

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

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<b>L.G., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 16-1247</b>
	)	<b>Issued: November 21, 2016</b>
<b>U.S. POSTAL SERVICE, POST OFFICE, Houston, TX, Employer</b>	)	
_____	)	

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
COLLEEN DUFFY KIKO, Judge  
ALEC J. KOROMILAS, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On May 25, 2016 appellant filed a timely appeal from a May 6, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (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 determined that appellant received an overpayment of compensation in the amount of \$9,563.93 from October 30, 2015 through March 5, 2016; and (2) whether OWCP properly found that appellant was at fault in the creation of the overpayment and therefore not entitled to waiver of the recovery.

On appeal, appellant argues that the amount of overpayment is incorrect and that she was not at fault in the creation of the overpayment.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On April 15, 2015 appellant, then a 21-year-old city carrier assistant, filed a traumatic injury claim (Form CA-1) alleging neck sprain as a result of a vehicular incident on April 14, 2015. On June 18, 2015 OWCP accepted her claim for neck sprain, disorder of the bursae and tendons in the left shoulder region, and sprain of the left elbow and forearm.

Appellant was placed on the periodic rolls for compensation payments. Her first payment for the dates May 30 through July 25, 2015 in the net amount of \$4,258.94 was paid on July 31, 2015. Thereafter, appellant was paid a net amount of \$2,092.11 every 28 days on the periodic rolls until her last payment on March 5, 2016.

On June 18, 2015 OWCP notified appellant that her claim had been accepted. Appellant was advised that she was expected to return to work as soon as she was able, and it was her responsibility to advise her employing establishment once her physician found her capable of returning to work. She was also advised that once she returned to work she should notify OWCP immediately and return a payment for a period worked to prevent an overpayment of compensation. Appellant was also advised that if she received compensation *via* electronic funds transfer she should monitor her bank statements carefully, at least every two weeks, and if she had worked for any portion of the period for which payment was made, she would advise OWCP immediately so that the overpayment could be collected.

In a record of a telephone conversation dated June 18, 2015, an OWCP representative noted that appellant had stated that she had been released to work by her physician, but had been unable to return because there was no work available within her restrictions.

In a form dated September 8, 2015, appellant signed up for direct deposit of her compensation payments. On July 22, 2015 OWCP acknowledged receipt of this form.

In a workers' compensation status report dated October 29, 2015, Dr. David G. Vanderweide, a Board-certified orthopedic surgeon, stated that appellant was able to return to work without restrictions as of October 29, 2015.

In a record of a telephone conversation dated March 17, 2016, a supervisor spoke to an OWCP representative and informed her that appellant had returned to work at full duty on October 30, 2015.

By notice dated March 28, 2016, OWCP advised appellant of its preliminary determination that an overpayment of compensation in the amount of \$9,563.93 occurred from October 30, 2015 through March 5, 2016, as she returned to work on October 30, 2015 but continued to receive wage-loss compensation through March 5, 2016. It made the preliminary finding that appellant was at fault in the creation of the overpayment, as she accepted payments she knew or should have known to be incorrect. OWCP afforded appellant 30 days to submit additional evidence and argument and to request a hearing.

On April 4, 2016 appellant contested the overpayment as she believed the overpayment occurred through no fault of her own, and requested a waiver. She stated that she did not know she was supposed to report the overpayment, as she thought the reporting was her manager's responsibility. Appellant also provided financial information.

In an investigative report dated April 6, 2016, the Office of the Inspector General for the employing establishment provided the results of an investigation into appellant's overpayment. During an interview, appellant confirmed she had returned to work for the relevant period and stated, "I'm not saying I didn't know it didn't happen, because I had money to pay my bills."

By decision dated May 6, 2016, OWCP finalized appellant's overpayment of compensation in the amount of \$9,563.93 for the period October 30, 2015 through March 5, 2016. It found that she was at fault in the creation of the overpayment and requested payment of the full amount within 30 days.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8102(a) of FECA<sup>2</sup> 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 duty.<sup>3</sup> Section 8129(a) of FECA provides, in pertinent part, that 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.<sup>4</sup>

A claimant is not entitled to receive temporary total disability and actual earnings for the same period.<sup>5</sup> 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.<sup>6</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that OWCP correctly determined that appellant received an overpayment of compensation in the amount of \$9,563.93. Appellant was placed on the periodic rolls for compensation subsequent to July 31, 2015. Her continuing payment every four weeks was a net amount of \$2,092.11. The evidence reflects that appellant returned to work on October 30, 2015. However, she continued to receive wage-loss compensation between October 30, 2015 and March 5, 2016. On appeal appellant contests the amount of the overpayment.

The Board finds that OWCP correctly calculated the amount of appellant's overpayment. The periodic rolls cycle net payment was \$2,092.11. Each periodic rolls cycle consists of 28 days. Two-thousand ninety-two dollars and eleven cents divided by 28, and multiplied by the number of days between October 30, 2015 and March 5, 2016, 128 days, equals \$9,563.93. As this figure, \$9,563.93, is the correct amount of overpayment, OWCP correctly calculated the amount of appellant's overpayment. Appellant has not submitted any evidence demonstrating

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<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at § 8102(a).

<sup>4</sup> *Id.* at § 8129(a).

<sup>5</sup> *See M.S.*, Docket No. 16-0289 (issued April 21, 2016); *D.B.*, Docket No. 15-0258 (issued February 1, 2016).

<sup>6</sup> *See C.V.*, Docket No. 16-0986 (issued September 1, 2016); 20 C.F.R. § 10.500.

that she did not receive an overpayment of compensation. As such, the Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$9,563.93 for the period October 30, 2015 through March 5, 2016.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8129(b) of FECA provides that 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 this subchapter or would be against equity and good conscience.<sup>7</sup> No waiver of an overpayment is possible if the claimant is at fault in creating the overpayment.<sup>8</sup>

On the issue of fault, 20 C.F.R. § 10.433(a) provides that an individual is with fault in the creation of an overpayment who: (1) made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or (2) failed to furnish information which the individual knew or should have known to be material; or (3) with respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect.<sup>9</sup>

With respect to whether an individual is without fault, section 10.433(b) of OWCP's regulations provide that whether or not OWCP determines that an individual was at fault with respect to the creation of an overpayment depends on 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.<sup>10</sup>

### **ANALYSIS -- ISSUE 2**

OWCP applied the third standard in this case, finding that appellant accepted compensation payments that she knew or should have known were incorrect. Appellant accepted wage-loss compensation for the period October 30, 2015 through March 5, 2016 after she had returned to work at full duty.

In cases where a claimant receives compensation through direct deposit, the Board has held that OWCP must establish that at the time a claimant received the direct deposit in question that he or she knew or should have known that the payment was incorrect.<sup>11</sup> The Board has held that an employee who receives payments from OWCP in the form of a direct deposit may not be at fault for the first incorrect deposit into his or her account, since the acceptance of the overpayment, at the time of receipt of the direct deposit, lacks the requisite knowledge.<sup>12</sup>

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<sup>7</sup> 5 U.S.C. § 8129(b).

<sup>8</sup> *Gregg B. Manston*, 45 ECAB 344, 354 (1994).

<sup>9</sup> 20 C.F.R. § 10.433(a). See *Kenneth E. Rush*, 51 ECAB 116, 118 (1999).

<sup>10</sup> *Id.* at § 10.433(b).

<sup>11</sup> See *C.K.*, Docket No. 12-746 (issued May 1, 2012).

<sup>12</sup> See *Tammy Craven*, 57 ECAB 689, 692 (2006).

Because the fault is defined by what the claimant knew or should have known at the time of acceptance, one of the consequences of electronic fund transfers is that the claimant lacks the requisite knowledge at the time of the first incorrect payment.<sup>13</sup> Whether or not OWCP determines that an individual is at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment.<sup>14</sup> It is not appropriate, however, to make a finding that a claimant has accepted an overpayment by direct deposit until such time as a reasonable person would have been aware that this overpayment had occurred. This awareness could be established either through documentations such as a bank statement or notification from OWCP or where a reasonable period of time has passed during which a claimant could have reviewed independent confirmation of the incorrect payment.<sup>15</sup>

The Board finds that appellant was not at fault in the creation of the overpayment for the period October 30 through November 14, 2015, as the check for this period, deposited on November 14, 2015, was deposited electronically into her account and this was the first incorrect payment made to her. There is no documentation or other evidence to demonstrate that appellant had clear knowledge at the time she received a direct deposit from OWCP that a portion of the payment was incorrect or that a reasonable period of time passed during which she could have reviewed bank statements or been informed of the incorrect payment. Accordingly, the Board finds that OWCP improperly determined that she was at fault in the creation of the portion of the overpayment from October 30 through November 14, 2015.

The Board finds that OWCP properly determined that appellant was at fault for wage-loss compensation payments subsequent to this first incorrect electronic deposit on November 14, 2015. Appellant was advised on March 28, 2015 when her claim was accepted that she should return to work as soon as her physician released her to work, that she should notify OWCP immediately of a return to work, that receipt of compensation for a period of work would create an overpayment of compensation; and that she should check her electronic fund deposits carefully, at least every two weeks to prevent an overpayment of compensation.

In cases involving a series of incorrect payments, where the requisite knowledge is established by documentation from OWCP or simply with the passage of time and opportunity for discovery, the claimant will be at fault for accepting the payments subsequently deposited.<sup>16</sup> Thus, by the time of the second payment appellant should have known that she was no longer entitled to disability compensation after her return to work with no wage loss.<sup>17</sup>

The Board will set aside the portion of the May 6, 2016 decision finding appellant at fault for the overpayment for the period October 30 through November 14, 2015, and remand the case to OWCP to determine whether appellant is entitled to waiver of recovery for the amount paid

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<sup>13</sup> *J.S.*, Docket No. 12-1707 (issued June 10, 2013).

<sup>14</sup> *Id.*, see also *K.D.*, Docket No. 13-451 (issued April 12, 2013).

<sup>15</sup> See *K.D.*, *id.*

<sup>16</sup> *R.O.*, Docket No. 16-0186 (issued July 21, 2016).

<sup>17</sup> *Id.*

for that period. The Board will affirm the remainder of the May 6, 2016 decision finding that appellant was at fault for payments subsequent to November 14, 2015.

**CONCLUSION**

The Board finds that appellant received an overpayment of compensation in the amount of \$9,563.93 for the period October 30, 2015 through March 5, 2016. The Board further finds that appellant was without fault for the period of the overpayment from October 30 through November 14, 2015. The Board further finds that appellant was at fault for the period of overpayment from November 14, 2015 through March 5, 2016. The case will be remanded for consideration of waiver of the recovery of the overpayment from October 30 through November 14, 2015.

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 6, 2016 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part and the case is remanded for further action consistent with this decision of the Board.

Issued: November 21, 2016  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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