

of duty. She stopped work. On August 12, 2011 OWCP accepted the claim for right ankle sprain. Appellant did not initially lose time from work.

Appellant underwent surgery on her right ankle on May 2, 2012 and was placed on temporary total disability. On April 23, 2012 OWCP expanded her claim to include osteochondritis dissecans, right. Appellant returned to work in a limited capacity on August 15, 2012. After additional arthroscopic surgery on April 10, 2013, by letter dated May 17, 2013, OWCP advised appellant that she was being placed on the periodic rolls effective April 20, 2013.² Appellant was advised that, to avoid an overpayment in compensation, she needed to notify OWCP immediately when and if she returned to work. On March 13, 2014 she returned to part-time employment for four hours a day as a city letter carrier.

In an August 20, 2014 memorandum, OWCP reported that appellant had returned to part-time employment on March 13, 2014, but compensation payments for total disability continued through May 31, 2014. It found that she had received \$7,913.03 (net)³ in compensation payments for total disability from March 13 through May 31, 2014, but should have received only \$2,265.53. OWCP subtracted the amount appellant should have received, \$2,265.53, from the amount she did receive, \$7,913.03, to reach the \$5,247.50⁴ overpayment for the period March 13 to May 31, 2014.

On August 20, 2014 OWCP notified appellant of its preliminary determination that she had received an overpayment of compensation in the amount of \$5,247.50 because she was paid compensation for total disability instead of partial disability for the period March 13 to May 31, 2014. It further notified her of its preliminary determination that she was at fault in the creation of the overpayment because she accepted a payment she knew or should have known to be incorrect.

Appellant was further informed of her right to challenge the amount of the overpayment or request a waiver of the overpayment by one of three methods including a request for a telephone conference, a request for a written review of the record, or a request for a precoupment hearing. If she wished a waiver of the overpayment, she was specifically directed to submit financial information by completing an overpayment recovery questionnaire. Appellant did not respond.

By decision dated September 23, 2014, OWCP finalized its determination that appellant received an overpayment of compensation in the amount of \$5,247.50 for the period March 13 to May 31, 2014. It further finalized its determination that she was at fault in the creation of the

² On April 10, 2013 appellant underwent authorized right ankle surgery and was placed off work. The record reflects that she was receiving her payments through direct deposit.

³ A worksheet revealed that for the period March 13 to April 5, 2014, appellant received \$2,373.91 net compensation in an April 5, 2014 payment. For the period April 6 to May 3, 2014, she received \$2,769.56 net compensation in a May 3, 2014 payment. For the period May 4 to 31, 2014, appellant received \$2,769.56 net compensation in a May 31, 2014 payment.

⁴ The total overpayment should have been \$5,647.50. OWCP made an error in the math when subtracting the amounts.

overpayment and therefore not entitled to waiver. OWCP requested that appellant repay the overpayment in full or contact OWCP to make appropriate arrangements for recovery.⁵

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 his duty.⁶ When an overpayment has been made to an individual 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 the individual is entitled.⁷

A claimant is not entitled to receive temporary total disability and actual earnings for the same period.⁸ OWCP procedures provide that an overpayment in compensation is created when a claimant returns to work but continues to receive wage-loss compensation.⁹

ANALYSIS -- ISSUE 1

OWCP found that appellant received an overpayment of compensation in the amount of \$5,247.50 for the period March 13 to May 31, 2014 as she returned to part-time work for four hours per day on March 13, 2014, but continued to receive payments for total disability through May 31, 2014.

OWCP determined that appellant had been paid \$7,913.03 in net compensation for total disability during this period. It explained that for the period March 13 to May 31, 2014, she should have received a total of \$2,265.53, for 113.1 hours of leave without pay. OWCP subtracted \$2,265.53, the amount appellant should have received, from the amount she actually received, \$7,913.03, and found an overpayment of \$5,247.50. The Board notes that this amount is incorrect, as \$7,913.03 minus \$2,265.53 is actually \$5,647.50, or \$400.00 more.

Nevertheless, the Board finds that, although the formula OWCP utilized was correct, it failed to provide sufficient notice to appellant of the higher amount. Thus, as appellant did not receive a due process notice under the Debt Collection Act of the additional \$400.00, the Board cannot affirm the higher amount.¹⁰ The Board will therefore affirm OWCP's September 23,

⁵ As OWCP did not recover the overpayment from continuing compensation, the Board does not have jurisdiction over the issue. *See Teresa A. Ripley*, 56 ECAB 528 (2005); *Levon H. Knight*, 40 ECAB 658 (1989).

⁶ 5 U.S.C. § 8102(a).

⁷ *Id.* at § 8129(a).

⁸ *See R.W.*, Docket No. 13-1285 (issued November 13, 2013).

⁹ *See Danny E. Haley*, 56 ECAB 393 (2005); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2a (May 2004).

¹⁰ *See* 20 C.F.R. § 10.431 (regarding the requirements of OWCP when it identifies an overpayment); *see also* Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.4a (May 2004, June 2009). *See also M.F.*, Docket No. 14-1913 (issued September 16, 2015).

2014 decision finding fact of overpayment and will affirm an overpayment of compensation in the amount of \$5,247.50 for the period March 13 to May 31, 2014.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of FECA¹¹ provides that “[a]djustment 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.” Section 10.433 of OWCP’s implementing regulation¹² provides that, in determining whether a claimant is at fault, OWCP will consider all pertinent circumstances. 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.”

The Board has held that an employee who receives payments from OWCP in the form of direct deposit may not be at fault the first time incorrect funds are deposited into his or her account, as the acceptance of the resulting overpayment lacks the requisite knowledge.¹³ The Board has also held in cases involving a series of incorrect payments, where the requisite knowledge is established by a letter or telephone call from OWCP or simply with the passage of time and a greater opportunity for discovery, the claimant will be at fault for accepting the payments subsequently deposited.¹⁴ Previous cases have held that receiving one or two erroneous direct deposit payments does not necessarily create the requisite knowledge to find that a claimant was at fault in the creation of the overpayment.¹⁵

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 following her return to part-time work, she knew or should have known the payment was incorrect.

¹¹ 5 U.S.C. § 8129(b).

¹² 20 C.F.R. § 10.433.

¹³ See *Tammy Craven*, 57 ECAB 689 (2006).

¹⁴ *Id.*

¹⁵ V.S., Docket No. 13-1278 (issued October 23, 2013).

As discussed, 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 he or she knew or should have known that the payment was incorrect.¹⁶ The Board has held that an employee who receives payments from OWCP in the form of a direct deposit 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.¹⁷ One of the consequences of electronic fund transfers is that the claimant lacks the requisite knowledge at the time of the first incorrect payment.¹⁸ Whether or not OWCP determines that an individual is at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment.¹⁹ It is not appropriate, however, to make a finding that a claimant has accepted an overpayment *via* 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.²⁰

Appellant received compensation by direct deposit. The evidence of record does not establish that, as of the first direct deposit of compensation after she returned to part-time work on March 13, 2014, 2013, she knew or should have known that she was accepting a direct deposit to which she was not entitled. There is no documentation or other evidence to demonstrate that appellant had clear knowledge at the time she received a direct deposit from OWCP on April 5, 2014, covering the period March 13 to April 5, 2014, that a portion of 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. Therefore, she is not at fault in the acceptance of the direct deposit covering the period of the overpayment from March 13 to April 5, 2014.

Even though 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.²¹ In cases involving a series of incorrect payments, where the requisite knowledge is established by documentation from OWCP or simply with the passage of time and opportunity for discovery, the claimant will be at fault for accepting the payments subsequently deposited.²² By the time of the second payments dated May 3 and 31, 2014, appellant knew or should have known that she was no longer entitled to compensation. She returned to part-time work on March 13, 2014 and realized by this time that she was not entitled to total disability

¹⁶ See *C.K.*, Docket No. 12-746 (issued May 1, 2012).

¹⁷ See *supra* note 13; see also *George A. Hirsch*, 47 ECAB 520 (1996).

¹⁸ *Id.*

¹⁹ *Id.*; see also *K.D.*, Docket No. 13-451 (issued April 12, 2013).

²⁰ See *K.H.*, Docket No. 06-191 (issued October 30, 2006).

²¹ See *William E. McCarty*, 54 ECAB 525 (2003).

²² See *J.W.*, Docket No. 10-1271 (issued February 3, 2011); see also *Karen Dixon*, 56 ECAB 145 (2004).

compensation. Accordingly, the Board will affirm the finding of fault for the remaining April 6 through May 31, 2014 period of overpayment.

The Board will set aside the September 23, 2014 decision regarding the issue of fault as to the April 5, 2014 direct deposit and will remand the case for OWCP to determine whether appellant would be entitled to waiver of recovery for that portion of the overpayment. The Board affirms the finding of fault regarding the remaining periods.

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment in the amount of \$5,247.50. The Board also finds that OWCP properly determined that appellant was without fault for the period of the overpayment from March 13 to April 5, 2014 but at fault for the overpayment from April 6 through May 31, 2014. The case will be remanded for consideration of waiver of the recovery of the overpayment from March 13 to April 5, 2014.

ORDER

IT IS HEREBY ORDERED THAT the September 23, 2014 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.²³

Issued: February 1, 2016
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

²³ James A. Haynes, Alternate Judge, participated in the original decision but was no longer a member of the Board effective November 16, 2015.