

FACTUAL HISTORY

On May 22, 2012 appellant, then a 51-year-old supervisory human services specialist, sustained a right knee injury when she slipped and fell on water in the ladies bathroom. By decision dated July 20, 2012, OWCP accepted the claim for right knee tear of the medial meniscus. Appellant stopped work on the date of injury and did not return. She received continuation of pay from May 23 to July 6, 2012. Beginning July 7, 2012 and continuing, appellant filed claim for compensation forms (CA-7) for leave without pay. OWCP paid her compensation for temporary total disability by direct deposit and placed her on the periodic rolls effective August 26, 2012.²

By letter dated October 17, 2012, OWCP advised appellant that she had been placed on periodic rolls and outlined her entitlement to compensation benefits and her responsibility to return to work in connection with the accepted injury. Appellant's weekly pay rate was calculated at \$1,125.21. In an attached EN1049, OWCP provided:

“In order to avoid an overpayment of compensation, NOTIFY THIS OFFICE IMMEDIATELY WHEN YOU GO BACK TO WORK.... If you receive your compensation payments *via* paper check, the payment shows the period for which payment is made. If you have worked for any portion of this period, return the payment to this office, even if you have already advised OWCP that you are working. For payments sent by electronic funds transfer (EFT), a notification of the date and amount of payment appears on the statement from your financial institution. You are expected to monitor your EFT deposits carefully, at least every two weeks. If you have worked for any portion of the period for which a deposit was made, advise OWCP immediately so that the overpayment can be collected.” (Emphasis in the original.)

On February 6 and March 28, 2013 OWCP informed appellant that federal regulations required her to make an affidavit of any earnings and employment during the previous year and that a Form CA-1032 was enclosed for that purpose. It notified her that she had to completely answer all questions on the Form CA-1032 and return the statement within 30 days or her benefits would be suspended.

By letter dated July 31, 2013, the employing establishment informed OWCP that a job offer had been extended to appellant which she accepted. Her return to work date was noted as August 12, 2013. In an August 8, 2013 e-mail correspondence, the employing establishment noted that appellant was unable to return to work on August 12, 2013 due to an appearance in court. Appellant's new start date was identified as August 26, 2013.

In a January 17, 2014 e-mail correspondence, OWCP claims examiner requested the employing establishment provide information regarding appellant's present work status.

On February 11, 2014 OWCP requested appellant submit a Form CA-1032 and return the statement within 30 days or her benefits would be suspended.

² On October 1, 2012 appellant underwent right knee surgery.

In e-mail correspondence dated February 27, 2014, the employing establishment informed OWCP that appellant resumed full-time employment beginning September 9, 2013. It further noted that she worked intermittently since her medical release to return to work, taking large blocks of leave without pay after returning to duty.

A payroll computer printout listed that appellant continued to receive wage-loss compensation from September 9, 2013 through March 8, 2014.

By letter dated March 12, 2014, OWCP made a preliminary determination that appellant received an overpayment of compensation in the amount of \$16,225.71 from September 9, 2013 to March 8, 2014 because she continued to receive disability compensation after her return to full-time work. It further found that she was at fault in creating the overpayment because she accepted payments that she knew or reasonably should have known that she was not entitled to after returning to work for a period of six months without notifying OWCP. An OWCP memorandum and fiscal worksheet noted that appellant was on periodic rolls and received gross compensation every 28 calendar days in the amount of \$3,098.00. Appellant's weekly pay rate was noted as \$1,125.21 at the 2/3 compensation rate with deductions for health benefits insurance and basic life insurance. Thus, OWCP found that she received an overpayment of \$16,255.71 from wage-loss compensation for total disability while working with no loss of wages for a period of 181 days. It informed appellant of her review rights and instructed her to complete an enclosed overpayment recovery questionnaire form (OWCP-20) and submit supporting documentation.

On March 18, 2014 appellant contested the overpayment and finding of fault and requested a preresoupment hearing before the Branch of Hearings and Review.

At the September 10, 2014 hearing, appellant was represented by counsel. She asserted that she was unaware that she was receiving an overpayment and believed that it occurred through no fault of her own and requested a waiver, but did not assert that she disagreed with the amount of the overpayment. Appellant testified that, after she resumed her employment, she missed a substantial amount of time due to physical therapy and medical appointments. She reported that she took four hours for each appointment, three to four times weekly and would immediately submit her physician's certificates to her supervisor the following day. Appellant further stated that she made approximately \$1,800.00 biweekly before the injury and never received the full amount after returning to work. Because she never received a full paycheck from her employing establishment, she believed that the remainder was being provided to her from FECA compensation benefits for leave without pay.

Appellant further testified that she did not submit any Form CA-7's, nor did her employing establishment instruct her to do so. She noted that she contacted the Department of Labor by telephone to advise that she had returned to work. Appellant argued that she could not payback the \$16,255.71 because she had already spent it on her daily living expenses and it would cause her a financial hardship. She stated that the house she was renting burned down approximately one year ago, she was not insured, and currently in the process of purchasing a vehicle.

Appellant was advised that the overpayment recovery questionnaire was not received and the record would be held open for 30 days. No other evidence was provided and she did not submit the overpayment recovery questionnaire with supporting financial documentation.

By decision dated November 19, 2014, OWCP finalized the preliminary determination finding that appellant was overpaid in the amount of \$16,255.71 from September 9, 2013 to March 8, 2014 because she continued to receive disability compensation after her return to full-time work. It found that she was at fault in the creation of the overpayment and thus, not entitled to waiver of recovery. Recovery was directed by submitting a check for the full amount of the overpayment.

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.³

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.⁴ 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.⁵ A claimant is not entitled to receive temporary total disability and actual earnings for the same period. OWCP procedures provide that an overpayment in compensation is created when a claimant returns to work but continues to receive wage-loss compensation.⁶

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$16,225.71 for a period between September 9, 2013 to March 8, 2014 because she continued to receive disability compensation after she returned to full-time work. On August 26, 2012 appellant was placed on periodic rolls and received wage-loss compensation from that date for total disability. The record indicates that she returned to work eight hours per day at the employing establishment on September 9, 2013. Appellant then continued to receive compensation through March 8, 2014 although, she is not entitled to receive compensation for

³ 5 U.S.C. § 8102.

⁴ *Id.* at § 8116(a).

⁵ 20 C.F.R. § 10.500.

⁶ *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).

total disability after she has returned to work.⁷ The Board finds that appellant received an overpayment of compensation.⁸

The record shows that OWCP calculated that, between September 9, 2013 to March 8, 2014, appellant received \$16,225.71 in disability compensation, but she was not entitled to any compensation during this period.

OWCP explained how the overpayment occurred and provided this to appellant with the preliminary notice of overpayment. There is no evidence that the overpayment did not occur as found by OWCP. Appellant did not dispute the calculation of her overpayment. The Board finds that OWCP correctly determined that she received an overpayment in the amount of \$16,255.71 from September 9, 2013 to March 8, 2014.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of FECA⁹ provides that an overpayment of compensation shall be recovered by OWCP unless 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.¹⁰ Thus, OWCP may not waive the overpayment of compensation unless appellant was without fault.¹¹ Adjustment or recovery must, therefore, be made when an incorrect payment has been made to an individual who is with fault.¹²

On the issue of fault, section 10.433 of OWCP's regulations provide 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; 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 was incorrect...”¹³

With respect to whether an individual is without fault, section 10.433(b) of OWCP's regulations provide that whether or not OWCP determines that an individual was at fault with

⁷ *Supra* notes 5 and 6. See also *M.A.*, Docket No. 13-2137 (issued March 11, 2014).

⁸ *R.W.*, Docket No. 13-1108 (issued September 10, 2013).

⁹ 5 U.S.C. § 8129(b).

¹⁰ *Michael H. Wacks*, 45 ECAB 791, 795 (1994).

¹¹ *Norman F. Bligh*, 41 ECAB 230 (1989).

¹² *Diana L. Booth*, 52 ECAB 370, 373 (2001); *William G. Norton, Jr.*, 45 ECAB 630, 639 (1994).

¹³ 20 C.F.R. § 10.433(a).

respect to the creation of an overpayment depends on the circumstances surrounding the 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.¹⁴

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 first incorrect payment of compensation, she knew or should have known it was incorrect.¹⁵

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.¹⁶ 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 may lack the requisite knowledge at the time of the first incorrect payment.¹⁷ It is not appropriate, to find that a claimant has accepted an overpayment *via* direct deposit until a reasonable person would have been aware that the questionable payment had occurred. This awareness can be established 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.¹⁸

The record establishes that, for the overpayment period September 9, 2013 to March 8, 2014, appellant received compensation by direct deposit. Appellant received a partial overpayment of \$1,171.01 for the 28-day pay period between September 9 and 21, 2014. Following this initial overpayment, she was improperly paid wage-loss compensation for six more 28-day pay periods between September 22, 2013 and March 8, 2014. The funds were directly deposited into appellant's account and amounted to an overpayment of \$15,084.70. On March 12, 2014 OWCP issued a preliminary determination of the total \$16,255.71 overpayment. It found that appellant knew or should have been aware that she was not entitled to the entire payment because she had returned to work and she was not entitled to compensation because she had returned to work.

The Board finds that appellant was without fault for the initial direct deposit of the \$1,171.01 overpaid amount into her account. While appellant accepted the overpayment by gaining control of the funds deposited into her account pursuant to her authorization, the evidence does not show that she knew that she would receive an incorrect payment on that day.

¹⁴ *Id.* at § 10.433(b).

¹⁵ *J.S.*, Docket No. 12-1707 (issued June 10, 2013).

¹⁶ *See Tammy Craven*, 57 ECAB 589 (2006); *see also George A. Hirsch*, 47 ECAB 520 (1996).

¹⁷ *Id.*

¹⁸ *See K.H.*, Docket No. 06-191 (issued October 30, 2006).

A finding of no fault does not mean, however, that the claimant may keep the initial payment. It requires only that OWCP must consider eligibility for waiver for this period, and the case must be remanded for OWCP to make that determination.

Following the initial direct deposit, appellant received six more payments for the period September 22, 2013 through March 8, 2014 that are also part of the overpayment. She has acknowledged her return to work on September 9, 2013. After the initial overpayment deposit on September 21, 2013, she was issued the next full 28-day compensation payment on October 19, 2013 and received the last deposit on March 8, 2014. The funds were directly deposited into appellant's account and the six disbursements amounted to an overpayment of \$15,084.70. 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

At the precoupment hearing, appellant argued that she informed OWCP *via* telephone that she had returned to work. OWCP telephone notes of record do not establish that this telephone call was made. Moreover, even though it may have been negligent in making incorrect payments, this does not excuse a claimant from accepting payments appellant knew or should have known to be incorrect.²⁰

On October 17, 2012 OWCP advised appellant, "In order to avoid an overpayment of compensation, NOTIFY THIS OFFICE IMMEDIATELY WHEN YOU GO BACK TO WORK.... If you have worked for any portion of this period return the payment to this office, even if you have already advised OWCP that you are working. Otherwise, an overpayment of compensation may result. For payments sent by EFT, a notification of the date and amount of payment appears on the statement from your financial institution. You are expected to monitor your EFT deposits carefully, at least every 2 weeks. If you have worked for any portion of the period for which a deposit was made, advise OWCP immediately so that the overpayment can be collected." By the time of the second payment issued on October 19, 2013, appellant knew or should have known that she was no longer entitled to compensation. She had returned to work on September 9, 2013, and could have taken further steps to prevent issuance of further payments. Accordingly, the Board will affirm the finding of fault for the remaining September 22, 2013 through March 8, 2014 period of overpayment.

Appellant also stated that although she resumed full-time work on September 9, 2013, she missed time because of physical therapy and medical appointments for which she would submit physician's certificates. She stated that she never filed a Form CA-7 after resuming full-time work. Appellant argued, however, that because she never received a full paycheck, she believed that OWCP was continuing FECA benefits to cover her leave without pay.

The Board finds that this argument without merit. Prior to being placed on periodic rolls, appellant filed CA-7 forms, claim for compensation for leave without pay. She was placed on periodic rolls beginning August 26, 2012. OWCP's strongly worded letter dated October 17,

¹⁹ See *J.W.*, Docket No. 10-1271 (issued February 3, 2011); *id.*

²⁰ See *Russell E. Wageneck*, 46 ECAB 653 (1995).

2012 informed her that she was not entitled to wage-loss compensation if she returned to work. This, together with multiple CA-1032 forms sent to appellant, establishes that she should have known that she was not entitled to accept wage-loss compensation for total disability for any period after she returned to work.²¹ Furthermore, appellant testified that she did not file any CA-7 forms for lost time after returning to work. Appellant was aware of the process for filing CA-7 forms for leave without pay, as she had previously filed them, but did not do so to support her argument that she thought she was entitled to the payments. She submitted no evidence that she was entitled to wage-loss compensation or any other monetary benefits from OWCP that could reasonably lead her to believe that the compensation checks accepted were for a correct amount.²²

For these reasons, the Board finds that appellant was at fault in that portion of the \$16,255.71 overpayment created by the six payments from September 22, 2013 through March 8, 2014, which total \$15,084.70. Appellant accepted payments she knew or should have known to be incorrect.²³ Recovery by OWCP of the \$15,084.70 overpayment of compensation may not be waived.²⁴

The Board further finds that this case is not in posture for decision regarding the issue of waiver of recovery of the overpayment for the initial direct deposit on September 21, 2013. The Board will set aside the November 19, 2014 decision regarding the issue of fault as to the initial September 21, 2013 direct deposit and will remand the case for OWCP to determine whether appellant is entitled to waiver of recovery for the overpayment of compensation covering the period September 9 through 21, 2013.²⁵

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$16,255.71 for the period September 9, 2013 through March 8, 2014. The Board further finds that she was without fault for the period of the overpayment from September 9 through 21, 2013, but at fault for the overpayment from September 22, 2013 through March 8, 2014. The November 19, 2014 decision is set aside in

²¹ *Supra* note 8.

²² *B.B.*, Docket No. 12-275 (issued June 21, 2012); *Linda E. Padilla*, 45 ECAB 768 (1994).

²³ *Supra* note 15.

²⁴ At the preresoupment hearing, appellant argued that repayment of the full amount would cause her a financial hardship. However, the method of recovery of the overpayment is not within the Board's jurisdiction. *Lorenzo Rodriguez*, 51 ECAB 295 (2000); 20 C.F.R. § 10.441. With respect to recovery of the overpayment, the Board's jurisdiction is limited to those cases where OWCP seeks recovery from continuing compensation benefits under FECA. *L.D.*, Docket No. 08-678 (issued August 7, 2008). Moreover, no waiver of an overpayment is possible if the claimant is at fault in creating the overpayment. *L.J.*, 59 ECAB 264 (2007). As OWCP did not direct recovery of the overpayment from continuing compensation payments, the Board does not have jurisdiction over the recovery of the overpayment. See *Desiderio Martinez*, 55 ECAB 245 (2004).

²⁵ *D.W.*, Docket No. 14-229 (issued April 17, 2014).

part and remanded to OWCP for consideration of waiver of recovery of the overpayment for the period September 9 through 21, 2013.

ORDER

IT IS HEREBY ORDERED THAT the November 19, 2014 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: July 13, 2015
Washington, DC

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

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

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