

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

S.V., Appellant

and

**U.S. POSTAL SERVICE, PARK PLACE
STATION, Houston, TX, Employer**

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**Docket No. 12-242
Issued: June 13, 2012**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 14, 2011 appellant filed a timely appeal from the August 5, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP), which found her at fault in creating an overpayment. 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 appellant received a \$94,166.18 overpayment of compensation; and (2) whether she was at fault in creating the overpayment.

FACTUAL HISTORY

On February 24, 2006 appellant, a 33-year-old letter carrier, sustained a traumatic injury in the performance of duty when she stepped out of her vehicle and into a hole. OWCP accepted her claim for an unspecified sprain/strain of the left ankle and left ankle villonodular synovitis.

¹ 5 U.S.C. § 8101 *et seq.*

She returned to full-time limited duty on April 16, 2007, at which point OWCP terminated her from the compensation rolls.

On March 11, 2008 OWCP issued a schedule award for an 11 percent impairment of appellant's left leg. The period of the award ran from November 1, 2007 to June 9, 2008. OWCP advised: "Payment of your award ends when you have been paid for the last day shown in item 3 above [June 9, 2008]." OWCP further notified appellant as follows:

"After the ending date of this award noted in item 3, your entitlement to compensation will be based solely on disability for work resulting from the accepted injury. You may claim continuing compensation by submitting evidence showing that the accepted injury prevents you from performing the kind of work you were doing when injured and from earning comparable wages."

After a large initial payment, appellant received regular schedule award payments of \$2,744.00 every four weeks through June 7, 2008. On July 5, 2008 OWCP issued a fourth periodic payment of \$2,744.00 covering the period June 8 through July 5, 2008. She continued to receive periodic compensation payments through January 15, 2011.

OWCP issued a preliminary determination that appellant received a \$94,166.18 overpayment because she accepted schedule award payments to which she was not entitled. It found her at fault in creating the overpayment on the grounds that she knew or should have reasonably known the payments were incorrect, as it had notified her that the period of the award ended on June 9, 2008.

On an overpayment recovery questionnaire, appellant explained that she thought she was receiving wage-loss compensation for the injury and surgeries she had on her foot. Further, the Form CA-1032 she completed stated that the information collected would be used to determine if she was entitled to continue to receive payments. Appellant explained that when she filled the forms out and sent them back and continued to receive payments, she believed she was entitled to the compensation.

At a preresoupment hearing, appellant's representative argued that there was error on appellant's part because OWCP notified her that the schedule award would end in 2008, but the gross error was with OWCP, because it took no action on the case for almost three years. Appellant testified that she was initially puzzled when the payments did not stop. She explained that she was working while getting the checks, but that was no reason to question the compensation because it was a schedule award.

In an August 5, 2011 decision, OWCP's hearing representative found that appellant was at fault in creating a \$94,166.18 overpayment of compensation. She found that appellant accepted payments that she knew or reasonably should have known were incorrect, as she knew or reasonably should have known that the schedule award was supposed to stop on June 9, 2008. The hearing representative noted that appellant was not receiving wage-loss compensation, so recovery could not be made by decreasing subsequent compensation payments.

On appeal, appellant states that she did think at one point prior to receiving the Form CA-1032 that "wow" the checks are still coming in, and had she not received the Form CA-1032

she would have inquired long before the total reached the magnitude that it did, but it was the Form CA-1032s that reassured her she was entitled to the money. “So I am willing to take the blame for any overpayment prior to the first 1032 but anything after it I don’t feel should be my fault.”

LEGAL PRECEDENT -- ISSUE 1

FECA authorizes the payment of a schedule award for the loss or loss of use of a specified member, organ or function of the body. Compensation for the total loss of a lower extremity, as with amputation at the hip, is 288 weeks’ compensation. Partial losses are compensated proportionately.²

ANALYSIS -- ISSUE 1

The fact and amount of overpayment are not in dispute. Appellant’s March 11, 2008 schedule award ended on June 9, 2008; however, she continued to receive periodic payments through January 15, 2011. As appellant was not entitled to such payments, an overpayment arose. The Board has reviewed the compensation payment history and finds that appellant received \$94,166.18 in compensation from June 10, 2008 through January 15, 2011.³ The Board will therefore affirm OWCP’s August 5, 2011 decision on the issues of fact and amount of overpayment.

LEGAL PRECEDENT -- ISSUE 2

When an overpayment of compensation has been made 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. Section 8129(b) of FECA describes the only exception:

“Adjustment or recovery by the United States may not be made when incorrect payment had been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of [FECA] or would be against equity and good conscience.”⁴

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 she receives from OWCP are proper. The recipient must show good faith and exercise a high degree of care in reporting events which may affect entitlement to or the amount of benefits. A recipient who

² 5 U.S.C. § 8107. Thus, an 11 percent impairment of the left lower extremity entitled appellant to a finite 31.68 weeks’ compensation (288 weeks’ compensation times 11 percent).

³ Periodic payments from June 8, 2008 through January 15, 2011 totaled \$94,362.18. Appellant was entitled to \$196.00 in compensation from June 9 to 10, 2008 (\$2,744.00 every 28 days divided by 28 times 2). The overpayment thus totals \$94,166.18.

⁴ 5 U.S.C. § 8129(b).

has done any of the following will be found to be at fault with respect to creating an overpayment: (1) Made an incorrect statement as to a material fact which she knew or should have known to be incorrect; or (2) Failed to provide information which she knew or should have known to be material; or (3) Accepted a payment which she knew or should have known to be incorrect.⁵

Whether or not an individual was at fault with respect to the creation of an overpayment depends on the circumstances. 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.⁶

The fact that OWCP may have erred in making the overpayment does not by itself relieve the individual who received the overpayment from liability for repayment if the individual also was at fault in accepting the overpayment.⁷

ANALYSIS -- ISSUE 2

Appellant's March 11, 2008 schedule award made clear that the period of the award ended on June 9, 2008. Having received notice, she should have expected compensation checks for the next three months and nothing more thereafter. As appellant testified before OWCP's hearing representative, she was puzzled when the payments continued. Her representative acknowledged error on her part because OWCP had notified her that the schedule award was ending in 2008. On appeal, appellant takes responsibility for accepting payments prior to when she completed and sent in her first Form CA-1032. Under the circumstances, the Board finds that appellant was at fault in creating the overpayment because she accepted payments that she should have known to be incorrect.

Two related issues remain: (1) whether OWCP's error in making the payments relieves appellant from liability for repayment; and (2) whether the Form CA-1032 appellant completed relieved her of fault. The first is squarely settled by regulations. It makes no difference whether OWCP was negligent in continuing to send the checks. The issue is whether appellant was also at fault. Appellant was at fault as she accepted payments that she should have known were incorrect.

The Board has carefully reviewed the Form CA-1032 that OWCP sent appellant in 2009. It states that the information requested will be used to decide whether she is entitled to continue receiving benefits. Appellant's argument is that by completing the form and sending it in, she could reasonably assume that any compensation she received thereafter was compensation to which OWCP had determined she was entitled. The problem with that assumption is that it does not explain the basis on which compensation was due or payable. Because appellant's schedule award expired on June 9, 2008, she did not have a reasonable basis for further schedule award

⁵ 20 C.F.R. § 10.433(a).

⁶ *Id.* at § 10.433(b).

⁷ *Id.* at § 10.435(a).

payments. Because she was working full-time limited duty, she could not have reasonably expected compensation for wage loss.

OWCP notified appellant that after the schedule award ended on June 9, 2008, her entitlement to compensation would be based solely on disability for work resulting from the accepted injury, which she could claim by submitting evidence showing that the accepted injury prevented her from performing the kind of work she was doing when injured and from earning comparable wages. But after June 9, 2008, appellant filed no Form CA-7 to claim compensation for disability.

As she testified, appellant did not question the continuing compensation because she thought it was a schedule award. This is inconsistent, however, with the fact that the schedule award had expired on June 9, 2008.

Although the Form CA-1032 stated that the information would be used to decide whether she was entitled to additional compensation, appellant never received a letter from OWCP notifying her that she was, in fact, entitled to additional wage-loss benefits. That was merely an assumption on appellant's part, an assumption the Board does not find to be reasonable under the circumstances.⁸

The Board finds that appellant was at fault in creating the overpayment. Notwithstanding the Form CA-1032, she knew or should have known that the payments she accepted after the schedule award expired on June 9, 2008 were incorrect. As she is with fault in this matter, she is not entitled to consideration of waiver. The Board will affirm OWCP's August 5, 2011 decision on the issue of fault.

Appellant argues her assumption on appeal, but even so, she should not keep money that does not belong to her. Over a 31-month period from 2008 to 2011, the Federal Government paid her \$94,166.18 more than it should have. And because she shares some fault in creating that overpayment, OWCP, by law, must recover it.

CONCLUSION

The Board finds that appellant was at fault in creating a \$94,166.18 overpayment of compensation and is thus not eligible for consideration of waiver.

⁸ See *William W. Rodgers*, 30 ECAB 809 (1979) (as OWCP always informed the claimant when he was entitled to compensation either for temporary total disability or under a schedule award, any assumption that he was entitled to additional compensation in the absence of such notice was not valid).

ORDER

IT IS HEREBY ORDERED THAT the August 5, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 13, 2012
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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