

FACTUAL HISTORY

On September 8, 1999 appellant, then a 30-year-old city mail carrier, filed an occupational disease claim alleging that she sustained heel spurs as a result of walking five to seven hours a day at work. She first became aware of her condition and realized that it resulted from her employment on August 7, 1999. Appellant stopped work on August 27, 1999 and returned to limited duty as of September 7, 1999. OWCP accepted her claim for bilateral heel spurs. Appellant received compensation for intermittent disability and medical treatment. On June 20, 2011 she signed up for direct deposit.

In a letter dated September 27, 2011, OWCP noted that appellant had been placed on the periodic rolls effective September 25, 2011. It outlined her entitlement to compensation benefits and her responsibility to return to work in connection with the accepted injury. The letter provided:

“In order to avoid an overpayment of compensation, NOTIFY THIS OFFICE IMMEDIATELY WHEN YOU RETURN TO WORK. Each payment made through this [OWCP’s] automated system will include the period for which payment is made. If you have worked for any portion of this period, you must return the check to this [OWCP]. Otherwise, an overpayment of compensation may result.”

By letter dated May 10, 2013, the employing establishment informed OWCP that appellant returned to full-time limited duty on December 8, 2012 but was paid on the periodic rolls through May 4, 2013.

An OWCP overpayment worksheet dated May 10, 2013 determined that appellant was overpaid 148 days for a total of \$15,042.51.²

On May 22, 2013 OWCP issued a preliminary determination that appellant received an overpayment of compensation in the amount of \$15,048.09 from December 8, 2012 to May 4, 2013 because she received wage loss for total disability after she returned to work at full salary. It calculated that from December 8, 2012 to February 28, 2013 she received daily compensation of \$100.86 for 83 days, which resulted in an overpayment of \$8,371.38. From March 1 to May 4, 2013 appellant was overpaid 65 days at a daily rate of \$102.71, which resulted in an overpayment of \$6,676.71. The total amount of overpayment was \$15,048.09. OWCP found that appellant was at fault in the creation of the overpayment because she accepted payments that she knew or reasonably should have known to be incorrect. It informed her of her appellate options and instructed her to complete an enclosed overpayment recovery form and submit supporting financial documentation.

² The worksheet listed that from December 8 to 15, 2012 appellant was paid \$806.88; from December 16, 2012 to January 12, 2013 she was paid \$2,824.08; from January 13 to February 9, 2013 she received \$2,820.76; from February 10 to March 9, 2013 she was paid \$2,820.76; from March 1 to 9, 2013 she was also paid \$17.79; from March 10 to April 6, 2013 she received \$2,876.12; and from April 7 to May 4, 2013 she was paid \$2,876.12 for a total of \$15,042.51.

In a statement dated June 20, 2013, appellant contested the overpayment and requested waiver, contending that the overpayment did not occur through any fault of her own. She stated that the employing establishment informed her that it had notified OWCP that she was back in pay status and she believed that the payments received from OWCP was for back pay. Appellant further reported that having to repay the overpayment would cause her to suffer severe financial hardship.

By decision dated June 25, 2013, OWCP finalized the overpayment in the amount of \$15,048.09. It found that appellant was at fault in the creation of the overpayment because she accepted payments that she knew or reasonably should have known to be incorrect. As appellant was no longer receiving compensation, OWCP found the amount of \$15,048.09 due and payable.

LEGAL PRECEDENT -- ISSUE 1

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.³ Section 8116 of FECA defines the limitations on the right to receive compensation benefits. This section provides that, while an employee is receiving such compensation, he or she may not receive salary, pay or remuneration of any type from the United States, except in limited circumstances.⁴ 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.⁵ A claimant is not entitled to receive temporary total disability and actual earnings for the same period.⁶ An overpayment of compensation occurs when a claimant returns to work and has earnings but continues to receive wage-loss compensation.⁷

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment in the amount of \$15,048.09. The record reflects that she returned to full-time work on December 8, 2012 but she continued to receive wage-loss compensation benefits for total disability until May 4, 2013. OWCP determined that appellant was overpaid for 148 days and calculated that the amount of compensation she received for that period totaled \$15,048.09. Appellant received her regular full-time wages from the employing establishment from December 8, 2012 through May 4, 2013. The Board finds that she was not entitled to wage-loss compensation from OWCP for the same period. Accordingly, the Board finds that appellant's receipt of dual payments created an overpayment of compensation. There is no contrary evidence nor does she contest the amount and period of overpayment. The Board finds that OWCP properly determined that appellant

³ 5 U.S.C. § 8102(a).

⁴ *Id.* at § 8116; *R.H.*, Docket No. 09-1981 (issued June 11, 2010).

⁵ 20 C.F.R. § 10.500.

⁶ *W.B.*, Docket No. 09-1440 (issued April 12, 2010).

⁷ *D.C.*, Docket No. 09-1460 (issued April 19, 2010).

received an overpayment in the amount of \$15,048.09 for the period December 8, 2012 through May 4, 2013.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of FECA provides that, when an overpayment of compensation has been made because of an error of fact or law, adjustment shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is when an incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of FECA or be against equity and good conscience.⁸ No waiver of payment is possible if appellant is with fault in helping to create the overpayment.⁹

In determining whether an individual is not without fault or alternatively, with fault, section 10.433(a) of OWCP's regulations provide in relevant part:

“An individual is with fault in the creation of an overpayment who--

- (1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or
- (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 to be incorrect.”¹⁰

ANALYSIS -- ISSUE 2

OWCP determined that appellant was at fault in the creation of the overpayment because she accepted payments that she knew or should have known to be incorrect. The Board finds, however, that OWCP failed to establish that, at the time she accepted the initial payment of compensation, she knew or should have known the payments were incorrect.

The Board has found the claimant to be at fault in cases where he or she is receiving compensation checks through direct deposit which involve a series of payments over several months with clear knowledge that the payments were incorrect.¹¹ An employee who receives payments from OWCP in the form of a direct deposit, however, may not be at fault for the first incorrect deposit into his or her account since the acceptance of the overpayment, at the time of receipt of the direct deposit, lacks the requisite knowledge.¹² Because fault is defined by what

⁸ 5 U.S.C. § 8129(b).

⁹ *Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

¹⁰ 20 C.F.R. § 10.433(a).

¹¹ *See Karen K. Dixon*, 56 ECAB 145 (2004).

¹² *See Tammy Craven*, 57 ECAB 589 (2006); *see also George A. Hirsch*, 47 ECAB 520 (1996).

the claimant knew or should have known at the time of acceptance, one of the consequences of electronic fund transfers is that the claimant lacks the requisite knowledge at the time of the first incorrect payment.¹³ In cases where a claimant receives compensation through direct deposit, OWCP must establish that at the time a claimant received the direct deposit in question that she knew or should have known that the payment was incorrect.¹⁴ It is not appropriate to make a finding that a claimant has accepted an overpayment by direct deposit until such time as a reasonable person would have been aware that this overpayment had occurred. This awareness could be established either through documentation such as a bank statement or notification from OWCP or where a reasonable period of time has passed during which a claimant could have reviewed independent confirmation of the incorrect payment.¹⁵

The record establishes that appellant received compensation by direct deposit every 28 days from December 8, 2012 to May 4, 2013. It does not establish, however, that at the time of the first direct deposit of compensation, after she returned to work on December 8, 2012, she knew or should have known that she was accepting a direct deposit to which she was entitled. The record does not contain any documentation or other evidence to demonstrate that appellant had clear knowledge at the time of the initial direct deposit for the period December 8 to 15, 2012 that the payment was incorrect or that a reasonable period of time passed during which she could have reviewed bank statements or been informed of the incorrect payment. The Board finds, therefore, that, when the initial December 15, 2012 direct deposit was made, she had no knowledge that this direct deposit was incorrect. Accordingly, appellant was not at fault in the acceptance of the initial December 15, 2012 direct deposit.

In cases involving a series of incorrect payments, knowledge is established by documentation from OWCP or simply with the passage of time and opportunity for discovery and the claimant will be at fault for accepting the payments subsequently deposited.¹⁶ The Board finds that at the time of the second payment dated January 12, 2013 appellant knew or should have known that the continued payment of compensation was incorrect. Appellant had returned to work on December 8, 2012 and could have taken further steps to prevent issuance of further payments. The Board will affirm the finding of fault for the remaining January 12 to May 4, 2013 period of overpayment.

On appeal, appellant contended that her supervisor informed her that he had notified OWCP that she had returned to work and she believed that the payments she received were due to her. She also contended that it would be a financial hardship to repay the overpayment. The Board notes that, even if an overpayment resulted from negligence on the part of OWCP, this does not excuse the beneficiary from accepting payments, which appellant knew or should have known to be incorrect.¹⁷ The September 27, 2011 letter clearly advised her that in order to avoid

¹³ *Id.*

¹⁴ *See C.K.*, Docket No. 12-746 (issued May 1, 2012).

¹⁵ *See K.H.*, Docket No. 06-191 (issued October 20, 2006).

¹⁶ *See J.W.*, Docket No. 10-271 (issued February 3, 2011); *Karen K. Dixon*, *supra* note 11.

¹⁷ *See Russell E. Wageneck*, 46 ECAB 653 (1995).

an overpayment of compensation she must notify OWCP immediately when she returned to work and that each payment made through OWCP's automated system would include the period for which payment is made. Appellant was put on notice of the payments made and the amount of each payment.¹⁸

The Board finds that the case is not in posture for decision regarding the issue of waiver for the initial direct deposit on December 15, 2012. The Board will set aside the June 25, 2013 decision regarding the issue of fault as to the initial December 15, 2012 direct deposit. The case is remanded for OWCP to determine whether appellant is entitled to waiver of recovery for the direct deposit of compensation covering the period December 8 to 15, 2012.

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment in the amount of \$15,048.09 for the period December 8, 2012 to May 4, 2013. The June 25, 2013 decision is set aside in part and remanded to OWCP regarding the issue of waiver of recovery of the overpayment for the period December 8 to 15, 2012.

ORDER

IT IS HEREBY ORDERED THAT the June 25, 2013 decision of the Office of Workers' Compensation Programs is affirmed, in part and set aside, in part. The case is remanded for further action consistent with this decision of the Board.¹⁹

Issued: May 28, 2014
Washington, DC

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

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

¹⁸ *J.R.*, Docket No. 08-1107 (issued June 15, 2009). 20 C.F.R. § 10.430.

¹⁹ Richard J. Daschbach, Chief Judge, who participated in the preparation of the decision, was no longer a member of the Board after May 16, 2014.