

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

A.R., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Fort Worth, TX, Employer**

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**Docket No. 12-688
Issued: September 7, 2012**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On February 7, 2012 appellant filed a timely appeal from a November 1, 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 this case.

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$960.84; and (2) whether OWCP properly found that appellant was at fault in the creation of the overpayment and it was therefore not subject to waiver.

FACTUAL HISTORY

On May 21, 2010 appellant, then a 48-year-old mail handler, filed a claim for occupational disease.

¹ 5 U.S.C. § 8101 *et seq.*

OWCP accepted appellant's claim for a right shoulder and upper arm sprain on July 26, 2010 and informed appellant that compensation benefits for total disability were payable only while she could not perform the duties of her regular job because of her accepted work injury. It instructed appellant as follows: "Once you return to work, or obtain new employment, notify this office immediately ... 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."

Appellant began receiving compensation benefits on the periodic rolls beginning August 27, 2010. She returned to full-time work on July 21, 2011 and OWCP was notified of her return to work on that date. Appellant received compensation benefits for the period July 3 through 30, 2011 in the amount of \$2,690.34. The amount of \$2,690.34 was directly deposited into appellant's account on July 30, 2011.

On July 27, 2011 OWCP issued a preliminary overpayment decision. It determined that appellant was overpaid \$960.84 for the period July 21 through 30, 2011. Appellant was found to be without fault in the creation of the overpayment.

Appellant disagreed with the decision on August 18, 2011 and requested that OWCP review the written record. She stated that the overpayment occurred through no fault of her own and requested a waiver of the overpayment. Appellant submitted a completed overpayment recovery questionnaire and supporting documentation of income and expenses.

By decision dated September 1, 2011, OWCP found appellant was overpaid for the period July 21 through 30, 2011 in the amount of \$960.84. It also found that, while appellant was without fault in creating the overpayment, she was not entitled to a waiver because the information she provided was insufficient to justify waiver of the overpayment.

On November 1, 2011 OWCP issued another final overpayment decision and determined that appellant was at fault in creating the overpayment. The decision noted that appellant had submitted a completed overpayment questionnaire, with supporting documentation, but stated that OWCP's July 27, 2011 preliminary decision found appellant to be with fault in the creation of the overpayment and that appellant had not provided information to refute the finding of fault.

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.² 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.³ A claimant, however, is not entitled to receive temporary total disability and actual earnings for the same period. OWCP procedures

² 5 U.S.C. § 8102(a).

³ *Id.* at § 8129(a).

provide that an overpayment in compensation is created when a claimant returns to work but continues to receive wage-loss compensation.⁴

ANALYSIS -- ISSUE 1

The record indicates that appellant returned to work at the employing establishment on July 21, 2011. Appellant received wage-loss compensation for total disability through July 30, 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 appellant received compensation benefits for the period July 3 through 30, 2011 in the amount of \$2,690.34; however, she should have been paid compensation for the period July 3 through 20, 2011 in the amount of \$1,729.50. OWCP calculated that, from July 21 to 30, 2011, appellant received \$960.84 in total disability compensation but was not entitled to any compensation during this period. It explained how the overpayment occurred and provided this information 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 \$960.84 for the period July 21 to 30, 2011.⁵

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 overpayment.⁶ 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.⁷ 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).⁸

⁴ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(a) (May 2004). *L.S.*, 59 ECAB 350 (2008).

⁵ Appellant did not dispute the calculation of the overpayment.

⁶ 20 C.F.R. § 10.433(a).

⁷ *Id.* at § 10.435(a).

⁸ *Id.* at § 10.433(a).

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.⁹

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.¹⁰

OWCP requires that recipients of compensation benefits take all reasonable measures to ensure that payments from OWCP are proper.¹¹ 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.¹² 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 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.¹³ 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.¹⁴

The record establishes that, for the overpayment period July 3 to 30, 2011, appellant received \$2,690.34 by direct deposit payment. Appellant was entitled to \$1,729.50 of this amount as she did not return to work until July 21, 2011; the remaining amount of this payment, \$960.84 was an overpayment.

The Board finds that appellant was without fault for the direct deposit of the overpaid amount into her account. The preliminary finding was issued and mailed out on July 27, 2011,

⁹ *Id.* at § 10.433(b).

¹⁰ See *Claude T. Green*, 42 ECAB 174, 278 (1990).

¹¹ *Supra* note 7.

¹² *Tammy Craven*, 57 ECAB 689 (2006).

¹³ *J.W.*, Docket No. 10-1271 (issued February 3, 2011).

¹⁴ *Supra* note 8.

while the actual electronic deposit took place merely three days later. It was unclear from the record whether appellant actually received the July 27, 2011 letter before the deposit occurred. 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 July 30, 2011 deposit was incorrect at the time that she accepted it.¹⁵

A finding of no fault does not mean, however, that the claimant may keep the \$960.84 amount of the overpayment, only that OWCP must consider eligibility for waiver for this period, and the case must be remanded for OWCP to determine whether she is entitled to waiver for this portion of the overpayment. The Board notes that appellant did complete an overpayment questionnaire on August 18, 2011 and did submit supporting documentation of both income and expenses. The Board will set aside OWCP's November 1, 2011 decision on the issue of fault and remand the case for consideration of waiver based on appellant's current financial circumstances.¹⁶

CONCLUSION

The Board finds that OWCP properly determined that appellant received \$960.84 in overpayment. The Board finds that appellant was not at fault in the receipt of the overpayment. The case is remanded to OWCP for further development in order to determine whether appellant is entitled to waiver.

¹⁵ On appeal, appellant argued that the November 1, 2011 decision erroneously stated that she had not provided information to refute the finding of fault in the July 27, 2011 preliminary decision, while the preliminary decision in fact found that she was without fault. The Board agrees. The Board has previously held that, if OWCP informs appellant in a preliminary determination that she was without fault, it is error for OWCP to subsequently change the finding without providing her an opportunity to respond. *See M.A.*, Docket No. 08-489 (issued July 22, 2008). However, this issue is rendered moot as the Board has determined that she was without fault in creation of the overpayment on other grounds.

¹⁶ *C.K.*, Docket No. 12-746 (issued May 1, 2012); *see also Ronald E. Smith*, 36 ECAB 652 (1985).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' November 1, 2011 decision is affirmed in part and set side and remanded in part for further action consistent with this decision.

Issued: September 7, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board