

FACTUAL HISTORY

On February 1, 2010 appellant, then a 44-year-old city carrier, filed an occupational disease claim alleging that she sustained a right shoulder injury as a result of her employment duties. She first became aware of her condition and realized that it resulted from her employment on September 15, 2009. OWCP accepted appellant's claim for right shoulder sprain, right shoulder impingement, right shoulder lap tear and right shoulder internal derangement. In its May 6, 2010 letter accepting the claim, it advised her that she was expected to return to work as soon as she was able and that she was 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 conditions and that she should immediately return any compensation checks received which included payment for a period during which she returned to work. Appellant stopped work on January 25, 2010 and received wage-loss compensation. She was placed on the periodic rolls effective January 1, 2011.²

On July 14, 2010 appellant initially accepted a job offer as a modified letter carrier but underwent shoulder surgery on December 6, 2010. On June 17, 2011 she underwent a functional capacity evaluation.

On October 20, 2011 OWCP was informed that appellant returned to full-time, limited-duty work on September 2, 2011. Appellant continued to receive compensation by direct deposit until October 22, 2011.

On October 25, 2011 OWCP issued a preliminary determination that appellant received an overpayment of compensation in the amount of \$4,757.39 for the period September 2 to October 22, 2011 because she returned to work on September 2, 2011 but received compensation on the periodic rolls until October 22, 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 September 2 to October 22, 2011, \$466.41, from the amount she received, \$5,223.80, to find an overpayment of \$4,757.39.³ 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.

An overpayment worksheet dated October 25, 2011 showed that appellant returned to work on September 2, 2011. Appellant received \$5,223.80 in compensation for the period August 28 to October 22, 2011 but should have only received \$466.41 for the period August 28 to September 1, 2011 resulting in an overpayment of \$4,757.39.

² On May 20, 2011 appellant enrolled in direct deposit.

³ An overpayment worksheet dated October 25, 2011 showed that appellant returned to work on September 2, 2011. Appellant received \$5,223.80 in compensation for the period August 28 to October 22, 2011 but should have only received \$466.41 for the period August 28 to September 1, 2011 resulting in an overpayment of \$4,757.39.

On October 27, 2011 appellant requested a telephonic prerecoupment hearing because she disagreed with the amount of overpayment and finding of fault. She stated that she returned to work on September 3, 2011 and that she was not told to notify anyone when she returned to work. In a completed overpayment recovery questionnaire, appellant noted that her monthly income included \$2,800.00 from her earnings. She stated that she supported five individuals including her son, two daughters and two granddaughters and did not have any other available funds. Appellant explained that no one explained the overpayment to her and that she was automatically put on the periodic rolls after she submitted her CA-7 forms. She believed that returning to work and that hitting the clock would stop her compensation payments.

OWCP was advised that appellant stopped work again on October 23, 2011 because no work was available. Appellant subsequently received disability compensation.⁴

In a January 4, 2012 letter, OWCP advised appellant that the telephonic prerecoupment hearing was scheduled for February 14, 2012 at 1:30 p.m. eastern time. Appellant was provided a toll-free number to call at the allotted time and a pass code to enter.

On March 15, 2012 OWCP advised appellant that she failed to call in for a telephone hearing scheduled for February 14, 2012. Accordingly, it would conduct a review of the written record regarding her overpayment. Appellant was allowed 15 days to submit additional evidence. No additional evidence was received.

In a decision dated May 7, 2012, OWCP's hearing representative finalized the overpayment in the amount of \$4,757.39 for the period September 2 to October 22, 2011. She determined that appellant was at fault in the creation of the overpayment because she accepted a payment which she knew or reasonably should have known to be incorrect and, therefore, was not entitled to waiver of recovery. The hearing representative noted that appellant listed a monthly income of approximately \$2,800.00 and monthly expenses of \$3,400.00 but did not provide any evidence to support her claimed expenses. She also found that appellant abandoned the telephonic prerecoupment hearing scheduled for February 14, 2012.⁵

LEGAL PRECEDENT -- ISSUE 1

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.⁶ Monetary compensation for total or partial disability due to an employment injury is paid as a percentage of pay,⁷ meaning pay at the time

⁴ Appellant submitted various disability compensation forms requesting wage-loss compensation for the period October 29 to November 4, 2011 and December 3 to 30, 2011. She was paid disability compensation and was placed back on the periodic rolls beginning December 3, 2011.

⁵ The record reveals that another decision regarding this overpayment was subsequently issued by OWCP on June 21, 2012. Appellant filed her appeal with the Board on May 14, 2012. Under the principles discussed in *Douglas E. Billings*, 41 ECAB 880 (1990), OWCP's June 21, 2012 decision, issued while the Board had jurisdiction over the matter in dispute is null and void. *See also M.F.*, Docket No. 11-2106 (issued September 12, 2012).

⁶ 5 U.S.C. § 8102(a).

⁷ *Id.* at §§ 8105, 8106.

of injury or pay at the time disability begins or pay at the time compensable disability recurs if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater.⁸

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.⁹ A claimant is not entitled to receive total disability compensation and actual earnings for the same period. 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.¹⁰

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment in the amount of \$4,757.39. The record reflects that appellant returned to limited duty on September 2, 2011 but continued to receive compensation by direct deposit. Based on this determination, OWCP properly found that she received an overpayment of compensation during that period. The record establishes that appellant received net compensation from August 28 to October 22, 2011 in the amount of \$5,223.80, but was only entitled to \$466.41 in wage loss for the period before she returned to work on September 2, 2011. OWCP subtracted the amount she should have received, \$466.41, from the amount she received, \$5,223.80 to determine that she was overpaid \$4,757.39. The Board finds that it correctly computed the amount of overpayment to be \$4,757.39. Thus, the Board affirms the fact and amount of overpayment.

On appeal, appellant contends that she returned to work on September 3, 2011 and requested that the Board revisit the facts and the amount of overpayment. She, however, did not submit any evidence to establish that she returned to work on September 3, 2011 or to refute the evidence of record that she returned to limited duty as of September 2, 2011.

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.¹¹ No waiver of payment is possible if appellant is with fault in helping to create the overpayment.¹²

⁸ *Id.* at § 8101(4); *John D. Williamson*, 40 ECAB 1179 (1989).

⁹ *Id.* at § 8116(a).

¹⁰ 20 C.F.R. § 10.500(a).

¹¹ 5 U.S.C. § 8129(b).

¹² *Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

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.”¹³

ANALYSIS -- ISSUE 2

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

OWCP requires that recipients of compensation benefits take all reasonable measures to ensure that payments from OWCP are proper. However, the Board has held that an employee who receives payments from OWCP in the form of direct deposit may not be at fault for the first incorrect deposit into her bank account because the acceptance of the amount lacks the requisite knowledge.¹⁴ 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 the claimant lacks the requisite knowledge at the time of the initial deposit. 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 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.¹⁵ It is not appropriate, however, 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.¹⁶

¹³ 20 C.F.R. § 10.433(a).

¹⁴ *Tammy Craven*, 57 ECAB 689 (2006); *see also George A. Hirsch*, 47 ECAB 520 (1996).

¹⁵ *See Karen K. Dixon*, 56 ECAB 145 (2004).

¹⁶ *See K.H.*, Docket No. 06-191 (issued October 20, 2006).

The record establishes that appellant received compensation by direct deposit payments every 28 days. The evidence of record does not establish that on the date of the first direct deposit of compensation after her return to work, she knew or should have known that she was accepting a direct deposit to which she was not entitled. No documentation was provided to demonstrate that appellant had clear knowledge at the time of the initial direct deposit 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. Therefore she cannot be found at fault for at least the first compensation payment after her return to work.

The Board finds that this case is not in posture for decision regarding the issue of waiver of the overpayment. The Board will set aside the May 7, 2012 decision regarding the issue of waiver and will remand the case for further consideration of appellant's current financial circumstances.

LEGAL PRECEDENT -- ISSUE 3

With respect to abandonment of hearing requests, Chapter 2.1601.6(g), issued October 2011, 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 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.¹⁷

ANALYSIS -- ISSUE 3

The record demonstrates that OWCP scheduled a telephonic prerecoumment hearing with an OWCP hearing representative at a specific time on February 12, 2012. 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. The Board will affirm OWCP's decision that she abandoned her request for a prerecoumment hearing.

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation for the period September 2 to October 22, 2011. The May 7, 2012 decision is

¹⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1061.6(g) (October 2011); *see also* 20 C.F.R. § 10.622(f).

set aside and remanded to OWCP regarding the issues of waiver of the overpayment. The Board also finds that appellant abandoned her request for prerecoupment hearing.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 7, 2012 is affirmed in part and set aside in part. The case is remanded for further action consistent with this decision.

Issued: December 3, 2012
Washington, DC

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

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

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