

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

L.J., Appellant

and

**DEPARTMENT OF DEFENSE, DEFENSE
COMMISSARY AGENCY, Fort Gillem, GA,
Employer**

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**Docket No. 11-1533
Issued: March 14, 2012**

Appearances:
Paul H. Felser, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On June 17, 2011 appellant, through her representative, filed a timely appeal from the May 26, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP), which found her at fault in the creation of 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 overpayment case.

ISSUES

The issues are: (1) whether appellant received a \$107,580.44 overpayment from November 4, 2001 to February 27, 2008; and (2) whether she was at fault in creating the overpayment.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On July 10, 1999 appellant, a 39-year-old store worker, hurt her left shoulder while stocking rice. OWCP accepted her claim for left shoulder dislocation, for which she underwent surgery.² Appellant's weekly pay rate on the date of injury was \$425.28. OWCP placed her on the periodic rolls and paid more than \$1,200.00 every four weeks for temporary total disability.

Appellant returned to work on September 1, 2000 as a customer service clerk. On November 22, 2000 OWCP issued a formal loss of wage-earning capacity determination reducing her compensation to reflect her actual earnings. Noting that appellant's weekly pay rate was now \$416.32, it explained that she would begin receiving \$115.00 in wage-loss compensation every four weeks for partial disability. OWCP later notified her that when her schedule award expired on October 25, 2001 she would be entitled to wage-loss compensation under the loss of wage-earning capacity determination.³

Beginning November 4, 2001, OWCP paid appellant over \$1,300.00 in wage-loss compensation every four weeks on the periodic rolls.⁴

Effective July 3, 2010, OWCP reduced appellant's wage-loss compensation to zero on the grounds that her injury-related condition had materially changed for the better. It found that the weight of the medical evidence demonstrated that the accepted medical conditions had resolved or were no longer disabling.

On September 22, 2010 OWCP issued a preliminary determination that appellant received a \$107,580.44 overpayment from November 4, 2001 to February 27, 2008 because it paid her wage-loss compensation for total disability instead of compensation for her loss of wage-earning capacity. It found that she received \$118,166.84 in gross compensation for the period but should have received \$10,586.40. OWCP found appellant at fault in creating the overpayment because she accepted payments that she knew or should have known to be incorrect. It explained that she was advised that the loss of wage-earning capacity determination would be implemented once her schedule award expired.

At a preresoupment hearing, appellant's representative argued that appellant faithfully reported her return to work and how much money she was making, but OWCP did not pay attention. He argued that it was not her fault that OWCP took 10 years to catch the mistake. Counsel argued that appellant did everything she could do to discharge her obligation to try to bring this to OWCP's attention. He noted that every time she spent a dollar to buy groceries or pay a bill or do anything, it was with the knowledge that "this is the bucket of dollars that I have to spend." Counsel argued that appellant detrimentally relied on the fact that the money was hers, that she was entitled to it, that it legally belonged to her.

² OWCP later expanded its acceptance to include left rotator cuff syndrome and left rotator cuff tear.

³ OWCP issued appellant a schedule award for 15 percent impairment of the left upper extremity, which was to run for 46.80 weeks during the period December 2, 2000 to October 25, 2001.

⁴ Due to cost-of-living increases every March, the payments rose to over \$1,500.00 by 2007.

Appellant submitted an overpayment recovery questionnaire showing \$6,574.00 in monthly income, \$5,210.00 in monthly expenses, rental property and \$99,000.00 in funds. She explained why the overpayment was not her fault: “When the checks were sent to me I called worker comp and mailed checks back several times, and was told I was entitled to payments.” Appellant and her representative submitted statements.

In a decision dated May 26, 2011, an OWCP hearing representative found that appellant was at fault in creating a \$107,580.44 overpayment from November 4, 2001 to February 27, 2008. OWCP paid compensation for total disability instead of reducing her wage-loss benefits based on the loss of wage-earning capacity determination. The hearing representative found that appellant accepted payments she knew or should have known to be incorrect. The checks she received were over \$1,000.00 more than the loss of wage-earning capacity determination to which she was entitled and she was clearly aware or should have been aware that the ongoing payments were more than she should have received. Although appellant stated that she believed that she was being paid more than she was entitled to, she kept all the payments. The hearing representative found no evidence to support that appellant returned any payment made during the period in question.

On appeal, appellant argues that she always kept OWCP informed of her work status and of receipt of payments that she did not think she was entitled.

LEGAL PRECEDENT -- ISSUE 1

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.⁵ “Disability” means the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury. It may be partial or total.⁶

It is well established that an employee is not entitled to compensation for temporary total disability after returning to work.⁷

ANALYSIS -- ISSUE 1

After appellant returned to work on September 1, 2000 as a customer service clerk, OWCP issued a formal loss of wage-earning capacity determination finding that she was entitled, based on her actual earnings, to \$115.00 in wage-loss compensation every four weeks. When her schedule award ended, however, OWCP paid her over \$1,300.00 every four weeks at the total disability rate of compensation. As appellant was not entitled to compensation for total

⁵ 5 U.S.C. § 8102(a).

⁶ 20 C.F.R. § 10.5(f).

⁷ *E.g., Tammi L. Wright*, 51 ECAB 463, 465 (2000) (where the record established that the employee returned to work at the employing establishment for four hours per day from August 7, 1996 to January 8, 1997 but received compensation for total disability for that same period, the Board found that the employee received an overpayment of compensation).

disability, fact of overpayment is well established. The Board will affirm OWCP's May 26, 2011 decision on the issue of fact of overpayment.

The amount of the overpayment is also well established in the record. Appellant's payment history shows every check she received during the period and compensation worksheets reflect show how much she should have received under the loss of wage-earning capacity determination. She received \$118,166.84 in gross compensation but should have received \$10,586.40. The difference, \$107,580.44, represent an overpayment. The Board will affirm OWCP's May 26, 2011 decision on the issue of amount of overpayment.

LEGAL PRECEDENT -- ISSUE 2

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 received 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 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; (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 (this provision applies only to the overpaid individual).⁸

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.⁹

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 was also at fault in accepting the overpayment.¹⁰

ANALYSIS -- ISSUE 2

The central issue in this case is the issue of fault, whether appellant accepted payments she knew or should have known to be incorrect. The first component, acceptance, is established. As the hearing representative explained, although appellant appeared to have returned at least one check prior to the period of the overpayment, there was no evidence that she returned any payment made during the period at issue. The record shows that none of the checks was cancelled. Further, appellant's representative effectively acknowledged acceptance at the

⁸ 20 C.F.R. § 10.433(a).

⁹ *Id.* at § 10.433(b).

¹⁰ *Supra* note 8.

prerecoupment hearing when he argued that appellant detrimentally relied on the payments whenever she spent a dollar to buy groceries or pay a bill from her “bucket” of dollars.

The second component of the fault finding, that appellant knew or should have known that the payments were incorrect, is also established. Appellant and her representative have argued that she did everything she could to discharge her obligation to bring to OWCP’s attention that she was in receipt of money to which she was not entitled. She had good reason to think the payments were incorrect. OWCP previously paid appellant for total disability -- over \$1,200.00 every four weeks -- so she understood the level of compensation OWCP paid for total wage loss. Appellant returned to work on September 1, 2000 earning nearly as much as she did on the date of injury. OWCP notified her that her actual earnings reduced her entitlement to only \$115.00 every four weeks. That was the amount appellant could expect to receive. Although this loss of wage-earning capacity determination would not go into effect for another year, when her schedule award expired, OWCP reminded her. When OWCP started paying appellant over \$1,300.00 every four weeks, instead of a little over \$100.00, the Board finds that she knew or should have known that the payments were incorrect, something she has effectively acknowledged in arguing that she tried to bring the matter to OWCP’s attention.

Appellant’s defense is to fault OWCP, but OWCP’s negligence in this matter does not relieve her from liability for repayment. She is at fault in accepting payments that she knew or should have known were incorrect. The Board will affirm OWCP’s May 26, 2011 decision on the issue of fault. Appellant is not entitled to consideration of waiver. OWCP must recover the debt.

The Board’s jurisdiction to review the collection of an overpayment is limited to cases of adjustment, where OWCP decreases later payments of compensation to which the individual is entitled.¹¹ Because collection of the overpayment in this case cannot be made by adjusting later payments -- OWCP terminated wage-loss compensation effective July 3, 2010 -- but must be recovered by other means, the Board lacks jurisdiction to review the amount of recovery determined by the hearing representative to be appropriate.

Appellant reiterated on appeal that she always kept OWCP informed of her work status and of when she was receiving payment that she did not think she was entitled. But again, OWCP’s negligence is immaterial. The critical question is whether appellant accepted payments that she knew or should have known were incorrect. The record shows that she did.

CONCLUSION

The Board finds that appellant received a \$107,580.44 overpayment from November 4, 2001 to February 27, 2008. The Board also finds that she was at fault in creating the overpayment.

¹¹ 5 U.S.C. § 8129; *Levon H. Knight*, 40 ECAB 658 (1989).

ORDER

IT IS HEREBY ORDERED THAT the May 26, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 14, 2012
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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