

FACTUAL HISTORY

On September 27, 1990 OWCP accepted that appellant, then a 29-year-old mark-up clerk, sustained bilateral carpal tunnel syndrome due to her repetitive work duties. It subsequently accepted left thoracic outlet syndrome and depression. Appellant received disability compensation and medical benefits.

In a February 4, 2009 decision, OWCP terminated appellant's wage-loss compensation and medical benefits effective February 14, 2009 finding that the medical evidence established that she no longer had disability due to her work injuries or a need for medical treatment due to her physical work injuries.²

In a March 5, 2009 letter to appellant, OWCP stated, "An error was made and a direct deposit is being made to your account on March 13, 2009. You are not entitled to this deposit and we are requesting the bank return it to [the Department of the] Treasury." On March 14, 2009 appellant received \$2,326.26 deposited into her bank account, an amount which covered the period February 15 to March 14, 2009. There is no indication in the record that she returned this check to OWCP.

In an August 28, 2009 decision, OWCP affirmed its February 4, 2009 decision. In an August 20, 2010 decision,³ the Board affirmed the termination of appellant's disability compensation and medical benefits effective February 14, 2009.

In a September 14, 2010 notice, OWCP advised appellant of its preliminary determination that she received a \$2,326.26 overpayment of compensation because her compensation benefits were terminated effective February 14, 2009 but she received an additional payment on the automatic rolls covering the period February 15 to March 14, 2009. It made a preliminary determination that she was at fault in the creation of the overpayment of compensation because she accepted a payment she knew or should have reasonably known to be incorrect. OWCP provided appellant 30 days to submit evidence challenging these determinations and requested that she complete and submit a financial information questionnaire. In an accompanying memorandum, it explained its preliminary determination as to why she was at fault in the creation of the overpayment. OWCP stated:

"Upon thorough consideration, it is acknowledged that the overpayment resulted after [OWCP] failed to terminate your entitlement to compensation from our automatic rolls. It is further acknowledged that you had been informed that [OWCP] would be retrieving the compensation benefits paid to you in March 2009, which did not occur. However, it is further determined that you were clearly put on notice that your entitlement to compensation benefits ceased as of February 14, 2009 in the decision issued to you on February 4, 2009 and

² Appellant continued to be eligible for medical benefits due to her work-related depression. OWCP determined that, although she continued to have residuals of her work-related depression, this condition did not cause disability. Its February 4, 2009 decision was sent to appellant's address of record in Taylor, MI.

³ Docket No. 09-2330 (issued August 20, 2010).

additionally advised that you were not entitled to the compensation check scheduled to be released on or around March 13, 2009 by letter dated March 5, 2009. However, there is no evidence on file to show that you have followed up with this [o]ffice regarding the erroneously issued compensation payment covering the period of February 15, 2009 through March 14, 2009. Furthermore, [OWCP] has not received the funds returned to this [o]ffice. Therefore, you are found with fault in the matter of the overpayment on the basis that you accepted a payment you knew to be incorrect.”

Appellant requested a telephonic hearing with an OWCP hearing representative. During the January 26, 2011 hearing, she testified that she did not receive OWCP’s March 5, 2009 letter advising her that she could not keep the compensation payment for the period February 15 to March 14, 2009. Appellant acknowledged that she received OWCP’s February 4, 2009 termination decision which was sent to the same address.

In a financial information questionnaire completed on February 9, 2011, appellant noted \$3,474.00 in monthly income (comprised of Social Security Administration benefits) and \$3,280.00 in monthly expenses.

In a March 31, 2011 decision, OWCP’s hearing representative determined that appellant received a \$2,326.26 overpayment of compensation and that she was at fault in the creation of the overpayment of compensation, thereby precluding waiver of recovery. He found that OWCP’s March 5, 2009 letter advising appellant of an improper payment for a period after February 14, 2009 was sent to her home address of record. The hearing representative reviewed appellant’s financial information and determined that she could repay the overpayment in monthly payments of \$194.00.⁴

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of 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.⁵ Section 8129(a) of FECA provides, in pertinent part, “When an overpayment has been made to an individual under this subchapter 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 an individual is entitled.”⁶

Section 8116(a) of FECA provides that while an employee is receiving compensation or if he has been paid a lump sum in commutation of installment payments until the expiration of the period during which the installment payments would have continued, the employee may not

⁴ As recovery from continuing compensation benefits under FECA is not involved in this case, the Board has no jurisdiction over the amount OWCP determined that appellant should repay each month. *Levon H. Knight*, 40 ECAB 658, 665 (1989).

⁵ 5 U.S.C. § 8102(a).

⁶ *Id.* at § 8129(a).

receive salary, pay or remuneration of any type from the United States, except in limited specified instances.⁷

ANALYSIS -- ISSUE 1

The Board finds that appellant received a \$2,326.26 overpayment of compensation. OWCP terminated her disability compensation effective February 14, 2009 and this termination determination was affirmed by the Board. However, despite this termination of disability compensation, appellant continued to receive disability compensation for the period February 15 to March 14, 2009. The amount of money received for this period was \$2,326.26. There is no indication that appellant was entitled to receive disability compensation after February 14, 2009 and, therefore, she received a \$2,326.26 overpayment of compensation.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of FECA provides that where 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.⁸ The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): “Adjustment 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.”⁹ No waiver of payment is possible if the claimant is not “without fault” in helping to create the overpayment.¹⁰

In determining whether an individual is not “without fault” or alternatively, “with fault,” section 10.433(a) of Title 20 of the Code of Federal 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....”¹¹

⁷ *Id.* at § 8116(a).

⁸ *Id.* at § 8129(a).

⁹ *Id.* at § 8129(b).

¹⁰ *Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

¹¹ 20 C.F.R. § 10.433(a).

Section 10.433(c) of OWCP's regulations provide:

“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 he or she is being overpaid.”¹²

It is presumed, in the absence of evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by that individual. This presumption arises when it appears from the record that the notice was properly addressed and duly mailed.¹³ Even though OWCP may have been negligent in continuing to issue a claimant checks for temporary total disability after the claimant's disability compensation was terminated, this does not excuse the claimant's acceptance of such checks which she knew or should have been expected to know should have been returned to OWCP.¹⁴

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly determined that appellant was at fault in the creation of the \$2,326.26 overpayment of compensation thereby precluding waiver of the overpayment.

OWCP found appellant at fault in the creation of the overpayment under the above-described third prong, *i.e.*, that she accepted a payment which she knew or should have known to be incorrect when she accepted the \$2,326.26 in wage loss covering the period February 15 to March 14, 2009.

Appellant was previously advised in an OWCP decision dated February 4, 2009 that her entitlement to wage-loss compensation was being terminated effective February 14, 2009.¹⁵ During the January 26, 2011 telephonic hearing with an OWCP hearing representative, she testified that she received OWCP's February 4, 2009 decision. The record reflects that OWCP sent appellant a March 5, 2009 letter in which it advised her that an error was made and that a deposit would be made into her bank account on March 13, 2009. The letter further advised her that she was not entitled to this deposit. Appellant asserted during the January 26, 2011 hearing that she did not receive OWCP's March 5, 2009 letter. However, OWCP's March 5, 2009 letter was mailed to her address of record in Taylor, MI, *i.e.*, the same address to which OWCP's February 4, 2009 decision was mailed.

It is presumed, in the absence of evidence to the contrary, that the March 5, 2009 letter OWCP mailed to appellant in the ordinary course of business was received by appellant. This

¹² *Id.* at § 10.433(c).

¹³ *Michelle R. Littlejohn*, 42 ECAB 463, 465 (1991).

¹⁴ *Supra* note 10.

¹⁵ This decision was mailed to appellant's address of record in Taylor, MI.

presumption arises in the present case because it appears from the record that the notice was properly addressed and duly mailed.¹⁶ Appellant did not submit sufficient evidence to rebut this presumption. Her presumed receipt of the March 5, 2009 letter shows that, when she accepted the \$2,326.26 in disability monies covering the period February 15 to March 14, 2009, she knew or should have known that she accepted an incorrect payment. The fact that OWCP was unable to prevent the incorrect payment from being deposited into appellant's bank account does not change the fact that appellant knew or should have known that the payment was incorrect.¹⁷ There is no indication in the record that appellant attempted to return the incorrect \$2,326.26 payment to OWCP.

For these reasons, OWCP properly determined that appellant was at fault in creating the \$2,326.26 overpayment of compensation, thereby precluding waiver of recovery of the overpayment.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that OWCP properly determined that appellant received a \$2,326.26 overpayment of compensation. The Board further finds that OWCP properly determined that appellant was at fault in creating the overpayment of compensation and that, therefore, the overpayment was not subject to waiver.

¹⁶ See *supra* note 13.

¹⁷ See *supra* note 14.

ORDER

IT IS HEREBY ORDERED THAT the March 31, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 9, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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