

FACTUAL HISTORY

On August 9, 2012 OWCP accepted that appellant, then a 45-year-old postmaster, sustained rotator cuff syndrome of her right shoulder with allied disorders due to the repetitive duties of her job. On November 18, 2012 she was placed on the periodic rolls for five hours per day.

On December 24, 2012 appellant returned to work on a full-time basis in a limited-duty position at the employing establishment.

In a December 28, 2012 letter, OWCP advised appellant that wage-loss compensation would continue to be paid every 28 days (for five hours per day) and that she was required to inform OWCP upon return to any work and to return all payments received for periods after her return to work.

On January 12, 2013 appellant accepted a \$2,032.05 disability compensation check covering the period December 16, 2012 to January 12, 2013. The record contains documents showing that \$1,451.46 of this check was paid for a period after which she had returned to work, *i.e.*, from December 24, 2012 to January 12, 2013.

In a February 15, 2013 letter, OWCP advised appellant that it had made a preliminary determination that she was overpaid in the amount of \$1,451.46 because she returned to work on December 24, 2012, but received compensation for five hours per day until January 12, 2013.² OWCP made a preliminary determination that she was at fault in the creation of the \$1,451.46 overpayment, because she accepted a payment that she knew or reasonably should have known to be incorrect. Appellant was found at fault in the creation of the overpayment because she had been advised by a December 28, 2012 letter, that she was required to inform OWCP upon return to any work and to return all payments received for periods after her return to work. OWCP requested that she complete an attached financial questionnaire even if she was not requesting waiver of recovery of the overpayment.

In a March 4, 2013 letter, appellant asserted that she was not at fault in the creation of the \$1,451.46 overpayment and requested waiver. She contended that the person who entered her time record while she was on leave was not aware of her limited-duty status and therefore entered incorrect information. Appellant stated, "I tried to correct the error when I came back on Saturday, December 29, but the time had already been submitted. On Monday, December 31, 2012 I submitted a P.S. Form 2240 to correct my time."

Appellant submitted her limited-duty contract, a document showing the improper entry of her time record and an invoice from the employing establishment for reimbursement of the overpayment. She signed and dated the financial questionnaire but did not complete the portions requesting information about monthly income, monthly expenses and assets.

² Regarding the calculation of the overpayment, OWCP noted, "The claimant was overpaid for the period December 24, 2012 to January 12, 2013. She was therefore overpaid for 20 days of the 28-day period for which she was paid. The overpayment was therefore $\$2,032.05 \times 20/28 = \$1,451.46$."

In a May 14, 2013 decision, OWCP found that appellant received a \$1,451.46 overpayment of compensation because she returned to work on December 24, 2012, but received compensation for five hours a day from December 24, 2012 to January 12, 2013. It also found that she was at fault in the creation of the \$1,451.46 overpayment, because she accepted a payment that she knew or reasonably should have known was incorrect. OWCP noted that appellant argued in a March 4, 2013 letter that she attempted to prevent her receipt of improper compensation payments, but found that she did not submit sufficient evidence to support her claim.³

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.⁴ Section 8129(a) of FECA provides, in pertinent part, “When an overpayment has been made to an individual under this subchapter 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.”⁵

Section 8116(a) of FECA provides that while an employee is receiving compensation or if he or 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 specified instances.⁶

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received a \$1,451.46 overpayment of compensation. OWCP accepted that appellant sustained rotator cuff syndrome of her right shoulder with allied disorders and placed her on the periodic rolls payment system for five hours per day. On December 24, 2012 appellant returned to work on a full-time basis in a limited-duty position. On January 12, 2013 she accepted a disability compensation check covering the period December 16, 2012 to January 12, 2013 and documents show that \$1,451.46 of this check was paid for a period after which she had returned to work, *i.e.*, December 24, 2012 to January 12, 2003. Appellant was not entitled to receive wage-loss compensation for this period and OWCP correctly determined that a \$1,451.46 overpayment occurred as a result.

³ OWCP requested that appellant forward payment of \$200.00 each month to repay the overpayment. As recovery from continuing compensation benefits under FECA is not involved in this case, the Board has no jurisdiction over the amount OWCP determined that appellant should repay each month. *See Levon H. Knight*, 40 ECAB 658, 665 (1989).

⁴ 5 U.S.C. § 8102(a).

⁵ *Id.* at § 8129(a).

⁶ *Id.* at § 8116(a).

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of FECA provides that where 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.⁷ The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): “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 this subchapter or would be against equity and good conscience.”⁸ No waiver of payment is possible if the claimant is not “without fault” in helping to create the overpayment.⁹

In determining whether an individual is not “without fault” or alternatively, “with fault,” section 10.433(a) of Title 20 of the Code of Federal 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....”¹⁰

Section 10.433(c) of OWCP’s regulations provide:

“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.”¹¹

Even though OWCP may have been negligent in continuing to issue appellant checks for temporary total disability after it was informed she had returned to work, this does not excuse appellant’s acceptance of such checks which she knew or should have been expected to know should have been returned to OWCP.¹²

⁷ *Id.* at § 8129(a).

⁸ 5 U.S.C. § 8129(b).

⁹ *Robert W. O’Brien*, 36 ECAB 541, 547 (1985).

¹⁰ 20 C.F.R. § 10.433(a).

¹¹ *Id.* at § 10.433(c).

¹² *Robert W. O’Brien*, 36 ECAB 541, 547 (1985).

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly determined that appellant was at fault in creating the \$1,451.46 overpayment of compensation, thereby precluding waiver of recovery. On January 12, 2013 appellant received \$1,451.46 in compensation that she knew or should have known she could not accept. Appellant was on notice that she could not accept these monies because, in a December 28, 2012 letter, OWCP advised her that she was required to inform it upon return to any work and to return all payments received for periods after her return to work. Documents of record, including a March 4, 2013 letter, support the finding that appellant knew or should have known that she could not receive the \$1,451.46 in compensation monies that she did in fact receive.¹³

On appeal, appellant contends that she contacted the employing establishment to prevent her from receiving compensation payments that were improper. She did not submit sufficient evidence, however, to support this assertion and she did, in fact, accept compensation monies which she knew or should have known to be incorrect.¹⁴

For these reasons, OWCP properly determined that appellant was at fault in creating the \$1,451.46 overpayment of compensation. Therefore, it also correctly found that waiver of recovery of the overpayment was not warranted.

CONCLUSION

The Board finds that OWCP properly determined that appellant received a \$1,451.46 overpayment of compensation. The Board further finds that OWCP properly determined that appellant was at fault in creating the overpayment of compensation and that, therefore, the overpayment was not subject to waiver of recovery.

¹³ Appellant indicated that she became aware on December 29, 2012 of incorrect recordation of her time which would lead to an improper payment.

¹⁴ Appellant indicated that she submitted a P.S. Form 2240 to correct her time, but the record does not contain such a document. She submitted additional evidence after OWCP's May 14, 2013 decision, but the Board cannot consider such evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the May 14, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 19, 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