

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

T.M., Appellant

and

**U.S. POSTAL SERVICE, BULK MAIL
CENTER, Memphis, TN, Employer**

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**Docket No. 15-0147
Issued: November 13, 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
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On October 20, 2014 appellant filed a timely appeal from a September 30, 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 \$12,435.25 for the period October 3, 2012 through April 16, 2013; (2) whether she was at fault in the creation of the overpayment, thereby precluding recovery of the overpayment; and (3) whether OWCP properly found that appellant abandoned her request for a prerecoupment hearing.

On appeal, appellant asserts, *inter alia*, that she did not receive notice of the prerecoupment hearing, that the communications from OWCP have been inconsistent and

¹ 5 U.S.C. § 8101 *et seq.*

confusing, that she followed all the guidelines, and that she should not be penalized for an administrative error of which she was not aware.²

FACTUAL HISTORY

This case has previously been before the Board. The facts as set forth in the Board's prior decision are incorporated herein.³

On October 3, 2012 OWCP terminated appellant's medical and compensation benefits as it concluded that she had no injury-related residuals or continuing disability as a result of the accepted employment conditions. However, appellant continued to receive compensation checks covering dates through April 6, 2013.

By decision dated April 10, 2013, OWCP determined that appellant received an overpayment in the amount of \$12,435.25 due to the fact that she continued to receive compensation after her benefits were terminated.⁴ It also made a preliminary determination that she was at fault in the creation of the overpayment because she knowingly accepted compensation to which she was not entitled. OWCP sent appellant financial forms to complete and forms to request a waiver and a recoupment hearing and advised her that they needed to be returned within 30 days.

Appellant completed the Overpayment Action Request on April 16, 2013, and requested a prerecoupment hearing. She checked the line indicating that she believed that the overpayment occurred through no fault of her own and requested a waiver. In an accompanying letter, appellant argued that she was being blamed for an error made by OWCP. She admitted that she received a letter stating that her benefits would be terminated on October 3, 2012. Appellant contended that when she received her first compensation payment after the termination, she was initially confused, but thought that OWCP was paying her until the compensation year ended around her birthday. She also noted that she received a form to update her employment and doctor's information. Appellant argued that she did not understand OWCP's confusing process for compensation.

² On October 20, 2014 appellant submitted a timely request for oral argument pursuant to 20 C.F.R. § 501.5(b). After exercising its discretion, pursuant to 20 C.F.R. § 501.5(a), the Board, by order dated July 29, 2015, denied appellant's request for oral argument, finding that it could adequately address her contentions based on a review of the case record. *Order Denying Request for Oral Argument*, Docket No. 15-147 (issued July 29, 2015).

³ Docket No. 10-1449 (issued April 1, 2011). On October 8, 2006 appellant, then a 27-year-old clerk, filed a traumatic injury claim alleging that on September 15, 2006 she suffered from stress resulting from the duties of her federal employment. OWCP accepted her claim for post-traumatic stress disorder (anxiety) and major depression, recurrent episode, and paid compensation and medical benefits.

⁴ OWCP determined that for the period October 3 through 20, 2012 appellant was overpaid \$1,200.50 for 18 calendar days. For the periods October 21 through November 17, 2012, November 18 through December 15, 2012 and December 16, 2012 through January 12, 2013, appellant was paid \$1,867.44 for each 28 calendar days, all of which was an overpayment. For the periods January 13 through February 9, 2013, and February 10 through March 9, 2013, she was paid \$1,862.50 for each 28-day period, all of which was found to be an overpayment. Appellant also received an additional \$10.93 deposit for March 1 through 9, 2013 and \$1,896.50 for March 10 to April 6, 2013. The total amount of these overpayments is \$12,435.25.

By letter dated July 2, 2014, OWCP notified appellant that the telephonic hearing was to take place on August 12, 2014 at 3:15 p.m., and provided her the toll free number and pass code. The letter was mailed to appellant's address of record. Appellant did not call the listed number on the assigned date.

By decision dated September 30, 2014, the hearing representative found that appellant had abandoned her prerecoupment hearing that she had received an overpayment in the amount of \$12,435.25, and that as she was with fault in the creation of the overpayment, overpayment could not be waived. He further determined that she could repay the overpayment in monthly installments of \$500.00 per month until the debt was liquidated.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of FECA 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.⁵ Section 8129(a) of FECA provides, in pertinent part:

“When an overpayment has been made to an individual under this subchapter because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.”⁶

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.⁷ 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.⁸ OWCP's regulations state in pertinent part that compensation for wage loss due to disability is available only for any periods during which the employee's work-related medical condition prevents her from earning the wages earned before the work-related injury.⁹

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly found that appellant received a \$12,435.25 overpayment of compensation. In an October 3, 2012 decision, OWCP terminated appellant's medical and compensation benefits as it concluded that appellant had no injury-related residuals or continuing disability as a result of the accepted employment injury. The record reveals, however, that appellant continued to receive total disability compensation from OWCP through

⁵ 5 U.S.C. § 8102(a).

⁶ *Id.* at § 8129(a).

⁷ *Id.* at § 8102.

⁸ *Id.* at § 8116(a).

⁹ 20 C.F.R. § 10.500.

April 16, 2013. Appellant was not entitled to receive disability compensation between October 3, 2012 and April 16, 2013 and the entire amount of compensation she received during that period, \$12,435.25, represented an overpayment of compensation. For these reasons, OWCP properly determined that she received a \$12,435.25 overpayment.¹⁰

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.¹¹

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”¹²

The regulations further provide that each recipient of compensation benefits is responsible to ensure that payments he or she receives from OWCP are proper.¹³ Whether or not OWCP determines that an individual was at fault with respect to the creation of the overpayment depends on the circumstances surrounding the overpayment.¹⁴

ANALYSIS -- ISSUE 2

OWCP applied the third standard to determine 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. To establish that she was at fault in creating the overpayment of compensation, it must

¹⁰ See *supra* note 4.

¹¹ *W.M.*, Docket No. 11-2000 (issued May 21, 2012).

¹² 5 U.S.C. § 8129(b).

¹³ 20 C.F.R. § 10.433(a).

¹⁴ *Id.*

establish that, at the time she accepted the compensation payments in question, she knew or should have known that the payments were incorrect.¹⁵

As noted, OWCP erroneously issued wage-loss compensation for total disability for the period October 3, 2012 through April 16, 2013 following the termination of such benefits. Appellant was not entitled to disability compensation for this period as wage-loss compensation benefits had been terminated effective October 3, 2012.

With respect to whether an individual is with fault, section 10.433(b) of OWCP's regulations provide that whether or not OWCP determines that individual was without fault with respect to the creation of the overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of the circumstances and the individual's capacity to realize that he or she is being overpaid. The Board has also noted that in applying the tests to determine fault, OWCP should apply a reasonable person test.¹⁶

The Board finds that appellant was at fault in the creation of the overpayment. The Board finds that she knew or should have known that at the time her monetary compensation was formally terminated effective October 3, 2012, she was not entitled to additional wage-loss compensation. Appellant had the obligation to return all payments she received after that date as a reasonable person would have known or should have known that any such payments were incorrect.¹⁷ She asserts that the communications from OWCP have been inconsistent and confusing. Appellant alleged that she did not believe that it was her error, and that if there was an oversight it was due to the misguidance she received from OWCP. Her explanation that she was confused and thought that OWCP was to pay her through her birthdate is without merit, as the October 3, 2012 decision clearly indicated that her benefits were terminated on that date. The Board therefore finds that OWCP has established that appellant accepted payments which she should have known to be incorrect.

LEGAL PRECEDENT -- ISSUE 3

Section 10.622(f) of OWCP's regulations and Chapter 2.1601(g) of OWCP's procedures provide that failure of appellant to appear at the scheduled hearing, failure to request a postponement, and failure to request a new hearing in writing within 10 days after the date of the scheduled hearing shall constitute abandonment of the request for a hearing.¹⁸ Under these circumstances, the Branch of Hearings and Review will issue a formal decision finding that the claimant has abandoned his or her request for a hearing and return the case to the district office. In cases involving prerecoupment hearings, the Branch of Hearings and Review will also issue a

¹⁵ See *Claude T. Green*, 42 ECAB 174, 178 (1990).

¹⁶ *C.D.*, Docket No. 12-1913 (issued August 2, 2013).

¹⁷ *Sinclair L. Taylor*, 52 ECAB 442 (2001).

¹⁸ 20 C.F.R. § 10.622(f); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Review of the Written Record*, Chapter 2.1601.6(g) (October 2011).

final decision on the overpayment, based on the available evidence, before returning the case to the district office.¹⁹

ANALYSIS -- ISSUE 3

In a letter dated July 2, 2014, OWCP advised appellant of a scheduled telephonic precoupment hearing with the hearing representative at a specific time on August 12, 2014. The evidence establishes that it mailed appropriate notice to appellant at her last known address. The record also reveals that appellant failed to request postponement, failed to appear for the scheduled hearing, and failed to provide any notification for such failure within 10 days of the scheduled date of the hearing. As this meets the condition for abandonment of a hearing as specified by OWCP's regulations and procedure manual, the Board finds that OWCP properly found that appellant abandoned her request for a precoupment hearing before an OWCP hearing representative and properly issued a final decision on the overpayment of compensation.²⁰ On appeal, appellant asserts that she did not receive notification of the scheduled hearing. However, absent evidence to the contrary, it is presumed that she received the properly addressed notice of hearing.²¹ Accordingly, the Board finds that OWCP properly found that appellant abandoned her request for a precoupment hearing.

The Board's jurisdiction with respect to the recovery of an overpayment is limited to those cases where OWCP seeks recovery from continuing compensation benefits.²² As appellant was not in receipt of compensation at the time of OWCP's overpayment determination, the Board does not have jurisdiction over the method of recovery of the overpayment in this case.²³

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$12,435.25 for the period October 3, 2012 through April 16, 2013 and that she was at fault in the creation of the overpayment, thereby precluding waiver of the overpayment. The Board further finds that OWCP properly found that appellant abandoned her request for a precoupment hearing.

¹⁹ *Id.*

²⁰ *See supra* note 18; *see also M.G.*, Docket No. 14-1917 (issued January 22, 2015).

²¹ Under the mailbox rule, it is presumed, in the absence of evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by that individual. This presumption arises when it appears from the record that the notice was properly addressed and duly mailed. *Michele Lagana*, 52 ECAB 187, 189 (2000).

²² *D.R.*, 59 ECAB 148 (2007); *Miguel A. Muniz*, 54 ECAB 217 (2002).

²³ *See Lorenzo Rodriguez*, 51 ECAB 295 (2000); 20 C.F.R. § 10.441.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 30, 2014 is affirmed.

Issued: November 13, 2015
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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