dated September 9, 2013, OWCP found that appellant was at fault in creating the overpayment that arose from the forfeiture of her compensation. It had previously found that she was at fault on the grounds that she knowingly failed to report or underreported earnings. Acknowledging that the Board had found this to be an incorrect standard, OWCP found that appellant was at fault on the grounds that she failed to provide information which she knew or reasonably should have known to be material.

OWCP advised that the wording on the form appellant completed on September 3, 2010 was sufficiently specific to indicate to any reasonable person that any monies earned, or “payment of any kind,” must be reported. “As such, you failed to provide information which you knew or should have known to be material.” OWCP noted appellant’s website, which advertised that she was “currently looking for a gig.”

LEGAL PRECEDENT

Extensive due process rights attach to any attempt by OWCP to recoup benefits already paid, even if paid in error.⁴ The United States Supreme Court ruling in the case of *Califano v. Yamasaki*, 442 U.S. 682 (1979), required that the Social Security Administration defer any measures to recover an overpaid benefit until the claimant had been notified of the overpayment, told of the right to seek reconsideration, and was given an opportunity for an oral hearing on the issues of fault and waiver. Because the wording of the Social Security Administration waiver provision is similar to that in FECA, OWCP also provides the right to a precoupment hearing to compensation claimants.⁵

ANALYSIS

OWCP issued a preliminary determination that appellant was at fault in creating the overpayment of compensation because she knowingly failed to report or underreported earnings on her Form EN-1032. The Board found this to be an improper standard. OWCP subsequently found, under 20 C.F.R. § 10.433(a), that appellant was at fault on the grounds that she failed to provide information which she knew or should have known to be material.

³ Appellant, a 26-year-old sales and service associate, sustained an occupational injury in the performance of duty while picking up bags from the workroom floor and hanging them. OWCP accepted her claim for aggravation of brachial neuritis or radiculitis not otherwise specified and aggravation of internal derangement of the right shoulder. The facts of this case, as set forth in the Board’s prior decision, are hereby incorporated by reference.

⁴ See generally FECA Circular No. 82-48, “Overpayments and Waiver” (December 1, 1982).

⁵ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Overpayment Overview*, Chapter 6.100.3.k (May 2004).

Although this is a proper standard for fault, OWCP did not provide appellant an opportunity to respond to the grounds upon which it made this new finding. It did not issue a preliminary determination. Instead, OWCP directly issued a final decision on the matter, thereby denying her the right to a prerecouplement hearing.

Under the circumstances, this case will be remanded for further consideration.⁶ On remand, OWCP should allow appellant a proper opportunity to respond to the grounds upon which it finds her at fault and afford her the right to a prerecouplement hearing prior to any final decision it might issue in the matter.

CONCLUSION

The Board finds that this case is not in posture for decision. Further action is warranted.

ORDER

IT IS HEREBY ORDERED THAT the September 9, 2013 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action.

Issued: June 6, 2014
Washington, DC

Patricia Howard Fitzgerald, Acting Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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

⁶ *Dorothy F. Ellis*, 41 ECAB 296 (1989).