

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount \$47,986.96 for the period September 6, 2013 through January 10, 2015 because she continued to receive FECA compensation after she returned to work; and (2) whether OWCP properly found her at fault and thus not entitled to waiver of recovery of the overpayment.

On appeal appellant asserts that she is entitled to waiver of recovery of the overpayment because the creation of the overpayment was not her fault.

FACTUAL HISTORY

On September 13, 1993 appellant, then a 33-year-old carrier tech, filed a Form CA-1, traumatic injury claim, alleging that she injured her right shoulder on September 11, 1993 when she fell down steps while delivering mail. The claim was adjudicated by OWCP under file number xxxxxx914, and right shoulder contusion and rotator cuff tenderness were accepted. A February 11, 2000 injury, adjudicated by OWCP under file number xxxxxx935, was accepted for left forearm sprain and left wrist tendinitis. A March 2, 2001 injury, adjudicated by OWCP under file number xxxxxx648, was accepted for right shoulder and cervical sprain. The claims were combined with case file number xxxxxx935, serving as the master file. Tenosynovitis of the left hand and wrist and displacement of cervical intervertebral disc without myelopathy were also accepted. Under file number xxxxxx914, on January 29, 1996 appellant was granted a schedule award for 14 percent permanent impairment of the right shoulder.

Following the February 11, 2000 employment injury, appellant worked limited duty. She stopped work following the March 2, 2001 employment injury. On September 24, 2001 Dr. Joseph K. Jamaris, a Board-certified neurosurgeon, performed cervical discectomy and decompression. Appellant was placed on the periodic compensation rolls.

In a March 17, 2004 decision, OWCP terminated appellant's compensation in accordance with section 8106(c) of FECA. In a March 26, 2014 decision, it reduced her compensation to zero based on her actual earnings in a modified sales and distribution position. Following a June 24, 2004 reconsideration request, by decision dated June 30, 2004, OWCP vacated the March 17 and 26, 2004 decisions. It found the March 17, 2004 decision in error because appellant had accepted an offered position, and found the March 26, 2004 decision premature because her condition worsened such that she could no longer work as of April 20, 2004. On July 12, 2004 Dr. Jamaris performed a second cervical discectomy and fusion. Appellant received appropriate compensation and was returned to the periodic compensation rolls.

On September 6, 2013 appellant accepted a full-time modified city carrier position, effective September 9, 2013. A notice of change in health benefits, transferring coverage to the employing establishment, was effective September 9, 2013. On an OWCP EN1032 form, signed by appellant on February 11, 2014, she reported that she had returned to work on September 7, 2013. Appellant telephoned OWCP on September 8, 2014 and reported that she

had returned to work effective September 6, 2013.⁴ On an EN1032 form, signed by appellant on December 11, 2014, she reported that she had returned to work on September 6, 2013.

On January 28, 2015 OWCP issued a preliminary determination that an overpayment of compensation in the amount of \$47,986.96 had been created. It explained that the overpayment was created because appellant had returned to full-time work on September 6, 2013 and continued to receive FECA wage-loss compensation through January 10, 2015. OWCP found her at fault because she had accepted a payment that she knew or reasonably should have known was incorrect. The preliminary overpayment determination provided an explanation of the calculation of the overpayment. Appellant was provided an overpayment action request and an overpayment questionnaire (Form CA-20). She was informed of the actions she could take and was allotted 30 days to respond. An overpayment memorandum indicated that appellant received FECA compensation totaling \$47,986.96 for the period September 6, 2013 to January 10, 2015.

Appellant timely requested a prerecoupment hearing before an OWCP hearing representative. In correspondence dated February 24, 2015, she maintained that the overpayment occurred through no fault of hers and requested waiver of recovery. Appellant asserted that she had returned to work on Monday, September 9, 2013, not September 6, 2013, and that she called OWCP on several occasions and left messages to notify them that she had returned to work. She submitted a completed overpayment recovery questionnaire in which she listed monthly income of \$5,895.06 and expenses totaling \$7,930.00. In March 2015, appellant repaid \$20,000.00 of the overpayment.

At the hearing held on May 14, 2015, appellant testified that she called OWCP on multiple occasions to report that she had returned to work. She noted that she had repaid \$20,000.00 and had used FECA compensation for “shortfalls,” such as when mold was discovered in her home. Appellant was given 30 days to submit supportive financial information.

By decision dated July 29, 2015, an OWCP hearing representative finalized the preliminary determination that appellant was at fault in the creation of an overpayment of compensation in the amount of \$47,986.96 for the period September 6, 2013 through January 10, 2015. She noted that appellant submitted nothing further after the hearing. The hearing representative found appellant at fault because she clearly accepted, and subsequently spent funds that she knew she was not entitled to receive and was thus not entitled to waiver of recovery of the overpayment. She found the overpayment due in full, noting that appellant was no longer receiving wage-loss compensation.

⁴ On September 15, 2014 appellant’s file was transferred from the Washington, DC district office to the Philadelphia, PA district office.

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.⁵

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.⁶ Section 10.500 of OWCP's 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."⁷

ANALYSIS -- ISSUE 1

The Board finds that an overpayment of compensation was created because appellant continued to receive FECA wage-loss compensation after she returned to work from September 2013 through January 10, 2015. As noted, both FECA and implementing regulations of OWCP provide that a claimant may not receive wage-loss compensation concurrently with a federal salary or other remuneration.⁸ An overpayment of compensation was therefore created.⁹

The Board, however, finds the case is not in posture for decision regarding the amount of the overpayment. The job offer accepted by appellant on September 6, 2013 indicated that the position was available on September 9, 2013. An overpayment worksheet indicated that appellant returned to full-time work on September 6, 2013. EN1032 forms signed by appellant on February 11 and December 11, 2004 indicated that she had returned to work on September 6 and 7, 2013 respectively. A notice of change in health benefits transferred appellant's health insurance to the employer effective September 9, 2013. Thus, as the record contains conflicting information regarding the actual date appellant returned to work, the Board does not have sufficient evidence to permit an informed adjudication regarding the amount of the overpayment. The case will therefore be remanded to OWCP to obtain information from the employing establishment regarding exactly when appellant returned to pay status. OWCP should then issue a *de novo* decision regarding the amount of overpayment.

⁵ 5 U.S.C. § 8102(a).

⁶ *Id.* at § 8116(a); *see Danny E. Haley*, 56 ECAB 393 (2005).

⁷ 20 C.F.R. § 10.500.

⁸ 5 U.S.C. § 8116(a); *supra* note 7.

⁹ *Id.*

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA provides that an overpayment in 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

Section 10.433(a) of OWCP regulations provide that OWCP:

“[M]ay consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from OWCP are proper. The recipient must show good faith and exercise a high degree of care in reporting events which may affect entitlement to or the amount of benefits.... A recipient who has done any of the following will be found to be at fault in creating an overpayment: (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. (This provision applies only to the overpaid individual).”¹¹

To determine if an individual was at fault with respect to the creation of an overpayment, OWCP examines 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.¹²

Even if an overpayment resulted from negligence by OWCP, this does not excuse the employee from accepting payment, which the employee knew or should have been expected to know she was not entitled.¹³

ANALYSIS -- ISSUE 2

OWCP found that appellant was at fault in creating the overpayment because she knew or should have reasonably known that she was not entitled to receive wage-loss compensation after she returned to work in early September 2013. The record indicates that appellant continued to receive FECA compensation until January 10, 2015.

¹⁰ 5 U.S.C. § 8129.

¹¹ 20 C.F.R. § 10.433(a); *see Sinclair L. Taylor*, 52 ECAB 227 (2001); *see also* 20 C.F.R. § 10.430.

¹² 20 C.F.R. 10.433(b); *Neill D. Dewald*, 57 ECAB 451 (2006).

¹³ *Diana L. Booth*, 52 ECAB 370 (2001).

Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives are proper¹⁴ and the recipient must show good faith and exercise a high degree of care in reporting events that may affect entitlement to or the amount of benefits.¹⁵ In an April 24, 2001 letter, found in file number xxxxxx648 claim, OWCP notified appellant that her claim was accepted, OWCP clearly advised her that she was to immediately inform OWCP upon her return to work to avoid an overpayment in compensation and that, if she worked during any period covered by a compensation payment, she had to return the payment to OWCP.

Thus, appellant should have known that she could not receive wage-loss compensation after her return to work.¹⁶ Although she maintained that she called OWCP on several occasions, she did not return the compensation she received over the 16-month period.

The Board therefore finds that appellant should have known that, at the time she returned to work, she was not entitled to continue to receive compensation and had an obligation to return payments she knew or should have known were incorrect.¹⁷ Under section 10.433(a) of OWCP's regulations, appellant is at fault. As she was at fault in creating the overpayment, appellant is not eligible for waiver of recovery of the overpayment in compensation.¹⁸

With respect to recovery of the overpayment in compensation, the Board's jurisdiction is limited to reviewing those cases where OWCP seeks recovery from continuing compensation benefits under FECA.¹⁹ As appellant is no longer receiving wage-loss compensation, the Board does not have jurisdiction with respect to the recovery of the overpayment under the Debt Collection Act.²⁰

CONCLUSION

The Board finds that appellant received an overpayment of compensation because she continued to receive compensation after her return to work in September 2013 until January 10, 2015, and that OWCP properly found her at fault and thus, she was not entitled to waiver of recovery of the overpayment. The Board, however, finds the case not in posture for decision regarding the amount of the overpayment because the record is unclear regarding the exact date appellant returned to work in September 2013.

¹⁴ *Danny E. Haley, supra* note 6.

¹⁵ *Sinclair L. Taylor, supra* note 11.

¹⁶ *Neill D. Dewald, supra* note 12.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Cheryl Thomas, 55 ECAB 610 (2004).*

²⁰ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the July 29, 2015 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part, and the case is returned to OWCP for proceedings consistent with this opinion of the Board.

Issued: February 4, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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