

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

J.N., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
New York, NY, Employer**

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**Docket No. 13-1027
Issued: September 25, 2013**

Appearances:
James D. Muirhead, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge

JURISDICTION

On March 26, 2013 appellant, through counsel, filed a timely appeal from a December 3, 2012 merit 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 this case.

ISSUES

The issues are: (1) whether OWCP properly found an overpayment of \$75,921.96 occurred; and (2) whether OWCP properly found appellant was at fault in creating the overpayment.

FACTUAL HISTORY

The case was before the Board on a prior appeal. As the Board noted, appellant filed a traumatic injury claim alleging that she sustained injuries on August 28, 1999 while working on a sorting machine. OWCP accepted the claim for right shoulder sprain, right shoulder villodular

¹ 5 U.S.C. § 8101 *et seq.*

synovitis, left shoulder impingement and left rotator cuff tear, OWCP File No. xxxxxx734. In a decision dated May 11, 2011, the Board reversed a May 14, 2010 OWCP decision that had affirmed a May 6, 2009 termination of compensation for refusal of suitable work.² The history of the case as provided in the Board's prior decision is incorporated herein by reference.

In a decision dated January 28, 2008, OWCP issued a schedule award for a five percent right arm and nine percent left arm permanent impairment. The period of the award was 43.68 weeks from November 1, 2007 to September 1, 2008. The record indicates that appellant received a schedule award through March 15, 2008. The May 6, 2009 OWCP decision stated that the schedule award had been "terminated due to authorized surgery" and appellant had received wage-loss compensation.

On January 8, 2010 appellant filed a recurrence of disability claim alleging that she had aggravated her condition from repetitive activity in federal employment. OWCP developed the claim as a new injury and accepted the claim for right shoulder impingement, right shoulder muscle spasm and right rotator cuff sprain, OWCP File No. xxxxxx444. Appellant began receiving compensation for total disability as of February 23, 2010. In a letter dated May 6, 2010, OWCP advised her that she must "report any retirement income, disability income, or compensation benefits from any [f]ederal agency. This is because a recipient of compensation benefits under [FECA] is not permitted to receive benefits under certain other [f]ederal programs, including the Civil Service retirement program."

Following the Board's May 11, 2011 decision, OWCP determined that appellant was entitled to retroactive compensation for total disability. The record indicates that OWCP issued compensation payments on June 22, 2011 to appellant's last known address. A payment was issued covering the period May 10 to December 31, 2009, a separate payment issued for the period January 1 to December 31, 2010, and another payment for January 1 to June 4, 2011. OWCP also issued a 28-day compensation payment on June 22, 2011 covering the period June 4 to July 2, 2011. Appellant continued to receive compensation payments covering a 28-day period pursuant to the 1999 claim. A November 4, 2011 letter advised her that continued compensation would be direct deposited into her bank account.

In a decision dated May 11, 2012, issued pursuant to the January 8, 2010 recurrence claim, OWCP stated that wage-loss compensation pursuant to this claim had been "terminated" effective February 23, 2010 as appellant had been receiving dual compensation benefits.

By letter dated May 18, 2012, OWCP stated it had made a preliminary determination that an overpayment of \$75,921.96 had been created because appellant had received compensation on the periodic rolls under two different claims. It stated that the amount of the overpayment represented the compensation paid in the attached compensation payment history. The history enclosed was compensation paid pursuant to the January 8, 2010 compensation claim. As to fault, OWCP made a preliminary determination that appellant was at fault. It stated that a May 6, 2010 Form CA-1049 had advised appellant to report any compensation benefits from any federal agency. OWCP further stated that for each payment sent by electronic funds transfer, (EFT), a notification of the date and amount of the payment appears on the statement from a claimant's financial institution. According to it, "That information, showing payments being

² Docket No. 10-1864 (issued May 11, 2011).

made in electronically in [the January 8, 2010 claim] and by check on and after [July 1, 2011 in the 1999 claim], in conjunction with the information supplied with the Form CA-1049 in [the 2010 claim] served to put her reasonably on notice that [appellant] was receiving compensation for total disability twice.”

Appellant requested a prerecoupment hearing before an OWCP hearing representative, which was held on October 2, 2012. She indicated that she assumed her schedule award had been reinstated when she began receiving compensation for wage loss.

By decision dated December 3, 2012, the hearing representative finalized the preliminary determination. The hearing representative found that OWCP had “correctly calculated” the overpayment amount. With respect to fault, the hearing representative stated that appellant knew or should have known she was not entitled to dual compensation. The hearing representative found that appellant’s belief that payments were pursuant to a schedule award was without support, as schedule award payments ended prior to February 2010, and in any case, a claimant is not entitled to wage-loss compensation and a schedule award concurrently. Appellant was directed to repay the overpayment at \$700.00 per month.

LEGAL PRECEDENT -- ISSUE 1

Pursuant to FECA, a claimant that is totally disabled is entitled to monetary compensation equal to 66 and 2/3 of her monthly pay during the period of disability, with augmented compensation for claimants with dependents.³ FECA does not provide for dual payment of compensation for temporary total disability for separate injuries covering the same period.⁴

ANALYSIS -- ISSUE 1

In the present case, the record indicates that appellant had been paid retroactive compensation for temporary total disability from February 23, 2010 to April 7, 2012 pursuant to the January 2010 claim. Appellant also received total disability compensation covering the same period pursuant to the 1999 claim. Since there is no provision for receiving total disability compensation for two injuries during the same period, an overpayment of compensation occurred.

OWCP did not properly describe the overpayment and its calculations as to the amount. The overpayment did not occur because OWCP issued a decision dated May 11, 2012 that attempted to retroactively “terminate” compensation from the 2010 claim. The termination of compensation is a separate issue.⁵ The record indicated that appellant was entitled to compensation for total disability from the accepted 2010 claim and had begun receiving wage-loss compensation as of February 23, 2010. The overpayment occurred when OWCP incorrectly issued retroactive compensation payments in June 2011, pursuant to the 1999 claim, that covered

³ 5 U.S.C. §§ 8106, 8110.

⁴ *Carolyn M. Leek*, 47 ECAB 374 (1996).

⁵ That a claimant has received compensation for total disability for two injuries during the same period does not establish that an employment-related disability had resolved for a particular injury.

periods already paid and then continued to issue 28-day continuing compensation pursuant to the 1999 claim.

A claimant is entitled to a decision with findings of fact and a statement of reasons.⁶ OWCP did not provide a clear explanation as to the circumstances of the overpayment and its calculations as to the amount of the overpayment appear to be limited to a list of payments from the 2010 claim. The case will be remanded to OWCP for appropriate findings on the issue. On return of the case record, OWCP should properly discuss the overpayment and clearly explain its calculations as to the amount.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of FECA provides: “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 FECA or would be against equity and good conscience.”⁷ A claimant who is at fault in creating the overpayment is not entitled to waiver.⁸ On the issue of fault, 20 C.F.R. § 10.433 provides that an individual will be found at fault if he or she has done any of the following: “(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 knew or should have known to be material; or (3) accepted a payment which he or she knew or should have known was incorrect.”

ANALYSIS -- ISSUE 2

As noted above, 20 C.F.R. § 10.433 has three specific grounds that may be identified to support a finding of fault in creating an overpayment. The May 18, 2012 preliminary determination appeared to focus on 20 C.F.R. § 10.433(2), the failure to provide material information. In this regard OWCP noted a CA-1049 issued to appellant on May 6, 2010, but the CA-1049 form is used to advise a claimant of the need to notify OWCP of a return to work, or of receipt of benefits from a federal agency or other source that may affect compensation benefits entitlement. There is no reasonable interpretation of this letter that would establish a requirement to notify OWCP of payments that OWCP itself is currently making to appellant. The information regarding Federal benefits is clearly explained as necessary because benefits from “certain other Federal programs” may restrict FECA benefits.

The hearing representative discussed fault in terms of 20 C.F.R. § 10.433(3), the acceptance of payments the claimant knew or should have known were incorrect. There are, however, insufficient findings from OWCP in this respect. The issue of what appellant knew or should have known must be made with reference to the specific relevant facts in this case. OWCP issued a compensation payment in June 2011 covering the entire 2010 calendar year and a second payment from January 1 to June 4, 2011. It appeared that the initial payments were sent to appellant’s last known address, while payments as of November 2011 were deposited into appellant’s bank account. OWCP failed to discuss the evidence of record and explain what

⁶ 20 C.F.R. § 10.126.

⁷ 5 U.S.C. § 8129(b).

⁸ See *Robert W. O’Brien*, 36 ECAB 541, 547 (1985).

appellant knew or should have known regarding acceptance of the specific payments sent in June 2011, as well as the additional continuing payments. The hearing representative dismissed appellant's allegation that she believed the payments represented a schedule award by stating the schedule award had expired prior to February 23, 2010. The record indicated that the previous schedule award had been interrupted in March 2008 when appellant had surgery and never resumed. OWCP failed to properly address the schedule award issue in terms of what appellant knew or should have known regarding acceptance of compensation payments commencing in June 2011 based on the evidence of record.

The case will accordingly be remanded for proper findings with respect to the fault issue. After such further development as OWCP deems necessary, it should issue an appropriate decision.

CONCLUSION

The Board finds that an overpayment occurred, but the case requires further development and appropriate findings as to the nature of the overpayment, the amount and fault.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 3, 2012 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: September 25, 2013
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board