

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

B.B., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Philadelphia, PA, Employer**

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**Docket No. 12-275
Issued: June 21, 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
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 18, 2011 appellant filed a timely appeal from an August 24, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 the case.

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received an \$8,029.83 overpayment of compensation for the period November 29, 2010 to February 12, 2011; and (2) whether OWCP properly determined that appellant was at fault in creating the overpayment of compensation, thereby precluding waiver of recovery of the overpayment.

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On April 9, 2009 appellant, then a 36-year-old sales and service representative, filed a claim alleging that she developed a neck and left shoulder condition as a result of performing her work duties. OWCP accepted cervical strain. Appellant stopped work on April 6, 2009 and returned to work full time on November 29, 2010.

By letter dated May 22, 2009, OWCP advised appellant of her diagnosed conditions and her eligibility for benefits. In an attached Form CA-1008, it advised her of certain information concerning the circumstances under which she could receive compensation. OWCP advised:

“Once you return to work, or obtain new employment, notify this office immediately. Full compensation is payable only while you are unable to perform the duties of your regular job because of your accepted employment-related condition. If you receive a compensation check which includes payment for a period you have worked, return it to us immediately to prevent an overpayment of compensation.”

In a letter dated June 25, 2009, OWCP outlined appellant’s entitlement to compensation benefits and her responsibility to return to work in connection with the injury accepted by OWCP. It noted that she would receive compensation for the period beginning May 16, 2009 and would receive continuing payments thereafter. OWCP’s letter cautioned:

“In order to avoid an overpayment of compensation, NOTIFY THIS OFFICE IMMEDIATELY WHEN YOU GO BACK TO WORK. Each payment made through the office’s automated system will include the period for which payment is made. If you have worked for any portion of this period, you must return the check to this office. Otherwise, an overpayment of compensation may result.”

Appellant submitted a direct deposit sign-up form dated June 4, 2009.

Appellant remained on the periodic rolls until February 12, 2011.

In a letter dated February 11, 2011, appellant, through her attorney, informed OWCP that she returned to work. In a February 23, 2011 letter, OWCP advised appellant that it was unaware she returned to work and indicated that she was currently on the periodic rolls and receiving compensation payments. It further advised that, when she was placed on the periodic rolls, she was informed by letter dated June 25, 2009 “that in order to avoid overpayment of compensation, notify this office immediately when you return to work.” OWCP indicated that overpayment procedures would be initiated.

In an e-mail dated February 23, 2011, OWCP advised the employing establishment that appellant returned to work full time. It requested the employer provide an actual date of return to work for purposes of calculating an overpayment.

In a March 7, 2011 supplemental roll payment worksheet, OWCP noted that appellant returned to full time, full duty on November 29, 2010. It noted that, for the period of

November 29, 2010 to February 12, 2011, appellant received gross compensation of \$8,225.26. OWCP noted the following deductions: life insurance of \$44.79, optional life insurance of \$150.64 for net compensation payments of \$8,029.83. In an attached March 7, 2011 memorandum, it noted that appellant received payment on the periodic rolls from November 29, 2010 to February 12, 2011 in the amount of \$8,029.83 and was not entitled to any pay during this period because she returned to work full time on November 29, 2010. OWCP advised that appellant failed to provide notification of her return to work.

In March 7, 2011 letter, OWCP informed appellant that it had made a preliminary determination that because she had received wage-loss benefits from November 29, 2010 to February 12, 2011 after she had returned to work full-time work on November 29, 2010.² Appellant had received an overpayment of compensation in the amount of \$8,029.83. It found that she was at fault in creating the overpayment because she accepted payment that she knew or reasonably should have known to be incorrect. OWCP informed appellant of her review options and instructed her to complete an enclosed overpayment recovery form and submit supporting documentation.

On March 9, 2011 appellant, through her attorney, requested a prerecoupment hearing which was held on May 31, 2011. In a letter dated March 11, 2011, appellant asserted that the total amount of the overpayment was in error as the Board had held that fault cannot be found for the first erroneously issued direct deposit payment. She submitted a May 17, 2011 overpayment questionnaire. Appellant indicated that she received support from her husband of \$526.00 per month and had expenditures of \$3,904.95. She also submitted pay stubs and miscellaneous bills. At the hearing, appellant did not dispute that an overpayment arose in her case and indicated that she returned to work on November 29, 2010. She asserted that she was confused because she had several claims pending including a schedule award in claim number xxxxxx475. When appellant received payment from OWCP she believed it was the schedule award in claim number xxxxxx475. She indicated that she was also confused about the timing of the payments from OWCP and from when she returned to work. Appellant noted that the payments were directly deposited into her account. She indicated that after she received the second and third direct deposits which were on a 28-day cycle she thought they were for the schedule award. Appellant stated that she earned \$53,102.00 per year, or \$4,425.17 per month. She also noted that she received \$263.00 in support from her husband every two weeks. Appellant advised that she did not have any of the overpayment monies but had paid her bills with the funds.

By decision dated August 24, 2011, an OWCP hearing representative finalized the overpayment determination, finding that appellant received an \$8,029.83 overpayment of compensation from November 29, 2010 to February 12, 2011 for which she was at fault. Appellant was at fault because she reasonably should have been aware that she was not entitled to compensation benefits for total disability while working full time. The hearing representative

² OWCP records show that on December 18, 2010 appellant was paid \$2,958.36 for the period November 21 to December 18, 2010. Of this amount, she was entitled to eight days of compensation, \$845.25, before she returned to work on November 29, 2010. Appellant was not entitled to the remainder of this payment, \$2,113.11. ($\$2,958.36/28 = \105.66 . $\$105.66 \times 8 = \845.25). On January 15, 2011 she was paid \$2,958.36 for the period December 19, 2010 to January 15, 2011; and on February 12, 2011 she was paid \$2,958.36 for the period January 16 to February 12, 2011. The funds were directly deposited into appellant's bank account.

addressed appellant's argument that she should not be found at fault because the checks were directly deposited into her account and she was without notice. He noted that Board precedent has found that the receipt of one or two direct deposit checks may not be sufficient to put appellant on notice as to the creation of an overpayment; however, the Board noted that such would not apply to the receipt of a series of checks as in appellant's case. The hearing representative asked that appellant pay \$500.00 every 28 days.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) 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 duty.³ When an overpayment has been made to an individual 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 the individual is entitled.⁴ A claimant, however, is not entitled to receive temporary total disability and actual earnings for the same period. OWCP procedures provide that an overpayment in compensation is created when a claimant returns to work but continues to receive wage-loss compensation.⁵

ANALYSIS -- ISSUE 1

The record indicates that appellant returned to work full time, eight hours per day, at the employing establishment on November 29, 2010. Appellant continued to receive wage-loss compensation for total disability through February 12, 2011. As noted above, she is not entitled to receive compensation for total disability after she has returned to work. Thus, an overpayment occurred.

The record shows that OWCP calculated that, from November 29, 2010 to February 12, 2011, appellant received \$8,029.83 in total disability compensation but was not entitled to any compensation during this period.⁶ OWCP explained how the overpayment occurred and provided this to appellant with the preliminary notice of overpayment. The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$8,029.83 for the period November 29, 2010 to February 12, 2011.

Appellant did not dispute the calculation of the overpayment.

LEGAL PRECEDENT -- ISSUE 2

Under OWCP regulations, waiver of the recovery of an overpayment may be considered only if the individual to whom it was made was not at fault in accepting or creating the

³ 5 U.S.C. § 8102(a).

⁴ *Id.* at § 8129(a).

⁵ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(a) (May 2004). *L.S.*, 59 ECAB 350 (2008).

⁶ *Supra* note 2.

overpayment.⁷ The fact that the overpayment was the result of error by OWCP or another government agency does not by itself relieve the individual who received the overpayment of liability for repayment if the individual also was at fault for receiving the overpayment.⁸ Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she received from OWCP are proper. The recipient must show good faith and exercise a high degree of care in reporting events that may affect entitlement to or the amount of benefits. A recipient who 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 he or she knew or should have known to be incorrect; (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 (this provision applies only to the overpaid individual).⁹

Whether 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.¹⁰

ANALYSIS -- ISSUE 2

OWCP applied the third standard in determining that appellant was at fault in creating the overpayment. For it to establish that appellant was with fault in creating the overpayment of compensation, OWCP must establish that, at the time appellant accepted the compensation checks in question, she knew or should have known the payments were incorrect.¹¹

OWCP requires that recipients of compensation benefits take all reasonable measures to ensure that payments from OWCP are proper.¹² 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 account, as the acceptance of that resulting overpayment lacks the requisite knowledge.¹³ Because the regulations define fault by what the claimant knew or should have known at the time of acceptance, one of the consequences of electronic fund transfers is that in many cases, but not necessarily all, the claimant will not be at fault for accepting the first incorrect payment because the requisite knowledge is lacking at the time of deposit. A finding of no fault does not mean, of course, that the claimant gets to keep the money, only that OWCP must consider whether the claimant is eligible for waiver. In cases involving a series of incorrect

⁷ 20 C.F.R. § 10.433(a).

⁸ *Id.* at § 10.435(a).

⁹ *Supra* note 7.

¹⁰ *Id.* at § 10.433(b).

¹¹ *See Claude T. Green*, 42 ECAB 174, 278 (1990).

¹² *Supra* note 7.

¹³ *Tammy Craven*, 57 ECAB 689 (2006).

payments, where the requisite knowledge is established by a letter or telephone call from OWCP or simply with the passage of time and a greater opportunity for discovery, the claimant will be at fault for accepting the payments subsequently deposited.¹⁴ Each case must be judged on its merits. 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.¹⁵

The record establishes that, for the overpayment period November 29, 2010 to February 12, 2011, appellant received compensation by direct deposit payments every 28 days. As discussed above, on December 18, 2010 she was paid \$2,958.36 for the period November, 21 to December 18, 2010. Appellant was entitled to \$845.25 of this amount as she did not return to work until November 29, 2010; the remaining amount of this payment, \$2,113.11 was an overpayment. On January 15, 2011 she was paid \$2,958.36 for the period December 19, 2010 to January 15, 2011; and on February 12, 2011 she was paid \$2,958.36 for the period January 16 to February 12, 2011. The funds were directly deposited into appellant's account and the disbursements amounted to an overpayment of \$8,029.83. On March 7, 2011 OWCP issued a preliminary determination of the overpayment. It found that appellant was aware or should have been aware that she was not entitled to the entire payment because she had returned to work on November 29, 2010 and she was not entitled to receive compensation for total disability after she has returned to work.

The Board finds that appellant was without fault for the initial direct deposit of the overpaid amount into her account. While appellant accepted the overpayment by gaining control of the funds deposited into her account pursuant to her authorization, the evidence does not show that she knew that she would receive an incorrect payment on that day. As noted above, OWCP regulations define fault by what the claimant knew or should have known at the time of acceptance, one of the consequences of electronic fund transfers is that in many cases the claimant will not be at fault for accepting the first incorrect payment because the requisite knowledge is lacking at the time of deposit. The Board finds that appellant was without fault for the initial deposit of the overpaid amount into her account. While appellant accepted the overpayment by gaining control of the funds deposited into her account pursuant to her authorization, the evidence does not show that she knew that she would receive an incorrect payment on that day. The Board finds that, given the above-described circumstances, there is no evidence of record to show that appellant knew or should have known that the December 18, 2010 payment of \$2,958.36 for the period November 21 to December 18, 2010 was incorrect at the time that she accepted them, *i.e.*, the date that they were deposited into her bank account on December 18, 2010.¹⁶

A finding of no fault does not mean, however, that the claimant may keep the \$2,113.11 amount of the initial payment, only that OWCP must consider eligibility for waiver for this

¹⁴ *J.W.*, Docket No. 10-1271 (issued February 3, 2011).

¹⁵ *Supra* note 10.

¹⁶ *See Karen K. Dixon*, 56 ECAB 145 (2004).

period, and the case must be remanded for OWCP to determine whether she is entitled to waiver for this portion of the overpayment.

Appellant received two more payments that are part of the overpayment. She acknowledged her return to work on November 29, 2010. On January 15, 2011 appellant was issued an incorrect payment of \$2,958.36 which was intended to cover the period December 19, 2010 to January 15, 2011 and on February 12, 2011 she was issued an incorrect payment of \$2,958.36 intended to cover the period January 16 to February 12, 2011. As she had previously been advised by OWCP in letters dated May 22 and June 25, 2009 that she was only entitled to receive compensation for wage loss after the first direct deposit while not working, she would have been expected to know that she was not entitled to any additional payments. Therefore, the Board finds that appellant was at fault in the portion of the \$8,029.83 overpayment created by the two \$2,958.36 payments on January 15 and February 12, 2011 (\$5,916.72 total) because she accepted a payment she knew or should have known to be incorrect.¹⁷ Consequently, she would not be entitled to waiver for this portion of the overpayment.¹⁸ Although appellant asserted that she thought the payments were for a schedule award in another claim, she submitted no evidence to the record that she was entitled to a schedule award or any other monetary benefits from OWCP that could reasonably lead her to believe that the compensation checks accepted were for a correct amount.¹⁹

On appeal, appellant questions how OWCP determined how much money she had each month after her expenses were satisfied in determining repayment of the overpayment. The Board notes that it has no jurisdiction over repayment of the overpayment as appellant is not in receipt of continuing monetary compensation.²⁰ Furthermore, the case must be remanded to determine whether appellant is entitled to waiver for the \$2,113.11 portion of the overpayment created by the initial December 18, 2010 direct deposit payment. After such development as it deems necessary, OWCP should issue an appropriate decision regarding appellant's eligibility for waiver of this portion of the overpayment.

CONCLUSION

The Board finds that OWCP properly determined that appellant received an \$8,029.83 overpayment of compensation. The Board finds that appellant was not at fault in the receipt of the \$2,113.11 portion of the overpayment created by the initial December 18, 2010 direct deposit but that she was at fault in the portion of the overpayment created by the receipt of the \$2,958.36 on January 15, 2011 and \$2,958.36 payment on February 12, 2011 (\$5,916.72 total). The case is remanded to OWCP for further development, including whether appellant is entitled to waiver with respect to the initial \$2,113.11 portion of the overpayment.

¹⁷ *Supra* note 7.

¹⁸ 5 U.S.C. § 8129(b).

¹⁹ *Linda E. Padilla*, 45 ECAB 768 (1994).

²⁰ *See D.R.*, 59 ECAB 148 (2007).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' August 24, 2011 decision is affirmed in part and set side and remanded in part for further action consistent with this decision.

Issued: June 21, 2012
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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