

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

N.C., Appellant)

and)

**DEPARTMENT OF HOMELAND SECURITY,
TRANSPORTATION SECURITY
ADMINISTRATION, JFK INTERNATIONAL
AIRPORT, Jamaica, NY, Employer**)

**Docket No. 12-740
Issued: January 22, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 15, 2012 appellant filed a timely appeal from a December 9, 2011 overpayment 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 the case.

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$1,949.74 for the period April 24 through May 21, 2011; and (2) whether OWCP properly determined that she was at fault in creating the overpayment, thereby precluding waiver of recovery of the overpayment.

¹ 5 U.S.C. §§ 8101-8193.

On appeal, appellant contends that on February 8, 2012, the claims examiner called her to inform her that deductions would be taken from her continuing compensation check. At that time, she informed the claims examiner she never received the December 9, 2011 overpayment decision. Appellant argues that she was not at fault with regards to the overpayment. She also contends that the claims examiner was rude.

FACTUAL HISTORY

On November 11, 2009 appellant, then a 31-year-old transportation security officer, filed a traumatic injury claim alleging that, while she was entering the metal detector, the black mat slid beneath her and she fell to the floor and sustained injuries to her lower back, wrists and knees. On January 28, 2010 OWCP accepted her claim for sprain of lumbosacral (joint) (ligament); unspecified internal derangement of knee (bilateral); and other disorders of bilateral joint, forearm. It paid wage-loss compensation and medical benefits. On October 6, 2010 OWCP accepted that appellant sustained a recurrence of disability on June 17, 2010. On January 28, 2011 it accepted her claim for the additional condition of tear of medial meniscus of knee, current right anterior cruciate ligament (ACL).

On May 11, 2011 appellant filed a claim for compensation for the period April 24 through May 7, 2011. On May 24, 2011 she filed a claim for compensation for the period May 8 through 21, 2011. On May 25, 2011 appellant spoke with OWCP and noted that she was having financial difficulties and asked for an immediate payment. On May 26, 2011 OWCP entered two electronic payments in the amounts of \$974.87 each for the periods April 24 through May 7, 2011 and May 8 through 21, 2011. These were paid on May 27, 2011.

Appellant continued filing claims for compensation and deposits continued to be made into her checking account by electronic check from June 7 through September 1, 2011.

On September 1, 2011 OWCP also made a duplicate payment to appellant's checking account for the period April 24 through May 21 in the amount of \$1,949.74.

On September 2, 2011 OWCP made a preliminary determination that appellant was overpaid in the amount of \$1,949.74 as she received payment twice for the period April 24 through May 21, 2011. It made a preliminary determination that she was at fault in the creation of the overpayment because she received two payments for the same period. Appellant was sent forms to contest the overpayment and fault findings.

On September 16, 2011 appellant requested a telephone conference before an OWCP hearing representative. She also stated that she believed recovery of the overpayment should be waived.

By letter dated October 26, 2011, a senior claims examiner indicated that when he attempted to schedule the conference appellant argued that she was not at fault in the creation of the overpayment. He stated that he attempted to inform her that he agreed that OWCP erred when it found that she was at fault in the creation of the overpayment, but that he was not able to fully explain during the telephone call that she did keep both payments that were sent by

electronic funds, and that OWCP is entitled to presume receipt and acceptance of a payment once the recipient has had an opportunity to receive a statement from their financial institution.

On December 9, 2011 OWCP finalized the finding that appellant received an overpayment of compensation in the amount of \$1,949.74, for which she was at fault, because she received compensation twice for the period April 24 through May 21, 2011.

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 his duty.² When a claimant receives a duplicate compensation payment for a period that he or she has already received compensation for wage loss, an overpayment in compensation is created.³

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received a duplicate payment for the period April 24 through May 21, 2011 thereby creating an overpayment of compensation. On May 26, 2011 OWCP entered two electronic payments in the amount of \$974.87 each for the periods April 24 through May 7, 2011 and May 8 through 21, 2011. On August 2, 2011 an electronic payment was made in the amount of \$1,949.74 for the period April 24 through May 21, 2011. Accordingly, appellant received duplicate payments to create an overpayment of compensation in the amount of \$1,949.74.

LEGAL PRECEDENT -- ISSUE 2

Under OWCP regulations, waiver of 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.⁴ 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.⁵ 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

² 5 U.S.C. § 8102(a).

³ *C.W.*, Docket No. 10-263 (issued September 14, 2010).

⁴ 20 C.F.R. § 10.433(a).

⁵ *Id.* at § 10.435(a).

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 (the provision applies only to the overpaid individual).⁶

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.⁷

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. In cases where a claimant receives compensation through direct deposit, however, OWCP must establish that at the time a claimant received the direct deposit in question she knew or should have known that the payment was incorrect.⁸ The Board has held that an employee who receives payments from OWCP in the form of a direct deposit might not be at fault at the first time an incorrect payment is deposited into her account since the acceptance of the overpayment, at the time of receipt of the direct deposit, lacks the requisite knowledge.⁹ OWCP's regulations, effective August 29, 2011, place claimants on notice that good faith and exercise of a high degree of care in regards to receipt of benefits require review of electronic bank statements. This regulation does not diminish the effect of the Board's previous decisions, such as in *Tammy Craven*,¹⁰ that the deposit of compensation into appellant's bank account marks the moment that the claimant gains control of the funds from the U.S. Treasury and the overpayment was created. 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.

In this case, appellant received one payment electronically for the period April 24 through May 21, 2011 in the amount of \$1,949.74. This payment was a duplicate of two payments previously received in the amount of \$974.87 each. Although appellant 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 electronic deposit that the payment was incorrect. At the time the overpayment was deposited in appellant's checking account on September 1, 2011, appellant was continuing to receive periodic payments from OWCP every 28 days. In the two-month period prior to the September 1, 2011 electronic check that resulted in the overpayment, she had received six other checks for wage-loss compensation

⁶ *Id.* at § 19.33(a).

⁷ *Id.* at § 10.433(b).

⁸ *C.K.*, Docket No. 12-746 (issued May 1, 2012).

⁹ *Tammy Craven*, 57 ECAB 589 (2006); *see also George A. Hirsch*, 47 ECAB 520 (1996).

¹⁰ *Id.*

from OWCP. Therefore, OWCP has not presented sufficient evidence to establish that appellant accepted a payment which she knew or should have known to be incorrect.

Accordingly, the Board finds that OWCP improperly determined that appellant was at fault in the creation of the overpayment in the amount of \$1,949.74. The Board will set aside OWCP's December 9, 2011 decision on the issues of fault and recovery with respect to the electronic payment of \$1,949.74 for the period April 24 through May 21, 2011 and remand the case for consideration of whether waiver of the recovery of overpayment is warranted.

CONCLUSION

The Board finds that appellant received an overpayment in the amount of \$1,949.74 for the period April 24 through May 21, 2011. The Board further finds that OWCP improperly found that appellant was at fault in the creation of the overpayment and the case will be remanded for consideration of whether waiver of the recovery of overpayment is warranted.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 9, 2011 is affirmed in part and set aside in part. The case is remanded for further consideration consistent with this decision.

Issued: January 22, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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