

FACTUAL HISTORY

OWCP accepted that on February 11, 2010 appellant, then a 44-year-old cashier, sustained capsulitis and a closed dislocation of the second right metatarsophalangeal joint, right hallux valgus, right acquired hammer toe, other acquired deformity of the right toe, right foot pain and right leg and knee sprains when a partial case of soda fell on her right foot at work. She underwent four authorized surgeries on her right foot and received temporary total disability compensation on the daily rolls. On April 29, 2013 appellant returned to part-time work at the employing establishment for 20 hours per week.

In a June 25, 2013 letter, OWCP made a preliminary determination that appellant received a \$1,155.27 overpayment of compensation for the period April 29 through May 29, 2013. Appellant returned to part-time work at the employing establishment on April 29, 2013 but received temporary total disability compensation from April 29 through May 29, 2013. OWCP also made a preliminary determination that she was at fault in the creation of the overpayment, thereby precluding waiver of recovery. It found that appellant accepted payments which she knew or should have known to be incorrect. OWCP advised her that she could submit evidence challenging the fact, amount or finding of fault and request waiver of the overpayment. It requested that appellant complete and return an enclosed financial information questionnaire within 30 days even if she was not requesting waiver of the overpayment.²

In a July 2, 2013 letter, appellant asserted that she was not at fault in the creation of the overpayment and requested waiver of recovery of the overpayment. She indicated that she contacted OWCP after she received the June 25, 2013 preliminary determination and inquired about the overpayment. Appellant stated, "I did not think I was being overpaid. The checks are always behind some and I never know what period they cover." She submitted a financial information questionnaire (completed on July 9, 2013), a request for waiver of the overpayment and a number of financial documents.

In a September 20, 2013 decision, OWCP determined that appellant received a \$1,155.27 overpayment of compensation and that she was at fault in the creation of the overpayment, thereby precluding waiver of recovery.³

² The record contains payment records and worksheets showing the periods that appellant received wages for part-time work as well as total disability compensation from OWCP between April 29 and May 29, 2013. It was calculated that she was not entitled to \$1,155.27 of the total compensation she received during this period. On May 4, 2013 appellant received a total disability payment, *via* direct deposit, covering the period April 7 through May 4, 2013 and, on June 1, 2013, she received a total disability payment covering the period May 5 through 29, 2013.

³ Regarding the recovery of the overpayment, OWCP indicated that "the sum of each future compensation payment beginning with September 7, 2013" would be held. However, appellant was not receiving OWCP compensation at the time of OWCP's September 20, 2013 decision. 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 she should repay each month. *Lorenzo Rodriguez*, 51 ECAB 295 (2000); 20 C.F.R. § 10.441.

LEGAL PRECEDENT -- ISSUE 1

Section 8102 of FECA 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.⁴

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.⁵ 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."⁶ A claimant is not entitled to receive temporary total disability and actual earnings for the same period. OWCP's procedures provide that an overpayment in compensation is created when a claimant returns to work but continues to receive wage-loss compensation."⁷

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$1,155.27. Appellant returned to part-time work on April 29, 2013 but was paid for temporary total disability from April 29 to May 29, 2013. As she received wages for part-time work from the employing establishment from April 29 to May 29, 2013, she was not entitled to temporary total disability compensation from OWCP for this same period, but rather was only entitled to receive partial disability compensation. OWCP determined that the impermissible portion of compensation that appellant received for this period totaled \$1,155.27 and it properly found that she received an overpayment of compensation in this amount.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of FECA⁸ 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 regulations⁹

⁴ 5 U.S.C. § 8102.

⁵ *Id.* at § 8116(a).

⁶ 20 C.F.R. § 10.500.

⁷ *B.H.*, Docket No. 09-292 (issued September 1, 2009); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(a) (May 2004).

⁸ 5 U.S.C. § 8129(b).

⁹ 20 C.F.R. § 10.433.

provides 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.¹⁰ 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.¹¹ 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.¹²

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 part-time work, she knew or should have known the payment was 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.¹³ 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.¹⁴ 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

¹⁰ See *Tammy Craven*, 57 ECAB 689 (2006).

¹¹ *Id.*

¹² *V.S.*, Docket No. 13-1278 (issued October 23, 2013).

¹³ See *C.K.*, Docket No. 12-746 (issued May 1, 2012).

¹⁴ See *Tammy Craven*, *supra* note 10; see also *George A. Hirsch*, 47 ECAB 520 (1996).

time of the first incorrect payment.¹⁵ 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.¹⁶ 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.¹⁷

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 part-time work on April 29, 2013, 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 May 4, 2013, covering the period April 7 through May 4, 2013, 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 April 29 through May 4, 2013.

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.¹⁸ 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.¹⁹ By the time of the second payment dated June 1, 2013, appellant knew or should have known that she was no longer entitled to compensation. She returned to part-time work on April 29, 2013 and realized by this time that she was not entitled to total disability compensation.²⁰ Accordingly, the Board will affirm the finding of fault for the remaining May 5 to 29, 2013 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 May 4, 2013, covering the part of the overpayment that occurred from April 29 through May 4, 2013. The Board will set aside the September 20, 2013 decision regarding the issue of fault as to the May 4, 2013 direct deposit and

¹⁵ *Id.*

¹⁶ *Id.*; *see also K.D.*, Docket No. 13-451 (issued April 12, 2013).

¹⁷ *See K.H.*, Docket No. 06-191 (issued October 30, 2006).

¹⁸ *See William E. McCarty*, 54 ECAB 525 (2003).

¹⁹ *See J.W.*, Docket No. 10-1271 (issued February 3, 2011); *see also Karen Dixon*, 56 ECAB 145 (2004).

²⁰ Appellant claimed that she did not know what period was covered by the payment she received on June 1, 2013, but given the timing and the amount of the payment she knew or should have known that it was for total disability and that she would not have been entitled to the full amount.

will remand the case for OWCP to determine whether appellant is entitled to waiver of recovery for that portion of the overpayment that was received from April 29 through May 4, 2013.²¹

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$1,155.27 for the period April 29 through May 29, 2013, because she received total disability compensation from OWCP after she returned to part-time work. The Board further finds that she was without fault for the period of the overpayment from April 29 through May 4, 2013 but at fault for the overpayment from May 5 through 29, 2013. The case will be remanded for consideration of waiver of the recovery of the overpayment from April 29 through May 4, 2013.

ORDER

IT IS HEREBY ORDERED THAT the September 20, 2013 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: April 17, 2014
Washington, DC

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

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

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

²¹ On appeal, appellant argued that her finances prevented her from repaying the overpayment, but the method of recovery of the overpayment is not within the Board's jurisdiction. *See supra* note 3.