

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

J.S., Appellant

and

**U.S. POSTAL SERVICE, FORT DEARBORN
POST OFFICE, Chicago, IL, Employer**

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**Docket No. 13-909
Issued: August 7, 2013**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 5, 2011 appellant filed a timely appeal from the February 21, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP), which found her at fault in creating 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 case.

ISSUE

The issue is whether appellant was at fault in creating a \$775.23 overpayment of compensation.

FACTUAL HISTORY

On February 7, 2011 appellant, a 56-year-old city regular letter carrier, sustained a traumatic injury in the performance of duty when she slipped and fell on an ice-covered driveway at the postal garage. She stopped work that day. OWCP accepted her claim for sprain

¹ 5 U.S.C. § 8101 *et seq.*

of the right wrist; sprain of the left knee; sprain of the left shoulder; full-thickness tear of the supraspinatus tendon in her right rotator cuff; and a tear of the right triangular fibrocartilage complex in her right wrist.

As no work was available within her medical restrictions, appellant received compensation for temporary total disability on the periodic rolls. She received payment through direct deposit.

On December 1, 2012 appellant accepted a part-time modified assignment beginning December 8, 2012. OWCP received notice of this assignment on December 7, 2012. Appellant wrote a letter on December 7, 2012 notifying OWCP that she was returning to work for 20 hours a week. "My work schedule is from 8 a.m. -- 12 noon." On December 10, 2012 the employing establishment advised that appellant had returned to work on a full-time basis beginning December 8, 2012. Appellant filed a claim for compensation for intermittent leave without pay from December 18 to 26, 2012. The attached time analysis form, signed by an employing establishment official, listed that appellant worked four hours a day during this period.

The record reflects that a periodic payment of compensation, covering temporary total disability from November 18 to December 15 2012, was direct deposited to appellant's account on December 15, 2012.

On January 16, 2013 OWCP made a preliminary determination that appellant received a \$775.23 overpayment of compensation because she had returned to part-time limited duty on December 8, 2012. It found she was without fault in creating the overpayment: "It is recommended that the claimant be found without fault in the creation of the overpayment because the claimant was not aware nor could the claimant reasonably have been expected to know that OWCP had paid compensation incorrectly." Showing how it calculated the amount of the overpayment, OWCP divided by 28 the net compensation appellant received for the 28-day period, then multiplied the daily compensation rate by 8, or the number of days appellant was overpaid from December 8 to 15, 2012.

Appellant advised OWCP that she had returned to work for four hours a day beginning December 10, 2012. A time analysis form dated February 1, 2013 again verified that she was working only four hours a day.

In a final decision dated February 21, 2013, OWCP found that appellant received an overpayment of \$775.23 from December 8 to 15, 2012. In the attached memorandum, it related that the preliminary determination had found appellant at fault: "The claimant was found with fault in the creation of the overpayment because they accepted a payment that they knew or reasonably should have known was incorrect." As appellant did not respond to the preliminary determination, OWCP made a final determination that the finding of overpayment and fault were correct. It asked appellant to forward a check for the full amount within 30 days.

On appeal, appellant argues that she was without fault because she gave OWCP proper notice and it had ample time to make whatever adjustments were necessary prior to her receiving the funds through direct deposit.

LEGAL PRECEDENT

FECA places limitations on the right to receive compensation. While an employee is receiving compensation, he or she may not receive salary, pay or remuneration of any type from the United States, with certain exceptions.² It is therefore well established that an employee is not entitled to compensation for temporary total disability after returning to work.³

When an overpayment of compensation has been made 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 an individual is entitled. Section 8129(b) describes the only exception:

“Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of [FECA] or would be against equity and good conscience.”⁴

Thus, 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 receives 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 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.⁵

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.⁶

ANALYSIS

The fact of overpayment is not in dispute. Appellant returned to work on December 8 or 10, 2012 but received compensation for temporary total disability through December 15, 2012.

² 5 U.S.C. § 8116(a).

³ *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).

⁴ 5 U.S.C. § 8129(b).

⁵ 20 C.F.R. § 10.433(a).

⁶ *Id.* at § 10.433(b).

As she was not in fact totally disabled for work through December 15, 2012, an overpayment of compensation arose. The Board will therefore affirm OWCP's February 21, 2013 decision on the issue of fact of overpayment.

The amount of the overpayment, however, is not established. The offer appellant accepted shows her work schedule to be from 8:00 a.m. to 12:00 p.m., or four hours a day. Her December 7, 2012 letter to OWCP confirmed this part-time schedule, though she explained that she was actually returning to work on December 10, 2012 not on December 8, 2012. Appellant's part-time schedule is further confirmed by time analysis forms, signed by an agency official, showing that she worked four hours a day. After OWCP issued its preliminary determination of overpayment, appellant called to advise that she had returned to work only part time.

The only contrary evidence is a report of telephone contact from the employing establishment indicating that appellant had returned to work on a full-time basis beginning December 8, 2012.

The Board finds that this case is not in posture for decision on the amount of the overpayment. Further development of the factual evidence is indicated. OWCP should ask the employing establishment for documentary evidence of appellant's schedule and of her actual return to work date. It calculated the amount of the overpayment assuming that she had returned to full-time work with no wage loss beginning December 8, 2012, but the existing record is not sufficient to establish this date as factual. The Board will therefore set aside OWCP's February 21, 2013 decision on the issue of amount of overpayment.

In its January 16, 2013 preliminary determination, OWCP clearly found appellant to be without fault in creating the overpayment. It recommended that she be found without fault in the creation of the overpayment because she was not aware nor could she reasonably have been expected to know that OWCP had paid compensation incorrectly.

In its February 21, 2013 final decision, however, OWCP made an inconsistent finding with respect to fault. Although it first found that the preliminary determination of "without fault" was correct, the claims examiner then determined appellant to be at fault.⁷ The attached memorandum then incorrectly asserted that the preliminary determination had found appellant at fault because she accepted a payment that she knew or reasonably should have known was incorrect. OWCP proceeded to find appellant at fault on those grounds.

Having given appellant notice that she was without fault in creating the overpayment, OWCP may not, in its final decision, change its finding to "at fault" without violating appellant's right to due process. Such an action denies the employee an opportunity to submit evidence and be heard on the issue.⁸ The Board will therefore set aside OWCP's February 21, 2013 decision on the issue of fault. The case is remanded for an appropriate determination as to whether appellant was at fault in the creation of the overpayment, and if not, whether she is entitled to

⁷ The cover letter found appellant to be without fault but is jumbled with incomplete sentences and gives the appearance of an edited but unfinished document.

⁸ *K.W.*, Docket 10-1511 (issued April 6, 2011).

waiver of recovery of the overpayment. In *Tammy Craven*,⁹ the Board explained that an employee who receives payments from OWCP in the form of a direct deposit may not be at fault for the first incorrect deposit into her account because she may lack the requisite knowledge at the time of acceptance, which is necessarily the time of deposit.

CONCLUSION

The Board finds that appellant received an overpayment of compensation, but the amount of the overpayment is not yet established. Further development is warranted. The Board also finds that this case is not in posture for decision on the issue of fault. The Board will remand the case for an appropriate preliminary determination.

ORDER

IT IS HEREBY ORDERED THAT the February 21, 2013 decision of the Office of Workers' Compensation Programs is affirmed on the issue of fact of overpayment and is otherwise set aside. The case is remanded for further action.

Issued: August 7, 2013
Washington, DC

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

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

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

⁹ Docket No. 05-249 (issued July 24, 2006) (order granting petition for reconsideration and reaffirming prior decision).