



reconsideration under 5 U.S.C. § 8128.<sup>2</sup> The Board found that she had submitted medical evidence relevant to the pertinent issue of whether she established interstitial pulmonary fibrosis causally related to factors of her federal employment. The Board remanded the case for OWCP to consider the merits of the claim. The facts and circumstances as set forth in the prior decision are hereby incorporated by reference.

On May 6, 2005 OWCP accepted the claim for pulmonary fibrotic disease and an exacerbation of asthma. It paid appellant compensation for total disability by direct deposit. In March 2008, appellant returned to work for four hours per day. OWCP paid her compensation for partial disability beginning March 16, 2008.

On January 24, 2012 appellant accepted a position as a full-time modified mail processing clerk. By letter dated July 18, 2012, her attorney indicated that she had returned to work in January 2012 but continued to receive compensation for disability. He noted that appellant had tried to contact OWCP about the continued compensation.

On August 13, 2012 OWCP advised appellant of its preliminary determination that she received an overpayment of compensation in the amount of \$11,835.61 from January 24 through July 28, 2012 because she returned to full-time employment but continued to receive compensation for partial disability. It calculated the overpayment by determining the net amount paid to appellant from January 24 to July 28, 2012, \$11,835.61. OWCP further advised her of its preliminary determination that she was at fault in the creation of the overpayment. It requested that appellant complete the enclosed overpayment recovery questionnaire and submit supporting financial documents. Additionally, OWCP notified her that, within 30 days of the date of the letter, she could request a telephone conference, a final decision based on the written evidence or a prerecoupment hearing.

On September 11, 2012 appellant, through her attorney, requested a prerecoupment hearing by telephone. In an overpayment recovery questionnaire, she asserted that the employing establishment informed her that it would notify OWCP of her return to work.

At the telephone hearing, held on December 12, 2012, appellant related that the employing establishment had advised her that it would notify OWCP about her return to full-time employment. When she continued to receive compensation from OWCP, she wrote two letters questioning the continued payments and asking what to do with the money. Appellant noted that she received the payment by direct deposit and spent the money that she initially received because she believed that it was her money. She contacted her attorney for assistance in stopping the compensation payments. Appellant related that she had \$8,000.00 of the compensation erroneously paid by OWCP. She described her income and expenses to the hearing representative. Appellant's attorney argued that she was without fault.

By decision dated March 5, 2013, the hearing representative found that appellant received an overpayment of \$11,835.61 for the period January 24 through July 28, 2012 and that she was

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<sup>2</sup> Docket No. 04-174 (issued April 14, 2004). On November 30, 2001 appellant, then a 49-year-old distribution clerk, filed an occupational disease claim alleging that she sustained interstitial lung disease due to factors of her federal employment.

at fault in the creation of the overpayment. He found that she should repay the \$8,000.00 in her possession and thereafter pay \$200.00 per month as repayment of the overpayment.

**LEGAL PRECEDENT -- ISSUE 1**

Section 8102 of FECA<sup>3</sup> provides that the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.<sup>4</sup>

Section 8116 of FECA defines the limitations on the right to receive compensation benefits. This section of FECA provides that, while an employee is receiving compensation, 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's regulations state in pertinent part: "compensation for wage loss due to disability is available only for any periods during which an employee's work-related medical condition prevents him or her from earning the wages earned before the work-related injury."<sup>6</sup>

**ANALYSIS -- ISSUE 1**

The Board finds that appellant received an overpayment of compensation in the amount of \$11,835.61. Appellant returned to full-time work on January 24, 2012 but continued to receive compensation for partial disability from OWCP through July 28, 2012. As she received regular full-time wages from the employing establishment from January 24 through July 28, 2012, she was not entitled to disability compensation from OWCP for this same period. OWCP determined that the amount of compensation that appellant received for the period totaled \$11,835.61. Appellant has not challenged the amount and period of the overpayment.

**LEGAL PRECEDENT -- ISSUE 2**

Section 8129(b) of FECA<sup>7</sup> provides that "[a]djustment 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." Section 10.433 of OWCP's implementing regulations<sup>8</sup>

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<sup>3</sup> *Supra* note 1.

<sup>4</sup> 5 U.S.C. § 8102.

<sup>5</sup> *Id.* at § 8116(a).

<sup>6</sup> 20 C.F.R. § 10.500.

<sup>7</sup> 5 U.S.C. § 8129(b).

<sup>8</sup> 20 C.F.R. § 10.433.

provide that in determining whether a claimant is at fault, it will consider all pertinent circumstances. 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.”

The Board has held that an employee who receives payments from OWCP in the form of direct deposit may not be at fault the first time incorrect funds are deposited into his or her account, as the acceptance of the resulting overpayment lacks the requisite knowledge.<sup>9</sup> The Board has also held in cases involving a series of incorrect payments, where the requisite knowledge is established by a letter or telephone call from OWCP or simply with the passage of time and a greater opportunity for discovery, the claimant will be at fault for accepting the payments subsequently deposited.<sup>10</sup> Previous cases have held that receiving one or two erroneous direct deposit payments does not necessarily create the requisite knowledge to find that a claimant was at fault in the creation of the overpayment.<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 she accepted the initial payment of compensation following her return to full-time work, she knew or should have known the payments were incorrect.

As discussed, in cases where a claimant receives compensation through direct deposit, OWCP must establish that at the time a claimant received the direct deposit in question that he or 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 his or 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

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<sup>9</sup> See *Tammy Craven*, 57 ECAB 689 (2006).

<sup>10</sup> *Id.*

<sup>11</sup> *Supra* note 6.

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

<sup>13</sup> See *supra* note 9; see also *George A. Hirsch*, 47 ECAB 520 (1996).

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>

Appellant received compensation by direct deposit payments every 28 days. The evidence of record does not establish that, as of the first direct deposit of compensation after she returned to work on January 24, 2012, she knew or should have known that she was accepting a direct deposit to which she was not entitled. There is no documentation or other evidence to demonstrate that appellant had clear knowledge at the time she received a direct deposit from OWCP on February 11, 2012, covering the period January 15 through February 11, 2012, that a portion of 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. Therefore, she is not at fault in the acceptance of the direct deposit covering the period of the overpayment from January 24 through February 11, 2012.

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 March 10, 2012, appellant knew or should have known that she was no longer entitled to compensation. She had returned to work on January 24, 2012 and realized by this time that she was not entitled to further compensation. Accordingly, the Board will affirm the finding of fault for the remaining February 12 through July 28, 2012 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 direct deposit on February 11, 2012 covering the part of the overpayment from January 24 through February 11, 2012. The Board will set aside the March 5, 2013 decision regarding the issue of fault as to the February 11, 2012 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 of the overpayment from January 24 through February 11, 2012.

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<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).

<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 Dixon*, 56 ECAB 145 (2004).

**CONCLUSION**

The Board finds that appellant received an overpayment of compensation in the amount of \$11,835.61 for the period January 24 through July 28, 2012 because she received compensation from OWCP after she returned to work. The Board further finds that she was without fault for the period of the overpayment from January 24 through February 11, 2012 but at fault for the overpayment from February 12 through July 28, 2012. The case will be remanded for consideration of waiver of the recovery of the overpayment from January 24 through February 11, 2012.

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 5, 2013 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part and the case is remanded for further action consistent with this decision of the Board.

Issued: October 23, 2013  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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