

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

C.W., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,)
TUSKEGEE VETERANS MEDICAL CENTER,)
Tuskegee, AL, Employer)

Docket No. 12-647
Issued: August 10, 2012

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On January 30, 2012 appellant filed a timely appeal from a December 9, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) finding an overpayment of compensation. 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.

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received an overpayment in the amount of \$2,365.93 for the period January 11 to February 12, 2011; (2) whether OWCP properly determined that appellant was at fault in creating the overpayment of compensation, thereby precluding waiver of recovery; and (3) whether OWCP properly found that appellant abandoned her request for a precoupment hearing before an OWCP hearing representative.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

OWCP accepted that on August 15, 2008 appellant, then a 53-year-old health technician, sustained injuries to both her knees when she slipped on a wet floor at work. Her claim was accepted for left knee sprain and aggravation to right knee osteoarthritis. In its July 7, 2009 letter accepting the claim, OWCP advised appellant that she was expected to return to work as soon as she was able and to notify OWCP once she returned to work. It further informed her 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 August 19, 2009. On December 2, 2009 OWCP was informed that appellant returned to work full duty on November 30, 2009.

On September 29, 2010 appellant underwent authorized total right knee arthroplasty. She stopped work and received wage-loss compensation for disability. On November 2, 2010 appellant enrolled in direct deposit.

On January 10, 2011 appellant returned to modified-duty full time.² She continued to receive compensation by direct deposit for the periods December 19, 2010 to January 15, 2011 and January 16 to February 12, 2011.

On March 7, 2011 OWCP issued a preliminary determination that appellant received an overpayment of compensation in the amount of \$2,365.93 because she returned to work on January 11, 2011 but received disability compensation until February 12, 2011. 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. OWCP calculated the overpayment by subtracting the compensation to which she was entitled from December 19, 2010 to February 12, 2011, \$1,650.65, from the amount that she received, \$4,016.58, to find an overpayment of \$2,365.93. It informed appellant that she had 30 days to request a telephone conference, a final decision based on the written evidence, or a prerecoupment hearing on the issues of fault and a possible waiver.

On March 31, 2011 appellant contested the March 7, 2011 preliminary determination because she disagreed with the amount of the overpayment and believed it occurred through no fault of her own. She noted that OWCP was informed that she returned to work. Appellant explained that her payments stopped when she returned to work but in February she received a payment. She stated that she thought it was a payment that OWCP realized they owed her. Appellant contested that she should not be found at fault for OWCP sending her a check even though they were informed that she returned to work. She did not submit an overpayment recovery questionnaire.³

² The record reveals that appellant retired effective January 31, 2011.

³ The Board notes that appellant did not indicate whether she requested a telephone conference, prerecoupment hearing, or a decision based on the written evidence but that OWCP treated her response as a request for a prerecoupment hearing. The Board further notes that OWCP sent adequate notice of the prerecoupment hearing to appellant and she did not contest this action nor request that different action take place.

In an October 17, 2011 letter, OWCP advised appellant that a telephonic prerecoument hearing would be held on November 30, 2011 at 8:30 a.m. eastern time. Appellant was provided a toll-free number to call at the allotted time and a pass code to enter.

In a decision dated December 9, 2011, OWCP finalized the overpayment of \$2,365.93 for the period January 11 to February 12, 2011. It found that appellant was at fault in the creation of the overpayment, thereby precluding waiver of recovery. OWCP also found that appellant abandoned the telephonic prerecoument hearing scheduled for November 30, 2011.

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.⁴

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.⁵ 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.⁶

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment in the amount of \$2,365.93 for the period January 11 to February 12, 2011. The record reflects that she returned to modified duty on January 11, 2011 but continued to receive compensation until February 12, 2011. As noted, FECA and OWCP regulations provide that a claimant may not receive wage-loss compensation while simultaneously receiving salary or other type of pay from the United States.⁷ Computer printouts and overpayment worksheets demonstrate that appellant received compensation in the amount of \$4,016.58 for the period December 19 to February 12, 2011 even though she returned to work on January 11, 2011 and should have only received \$1,650.65. This resulted in an overpayment of \$2,365.93. The Board will affirm the fact and amount of overpayment in compensation of \$2,365.93.

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.⁸ No

⁴ 5 U.S.C. § 8102.

⁵ *Id.* at § 8116(a).

⁶ 20 C.F.R. § 10.500(a).

⁷ 5 U.S.C. § 8116(a).

⁸ *Id.* at § 8129(b).

waiver of payment is possible if appellant is not without 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

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 degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that she is being overpaid.¹¹

ANALYSIS -- ISSUE 2

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

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

¹⁰ 20 C.F.R. § 10.433(a).

¹¹ *Id.* at § 10.433(a) (August 29, 2011) provides as follows:

“(a) OWC’P 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.)”

known that a payment was incorrect.¹² 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.¹³ 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*,¹⁴ 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 two payments electronically for periods ending January 15 and February 12, 2011. Although appellant accepted the overpayment in this case by gaining control of the funds deposited into her account, OWCP has not shown that she knew or should have known at the time of the first electronic deposit of January 15, 2011 that the payment was incorrect. It has not presented sufficient evidence to establish that she accepted a payment which she knew or should have known to be incorrect.¹⁵ Thus, the Board finds that OWCP improperly determined that appellant was at fault in the creation of the January 15, 2011 overpayment. The Board will set aside OWCP's December 19, 2011 decision on the issues of fault and recovery with respect to the first January 15, 2011 electronic payment and remand the case for consideration of waiver based on appellant's current financial circumstances.

LEGAL PRECEDENT -- ISSUE 3

OWCP regulations provide guidance as to how a claimant may postpone a hearing, and when a hearing will be considered to be abandoned. Pursuant to 20 C.F.R. § 10.622:

“(c) Once the oral hearing is scheduled and OWCP has mailed appropriate written notice to the claimant and representative, OWCP will, upon submission of proper written documentation of unavoidable serious scheduling conflicts (such as court-ordered appearances/trials, jury duty or previously scheduled outpatient procedures), entertain requests from a claimant or his representative for rescheduling as long as the hearing can be rescheduled on the same monthly docket, generally no more than seven days after the originally scheduled time. When a request to postpone a scheduled hearing under this subsection cannot be accommodated on the docket, no further opportunity for an oral hearing will be provided. Instead, the hearing will take the form of a review of the written record and a decision issued accordingly.

¹² *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).

¹³ *Tammy Craven*, 57 ECAB 689 (2006); see also *George A. Hirsch*, 47 ECAB 520 (1996).

¹⁴ *Id.*

¹⁵ See also *C.K.*, Docket No. 12-746 (issued May 1, 2012).

“(d) Where the claimant or representative is hospitalized for a nonelective reason or where the death of the claimant’s or representative’s parent, spouse, child or other immediate family prevents attendance at the hearing, OWCP will, upon submission of proper documentation, grant a postponement beyond one monthly docket.

“(e) Decisions regarding rescheduling under paragraphs (b) through (d) of this section are within the sole discretion of the hearing representative and are not reviewable.

“(f) A claimant who fails to appear at a scheduled hearing may request in writing within 10 days after the date set for the hearing that another hearing be scheduled. Where good cause for failure to appear is shown, another hearing will be scheduled and conducted by teleconference. The failure of the claimant to request another hearing within 10 days, or the failure of the claimant to appear at the second scheduled hearing without good cause shown, shall constitute abandonment of the request for a hearing. Where good cause is shown for failure to appear at the second scheduled hearing, review of the matter will proceed as a review of the written record.”¹⁶

ANALYSIS -- ISSUE 3

The record demonstrates that OWCP scheduled a telephonic prerecoumment hearing with an OWCP hearing representative at a specific time on November 30, 2011. The evidence establishes that OWCP mailed appropriate notice to the claimant at her address of record. The record also supports that appellant did not request postponement, failed to appear for the scheduled hearing, and failed to provide any notification for such failure within 10 days of the scheduled date of the hearing. As this meets the conditions for abandonment specified by OWCP’s regulations and procedure manual, it properly found that appellant abandoned her request for a prerecoumment hearing before an OWCP hearing representative and properly issued a final decision on the overpayment of compensation.¹⁷

On appeal, appellant alleges that she attempted to contact OWCP on several occasions and left several voicemails informing OWCP that she would not be able to make the scheduled hearing but her telephone calls were never returned. Pursuant to OWCP’s regulations, once a hearing is scheduled and written notice has been mailed, OWCP will entertain requests for rescheduling, upon submission of proper written documentation of unavoidable serious

¹⁶ With respect to abandonment of hearing requests, Chapter 2.1601.6(g), issued October 2011, of OWCP’s procedure manual provides in relevant part that failure of the claimant to appear at the scheduled hearing, failure to request a postponement, and failure to request in writing within 10 days after the date set for the hearing that another hearing be scheduled shall constitute abandonment of the request for a hearing. Under these circumstances, the Branch of Hearings and Review will issue a formal decision finding that the claimant has abandoned his or her oral request for a hearing and return the case to the district OWCP. In cases involving prerecoumment hearings, the Branch of Hearings and Review will also issue a final decision on the overpayment, based on the available evidence, before returning the case to the district OWCP.¹⁶

¹⁷ See *T.S.*, Docket No. 07-573 (issued May 31, 2007).

scheduling conflicts. The evidence of record does not substantiate that appellant made any written request for rescheduling of the oral argument.

The Board also notes that OWCP's regulations allows that, if a claimant fails to appear at the hearing, the claimant may request in writing within 10 days after the date set for the hearing that another hearing be scheduled, for good cause shown. Appellant does not allege, nor does the record substantiate that appellant submitted a written request, substantiating good cause, within 10 days following the date of the scheduled hearing.

The Board will affirm OWCP's decision that she abandoned her request for a prerecoumment hearing.

CONCLUSION

The Board finds that appellant received an overpayment in the amount of \$2,365.93 for the period January 11 to February 12, 2011 because she received wage-loss compensation after she returned to work on January 11, 2011. The Board finds that OWCP improperly found that appellant was at fault in the creation of the overpayment for the first January 15, 2011 electronic payment and will remand the case for consideration of whether waiver of the recovery of the overpayment is warranted. The Board also finds that appellant abandoned her request for a prerecoumment hearing.

ORDER

IT IS HEREBY ORDERED THAT the December 9, 2011 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 10, 2012
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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