

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

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**J.S., Appellant**

**and**

**DEPARTMENT OF THE AIR FORCE, AIR  
COMBAT COMMAND, Langley AFB, VA,  
Employer**

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**Docket No. 12-1707  
Issued: June 10, 2013**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

RICHARD J. DASCHBACH, Chief Judge  
ALEC J. KOROMILAS, Alternate Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On August 13, 2012 appellant filed a timely appeal of a June 15, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) which found an overpayment of compensation. 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.<sup>2</sup>

**ISSUES**

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$8,460.55 for the period July 17 through October 22, 2011; and (2) whether it properly found that appellant was at fault in the creation of the overpayment and not entitled to waiver of recovery of the overpayment.

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

<sup>2</sup> The Board notes that, following the issuance of the June 15, 2012 OWCP decision, appellant submitted new evidence. The Board is precluded from reviewing evidence which was not before OWCP at the time it issued its final decision. See 20 C.F.R. § 501.2(c)(1).

On appeal appellant contends that she was not at fault in the creation of the overpayment as she was not aware of the direct deposit payments due to her automated banking system.

### **FACTUAL HISTORY**

OWCP accepted that appellant, then a 32-year-old joint basing coordinator, sustained cervical brachial neuritis or radiculitis and aggravation of cervical disc disease at C5-6 in the performance of duty on August 10, 2009. It paid her compensation for total disability by direct deposit and placed her on the periodic rolls effective February 14, 2010.

In a March 11, 2010 letter, OWCP informed appellant about her entitlement to compensation benefits and her responsibility to return to work. Appellant was advised that compensation benefits were only payable when she could not perform her job duties due to her injury and to immediately notify OWCP when she returned to work. OWCP explained that she was to immediately return any payments that she received for any portion of the period after she returned to work to prevent an overpayment of compensation.

Appellant underwent cervical spine surgery on June 24, 2010. She returned to work in a full-time, full-duty capacity at a new employing establishment effective July 17, 2011. Despite her return to full-time employment, appellant received disability compensation by direct deposit payments in the amount of \$2,417.30 every 28 days through October 22, 2011. The dates of the checks were: July 30, 2011 for the period July 3 through 30, 2011; August 27, 2011 for the period July 31 through August 27, 2011; September 24, 2011 for the period August 28 through September 24, 2011; and October 22, 2011 for the period September 25 through October 22, 2011.

On February 24, 2012 OWCP notified appellant of its preliminary determination that she received an overpayment of compensation in the amount of \$8,460.55 because she returned to work at full salary while on the periodic rolls.<sup>3</sup> It notified her of its preliminary determination that she was at fault in the creation of the overpayment because she accepted payments that she knew or reasonably should have known to be incorrect. Appellant was informed of her options if she wished to challenge the fact of overpayment or to request waiver of recovery of the overpayment. She was advised to submit, within 30 days, financial information by completing an overpayment recovery questionnaire (Form OWCP-20).

By decision dated June 15, 2012, OWCP finalized its determination that appellant received an overpayment of compensation in the amount of \$8,460.55 from July 17 through October 22, 2011 because she received wage-loss compensation after returning to work at full salary. It determined that she was at fault in the creation of the overpayment because she accepted a payment which she knew or reasonably should have known to be incorrect and, therefore, was not entitled to waiver of recovery.

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<sup>3</sup> OWCP calculated that appellant received \$2,417.30 every 28 days for 98 days for the period July 17 through October 22, 2011:  $(\$2,417.30/28) \times 98 = \$8,460.55$ .

### **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>4</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>5</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>6</sup> A claimant is not entitled to receive temporary total disability and actual earnings for the same period.<sup>7</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>8</sup>

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

The Board finds that appellant received an overpayment of compensation in the amount of \$8,460.55. The record reflects that she returned to full-time work at a new employing establishment on July 17, 2011; but she continued to receive wage-loss compensation benefits for total disability until October 22, 2011. OWCP determined that the amount of compensation appellant received for the period July 17 through October 22, 2011 totaled \$8,460.55. Because appellant received regular full-time wages from the employing establishment from July 17 through October 22, 2011, she was not entitled to disability compensation from OWCP for the same period. The Board finds that her receipt of dual payments created an overpayment of compensation. There is no contrary evidence nor does appellant contest the amount and period of the overpayment. The Board finds that OWCP properly determined that she received an overpayment in the amount of \$8,460.55 for the period July 17 through October 22, 2011.

### **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

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<sup>4</sup> 5 U.S.C. § 8102(a).

<sup>5</sup> *Id.* at § 8116(a).

<sup>6</sup> 20 C.F.R. § 10.500(a).

<sup>7</sup> *See Daniel Renard*, 51 ECAB 466, 469 (2000).

<sup>8</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).

would defeat the purpose of FECA or be against equity and good conscience.<sup>9</sup> No waiver of payment is possible if appellant is with fault in helping to create the overpayment.<sup>10</sup>

In determining whether an individual is with fault, section 10.433(a) of OWCP's regulations provide in relevant part 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>11</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 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.<sup>12</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 her account since the acceptance of the overpayment, at the time of receipt of the direct deposit, lacks the requisite knowledge.<sup>13</sup> 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.<sup>14</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>15</sup> 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 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.<sup>16</sup>

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<sup>9</sup> 5 U.S.C. § 8129(b).

<sup>10</sup> See *Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

<sup>11</sup> 20 C.F.R. § 10.433(a).

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

<sup>13</sup> See *Tammy Craven*, 57 ECAB 589 (2006); see also *George A. Hirsch*, 47 ECAB 520 (1996).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*; see also *K.D.*, Docket No. 13-451 (issued April 12, 2013).

<sup>16</sup> See *K.H.*, Docket No. 06-191 (issued October 30, 2006).

On appeal appellant contends that she was not at fault in the creation of the overpayment as she was not aware of the direct deposit payments due to her automated banking system. The record establishes that appellant received compensation by direct deposit payments every 28 days from July 17 to October 22, 2011. The evidence of record does not establish that, as of the first direct deposit of compensation, after appellant returned to work on July 17, 2011, she 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 July 17 through 30, 2011 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. The Board finds that, when the initial July 30, 2011 direct deposit was made, appellant had no knowledge that this direct deposit was incorrect. Therefore, she is not at fault in the acceptance of the initial July 30, 2011 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.<sup>17</sup> 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.<sup>18</sup> By the time of the second payment dated August 27, 2011, appellant knew or should have known that she was no longer entitled to compensation. She had returned to work on July 17, 2011, and could have taken further steps to prevent issuance of further payments. Accordingly, the Board will affirm the finding of fault for the remaining July 31 through October 22, 2011 period of overpayment.

The Board finds that this case is not in posture for decision regarding the issue of waiver of recovery of the overpayment for the initial direct deposit on July 30, 2011. The Board will set aside the June 15, 2012 decision regarding the issue of fault as to the initial July 30, 2011 direct deposit and will remand the case for OWCP to determine whether appellant is entitled to waiver of recovery for the direct deposit of compensation covering the period July 17 through 30, 2011.

### **CONCLUSION**

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$8,460.55 for the period July 17 through October 22, 2011. The June 15, 2012 decision is set aside in part and remanded to OWCP regarding the issue of waiver of recovery of the overpayment for the period July 17 through 30, 2011.

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<sup>17</sup> See *William E. McCarty*, 54 ECAB 525 (2003).

<sup>18</sup> See *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 June 15, 2012 decision of the Office of Workers' Compensation Programs is affirmed, in part, and set aside, in part. The case is remanded for further action consistent with this decision of the Board.

Issued: June 10, 2013  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

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

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