

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

E.T., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
San Francisco, CA, Employer**

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**Docket No. 15-611
Issued: June 2, 2015**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On January 23, 2015 appellant filed a timely appeal from a December 19, 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 appellant received an overpayment of compensation in the amount of \$1,733.36 for the period October 19 to November 15, 2014 because she returned to work but continued to receive disability compensation; and (2) whether she was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On November 14, 2008 appellant, then a 47-year-old window distribution clerk, filed an occupational disease claim alleging that she sustained bilateral medial epicondylitis as a result of using her hands in repetitive motions. OWCP accepted her claim for right medial epicondylitis.²

On October 14, 2009 appellant filed a recurrence claim alleging that on September 24, 2009 she stopped work because the employing establishment could not accommodate her modified-duty requirements. OWCP accepted the claim and paid wage-loss compensation benefits.

In a letter dated December 23, 2009, appellant was advised that she was placed on the periodic rolls effective November 7, 2009. In that same letter, OWCP informed her that she was only entitled to compensation benefits when she could not perform her duties due to her employment injury. Appellant was to advise OWCP if she returned to work, and to return any payment to which she was not entitled.

Appellant received compensation by direct deposit.

On October 20, 2014 appellant returned to full-time light duty. On November 15, 2014 OWCP issued a payment of compensation *via* direct deposit in the amount of \$1,733.36 for the period October 19 to November 15, 2014.

On November 18, 2014 OWCP made a preliminary determination that appellant received an overpayment of compensation in the amount of \$1,733.36 because she returned to full-time light duty on October 20, 2014 but received a disability payment for the period October 19 through November 15, 2014. It found that she was at fault in the creation of the overpayment because she accepted a payment that she knew or reasonably should have known to be incorrect. OWCP explained how it calculated the amount of the overpayment and noted that appellant received a payment of \$1,733.36 for the period October 19 to November 15, 2014. It requested that she complete the Overpayment Recovery Questionnaire and submit relevant financial information within 30 days.

By decision dated December 19, 2014, OWCP finalized the determination that appellant received an overpayment in compensation in the amount of \$1,733.36 for the period October 19 to November 15, 2014 because she continued to receive compensation after she returned to work. It found that she was at fault in the creation of the overpayment because she knew or reasonably should have known that she was not entitled to compensation after returning to work. As appellant was no longer receiving compensation from OWCP, it found that she should forward a check for the full amount of the debt.

² The record reveals that appellant has two previously accepted claims for January 6, 2001 (File No. xxxxxx025) and June 1, 2004 (File No. xxxxxx007) injuries.

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, she may not receive salary, pay, or remuneration of any type from the United States, except in limited circumstances.⁴ 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

ANALYSIS -- ISSUE 1

OWCP accepted appellant's claim and paid appropriate wage-loss compensation benefits. Appellant returned to full-time light duty on October 20, 2014. As of that date, she was no longer entitled to wage-loss compensation benefits. After appellant returned to work, OWCP made an automatic payment of compensation in the amount of \$1,733.36 on November 15, 2014. The payment was made by direct deposit covering the period October 19 to November 15, 2014. The Board finds that the direct deposit of this compensation created an overpayment of compensation in the amount of \$1,733.36 for the period October 19 to November 15, 2014 as appellant was not entitled to compensation for total disability after returning to work. The Board has reviewed OWCP's calculation of the overpayment in its preliminary determination and finds that it is correct. Accordingly, the Board will affirm OWCP's December 19, 2014 decision on the issues of fact and amount of overpayment.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of FECA provides that, when an overpayment of compensation has been made because of an error of fact or law, adjustment shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is when an incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of FECA or be against equity and good conscience.⁶ No waiver of payment is possible if appellant is with fault in helping to create the overpayment.⁷

³ 5 U.S.C. § 8102(a).

⁴ *Id.* at § 8116(a).

⁵ 20 C.F.R. § 10.500(a).

⁶ 5 U.S.C. § 8129(b).

⁷ *Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

In determining whether an individual is not without fault or alternatively, with fault, section 10.433(a) of OWCP's regulations provide in relevant part:

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.”⁸

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 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 found appellant at fault in creating the overpayment of compensation because she accepted a payment which she knew or should have known to be incorrect. The Board finds, however, that OWCP failed to provide any explanation of how she was at fault in creating the overpayment when she could not avoid the incorrect payment sent by electronic fund transfer (EFT). In *Tammy Craven*,¹⁰ the Board explained that an employee who receives payment 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 requisite knowledge. The Board has recognized that in the case of EFTs, an employee would not receive notification of the date and amount of payment until after the deposit was made and the overpayment created.¹¹

In this case, appellant received one electronic deposit on November 15, 2014 in the amount of \$1,733.36. Although she accepted the overpayment at the time it was deposited into her account, OWCP has not shown that she knew or should have known at the time of the direct deposit on November 15, 2014 that the payment was incorrect. It has not presented evidence to establish that appellant accepted a payment at the time of deposit which she knew or should have known to be incorrect.¹² Appellant had no reason to suspect at the time of the direct deposit that

⁸ 20 C.F.R. § 10.433(a).

⁹ *Id.* at § 10.433(b).

¹⁰ Docket No. 05-249 (issued June 20, 2005), *order granting petition for recon. and reaffirming prior decision* (issued July 24, 2006).

¹¹ *See J.H.*, Docket No. 15-195 (issued March 17, 2015).

¹² *V.A.*, Docket No. 12-637 (issued August 27, 2012).

OWCP had issued an incorrect payment since this was the first and only incorrect payment made.¹³ Thus, the Board finds that she was not at fault in creating the overpayment received on November 15, 2014. A finding of no fault, however, does not mean that the claimant may keep the money, only that OWCP must consider eligibility for waiver for this period.¹⁴ The Board will remand the case for OWCP to obtain current financial information regarding income and expenses and consider waiver of recovery of the overpayment based on appellant's updated financial information.

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$1,733.36 because she received wage-loss compensation after she returned to work. The Board further finds that OWCP improperly found that she was at fault in creating the overpayment and will remand the case for consideration of waiver of the recovery of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the December 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 proceedings consistent with this decision of the Board.

Issued: June 2, 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

¹³ See *S.C.*, Docket No. 14-1730 (issued April 13, 2015).

¹⁴ *D.B.*, Docket No. 14-397 (issued June 3, 2014); *M.F.*, Docket No. 12-456 (issued November 13, 2012).