

FACTUAL HISTORY

On October 16, 1996 appellant, then a 48-year-old mail handler, filed an occupational disease claim (Form CA-2) alleging pain in her arms and hands. OWCP accepted her claim for bilateral carpal tunnel syndrome on December 27, 1996. Appellant received periodic rolls payments as of June 16, 2002.

On June 9, 2003 appellant chose to receive electronic direct deposit of her compensation benefits.

After several attempts to reduce appellant's wage-earning capacity, on March 17, 2011, she was returned to the periodic rolls at a gross payment of \$3,335.00 every 28 days.

On February 26, 2014 OWCP again proposed to reduce appellant's compensation based on her ability to earn wages as a customer service representative. It noted that the wage-earning capacity of this position was \$392.00 per week and that, because this rate of pay was lower than the current pay of the job held when she was injured, it proposed to reduce her wage-loss benefits to \$1,751.00 every four weeks.

By decision dated April 16, 2014, OWCP finalized the reduction of appellant's compensation as she had the ability to earn wages of a customer service representative.

On May 5, 2014 appellant requested a review of the written record before the Branch of Hearings and Review. By decision dated June 12, 2014, OWCP denied her request as untimely.

In an "ACPS" report dated July 1, 2014, OWCP noted that compensation had not been reduced as appropriate following the decision of April 16, 2014.

By letter dated August 8, 2014, OWCP informed appellant of a preliminary finding of overpayment in the amount of \$2,816.00 because compensation for temporary total disability had inadvertently been paid at the previous higher rate from May 4 through June 28, 2014 after she had received a decision regarding a reduction of her compensation based on her wage-earning capacity.

By decision dated October 22, 2014, OWCP finalized its finding of overpayment in the amount of \$2,816.00. It directed withholding \$50.00 of continuing compensation payments effective October 19, 2014.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of FECA² 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 or her duty.³ Section 8129(a) of FECA provides, in pertinent part, that when an overpayment has been made to an individual under this subchapter because of an error of fact

² *Id.*

³ *Id.* at § 8102(a).

or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.⁴ OWCP's procedure manual identifies various situations when overpayments of compensation may occur, including when adjustments are made to the rate of pay.⁵

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$2,816.00. The record reflects that OWCP issued a decision on April 16, 2014 finalizing a proposed reduction of her compensation on the basis that she had the ability to earn wages of a customer service representative. The wage-earning capacity of this position was \$293.00 per week and because this rate of pay was lower than the current pay of the job held when appellant was injured, OWCP proposed to reduce her wage-loss benefits to \$1,751.00 every four weeks. However for the period May 4 through June 28, 2014, appellant was paid at her prior pay rate. She is not contesting the amount of overpayment. The Board finds that OWCP properly determined that appellant received an overpayment in the amount of \$2,816.00 for the period May 4 through June 28, 2014.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of FECA provides that 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.⁶ No waiver of an overpayment is possible if the claimant is at fault in creating the overpayment.⁷

On the issue of fault, 20 C.F.R. § 10.433(a) provides that an individual is with fault in the creation of an overpayment who: (1) made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; (2) failed to furnish information which the individual knew or should have known to be material; or (3) with respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect.⁸

With respect to whether an individual is without fault, section 10.433(b) of OWCP regulations provide that 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

⁴ *Id.* at § 8129(a).

⁵ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(e) (May 2004).

⁶ 5 U.S.C. § 8129(b).

⁷ *Gregg B. Manston*, 45 ECAB 344, 354 (1994).

⁸ 20 C.F.R. § 10.433(a). See *Kenneth E. Rush*, 51 ECAB 116, 118 (1999).

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.⁹

ANALYSIS -- ISSUE 2

OWCP applied the third standard in this case, finding that appellant accepted compensation payments that she knew or should have known were incorrect. Appellant accepted wage-loss compensation for the period May 4 through June 28, 2014, at her original pay rate despite a decision dated April 16, 2014 reducing her benefits based upon her wage-earning capacity. The Board finds, however, that OWCP failed to establish that, at the time she accepted the first payment of compensation, she knew or should have known that the payments were incorrect.

In cases where a claimant receives compensation through direct deposit, the Board has held that 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.¹⁰ 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.¹¹ Because the 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 time of the first incorrect payment.¹² 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.¹³ It is not appropriate, however, to make a finding that a claimant has accepted an overpayment by 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 documentations 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.¹⁴

The Board finds that appellant was not at fault in the creation of the overpayment for the first direct deposit payment she received on May 31, 2014. While appellant received the decision dated April 16, 2014 reducing her compensation, and received compensation during the period May 4 through June 28, 2014, her check was deposited electronically into her account and this was the first incorrect payment made to her. There is no documentation or other evidence to demonstrate that she had clear knowledge at the time she received a direct deposit from OWCP that the payment was incorrect or that a reasonable period of time passed during which she could

⁹ *Id.* at § 10.433(b).

¹⁰ *See C.K.*, Docket No. 12-746 (issued May 1, 2012).

¹¹ *See Tammy Craven*, 57 ECAB 689, 692 (2006).

¹² *J.S.*, Docket No. 12-1707 (issued June 10, 2013).

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

¹⁴ *See K.H.*, Docket No. 13-451 (issued April 12, 2013).

have reviewed bank statements or been informed of the incorrect payment. Accordingly, OWCP improperly determined that appellant was at fault in the creation of the overpayment for the direct deposit on May 31, 2014.

Although OWCP may have been negligent in making incorrect payments, this does not excuse a claimant from accepting payments he or she knew or should have known to be incorrect.¹⁵ 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.¹⁶ Thus, by the time of the second payment dated June 28, 2014, appellant should have known that she was no longer entitled to the same amount of FECA wage-loss compensation as she had received prior to the April 16, 2014 decision, which reduced her compensation benefits.¹⁷

The Board finds that this case is not in posture for decision regarding the issue of waiver of the recovery of the overpayment for the direct deposit on May 31, 2014. The Board will set aside the October 22, 2014 decision regarding the issue of fault as to this direct deposit and will remand the case to OWCP to determine whether appellant is entitled to waiver of recovery for the direct deposit of compensation covering the period May 4 through 31, 2014. After such further development as necessary, OWCP shall issue an appropriate decision.¹⁸

CONCLUSION

The Board finds that OWCP has established fact and amount of overpayment for the period May 4 through June 28, 2014. The Board further finds that appellant was without fault for the period May 4, through 31, 2014. The case will be remanded for findings of fact regarding waiver of the recovery of the overpayment for the period May 4 through 31, 2014.

¹⁵ See *William E. McCarty*, 54 ECAB 525 (2003).

¹⁶ *M.M.*, Docket No. 15-265 (issued May 27, 2015).

¹⁷ *Id.*

¹⁸ In view of the Board's decision on fault, it is premature to address the issue of recovery of the overpayment from continuing compensation payments.

ORDER

IT IS HEREBY ORDERED THAT the October 22, 2014 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: December 9, 2015
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board