

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

K.D., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Buffalo, NY, Employer**

)
)
)
)
)
)
)
)
)
)
)
)

**Docket No. 13-451
Issued: April 12, 2013**

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 December 13, 2012 appellant filed a timely appeal from a November 13, 2012 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 overpayment issue of this case.²

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received an overpayment in the amount of \$12,859.60 for the period May 6 to September 22, 2012; and (2) whether she was at fault in the creation of the overpayment and therefore not entitled to waiver of recovery.

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that appellant submitted additional evidence following the November 13, 2012 decision. Since 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 that evidence to OWCP along with a request for reconsideration.

FACTUAL HISTORY

OWCP accepted that on October 31, 2006 appellant, then a 58-year-old postal clerk, sustained injuries to her left arm, back, and buttocks when she sat on a chair and it collapsed. She stopped work on November 1, 2006 and returned to modified duty on December 18, 2006. Appellant stopped work again on April 17, 2009 and filed a recurrence claim. In a decision dated July 17, 2009, OWCP accepted her recurrence claim and paid wage-loss compensation for total disability beginning April 17, 2009. Appellant was placed on the periodic rolls. She submitted a direct deposit sign-up form.

OWCP referred appellant, along with a statement of accepted facts, to Dr. Arlen Snyder, a Board-certified orthopedic surgeon, for a second opinion examination. In a March 1, 2012 report, Dr. Snyder reviewed appellant's history, including the statement of accepted facts and conducted an examination. He opined that her accepted employment injuries had resolved and that she was capable of returning to full duty.

On April 3, 2012 OWCP proposed to terminate appellant's medical and wage-loss compensation benefits based on Dr. Arlen's March 1, 2012 second opinion report which found that her employment-related conditions had resolved and that she no longer had residuals of her accepted employment conditions.

By decision dated May 4, 2012, OWCP finalized the termination of appellant's wage-loss compensation benefits effective May 6, 2012.

Appellant continued to receive disability compensation by direct deposit every 28 days until September 22, 2012. She received a net compensation of \$2,571.92 for each of the following 28-day periods: May 6 to June 2; June 3 to 30; July 1 to 28; July 29 to August 25 and August 26 to September 22, 2012.

An overpayment worksheet dated October 1, 2012 indicated that appellant received compensation payments for 140 days of time lost which totaled \$12,859.60. It noted that her medical and wage-loss compensation benefits were terminated on May 6, 2012.

On October 12, 2012 OWCP issued a preliminary decision that appellant received an overpayment in the amount of \$12,859.60 because she received compensation for total disability from May 6 to September 22, 2012 after her wage-loss compensation benefits were terminated effective May 6, 2012. It found that she was at fault in creating the overpayment because she accepted payments 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.

On October 12, 2012 appellant informed OWCP *via* telephone that she retired as of May 2012 but had received five extra payments.

In a November 13, 2012 decision, OWCP finalized the overpayment of \$12,859.60 and found 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.

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.³ 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 or if she has been paid a lump sum in commutation of installment payments until the expiration of the period during which the installment payments would have continued, the employee may not receive salary, pay, or remuneration of any type from the United States, except in limited specific instances.⁴

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment in compensation in the amount of \$12,859.60 for the period May 6 to September 22, 2012. The record reflects that OWCP terminated appellant's wage-loss compensation benefits effective May 6, 2012 but appellant continued to receive disability compensation until September 22, 2012.

The record reveals that an amount of \$2,571.92 in compensation benefits was electronically deposited into appellant's bank account every 28 days from May 6 to September 22, 2012 for a period of 140 days even though her compensation benefits were terminated effective May 6, 2012. As appellant's compensation checks ran from May 6 to September 22, 2012 and her benefits were terminated as of May 6, 2012, the entire amount of compensation appellant received during this period, \$12,859.60, was an overpayment of compensation. The Board finds that appellant received an overpayment of compensation in the amount of \$12,589.86 for the period May 6 to September 22, 2012.⁵

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of FECA provides that, when an overpayment of compensation has been made because of an error of fact or law, adjustment shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is when an 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.⁶ No waiver of payment is possible if appellant is with fault in helping to create the overpayment.⁷

³ 5 U.S.C. § 8102.

⁴ *Id.* at § 8116(a).

⁵ *See M.G.*, Docket No. 08-1942 (issued September 3, 2009).

⁶ 5 U.S.C. § 8129(b).

⁷ *Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

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.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 he or she is being overpaid.⁹

ANALYSIS -- ISSUE 2

OWCP determined that appellant was at fault in the creation of the overpayment because she accepted payments that she knew or should have known to be incorrect. The Board finds, however, that OWCP failed to establish that, at the time appellant accepted the initial payment of compensation, she knew or should have known the payments were incorrect.

In cases where a claimant receives compensation through direct deposit, the Board has held that OWCP must establish that at the time a claimant received the direct deposit in question that she knew or should have known that the payment was incorrect.¹⁰ The Board has held that an employee who receives payments from OWCP in the form of a direct deposit might not be at fault for the first incorrect deposit into her account since the acceptance of the overpayment, at the time of receipt of the direct deposit, lacks the requisite knowledge.¹¹ 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 the claimant lacks the requisite knowledge at the time of the first incorrect payment.¹² Whether or not OWCP determines that an individual is at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment.¹³ It is not appropriate, however, to make a finding that a claimant has accepted an overpayment *via* direct deposit until such time as a reasonable person would have been aware

⁸ 20 C.F.R. § 10.433(a).

⁹ *B.H.*, Docket No. 09-292 (issued September 1, 2009).

¹⁰ *C.K.*, Docket No. 12-746 (issued May 1, 2012).

¹¹ *Tammy Craven*, 57 ECAB 589 (2006); *see also George A. Hirsch*, 47 ECAB 520 (1996).

¹² *Id.*

¹³ *Id.*

that this overpayment had occurred. This awareness could be established either through documentation such as a bank statement or notification from OWCP or where a reasonable period of time has passed during which a claimant could have reviewed independent confirmation of the incorrect payment.¹⁴

The record establishes that appellant received compensation by direct deposit every 28 days from May 6 to September 22, 2012. The evidence of record does not establish that on the date of the first direct deposit of compensation after her benefits were terminated effective May 6, 2012 that appellant knew or should have known that she was accepting a direct deposit to which she was not entitled. The record does not contain any documentation or other evidence to demonstrate that appellant had clear knowledge at the time of the initial direct deposit for the period May 6 to June 2, 2012 that the payment was incorrect or that a reasonable period of time passed during which she could have reviewed bank statements or been informed of the incorrect payment. Thus, the Board finds that, when the initial June 2, 2012 direct deposit was made, appellant had no knowledge that this direct deposit was incorrect. Appellant, therefore, cannot be found at fault in the acceptance of the initial June 2, 2012 direct deposit.

Even though OWCP may have been negligent in making incorrect payments, this does not excuse a claimant from accepting payments she knew or should have known to be incorrect.¹⁵ In cases involving a series of incorrect payments, where the requisite knowledge is established by documentation from OWCP or simply with the passage of time and opportunity for discovery, the claimant will be at fault for accepting the payments subsequently deposited.¹⁶ Thus, by the time of the second payment dated June 30, 2012 appellant should have known that she was no longer entitled to compensation and should have taken further steps to prevent issuance of another payment. Accordingly, the Board will affirm the finding of fault for the remaining June 3 to September 22, 2012 period of overpayment.

The Board finds that this case is not in posture for decision regarding the issue of waiver of the overpayment for the initial direct deposit on June 2, 2012. The Board will set aside the November 13, 2012 decision regarding the issue of fault as to the initial June 2, 2012 direct deposit and will remand the case for OWCP to determine whether appellant is entitled to waiver for the direct deposit of compensation covering the period May 6 to June 2, 2012.

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation for the period May 6 to September 22, 2012. The November 13, 2012 decision is set aside and remanded to OWCP regarding the issue of waiver of the overpayment for the period May 6 to June 2, 2012.

¹⁴ See *K.H.*, Docket No. 06-191 (issued October 30, 2006).

¹⁵ *William E. McCarty*, 54 ECAB 525 (2003).

¹⁶ *J.W.*, Docket No. 10-1271 (issued February 3, 2011); see also *Karen K. Dixon*, 56 ECAB 145 (2004).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 13, 2012 is affirmed in part or set aside in part. The case is remanded for further action consistent with this decision.

Issued: April 12, 2013
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