

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

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V.A., Appellant )

and )

U.S. POSTAL SERVICE, POST OFFICE, )  
Fredericksburg, VA, Employer )

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**Docket No. 13-1433  
Issued: December 13, 2013**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On June 3, 2013 appellant filed a timely appeal of a May 7, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (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 OWCP properly determined that appellant received an overpayment of compensation in the amount of \$655.39 from September 17 through 22, 2012; and (2) whether OWCP properly found that appellant was at fault in the creation of the overpayment and therefore not entitled to waiver of the recovery.

On appeal, appellant contends that she was not at fault in the creation of the overpayment and that repayment would cause financial hardship.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On April 1, 2011 appellant, then a 54-year-old letter carrier, filed an occupational disease claim alleging carpal tunnel syndrome in her right hand as a result of lifting, casing and handling heavy parcels. On September 2, 2011 OWCP accepted her claim for tenosynovitis and carpal tunnel syndrome of the right hand. It paid medical and compensation benefits. Appellant's compensation was deposited directly into her bank account.

On September 6, 2012 appellant accepted an offer of modified duty at the employing establishment. She returned to work on September 17, 2012.

On October 5, 2012 OWCP made a preliminary determination that appellant received an overpayment of compensation in the amount of \$655.39. Appellant returned to work on September 17, 2012, but received compensation for the period September 17 through 22, 2012. She received compensation every 28 days in the gross amount of \$3,326.55, or \$109.23 day. As appellant was overpaid for six days, she received an overpayment of compensation in the amount of \$655.39. It also found that she was at fault as she accepted compensation to which she knew she was not entitled.

The record contains a September 17, 2012 Compensation Termination fiscal form, which noted that appellant had a 28-day gross payment of amount of \$3,326.55. She received payment for the period September 17 through 22, 2012 which created an overpayment in the amount of \$655.39.

On October 19, 2012 appellant requested a prerecoupment hearing before an OWCP hearing representative. She contended that the overpayment arose through no fault of her own and requested waiver. Appellant stated that the employing establishment ordered her back to work knowing that she was set up on the periodic rolls and that this would cause an overpayment. She stated that she told her employer and OWCP that this would result in an overpayment.

At the hearing held on February 12, 2013, appellant did not dispute the overpayment, but contended that she was not at fault in its creation. She testified that in a conference call she told representatives from both the employing establishment and OWCP that, if she returned to work on September 17, 2012, an overpayment would occur. Appellant noted that she had not worked since November 19, 2012 because her doctor took her off work. She filed a new occupational disease claim and had used all of her leave. Appellant separated from her husband and did not receive any support and stayed with her daughter. She listed her monthly expenses. The hearing representative gave appellant instructions with regard to completing the financial questionnaire. By letter dated February 28, 2013, appellant submitted financial information. She reiterated that she was not at fault in the creation of the overpayment.

By decision dated May 7, 2013, the hearing representative finalized the overpayment in the amount of \$655.39. He denied waiver of the overpayment as he found that appellant was not without fault in the creation of the overpayment. The hearing representative found that she was informed to return any compensation after returning to full-time work.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8102(a) of FECA 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.<sup>2</sup> FECA, however, also places limitations on an employee's right to receive compensation benefits. Section 8116 provides that, while an employee is receiving benefits, he or she may not receive salary, pay or remuneration of any type from the United States, except in limited circumstances.<sup>3</sup> OWCP regulations further state that compensation for wage loss due to disability is available only for the period where an employee's work-related medical condition prevents him or her from earning the wages earned before the work-related injury.<sup>4</sup> A claimant is not entitled to receive temporary total disability and actual earnings for the same period.<sup>5</sup> OWCP procedures provide that an overpayment in compensation is created when a claimant returns to work and has earnings but continues to receive wage-loss compensation.<sup>6</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that appellant received an overpayment of compensation in the amount of \$655.39. The record reflects that she returned to full-time work at the employing establishment on September 17, 2012, but she received wage-loss compensation benefits for total disability through September 22, 2012. OWCP determined that the amount of compensation appellant received for the period September 17 through 22, 2012 totaled \$655.39. Because appellant received regular full-time wages from the employing establishment for this period, the Board finds that her receipt of dual payments created an overpayment of compensation. She did not contest the amount or period of the overpayment. The Board finds that OWCP properly determined that appellant received an overpayment in the amount of \$655.39 for the period September 17 through 22, 2012.

### **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.<sup>7</sup> No waiver of payment is possible if appellant is with fault in helping to create the overpayment.<sup>8</sup> In

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<sup>2</sup> 5 U.S.C. § 8102(a).

<sup>3</sup> *Id.* at § 8116(a).

<sup>4</sup> 20 C.F.R. § 10.500(a).

<sup>5</sup> *See Daniel Renard*, 51 ECAB 466, 469 (2000).

<sup>6</sup> *See L.S.*, 59 ECAB 350 (2008); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(a) (September 2010).

<sup>7</sup> 5 U.S.C. § 8129(b).

<sup>8</sup> *See Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

determining whether an individual is with fault, section 10.433(a) of OWCP's regulations provide that 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.<sup>9</sup>

### 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 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.<sup>10</sup> The Board has held 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 his or her account since the acceptance of the overpayment, at the time of receipt of the direct deposit, lacks the requisite knowledge.<sup>11</sup> Because the 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.<sup>12</sup> 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.<sup>13</sup> It is not appropriate, however, to make a finding that a claimant has accepted an overpayment by direct deposit until such time as a reasonable person would have been aware that this overpayment had occurred. This awareness could be established either through documentations 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.<sup>14</sup>

The Board finds that appellant was not at fault in the creation of the overpayment. Appellant notified OWCP that an overpayment may occur. She returned to work on September 17, 2012 and the overpayment was created during the period September 17 through 22, 2012. Appellant's check was deposited electronically into her account. Accordingly, OWCP improperly determined that she was at fault in the creation of the overpayment.

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<sup>9</sup> 20 C.F.R. § 10.433(a).

<sup>10</sup> See *C.K.*, Docket No. 12-746 (issued May 1, 2012).

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

<sup>12</sup> *J.S.*, Docket No. 12-1707 (issued June 10, 2013).

<sup>13</sup> *Id.*, see also *K.D.*, Docket No. 13-451 (issued April 12, 2013).

<sup>14</sup> See *K.H.*, Docket No. 13-451 (issued April 12, 2013).

Because OWCP's hearing representative found appellant at fault, waiver of recovery of the overpayment was not considered. As the Board finds that appellant was not at fault as to the creation of the \$655.39 overpayment, the case will be remanded to OWCP for consideration of waiver.

**CONCLUSION**

Appellant received an overpayment of \$655.39 for the period September 17 to 22, 2012 for which she was not at fault.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated May 7, 2013 is affirmed in part and set aside as to the issue of fault and remanded for consideration of waiver.

Issued: December 13, 2013  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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