United States Department of Labor
Employees' Compensation Appeals Board

K.M., Appellant	)	
and	)	**Docket No. 16-0802**
	)	**Issued: November 23, 2016**
U.S. POSTAL SERVICE, POST OFFICE, Chicopee, MA, Employer	)	

Appearances:
James G. Noucas, Jr., Esq., for the appellant[1]
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 3, 2016 appellant, through counsel, filed a timely appeal from September 9 and December 31, 2015 merit decisions of the Office of Workers' Compensation

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.; see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

Programs (OWCP).[2] Pursuant to the Federal Employees' Compensation Act[3] (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 OWCP properly terminated appellant's wage-loss and schedule award compensation effective December 14, 2014 as she refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c); (2) whether she received a $3,122.90 overpayment of compensation because she received wage-loss compensation through January 10, 2015 after OWCP terminated her compensation on December 14, 2014; and (3) whether appellant was at fault in creating the overpayment.

FACTUAL HISTORY

On June 10, 2009 appellant, then a 37-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that on June 9, 2009 she sustained neck spasms and problems with her arm, back, and shoulder on the left side in the performance of duty. She stopped work on June 9, 2009 and did not return. OWCP accepted the claim, assigned file number xxxxxx917 for cervical radiculitis, and paid her compensation for total disability beginning July 25, 2009.[4] Appellant was placed on the periodic rolls.

On August 13, 2013 OWCP referred appellant to Dr. Richard L. Levy, a Board-certified neurologist, for a second opinion examination to determine her current work status. In a report dated August 23, 2013, Dr. Levy diagnosed chronic cervical pain most likely musculoskeletal, subjective complaints of radiculitis without objective findings, and a history of a cervical disc herniation. He found that appellant could perform light-duty work and that her restrictions were due to her 2009 employment injury. Dr. Levy recommended a functional capacity evaluation (FCE).

Appellant underwent an FCE on October 8, 2013. The test indicated that she could perform full-time sedentary employment.

Dr. Levy provided a supplemental report on December 23, 2013. He found that appellant "suffers from a chronic pain syndrome predominately chronic cervical pain most likely musculoskeletal in origin." Dr. Levy advised that she could work full time in a sedentary

[2] Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of issuance of an OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. *See* 20 C.F.R. § 501.3(e)-(f). One hundred and eighty days from September 9, 2015, the date of OWCP's last decision was March 7, 2016. Since using March 10, 2016, the date the appeal was received by the Clerk of the Appellate Boards would result in the loss of appeal rights on this decision, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is March 3, 2016, rendering the appeal of this decision timely filed. *See* 20 C.F.R. § 501.3(f)(1).

[3] 5 U.S.C. § 8101 *et seq.*

[4] OWCP had previously accepted a 2001 disc herniation at L5-S1 under file number xxxxxx666. In September 2001 appellant underwent a laminectomy and discectomy at L5-S1. She returned to her usual work duties on September 17, 2008. This claim is not before the Board on the present appeal.

position occasionally lifting, pushing, and pulling up to 12 pounds, occasionally reaching, twisting, and bending, and walking and standing for one hour a day. He found that appellant had no restriction against operating a motor vehicle at work and to and from work.

OWCP, in a letter dated December 27, 2013, requested that Dr. Laura Bessette, a Board-certified internist and appellant's attending physician, review and discuss Dr. Levy's evaluation findings.

In a January 2, 2014 work restriction evaluation, Dr. Bessette found that appellant could sit for one hour a day, operate a motor vehicle to and from work one hour a day, lift under 10 pounds, but not push or pull. She advised that appellant was not able to drive an hour and a quarter to her workstation that had relocated to Springfield, MA. On January 5, 2014 Dr. Bessette diagnosed cervical radiculopathy and noted that appellant had findings on a magnetic resonance imaging (MRI) scan consistent with her complaints. She discussed appellant's physical limitations and examination findings and opined that she was "unable to return to even the light-duty position available through the [employing establishment]."

OWCP determined that a conflict of medical opinion existed between Dr. Levy and Dr. Bessette regarding appellant's current condition and disability. It referred her to Dr. Harvey Taylor, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a report dated March 31, 2014, Dr. Taylor reviewed the history of injury and the medical reports of record. On examination he found pain with neck motion and full upper extremity strength. Dr. Taylor diagnosed cervical radiculitis and a history of a cervical disc herniation. He opined that appellant had continued limitations due to her June 9, 2009 work injury but could work with restrictions. Dr. Taylor found "no significant abnormal neurological findings and a range of motion of the cervical spine that would allow sedentary work." In a work restriction evaluation, Dr. Taylor found that appellant could sit for six to eight hours per day, walk, stand, reach, twist, bend, and stoop one to two hours per day, perform repetitive movements, squat, and kneel eight hours per day, climb seven hours per day, and push, pull, and lift up to 10 pounds for one hour per day. He indicated that appellant had no restrictions on operating a motor vehicle at work and or traveling to and from work. Dr. Taylor advised that appellant should take a 5- to 10-minute break every one to two hours.

On July 21, 2014 the employing establishment offered appellant a position as a modified mail handler in Springfield, MA. The effective date of the position was to be determined. The position required intermittent lifting up to 10 pounds for one hour a day, standing and walking for one to two hours per day, simple grasping and sitting for up to six hours per day, and sliding packages on a flat surface intermittently for one hour per day. In the cover letter accompanying the offer, K.D., a management specialist, requested that appellant discuss the position with him in person on August 12, 2014.

Appellant, in a September 4, 2014 letter, advised that she wanted to work in a location closer to her residence because it was difficult for her to drive. In a September 4, 2014 report, Dr. Bessette reiterated that she was not able to drive one and a quarter hours as required to accept the offered position. She found that appellant could perform the position of modified mail handler "in a geographically suitable location."

On September 12, 2014 K.D. advised OWCP that he had met with appellant on August 12, 2014 and agreed that she could discuss the position with her attending physician before accepting or declining the position. He notified her at that time that she had to submit a signed acceptance of the offer. K.D. indicated that he had not heard from appellant since September 12, 2014 and therefore requested a suitability determination.

On October 2, 2014 OWCP notified appellant that it had determined that the position of modified mail handler offered July 21, 2014 was suitable and provided her 30 days to accept the position or submit reasons for her refusal. It informed her that an employee who refused an offer of suitable work without cause was not entitled to compensation.

Dr. Bessette, in an October 13, 2014 report, opined that appellant could perform the position of modified mail handler, but could not commute to work due to cervical radiculopathy as a result of her employment injury.

In an October 18, 2014 response, appellant questioned why OWCP did not consider Dr. Bessette's opinion that she could not drive to the work location due to her employment injury. She also indicated that the employing establishment had not searched for a position within her restrictions that was geographically suitable.

On October 28, 2014 OWCP advised appellant that her reasons for refusing the job were invalid and allowed her an additional 15 days to accept the position or have her compensation terminated. It indicated that it had confirmed on that date that the position remained available.

In a telephone call dated November 19, 2014, appellant advised that she was trying to contact the employing establishment about returning to work.

By decision dated November 25, 2014, OWCP terminated appellant's compensation and entitlement to a schedule award effective December 14, 2014 as she refused an offer of suitable employment under section 8106(c). It found that the opinion of Dr. Taylor represented the weight of the evidence and established that she had the ability to perform the offered position. OWCP noted that Dr. Taylor did not find any driving limitations.

Appellant, through counsel, on December 16, 2014 requested an oral hearing before an OWCP hearing representative.

OWCP continued to pay compensation benefits for total disability for the period December 14, 2014 to January 10, 2015.

Dr. Bessette, in a December 21, 2014 progress report, noted that appellant contacted the employing establishment to accept the light-duty position but received no response. She indicated that she and appellant both had "concerns about her ability to tolerate the hour and 15-minute commute back and forth to Springfield, as well as her ability to function in even the modified light-duty position give her ongoing issues with pain in both the left trapezius and well as intermittent paresthesias and radicular pattern pain…."

On March 5, 2015 OWCP advised appellant of its preliminary finding that she received a $3,122.90 overpayment of compensation because she received disability compensation through

January 10, 2015 after it terminated her compensation effective December 14, 2014. It further notified her of its preliminary finding that she was at fault in creating the overpayment. OWCP requested that appellant complete an enclosed overpayment recovery questionnaire and submit supporting financial evidence. It also informed her that, within 30 days, she could request a telephone conference, a final decision based on the written evidence, or a prerecoupment hearing.

By letter dated March 30, 2015, appellant, through counsel, requested a prerecoupment hearing.[5] Appellant submitted a list of telephone numbers and indicated that she had telephoned K.D. on November 12 and 13, 2014.

At the hearing, held on June 24, 2015, appellant related that she lived in Rutland, MA at the time of injury and worked in Springfield, MA. It took an hour to commute to work. The job offered by the employing establishment in July 2014 was in Springfield, MA but was 20 minutes further from her residence. In August 2014 appellant met with K.D. about the job. K.D. gave her his telephone number but did not inform her of what she should do to accept the position. Appellant asserted that driving 1 hour and 20 minutes to work would cause pain in her neck radiating into her arm. In early November 2014, she decided to accept the job. Appellant telephoned K.D. on November 12, 13, and 18, 2014 and left messages but did not receive a return call. She believed that she was supposed to contact K.D. before resuming work. The job offer did not have the address of her work site. Counsel further argued that Dr. Taylor's finding that appellant had no driving restriction was inconsistent with his finding that she could only reach one to two hours a day.

In a statement dated July 22, 2015, P.B., a supervisor, related that he was with K.D. at the August 12, 2014 meeting with appellant. K.D. advised her that "when he received the signed accepted job offer he would notify the other departments involved in the reemployment process that he had an accepted job offer."

K.D. provided a July 22, 2015 statement noting that he and P.B. met with appellant on August 12, 2014 about the offered position. He provided her with his telephone number if she had questions. Appellant telephoned and requested an extension of time to have her physician review the job offer. K.D. did not hear from her again. He informed appellant at the meeting that "failure to respond to the offer in writing would be considered noncompliance, which could affect her benefit entitlement." K.D. questioned whether alleged telephone calls to his office were to accept the job offer.

In a report dated July 24, 2015, Dr. John J. Walsh, Jr., a Board-certified orthopedic surgeon, discussed appellant's history of work injuries to her cervical and lumbar spine. He diagnosed a disc herniation with left C7 radiculopathy. Dr. Walsh reviewed the July 21, 2014 job offer and found that she could not perform the duties of the position. He discussed Dr. Bessette's opinion that appellant could not drive an hour and a quarter each way. Dr. Walsh also indicated that she had restrictions from her prior lumbar injury. He additionally advised that

[5] On October 28, 2015 appellant's counsel withdrew her request for a prerecoupment hearing regarding the proposed overpayment of compensation.

appellant was unable to work as a mail handler as she could not carry up to 45 pounds. Dr. Walsh opined that she could not drive an hour to work and back daily.

Appellant's counsel, in an August 13, 2015 statement, argued that the position offered by the employing establishment was not suitable as it did not specify reaching requirements other than to note that she could slide packages on a flat surface intermittently for an hour. He also contended that OWCP had not considered Dr. Bessette's finding that she could not commute to the location because of driving restrictions. Counsel maintained that Dr. Taylor had not considered her commute and did not provide rationale for his finding that she did not have driving restrictions. He argued that Dr. Walsh, a specialist, concurred with Dr. Bessette's finding. Counsel also argued that Dr. Taylor provided restrictions on reaching of one to two hours, which was inconsistent with driving a motor vehicle over two hours a day as driving required reaching to the steering wheel. He additionally contended that she telephoned and left messages for K.D. on November 12, 13, and 18, 2014 within the time allotted to ask how to return to work, but he did not respond to the messages.

By decision dated September 9, 2015, an OWCP hearing representative affirmed the November 25, 2014 suitable work termination decision.

OWCP, in a decision dated December 31, 2015, found an overpayment of compensation in the amount of $3,122.90 for the period December 14, 2014 through January 10, 2015 because she continued to receive compensation benefits after her wage-loss compensation was terminated for refusing suitable work. It found that she was at fault in creating the overpayment because she accepted a payment that she knew or should have known was incorrect. OWCP found that appellant should submit the entire amount of the overpayment.

On appeal appellant's counsel contends that the offered position did not specify the reaching requirement. He also argues that OWCP did not consider whether she could commute at least an hour each way to work as found by Dr. Bessette. Counsel notes that Dr. Taylor did not discuss the commuting requirement and did not support his conclusion that appellant had no driving restrictions with adequate medical rationale. He also alleges that Dr. Walsh found that reaching was required to drive a motor vehicle and Dr. Taylor limited her reaching. Counsel maintains that Dr. Walsh's report constitutes the weight of the medical evidence as he provided medical rationale for his finding.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[6] Section 8106(c)(2) of FECA[7] provides that a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee is not entitled to compensation.[8] To justify termination of

[6] *Linda D. Guerrero*, 54 ECAB 556 (2003).

[7] 5 U.S.C. § 8101 *et seq.*

[8] *Id.* at § 8106(c)(2); *see also Geraldine Foster*, 54 ECAB 435 (2003).

compensation, OWCP must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.[9] Section 8106(c) will be narrowly construed as it serves as a penalty provision, which may bar an employee's entitlement to compensation based on a refusal to accept a suitable offer of employment.[10]

Section 10.517(a) of FECA's implementing regulations provides that an employee who refuses or neglects to work after suitable work has been offered or secured by the employee, has the burden of showing that such refusal or failure to work was reasonable or justified.[11] Pursuant to section 10.516, the employee shall be provided with the opportunity to make such a showing before a determination is made with respect to termination of entitlement to compensation.[12]

Before compensation can be terminated, however, OWCP has the burden of demonstrating that the employee can work, setting forth the specific restrictions, if any, on the employee's ability to work, establishing that a position has been offered within the employee's work restrictions and setting for the specific job requirements of the position.[13] In other words, to justify termination of compensation under 5 U.S.C. § 8106(c)(2), which is a penalty provision, OWCP has the burden of showing that the work offered to and refused by appellant was suitable.[14]

Once OWCP establishes that the work offered is suitable, the burden shifts to the employee who refuses to work to show that the refusal or failure to work was reasonable or justified.[15] The determination of whether an employee is physically capable of performing a modified assignment is a medical question that must be resolved by medical evidence.[16] OWCP procedures state that acceptable reasons for refusing an offered position include medical evidence of inability to do the work.[17]

Where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the

[9] *Ronald M. Jones*, 52 ECAB 190 (2000).

[10] *Joan F. Burke*, 54 ECAB 406 (2003).

[11] 20 C.F.R. § 10.517(a); *see supra* note 9.

[12] 20 C.F.R. § 10.516.

[13] *See Linda Hilton*, 52 ECAB 476 (2001).

[14] *Id*.

[15] 20 C.F.R. § 10.517(a).

[16] *Gayle Harris*, 52 ECAB 319 (2001).

[17] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(a)(3) (June 2013).

opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[18]

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained cervical radiculitis due to a June 9, 2009 work injury. It previously accepted that she sustained a disc herniation at L5-S1 due to factors of her federal employment. Appellant underwent an L5-S1 laminectomy and discectomy at L5-S1 in September 2001, following which she resumed her regular employment duties.

OWCP paid appellant compensation for total disability due to her accepted cervical radiculitis beginning July 25, 2009. It determined that a conflict arose between Dr. Levy, an OWCP referral physician, and Dr. Bessette, her attending physician, regarding the extent of her disability from employment. Additionally, Dr. Levy found that appellant had no restrictions on operating a motor vehicle either at work or traveling to and from work while on January 2, 2014 Dr. Bessette advised that she could not drive more than an hour a day. OWCP referred appellant to Dr. Taylor for an impartial medical examination pursuant to section 8123(a).

When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[19]

On March 31, 2014 Dr. Taylor discussed appellant's history of injury, reviewed the medical reports, and provided findings on examination. He diagnosed cervical radiculitis and a history of a cervical disc herniation. Dr. Taylor determined that appellant could not resume her regular employment but could work with restrictions of sitting six to eight hours per day, walking, standing, reaching, twisting, bending, and stooping one to two hours per day, and pushing, pulling, and lifting up to 10 pounds for one hour per day. He advised that she had no restrictions on operating a motor vehicle either at work or traveling to and from work. Dr. Taylor provided rationale for his opinion that appellant was partially disabled by explaining that he found no significant neurological abnormalities and a range of cervical motion that permitted sedentary work. The Board finds that he provided a complete and rationalized opinion based on an accurate factual and medical background, and thus his opinion that appellant could work with restrictions is accorded special weight due to his status as impartial medical examiner.[20]

The employing establishment offered appellant a position on July 21, 2014 that was within the work restrictions provided by Dr. Taylor. The position was in Springfield, MA, the same city that appellant worked at the time of her June 9, 2009 injury, though at a different work location. The duties included intermittent lifting of up to 10 pounds for one hour per day, sitting

[18] *David W. Pickett*, 54 ECAB 272 (2002); *Barry Neutuch*, 54 ECAB 313 (2003).

[19] *Id*.

[20] *See R.P.*, Docket No. 14-1264 (issued March 9, 2015); *Bryan O. Crane*, 56 ECAB 713 (2005).

and simple grasping for six hours per day, standing and walking for one to two hours per day, and sliding packages intermittently on a flat surface for one hour per day. The Board finds that the physical requirements of the offered modified mail handler position were within the work restrictions of the impartial medical examiner, and thus the weight of the medical evidence establishes that she had the capacity to perform the duties listed in the July 21, 2014 job offer.

In a September 4, 2014 report, Dr. Bessette opined that appellant was unable to perform the position because she could not drive an hour and a quarter each way as required. She contained to submit reports advising that she could not perform the position because of driving limitations. Dr. Taylor, however, resolved the conflict that arose between Dr. Levy and Dr. Bessette regarding appellant's ability to drive. He found that she had no driving restrictions and, as discussed, his report as the impartial medical specialist constitutes the weight of the evidence. Further, Dr. Bessette was on one side of the conflict resolved by Dr. Taylor. Medical reports from a physician on one side of a conflict resolved by an impartial medical examiner are generally insufficient to overcome the weight accorded the report of an impartial medical examiner or create a new conflict.[21]

In accordance with the procedural requirements of section 8106(c), OWCP advised appellant on October 2, 2014 that it found the job to be suitable and gave her an opportunity to accept the position or provide reasons for refusing the position within 30 days. After reviewing the additional evidence submitted, it advised her on October 28, 2014 that her reasons for refusing the position were not valid and provided her an additional 15 days to accept the position without penalty. The Board finds that OWCP followed its established procedures prior to terminating appellant's compensation pursuant to section 8106(c) of FECA.

Appellant argued that she tried to accept the position by telephoning K.D. multiple times in November 2014. In a July 22, 2015 statement, K.D. related that at a meeting on August 12, 2014 he informed her that the acceptance of the offered position must be in writing. On July 22, 2015 P.B. indicated that he was also present at the August 2014 meeting with appellant and that K.D. informed her that the process began after he received the signed accepted offer. There is no evidence that she accepted the offered position.

Subsequent to OWCP's terminating of her compensation, appellant submitted a July 24, 2015 report from Dr. Walsh. Dr. Walsh diagnosed a disc herniation at C7 with radiculopathy. He found that appellant was unable to perform her regular work duties or drive more than an hour to work and back as she could not reach to hold the steering wheel that long without symptoms of pain and radiculopathy. Dr. Walsh did not, however, explain his restriction other than to note that appellant complained of symptoms with prolonged driving. His report is thus insufficient to overcome the special weight afforded Dr. Taylor as impartial medical examiner.

On appeal counsel maintains that the offered position did not specify the reaching requirement. The job offer, however, indicated that it required intermittent sliding of packages on a flat surface for one hour per day, within the restriction set forth by Dr. Taylor.

[21] *Jaja K. Asaramo*, 55 ECAB 200 (2004); *Michael Hughes*, 52 ECAB 387 (2001).

Counsel also argues that OWCP did not address the commuting requirement and that Dr. Taylor did not explain his finding that appellant did not have driving restrictions. He maintains that driving requires reaching, as found by Dr. Walsh. As discussed, however, Dr. Taylor provided a reasoned opinion finding that appellant had no limitations on operating a motor vehicle. His opinion as the impartial medical examiner represents the special weight of the evidence.[22]

LEGAL PRECEDENT -- ISSUE 2

Section 8102(a) 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.[23] When an overpayment has been made to an individual 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 the individual is entitled.[24]

Section 8106(c)(2) of FECA states that a partially disabled employee who refuses to seek suitable work or refuses or neglects to work after suitable work is offered to, procured by or secured for her is not entitled to compensation.[25] The implementing regulations provide that a partially disabled employee who refuses to seek suitable work, or refuses to or neglects to work after suitable work is offered to or arranged for her, is not entitled to compensation, including compensation for a schedule award under 5 U.S.C. § 8107.[26]

ANALYSIS -- ISSUE 2

By decision dated November 25, 2014, OWCP terminated appellant's wage-loss compensation effective December 14, 2014 based on her refusal of suitable work. Appellant continued to receive compensation for total disability until January 10, 2015. As OWCP had terminated her wage-loss compensation benefits, she was not entitled to wage-loss compensation after December 14, 2014, and thus received an overpayment of compensation.

OWCP paid appellant net compensation of $3,122.90 for the period December 14, 2014 through January 10, 2015. The evidence establishes that she received an overpayment of $3,122.90 for the period December 14, 2014 to January 10, 2015.

LEGAL PRECEDENT -- ISSUE 3

Under OWCP regulations, waiver of the recovery of an overpayment may be considered only if the individual to whom it was made was not at fault in accepting or creating the

[22] *See C.G.*, Docket No. 15-1035 (issued September 11, 2015).

[23] 5 U.S.C. § 8102(a).

[24] *Id*. at § 8129(a).

[25] *Id*. at § 8106(c)(2).

[26] *Id*.

overpayment.[27] The fact that the overpayment was the result of error by OWCP or another government agency does not by itself relieve the individual who received the overpayment of liability for repayment if the individual also was at fault for receiving the overpayment.[28] Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments she received from OWCP are proper. 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. A recipient who has done any of the following will be found to be at fault with respect to 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; (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).[29]

ANALYSIS -- ISSUE 3

OWCP determined that appellant was at fault in the creation of the overpayment because she accepted a payment that she knew or should have known was incorrect. It advised her in its November 25, 2014 decision that it had terminated her compensation benefits effective December 14, 2014. By accepting a payment after OWCP terminated her wage-loss and schedule award compensation, appellant accepted a payment that she knew or should have known was incorrect, and therefore she was at fault in the creation of the overpayment.[30]

Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives are proper.[31] 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.[32] OWCP clearly informed appellant that her entitlement to further wage-loss compensation was terminated effective December 14, 2014. Thus, appellant should have been aware that, as of December 14, 2014, she was not entitled to receive wage-loss compensation.[33] The fact that OWCP may have been negligent in issuing the payments does not mitigate this finding.[34]

[27] *Id*. at § 10.433(a).

[28] *Id*. at § 10.435(a).

[29] *Id*. at § 433(a); *see Kenneth E. Rush*, 51 ECAB 116 (1999).

[30] *See J.H.*, Docket No. 08-0732 (issued November 4, 2008); *Otha J. Brown*, 56 ECAB 228 (2004).

[31] *Danny E. Haley*, 56 ECAB 393 (2005).

[32] *Sinclair L. Taylor*, 52 ECAB 227 (2001).

[33] *See A.P.*, Docket No. 10-1212 (issued February 23, 2011).

[34] 20 C.F.R. § 10.435(a); *William E. McCarty*, 54 ECAB 525 (2003).

As appellant was at fault in the creation of the overpayment, she is not eligible for waiver of recovery of the overpayment.[35]

CONCLUSION

The Board finds that OWCP properly terminated appellant's entitlement to wage-loss and schedule award compensation effective December 14, 2014 as she refused an offer of suitable work. The Board further finds that she received a $3,122.90 overpayment of compensation because she received compensation through January 10, 2015 after OWCP terminated her compensation on December 14, 2014 and that she was at fault in creating the overpayment, thereby precluding waiver of recovery.

ORDER

IT IS HEREBY ORDERED THAT the December 31 and September 9, 2015 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: November 23, 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

[35] Recovery of the overpayment is not an issue in this case, as appellant is not in receipt of continuing total disability payment. With respect to the recovery of the overpayment, the Board's jurisdiction is limited to those cases where OWCP seeks recovery from continuing compensation benefits under FECA. 20 C.F.R. § 10.441(a); *see Albert Pineiro*, 51 ECAB 310 (2000); *Lorenzo Rodriguez*, 51 ECAB 295 (2000).