

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

A.K., Appellant)

and)

DEPARTMENT OF HOMELAND SECURITY,)
TRANSPORTATION SECURITY)
ADMINISTRATION, San Antonio, TX,)
Employer)

Docket No. 16-0728
Issued: August 2, 2016

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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 1, 2016 appellant filed a timely appeal from a December 30, 2015 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 \$1,582.61 during the period June 25 through July 25, 2015; and (2) whether OWCP properly found appellant was at fault in creating the overpayment thereby precluding waiver of recovery of the overpayment.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On February 18, 2015 appellant, then a 23-year-old transportation security officer (screener), filed a traumatic injury claim (Form CA-1) alleging that on February 15, 2015 she injured her right wrist while moving a bag from the search table to the ground.

By letter dated April 10, 2015, OWCP advised appellant that her claim had been accepted for tenosynovitis of the right hand and wrist. Appellant was also advised that now that her claim had been accepted: "Once you return to work, or obtain new employment, notify this office immediately. If you receive a compensation check which includes payment for a period you worked, return it to us immediately to prevent an overpayment of compensation."

Appellant underwent right wrist diagnostic arthroscopy and open repair of triangular fibrocartilage complex, right wrist on June 8, 2015 and began receiving compensation for temporary total disability on the supplemental rolls.

Appellant filed claims for wage loss (Form CA-7) for the periods June 10 to 14, June 14 to 24, and July 2, 2015. These forms advised that appellant must report any and all earnings from employment or payment of any kind during the period(s) claimed. Fraudulently concealing employment or failing to report income may result in forfeiture of compensation benefits and/or criminal prosecution.

On July 29, 2015 appellant received compensation for the period June 10 through July 25, 2015 in the amount of \$2,348.39.

Appellant advised OWCP on August 18, 2015 that she had returned to work full time on July 15, 2015.

On August 27, 2015 OWCP made a preliminary determination that appellant was overpaid in the amount of \$561.57 because she returned to full-time work on July 15, 2015, but continued to receive compensation benefits until July 25, 2015.

A telephone memorandum dated September 9, 2015 noted that appellant called OWCP on that date and related that the preliminary determination had the wrong date that she returned to work. Appellant also indicated that she could not recall the exact date she returned to work. OWCP thereafter requested that the employing establishment provide further information as to when she returned to work. By e-mail dated September 9, 2015, the employing establishment responded that appellant returned to full-time modified work on June 25, 2015.

By letter dated October 1, 2015, OWCP advised appellant of its preliminary determination that an overpayment of \$1,582.61 had occurred during the period June 25 through July 25, 2015 as she was paid compensation after her return to full duty on June 25, 2015. It found that for the period June 10 through July 25, 2015, a period of 46 days, appellant received \$2,348.39. As she returned to work on June 25, 2015, appellant was overpaid from June 25 through July 25, 2015, a period of 31 days, or \$1,582.61. OWCP found that she was at fault in creating the overpayment as she knew or should have known that she could not receive wage-loss compensation after returning to full-time work. It informed appellant that she had a right to a preresumption hearing before an OWCP hearing representative. Appellant was also advised to

complete the enclosed OWCP-20 questionnaire and submit supporting financial documents, as this was necessary information on the issues of waiver and recovery of the overpayment.

Copies of October 1, 2015 worksheets indicated that for the period June 10 through July 25, 2015, appellant received \$2,348.39. However, as she returned to work on June 25, 2015, she was overpaid from June 25 through July 25, 2015 in the amount of \$1,582.61.

Appellant responded to the preliminary determination by completing the Overpayment Action Request Form and by completing the OWCP-20 form. On October 15, 2015 she requested a telephone conference, with an OWCP hearing representative, which was held on December 30, 2015.

During the telephone conference, appellant indicated that she was not with fault for the overpayment and that she was unable to pay the overpayment amount due to costly repairs to her kitchen and bathroom.

By decision dated December 30, 2015, OWCP finalized the overpayment determination that an overpayment in the amount of \$1,582.61 was created for the period June 25 through July 25, 2015 for which appellant was at fault as she accepted compensation payments she knew or reasonably should have known she was not entitled to.

LEGAL PRECEDENT -- ISSUE 1

Section 8102 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 duty.²

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.³ Section 10.500 of OWCP regulations provide that 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.⁴

ANALYSIS -- ISSUE 1

Appellant is not entitled to wage-loss compensation upon her return to work at full salary. The record establishes that she returned to full-time work on June 25, 2015. Appellant continued to receive wage-loss compensation until July 25, 2015. On July 29, 2015 she received compensation for the period June 10 through July 25, 2015, in the amount of \$2,348.39. As she returned to work on June 25, 2015, appellant was overpaid from June 25 through July 25, 2015,

² 5 U.S.C. § 8102(a).

³ *Id.* at § 8116(a); *see Danny E. Haley*, 56 ECAB 393 (2005).

⁴ 20 C.F.R. § 10.500.

in the amount of \$1,582.61. She has not disputed the fact or amount of overpayment. The Board finds that an overpayment of \$1,582.61 was created in this case.

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.⁵ A claimant who is at fault in creating the overpayment is not entitled to waiver.⁶ 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 was incorrect.

ANALYSIS -- ISSUE 2

OWCP found appellant was at fault in the creation of the overpayment because she accepted payments she knew or should have known to be incorrect. Appellant returned to work in a full-time capacity on June 25, 2015. She received compensation payments by check dated July 29, 2015 for the period June 10 through July 25, 2015 for temporary total disability after returning to work on June 25, 2015. 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 could 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.⁷

The Board finds that appellant was at fault in the creation of the overpayment. When appellant returned to full-time work on June 25, 2015, she knew she was no longer totally disabled. She was advised by OWCP's acceptance letter of April 10, 2015 that she was not to accept compensation after a return to work. Appellant was also informed of her reporting responsibilities regarding a return to work on the CA-7 forms she completed to obtain compensation benefits. While she returned to work on June 25, 2015, and accepted compensation through July 25, 2015, she waited until August 18, 2015, to notify OWCP that she had returned to work.⁸ Appellant thus knew or reasonably should have known that the payments she continued to receive after she returned to work were incorrect.

⁵ 5 U.S.C. § 8129(b).

⁶ See *Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

⁷ *C.D.*, Docket No. 12-193 (issued August 2, 2013).

⁸ An incorrect return to work date was provided, which appellant subsequently corrected to June 25, 2015.

For these reasons, OWCP properly found appellant at fault in the creation of the \$1,582.61 overpayment, thereby precluding waiver of recovery of the overpayment.⁹ As she is no longer receiving FECA wage-loss compensation, the Board does not have jurisdiction with respect to recovery of the overpayment.¹⁰

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation during the period June 25 through July 25, 2015 in the amount of \$1,582.61. The Board further finds that OWCP properly determined that she was at fault in creating the overpayment of compensation, thereby precluding waiver of recovery of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the December 30, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 2, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

⁹ 5 U.S.C. § 8129(b); *L.J.*, 59 ECAB 264 (2007).

¹⁰ *See Desiderio Martinez*, 55 ECAB 245 (2004).