

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

M.B., Appellant)	
)	
and)	Docket No. 12-1020
)	Issued: October 18, 2012
DEPARTMENT OF THE ARMY, U.S. ARMY)	
MATERIAL COMMAND, Fort Lee, VA,)	
Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 10, 2012 appellant filed a timely appeal from a February 8, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) finding an overpayment of compensation. 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.²

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received an overpayment in the amount of \$6,770.41 for the period September 12 to October 22, 2011; and

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that appellant submitted additional evidence following the February 8, 2012 decision. The Board's jurisdiction is limited to evidence that was before OWCP at the time it issued its final decision. The Board may not consider this evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c); *Sandra D. Pruitt*, 57 ECAB 126 (2005). Appellant may submit the evidence to OWCP with a request for reconsideration.

(2) whether she was at fault in the creation of the overpayment and therefore not entitled to waiver of recovery.

FACTUAL HISTORY

OWCP accepted that on June 15, 2011 appellant, then a 59-year-old information technology specialist, sustained a right shoulder and upper arm sprain, right biceps tendon rupture, right clavicle fracture and left ankle sprain, when she slipped and fell. She stopped work that day. In its July 6 and August 3, 2011 letters accepting the claim, OWCP advised appellant that she was expected to return to work as soon as she was able and to notify it once she returned to work. It informed her that she was only entitled to compensation if she was unable to work due to her accepted condition and should immediately return any compensation checks received which included payment for a period after which she returned to work. Appellant was placed on the periodic rolls.

Appellant submitted a direct deposit sign-up form.

On September 20, 2011 OWCP received notice that appellant had returned to limited-duty work on September 7, 2011.

OWCP paid appellant net compensation of \$4,121.12 for the period August 28 to September 24, 2011.

On October 18, 2011 OWCP noted that appellant returned to work on September 7, 2011. It advised her that she received an overpayment in the amount of \$6,770.41 for the period September 12 through October 22, 2011, a total of 46 days. OWCP informed appellant that she was issued a check for the period September 25 through October 22, 2011 in the amount of \$4,121.12 and advised her to return the check to OWCP.

Overpayment worksheets dated October 18, 2011 indicated that appellant received compensation payments for 46 days of time lost which totaled \$6,770.41. It noted that she returned to work on September 12, 2011.

In a statement dated October 21, 2011, appellant would remit the amount of \$4,121.12 to OWCP. She requested payment for 10 hours of LWOP for the period September 11 to 24, 2011; 6.5 hours of LWOP for the period September 5 through October 8, 2011; and medical travel refund requests from August 15 to 22, 2011. On November 16, 2011 OWCP received a cashier's check from appellant in the amount of \$4,121.12. It was noted that it was for an overpayment in case number xxxxxx030.

In a January 4, 2012 letter, OWCP issued a preliminary decision that appellant received an overpayment in compensation in the amount of \$6,770.41 because she received compensation for total disability from September 12 to October 22, 2011 (46 days) after she returned to light duty.³ It found that she was at fault in creating the overpayment because she accepted payment

³ OWCP determined that appellant was overpaid 12 days for the period September 12 to 24, 2011 and overpaid 34 days for the period September 25 to October 22, 2011 for a total of 46 days. It multiplied her daily compensation rate of \$147.18285 by 46 days for a total of \$6,770.41.

that she knew or reasonably should have known to be incorrect. OWCP informed appellant of her appellate options and instructed her to complete an enclosed overpayment recovery form and submit supporting documentation.⁴

In a February 8, 2012 decision, OWCP finalized the overpayment of \$6,770.41. As appellant submitted payment in the amount of \$4,121.12, the remaining balance was \$2,649.29.

LEGAL PRECEDENT -- ISSUE 1

Section 8102 of FECA provides that the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.⁵ 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.⁶ A claimant is not entitled to receive total disability compensation and actual earnings for the same period. OWCP's procedures provide that an overpayment in compensation is created when a claimant returns to work but continues to receive wage-loss compensation.⁷

ANALYSIS -- ISSUE 1

OWCP accepted appellant's claim and paid her compensation for total disability. After she returned to light duty in September 2011, appellant continued to receive disability compensation benefits until October 22, 2012. As noted, an employee is not entitled to total disability compensation for the same time period that she received actual earnings.⁸ Because appellant received compensation for total disability after she returned to light-duty work and received actual earnings, the Board will affirm OWCP's February 8, 2012 decision on the issue of fact of overpayment.

The Board finds, however, that the case is not in posture for decision regarding the amount of overpayment. In its preliminary determination, OWCP calculated the amount of the overpayment by multiplying the daily compensation rate of \$147.18285⁹ by 46, the total days of overpayment. It found that appellant was overpaid 12 days from September 12 to 24, 2011 and 34 days from September 25 to October 22, 2011 for a total of 46 days. The Board finds, however, that the period from September 25 to October 22, 2011 is a total of 28 days, not 34. Appellant received compensation payments for 40 days after she returned to limited-duty work,

⁴ Appellant submitted additional claims for disability compensation and medical evidence in support of such claims.

⁵ 5 U.S.C. § 8102.

⁶ *Id.* at § 8116(a).

⁷ *Danny E. Haley*, 56 ECAB 393 (2005); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Action*, Chapter 6.200.2(a) (May 2004).

⁸ *Id.*

⁹ OWCP calculated the daily rate by dividing \$4,121.12, the amount she received every 28 days, by 28.

if she returned to work on September 12, 2011. The record reveals that on September 20 and October 18, 2011 OWCP was informed that she returned to work on September 7, 2011. But, OWCP noted in its preliminary decision and overpayment worksheets that appellant returned to work on September 12, 2011. If she returned to work on September 7, 2011 then she was overpaid an additional 5 days, for a total of 45 days. The evidence of record is unclear as to the period of the overpayment. This, in turn, renders the amount of overpayment to question. The Board will set aside OWCP's February 8, 2012 decision on the amount of overpayment and remand the case for further clarification regarding the date appellant returned to work and the number of days of overpayment.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of FECA provides that an overpayment must be recovered unless 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.¹⁰ No waiver of payment is possible if appellant is not without fault in helping to create the overpayment.¹¹

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.’”¹²

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.¹³

¹⁰ *Id.* at § 8129(b).

¹¹ *Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

¹² 20 C.F.R. § 10.433(a).

¹³ *Id.*

ANALYSIS -- ISSUE 2

OWCP determined that appellant was at fault in the creation of the overpayment because she accepted payments that she knew or reasonably should have known to be incorrect. However, in cases where a claimant receives compensation through direct deposit, OWCP must establish that at the time the claimant received the direct deposit in question he or she knew or should have known that a payment was incorrect.¹⁴ The Board has held that an employee who receives payments from OWCP in the form of a direct deposit might not be at fault the first time an incorrect payment is deposited into his or her account since the acceptance of the overpayment, at the time of receipt of the direct deposit, lacks the requisite knowledge.¹⁵ According to OWCP's regulations (effective August 29, 2011), good faith and exercise of a high degree of care in regard to receipt of benefits require review of electronic bank statements. This regulation is in accordance with the Board's previous decisions, as in *Tammy Craven*,¹⁶ that a claimant gains control of the funds from the U.S. Treasury at the moment compensation is deposited into his or her bank account and, thereby, creates an overpayment. As explained in *Craven*, 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 a claimant may not be at fault for accepting the first incorrect payment because the requisite knowledge is lacking at the time of deposit.

Appellant received a payment electronically for the period ending September 24, 2011. Although she accepted the overpayment in this case by gaining control of the funds deposited into her account, OWCP has not shown that she knew or should have known at the time of the first electronic deposit of September 24, 2011 that the payment was incorrect. OWCP has not presented sufficient evidence to establish that appellant accepted a payment which she knew or should have known to be incorrect.¹⁷ Appellant had no reason to suspect at the time of the September 24, 2011 deposit that OWCP had issued an incorrect payment since this was the first incorrect payment made. The Board finds that she was not at fault in creating the overpayment for the period September 12 to 24, 2011. A finding of no fault, however, does not mean that the claimant may keep the money; only that OWCP must consider eligibility for waiver for this period. The case will be remanded for OWCP to determine whether appellant is entitled to waiver for this period. The Board will set aside OWCP's February 8, 2012 decision on the issues of fault and recovery for the period September 12 through 24, 2011 and remand the case for consideration of waiver for the relevant portion of the September 24, 2011 direct deposit.

Regarding the second direct deposit appellant received in October 2011, OWCP advised her by telephone on October 18, 2011 that she was to receive an improper compensation payment of \$4,121.12 for the period September 25 through October 22, 2011 and that she should return this compensation. The record establishes that on November 16, 2011 OWCP received a

¹⁴ *J.H.*, Docket No. 11-114 (issued July 18, 2011); *R.C.*, Docket No. 10-2113 (issued July 6, 2011); *C.S.*, Docket No. 10-926 (issued March 16, 2011).

¹⁵ *Tammy Craven*, 57 ECAB 689 (2006); see also *George A. Hirsch*, 47 ECAB 520 (1996).

¹⁶ *Id.*

¹⁷ See also *C.K.*, Docket No. 12-746 (issued May 1, 2012).

cashier's check from appellant in the amount of \$4,121.12. Since appellant returned the compensation payment upon OWCP's request, the issue of fault is rendered moot

CONCLUSION

The Board finds that appellant received an overpayment because she received wage-loss compensation after she returned to limited duty in September 2012. The Board finds that the evidence is not clear as to the period and amount of the overpayment. The Board further finds that OWCP improperly found that appellant was at fault in the creation of the overpayment for the first September 24, 2011 electronic payment and will remand the case for consideration of whether waiver of the recovery is warranted.

ORDER

IT IS HEREBY ORDERED THAT the February 8, 2012 decision of the Office of Workers' Compensation Programs is affirmed, in part and set aside in part. The case is remanded for further action consistent with this decision.

Issued: October 18, 2012
Washington, DC

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

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

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