

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

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V.A., Appellant	)	
	)	
and	)	<b>Docket No. 12-637</b>
	)	<b>Issued: August 27, 2012</b>
<b>DEPARTMENT OF DEFENSE, ARMED</b>	)	
<b>FORCES RETIREMENT HOME,</b>	)	
<b>Washington, DC, Employer</b>	)	

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*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
COLLEEN DUFFY KIKO, Judge  
PATRICIA HOWARD FITZGERALD, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On January 27, 2012 appellant filed a timely appeal from a January 4, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) finding an overpayment of compensation. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over this overpayment decision.

**ISSUES**

The issues are: (1) whether OWCP properly determined that appellant received an overpayment in the amount of \$2,760.01 for the period December 2 to 18, 2010; and (2) whether appellant was at fault in creating the overpayment of compensation, thereby precluding waiver of the overpayment.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

OWCP accepted that on April 10, 2010 appellant, then a 40-year-old nurse sustained a left knee medial meniscus tear when she slipped and fell in the parking lot at work. In its June 3, 2010 letter accepting the claim, it advised her that she was expected to return to work as soon as she was able and to notify OWCP once she returned to work. OWCP further informed appellant that she was only entitled to compensation if she was unable to work due to her accepted condition and that she should immediately return any compensation checks received which included payment for a period during which she returned to work. Appellant received wage-loss compensation for disability beginning May 25, 2010 and was placed on the periodic rolls.<sup>2</sup>

Appellant accepted a job offer to return to full duty on December 2, 2010 as a clinical nurse. The employing establishment subsequently advised that she utilized sick leave on December 2, 2010 and returned to work on December 4, 2010. Appellant continued to receive compensation by direct deposit until December 18, 2010.

In letters dated March 10 and June 21, 2011, the employing establishment informed OWCP that appellant received an overpayment of compensation. It stated that she was medically authorized to return to full duty on December 1, 2010 and accepted a return to work offer as of December 2, 2010. However, appellant then took sick leave on December 2, 2010 and did not return to work until December 4, 2010. A computer printout of her compensation history demonstrated that she received \$4,505.34 in net compensation for the period November 21 to December 18, 2010 and gross compensation in the amount of \$4,545.90. A computer printout also establishes that health and life insurance benefits were deducted from the periodic rolls payment in question.

On November 30, 2011 OWCP issued a preliminary determination that appellant received an overpayment of compensation in the amount of \$2,760.01 for the period December 2 to 18, 2010 because she was paid sick leave on December 2, 2010 instead of returning to work and then returned to work on December 4, 2010. Appellant was found at fault in creating the overpayment, as she knew or should have known that she was not entitled to receive compensation for a period after her return to work. The memorandum stated that she was paid \$4,545.90 for each 28-day period and multiplied that amount by 17/28 because 17 was the number of days of overpayment to total an overpayment of \$2,760.01. OWCP informed appellant that she had 30 days to request a telephone conference, a final decision based on the written evidence or a precoupment hearing on the issues of fault and a possible waiver. Appellant did not respond to the preliminary finding of overpayment.

In a decision dated January 4, 2012, OWCP finalized the overpayment of \$2,760.01 for the period December 2 to 18, 2010. It found that appellant was at fault in the creation of the overpayment, thereby precluding waiver of recovery.

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<sup>2</sup> On May 25, 2010 appellant enrolled in direct deposit.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8102 of FECA provides that the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.<sup>3</sup>

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, she may not receive salary, pay or remuneration of any type from the United States, except in limited circumstances.<sup>4</sup> OWCP's regulations provide that compensation for wage loss due to disability is available only for any periods during which an employee's work-related medical condition prevents her from earning the wages earned before the work-related injury.<sup>5</sup>

A final decision of OWCP shall contain findings of fact and a statement of reasons.<sup>6</sup> With respect to overpayment decisions, it must provide clear reasoning showing how the overpayment was calculated.<sup>7</sup>

### **ANALYSIS -- ISSUE 1**

The record reflects that appellant was medically authorized to return to full duty on December 1, 2010, voluntarily accepted a job offer to return to work on December 2, 2010, utilized sick leave on December 2, 2010 and returned to work on December 4, 2010, but continued to receive compensation until December 18, 2010. Thus, the Board finds that an overpayment was created.

Regarding the amount of overpayment, however, the Board finds that the case is not in posture for decision.

OWCP found that the gross amount of compensation paid to appellant, after she returned to work, constituted an overpayment of compensation. In calculating the overpayment, it added payments for health and life insurance premiums to her net compensation. In *Sandra K. Neil*,<sup>8</sup> the Board found that it was improper to base overpayment calculations on the gross amount of compensation if health and life insurance premiums were deducted from the compensation, as these deductions were undoubtedly made from appellant's wages during the same period. The

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<sup>3</sup> 5 U.S.C. § 8102.

<sup>4</sup> *Id.* at § 8116(a).

<sup>5</sup> 20 C.F.R. § 10.500(a).

<sup>6</sup> *Id.* at § 10.126.

<sup>7</sup> *James Tackett*, 54 ECAB 611 (2003).

<sup>8</sup> 40 ECAB 924 (1989).

Board explained that she did not derive any benefit from OWCP's deductions.<sup>9</sup> Accordingly, the case will be remanded to OWCP for a proper determination as to the amount of overpayment.

On remand, OWCP should obtain clarification as to why appellant returned to work on December 4, 2010 and shall recalculate the overpayment as necessary.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8129(a) of FECA provides that an overpayment must be recovered unless 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.<sup>10</sup> No waiver of payment is possible if appellant is not without fault in helping to create the overpayment.<sup>11</sup>

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.<sup>12</sup>”

Whether or not OWCP determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The

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<sup>9</sup> See also *Kenneth E. Rush*, 51 ECAB 116 (1999). The Board also notes that generally overpayment of compensation is calculated on net, rather than gross compensation. See also *B.B.*, Docket No. 12-275 (issued June 21, 2012); *A.H.*, Docket No. 11-1101 (issued May 1, 2012).

<sup>10</sup> *Id.* at § 8129(b).

<sup>11</sup> *Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

<sup>12</sup> 20 C.F.R. § 10.433(a).

degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that she is being overpaid.<sup>13</sup>

### ANALYSIS -- ISSUE

OWCP determined 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. In cases where a claimant receives compensation through direct deposit, however, OWCP must establish that at the time the claimant received the direct deposit in question she knew or should have known that a payment was incorrect.<sup>14</sup> 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 since the acceptance of the overpayment, at the time of receipt of the direct deposit, lacks the requisite knowledge.<sup>15</sup> According to OWCP's regulations (effective August 29, 2011), good faith and exercise of a high degree of care in regard to receipt of benefits require review of electronic bank statements. This regulation is in accordance with the Board's previous decisions, as in *Tommy Craven*,<sup>16</sup> that a claimant gains control of the funds from the U.S. Treasury at the moment compensation is deposited into his or her bank account and, thereby, creates an overpayment. As explained in *Craven*, because fault is defined by what the claimant knew or should have known at the time of acceptance, one of the consequences of electronic fund transfers is that a claimant may not be at fault for accepting the first incorrect payment because the requisite knowledge is lacking at the time of deposit.

In this case, appellant received one payment electronically for the period November 21 to December 18, 2010. Although she accepted the overpayment at the time it was deposited into her account, OWCP has not shown that she knew or should have known at the time of the

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<sup>13</sup> *Id.* (August 29, 2011) provides as follows:

“(a) OWCP 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 he or she receives from OWCP are proper. The recipient must show good faith and exercise a high degree of care in regard to receipt of their benefits. Such care includes reporting events which may affect entitlement to or the amount of benefits, including reviewing their accounts and related statements (including electronic statements and records from their financial institutions involving EFT payments). A recipient who has done any of the following will be found at fault with respect to creating an overpayment --

- (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 the recipient knew or should have known to be incorrect. (This provision applies only to the overpaid individual).”

<sup>14</sup> *J.H.*, Docket No. 11-114 (issued July 18, 2011); *R.C.*, Docket No. 10-2113 (issued July 6, 2011); *C.S.*, Docket No. 10-926 (issued March 16, 2011).

<sup>15</sup> *Tammy Craven*, 57 ECAB 689 (2006); see also *George A. Hirsch*, 47 ECAB 520 (1996).

<sup>16</sup> *Id.*

deposit on December 18, 2010 that the payment was incorrect. It has not presented sufficient evidence to establish that appellant accepted a payment which she knew or should have known to be incorrect.<sup>17</sup> She had no reason to suspect at the time of the December 18, 2010 deposit that OWCP had issued an incorrect payment since this was the first incorrect payment made. Thus, the Board finds that appellant was not at fault in either creating or accepting the overpayment for the period December 2 to 18, 2010. A finding of no fault, however, does not mean that the claimant may keep the money, only that OWCP must consider eligibility for waiver for this period and the case must be remanded for it to determine whether appellant is entitled to waiver for this period. After such further development as OWCP may find necessary, it should issue an appropriate decision on the issue of whether the overpayment should be waived for the relevant portion of the December 18, 2010 direct deposit.

### **CONCLUSION**

The Board finds that OWCP properly determined that appellant received an overpayment of compensation but the case is not in posture for decision regarding the amount of overpayment. The Board further finds that OWCP improperly found her at fault in creating the overpayment.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the January 4, 2012 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.

Issued: August 27, 2012  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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

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<sup>17</sup> See also *C.K.*, Docket No. 12-746 (issued May 1, 2012).