

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

N.L., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Corona, CA, Employer)

**Docket No. 15-0431
Issued: January 12, 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
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On December 15, 2014 appellant timely appealed from a July 29, 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 \$7,855.27 for the period of May 1, 2012 through February 12, 2013; and (2) whether appellant was at fault in creating the overpayment.

FACTUAL HISTORY

Appellant, a 63-year-old former mail processing clerk, injured her bilateral upper extremities in the performance of duty on or about February 6, 2012. OWCP accepted her claim

¹ 5 U.S.C. § 8101 *et seq.*

for bilateral carpal and cubital tunnel syndrome, bilateral tenosynovitis of the wrist and elbow, and bilateral triangular fibrocartilage complex of the wrist. Appellant last worked on February 4, 2012.²

Soon after OWCP accepted her claim in May 2012, appellant filed for wage-loss compensation (Form CA-7) for the period February 6 to April 30, 2012. A few weeks later, she filed another claim for the period May 1 to June 15, 2012. On this latest (Form CA-7) dated June 18, 2012, appellant reported several dates in May and June 2012 when she worked part time as an usher at the Anaheim Convention Center.³

On December 11, 2012 OWCP advised appellant that she would be compensated for the period February 7 to December 15, 2012 in the amount of \$16,739.24, and for the period beginning December 16, 2012, she would receive payment every 28 days in the amount of \$1,497.44. The following instructions were included:

“In order to avoid an overpayment of compensation, NOTIFY THIS OFFICE IMMEDIATELY WHEN YOU RETURN TO WORK. Each payment made through [OWCP’s] automated system will include the period for which payment is made. If you have worked for any portion of this period, you must return the check to [OWCP]. Otherwise, an overpayment of compensation may result.”

OWCP paid compensation for temporary total disability based on a date-of-injury weekly pay rate of \$561.54.

In January 2013, OWCP’s vocational rehabilitation counselor learned that appellant was working full time. Consequently, OWCP removed her from the periodic compensation rolls effective January 13, 2013.⁴ It later learned that beginning August 13, 2012, appellant worked full time for Cooperative Agricultural Support Services (CASS) Authority. Appellant earned \$12.00 per hour working for CASS.

Appellant’s 2012 Internal Revenue Service (IRS) Wage & Tax Statement (Form W-2) showed that she received gross wages totaling \$9,120.00 from CASS. Her 2012 W-2 form from the City of Anaheim showed gross wages of \$973.22.⁵

By letter dated February 16, 2013, a CASS representative advised appellant that due to budgetary constraints, her employment would be terminated effective February 19, 2013.⁶

² The employing establishment ultimately terminated appellant’s employment effective August 22, 2012.

³ Appellant indicated that she worked on May 1, 3, 11, 19, 20, and 31 and June 10, 2012.

⁴ OWCP subsequently reinstated wage-loss compensation beginning January 13, 2013. Effective April 23, 2013, it terminated wage-loss compensation and medical benefits because appellant’s employment-related bilateral upper extremity condition(s) had resolved.

⁵ The record also includes a 2012 IRS (Form W-2) from the employing establishment with reported gross earnings of \$4,952.11.

⁶ The record does not include evidence of appellant’s 2013 earnings from CASS.

In a March 21, 2013 preliminary determination, OWCP found that appellant received an overpayment of \$8,392.29 for the period May 1, 2012 through January 12, 2013. Essentially, it declared her 2012 nonfederal net wages as an overpayment.⁷ OWCP calculated the overpayment by reducing the reported gross earnings on appellant's CASS and City of Anaheim 2012 W-2s by the various deductions/withholdings for federal, state, and local income tax, social security, Medicare, and other miscellaneous deductions. It also determined that she was at fault in creating the overpayment because she knew or reasonably should have known that she was not entitled to receive.

Appellant requested a prereduction hearing before an OWCP hearing representative, which was held on October 31, 2013. She also submitted an overpayment recovery questionnaire (OWCP-20), along with information regarding her current income, expenses, and assets. Appellant reportedly had not worked since leaving CASS in February 2013.

By decision dated January 27, 2014, the hearing representative finalized OWCP's March 21, 2013 preliminary overpayment determination. The hearing representative's decision similarly found appellant at fault in creating the \$8,392.29 overpayment, and because she was at fault, she was not entitled to waiver of recovery of the overpayment.

In a July 29, 2014 decision, upon inquiry from appellant, OWCP revisited the issue regarding the amount of appellant's overpayment. The senior claims examiner reduced the overpayment amount to \$7,855.27 and extended the period of the overpayment through February 12, 2013.⁸ Based on appellant's 2012 W-2s, OWCP calculated an average gross weekly wage of \$288.35 for the 35-week period of May 1 through December 31, 2012. Although there was no specific wage information for 2013, OWCP "made the assumption" that her early-2013 wages were not substantially different than her "2012 average." As such, OWCP applied its 2012 weekly wage calculation (\$288.35) through February 12, 2013. Utilizing the *Shadrick* formula (20 C.F.R. § 10.403), it determined that appellant was entitled to \$7,546.97 in lost wages for the period May 1, 2012 through February 12, 2013. However, appellant had received \$15,402.24 for the period in question, which represented a \$7,855.27 overpayment. OWCP did not otherwise modify the hearing representative's January 27, 2014 decision.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of FECA provides that the United States shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.⁹ An employee is not entitled to receive temporary total disability benefits and actual earnings for the same time period.¹⁰ An

⁷ The March 21, 2013 preliminary determination did not identify the amount of FECA wage-loss compensation appellant received during the period May 1, 2012 through January 12, 2013.

⁸ The senior claims examiner believed that appellant had been laid off effective February 13, 2013.

⁹ 5 U.S.C. § 8102(a).

¹⁰ *L.S.*, 59 ECAB 350, 352-53 (2008).

overpayment of compensation occurs when an employee returns to work and continues to receive compensation.¹¹

ANALYSIS -- ISSUE 1

The Board finds that the case is not in posture for decision with respect to the amount of the overpayment and period of the overpayment. OWCP declared an overpayment of compensation in the amount of \$7,855.27 for the period May 1, 2012 through February 12, 2013. However, neither the amount of the overpayment nor the designated period is supported by the current record. As noted, OWCP found that beginning May 1, 2012 appellant had average weekly earnings of \$288.35.

On her June 18, 2012 CA-7 form, appellant reported having worked part time for the Anaheim Convention Center on May 1, 3, 11, 19, 20, 31, and June 10, 2012. She did not specify an hourly rate for the part-time work she performed there as an usher. It is also unclear when appellant last worked for the City of Anaheim. At the October 31, 2013 preresoupment hearing, her then representative indicated that there were no periods of overlap between her part-time work with the City and her full-time work with CASS beginning Monday, August 13, 2012. Moreover, he advised that appellant had been off work for several weeks prior to joining CASS. On appeal, appellant represented that she worked for the City from May until July 2012. She described herself as a part time, on-call usher. The 2012 W-2 from the City of Anaheim showed gross earnings of \$973.22. If spread across the entire 13-week period (May 1 - July 31, 2012), appellant's weekly earnings from the City would be approximately \$75.00. In contrast, OWCP calculated the overpayment based on an average weekly wage of \$288.35, which assumed there were no periods of unemployment after May 1, 2012.

With respect to appellant's earnings from CASS, her \$12.00 hourly rate corresponds to weekly gross earnings of \$480.00. The 2012 CASS W-2 reflected gross earnings of \$9,120.00 (19 weeks x \$480 per week). The Board finds that appellant's CASS payment stubs, in conjunction with the 2012 W-2 demonstrate actual gross weekly earnings of \$480.00 over the 19-week period from August 13 through December 22, 2012,¹² but instead of relying on her actual weekly earnings from CASS, OWCP calculated the overpayment based on an average weekly wage of \$288.35. Although there was no specific earnings information for 2013, OWCP applied the same average weekly rate through Tuesday, February 12, 2013. CASS terminated appellant from employment effective close of business on February 19, 2013. However, OWCP mistakenly found that appellant was laid off effective February 13, 2013.

In this instance, the purported overpayment spans a continuous 41-week period, yet the record documents actual 2012 full-time wages covering only a 19-week period. The remaining 2012 wages are sporadic and span a period of between 6 and 13 weeks. OWCP's finding that appellant earned on average \$288.35 per week is based on a 35-week earnings period, which is

¹¹ *Id.*; Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2a (May 2004).

¹² CASS paid appellant on a bi-weekly basis. The two-week period beginning December 23, 2012 included several days in early January 2013. As such, these wages would not likely be reflected on appellant's 2012 W-2.

not supported by the current record. It is imperative that OWCP properly match her actual earnings with the corresponding period of wage-loss compensation received.

Accordingly, the case shall be remanded for further development regarding appellant's specific period of employment with the City of Anaheim. OWCP should also obtain additional information from CASS and/or appellant regarding her actual earnings through February 19, 2013. After it has developed the record consistent with the above-noted directive, it shall issue a *de novo* decision regarding the amount and period of the overpayment.

LEGAL PRECEDENT -- ISSUE 2

OWCP may consider waving an overpayment only if the individual to whom it was made was not at fault in either accepting or creating the overpayment.¹³ Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments she receives from OWCP are proper.¹⁴ Recipients must show good faith and exercise a high degree of care in regard to receipt of their benefits.¹⁵ A recipient will be found to be at fault with respect to creating an overpayment if she "[a]ccepted a payment which [she] knew or should have known to be incorrect."¹⁶

ANALYSIS -- ISSUE 2

OWCP found appellant at fault because she accepted payment which she knew or should have known to be incorrect. Whether an individual is at fault in creating an overpayment depends on the circumstance of the overpayment.¹⁷ The degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that she is being overpaid.¹⁸ In determining fault OWCP applies a "reasonable person" standard.¹⁹

When OWCP accepted appellant's claim on May 22, 2012, it informed her of her various rights and responsibilities under FECA. With respect to returning to work, OWCP advised that once she resumed work, including new employment, she should notify OWCP immediately. The May 22, 2012 acceptance letter further noted that if appellant received a compensation check that included payment for a period when she actually worked, she should immediately return the check to OWCP so as to prevent an overpayment of compensation. OWCP provided similar advice with respect to receipt of electronic funds transfer deposits. Specifically, it advised that if appellant worked for any portion of the period for which a deposit was made, she was to advise

¹³ 5 U.S.C. § 8129(b); 20 C.F.R. § 10.433(a) (2014).

¹⁴ *Id.* at § 10.433(a).

¹⁵ *Id.*

¹⁶ 20 C.F.R. § 10.433(a)(3).

¹⁷ *Id.* at § 10.433(b).

¹⁸ *Id.*; *J.S.*, 58 ECAB 515, 521-22 (2007).

¹⁹ *L.D.*, 59 ECAB 673, 679 (2008).

OWCP immediately so that the overpayment could be collected. Approximately, seven months passed before she first received any wage-loss compensation from OWCP. However, when appellant eventually received payment, the accompanying correspondence regarding her entitlement to wage-loss compensation reiterated OWCP's earlier remarks about how to avoid an overpayment.

The December 11, 2012 correspondence advised appellant that she was being compensated for the period February 7 through December 15, 2012 in the amount of \$16,739.24. OWCP further advised that, beginning December 16, 2012, she would receive 28-day periodic payments in the amount of \$1,497.44. The December 11, 2012 correspondence included the following instructions:

“In order to avoid an overpayment of compensation, NOTIFY THIS OFFICE IMMEDIATELY WHEN YOU RETURN TO WORK. Each payment made through [OWCP's] automated system will include the period for which payment is made. If you have worked for any portion of this period, you must return the check to [OWCP]. Otherwise, an overpayment of compensation may result.”

By the time she received OWCP's December 11, 2012 correspondence, appellant had been working full time for approximately four months, and she had been earning approximately 85 percent of her date-of-injury wages. Between August and December 2012, appellant, her representative, and her Congressman contacted OWCP on more than a dozen occasions regarding her outstanding claims for compensation (Form CA-7). In an October 22, 2012 letter, appellant's then representative described her as “suffering a financial hardship.” It is noteworthy that the numerous telephone conversations and letters made no mention of appellant having resumed full-time work in mid-August 2012. It was not until January 14, 2013 that she advised OWCP's rehabilitation counselor that she was currently employed.

Despite OWCP's explicit instructions regarding receipt of wage-loss compensation while working, appellant claimed to have believed that she was entitled to the payments received from OWCP. She noted that the December 11, 2012 letter indicated that compensation would be terminated without notice whenever OWCP learned that she had “earnings equal to or higher than” the wages being paid for the job she held when injured. Appellant explained that the pay she received from both the City of Anaheim and CASS was less than her prior earnings, and therefore, she did not believe that she was at fault with respect to the overpayment. Had her 2012 earnings been limited to the \$973.22 she received working part time as an usher, the above explanation would seem plausible.

Appellant earned \$12.00 per hour at CASS, whereas she earned approximately \$14.00 hourly as a mail processing clerk. Because of what amounts to a 15 percent pay discrepancy, she purportedly believed that she was entitled to both her full-time CASS wages, as well as FECA wage-loss compensation for temporary total disability. The \$16,739.24 payment appellant received in December 2012 covered a 10-month period where she had been working full time for at least four consecutive months. She subsequently received payment for the period December 16, 2012 through January 12, 2013, which coincided with her ongoing employment with CASS. OWCP advised appellant on at least two occasions regarding her rights and responsibilities as a FECA benefits recipient, yet she waited approximately five months before

informing OWCP of her full-time employment status, and only after she had already been overpaid. Under the circumstances, the Board finds that she “[a]ccepted ... payment which [she] knew or should have known to be incorrect.”²⁰ Accordingly, appellant is not eligible for waiver of recovery of the overpayment.

CONCLUSION

The Board finds that appellant was not entitled to wage-loss compensation for temporary total disability while she was working. However, the case is not in posture for decision with respect to the actual amount of the overpayment or the exact period of the overpayment. The Board further finds that appellant was at fault with respect to creating the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the July 29, 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.

Issued: January 12, 2016
Washington, DC

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

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

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

²⁰ 20 C.F.R. § 10.433(a)(3).