

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

B.G., Appellant)
and) Docket No. 14-850
U.S. POSTAL SERVICE, POST OFFICE,) Issued: September 17, 2014
Taylor, MI, Employer)

)

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On March 4, 2014 appellant filed a timely appeal from a January 9, 2014 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 \$22,360.04 for the period October 25, 2009 to September 25, 2010; (2) whether OWCP properly found that appellant was at fault in creating the overpayment; and (3) whether OWCP properly determined the overpayment should be recovered by deducting \$85.00 from her continuing compensation.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On December 19, 2005 appellant, then a 46-year-old carrier, sustained injuries to her neck and back in the performance of duty. She stated on the claim form that she was delivering mail and fell. OWCP initially denied the claim by decision dated February 6, 2006. On March 17, 2006 it accepted appellant's claim for lumbar, lumbosacral, cervical and sacroiliac strains. OWCP also accepted an L2-3 herniated disc on September 8, 2006. Appellant underwent lumbar surgery on January 8, 2007 and received compensation for wage loss.

The record contains an EN1108 form (long form statement of recovery) dated September 21, 2009 reflecting that appellant received a third-party settlement recovery of \$225,000.00 with respect to the employment injury. The form listed the disbursement of the recovery amount, including attorney fees and stated that the credit against future benefits from the third-party recovery was \$22,360.04.

By letter dated November 12, 2009, OWCP provided appellant with the information contained in the EN1108 form. In a separate letter dated November 12, 2009, it advised that she would not receive a periodic rolls payment for the period October 25 to November 21, 2009. OWCP further explained that, until the surplus of \$22,360.04 was exhausted, appellant would not receive a compensation payment. Appellant was advised that, based on her gross compensation entitlement, the surplus would be exhausted in September 2010.

In a letter dated September 17, 2010, OWCP advised appellant that, for the period October 25, 2009 to September 25, 2010, she would receive a compensation payment of \$343.88. This was the amount owed after deducting the \$22,360.04 surplus. In addition, appellant was advised that beginning September 26, 2010 she would receive her regular periodic rolls compensation payment.

On October 1, 2010 OWCP issued a compensation payment in the amount of \$22,703.92 for the period October 25, 2009 to September 25, 2010. On October 15, 2013 it advised appellant of a preliminary determination that an overpayment of \$22,360.04 was created from October 25, 2009 to September 25, 2010. OWCP found that she received \$22,703.92 for this period, but was only entitled to \$343.88. With regard to fault, it made a preliminary determination that appellant was at fault in creating the overpayment as she had accepted a payment she knew or should have known was incorrect. Appellant was advised to complete an overpayment recovery questionnaire.

In an October 24, 2013 memorandum of telephone call (CA-110), OWCP noted that appellant was upset and did not believe that she was at fault, believing that the surplus was money owed to her. By letter dated October 24, 2013, it sent her previous correspondence regarding entitlement to compensation from October 25, 2009 to September 25, 2010.

On November 20, 2013 OWCP received a request for a telephone conference on the issue of fault. A telephone conference was held on December 16, 2013. Appellant reiterated her belief that the surplus was an amount owed to her and she did not feel she was at fault.

By decision dated January 9, 2014, OWCP finalized the overpayment in the amount of \$22,360.04 and the finding of fault. It advised that the overpayment would be recovered by deducting \$85.00 from appellant's continuing compensation payments.

LEGAL PRECEDENT -- ISSUE 1

FECA provides that where an injury or death for which compensation is payable is caused under circumstances creating a legal liability in a person other than the United States to pay damages and a beneficiary entitled to compensation from the United States for that injury or death receives money or other property in satisfaction of that liability as a result of suit or settlement by him or her in his or her behalf, the beneficiary, after deducting therefrom the costs of suit and a reasonable attorney's fee, shall refund to the United States the amount of compensation paid by the United States and credit any surplus on future payments of compensation payable to him for the same injury.² The applicable regulations reiterate that after the refund owed to the United States is calculated, FECA beneficiary retains any surplus remaining and this amount is credited, dollar for dollar, against future compensation for the same injury.³ OWCP will resume the payment of compensation only after FECA beneficiary has been awarded compensation which exceeds the amount of the surplus.⁴

OWCP's procedure manual further explains that where a beneficiary has received a third-party recovery resulting in a surplus, compensation payments are calculated and continue to be charged against the surplus, as are medical expenses that have been paid by the claimant and submitted for reimbursement.⁵ Where a beneficiary who has received a third-party recovery has made the required refund, but subsequent events result in payment of compensation benefits, including medical benefits, this results in an overpayment of compensation.⁶

ANALYSIS -- ISSUE 1

The record reflects that appellant received a third-party recovery of \$225,000.00. After appropriate deductions for the costs of the suit and attorney fees, a surplus against future compensation of \$22,360.04 was determined. As noted, future compensation payments are charged against the surplus until it has been exhausted.

OWCP paid appellant wage-loss compensation for the period October 25, 2009 to September 25, 2010 in the amount \$22,703.92. The surplus of \$22,360.04 should have been deducted from this amount and therefore an overpayment of compensation was created. Appellant did not offer any arguments as to the fact of overpayment and there is no contrary

² 5 U.S.C. § 8132; *see also F.B.*, Docket No. 13-500 (issued February 6, 2014).

³ 20 C.F.R. § 10.712.

⁴ *Id.*

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *FECA Third Party Subrogation Guidelines*, Chapter 2.1100.10(b)(3) (March 2006).

⁶ *Id.*, Chapter 2.1100.10(b)(2). *See also F.B.*, *supra* note 2.

evidence. The Board finds that the record establishes that an overpayment of \$22,360.04 was created.

LEGAL PRECEDENT -- ISSUE 2

5 U.S.C. 8129(b) 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 to be incorrect.”

ANALYSIS -- ISSUE 2

OWCP found that appellant was at fault as she accepted a payment she knew or should have known to be incorrect. The Board notes that OWCP specifically advised her in a November 12, 2009 letter that as of October 25, 2009 she would not receive compensation on the periodic rolls until the surplus of \$22,360.04 was exhausted. Moreover, in a September 17, 2010 letter, OWCP advised appellant that the only compensation owed for the period October 25, 2009 to September 25, 2010 was \$343.88. It explained that this was the amount after the deduction of the surplus had been made and, as of September 26, 2010, she would begin receiving her regular 28-day wage-loss compensation payment.

Based on the information provided to appellant, when she received the October 1, 2010 payment by check in the amount of \$22,703.92 covering the period October 25, 2009 to September 25, 2010, she should have known it was incorrect. There was no reasonable basis to believe that she was entitled to a payment of \$22,703.92 for the period covered. Appellant knew or should have known that she was entitled to only \$343.88, as the September 17, 2010 letter specifically advised her of this amount. Pursuant to 20 C.F.R. § 10.433, OWCP properly found her to be at fault with respect to the creation of the overpayment in this case. Since she is at fault, appellant is not entitled to waiver of the overpayment.

On appeal, appellant correctly notes that the overpayment was the result of a mistake by OWCP. Although OWCP may have erred, this does not relieve the overpaid individual of the obligation to repay the overpayment if he or she was at fault in accepting the overpayment.⁹ Appellant also reiterated her argument that she thought the surplus was money owed to her and she should not be found at fault. OWCP does not have to show that she knew the payment was incorrect. Fault can be established if the circumstances show that the claimant accepted a

⁷ 5 U.S.C. § 8129(b).

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

⁹ 20 C.F.R. § 10.435(a).

payment he or she should have known was incorrect. As discussed above, OWCP provided specific explanation as to the nature of the surplus and her entitlement to compensation. Based on this evidence, appellant should have known the October 1, 2010 payment was incorrect.

LEGAL PRECEDENT -- ISSUE 3

OWCP regulations provide:

“When an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to OWCP the amount of the overpayment as soon as the error is discovered or his or her attention is called to the same. If no refund is made, OWCP shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize any hardship.”¹⁰

In addition, the regulations provide that the individual who received the overpayment is responsible for providing financial information with respect to income and expenses.¹¹ Such information will be used to determine the repayment schedule, if necessary.¹²

ANALYSIS -- ISSUE 3

OWCP requested that appellant submit an OWCP-20 form and supporting financial documents. This information can be used to determine the amount OWCP will deduct from her continuing compensation to minimize any hardship. Appellant did not, however, submit any financial information. As noted above, it is her responsibility to submit such evidence. OWCP determined that \$85.00 would be deducted from appellant’s 28-day compensation payments of approximately \$1,900.00. There is no evidence that such a determination is improper under OWCP regulations when she submitted no financial information.¹³ The Board finds that OWCP properly determined the recovery schedule of the overpayment in this case.

CONCLUSION

The Board finds that OWCP properly determined that an overpayment of \$22,360.04 was created, that appellant was at fault in creating the overpayment and that the overpayment should be recovered by deducting \$85.00 from continuing compensation.

¹⁰ *Id.* at § 10.441.

¹¹ *Id.* at § 10.438.

¹² *Id.*

¹³ See *L.W.*, Docket No. 14-196 (issued June 17, 2014); *M.R.*, Docket No. 14-549 (issued June 11, 2014).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 9, 2014 is affirmed.

Issued: September 17, 2014
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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