

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

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**J.S., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Sterling Heights, MI, Employer**

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**Docket No. 17-0260  
Issued: December 28, 2017**

*Appearances:*

Ronald W. Adams, Jr., for the appellant<sup>1</sup>  
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 November 15, 2016 appellant, through her representative, filed a timely appeal from a June 16, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</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 appellant received a \$18,871.08 overpayment of compensation for the period January 1, 2012 through March 7, 2015; (2) whether appellant was

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<sup>1</sup> 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.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

at fault in the creation of the \$18,871.08 overpayment and, therefore, ineligible for waiver of recovery; and (3) whether OWCP properly found that the overpayment should be recovered by deducting \$150.00 every 28 days from appellant's continuing compensation payments.

### **FACTUAL HISTORY**

On June 20, 1989 appellant, then a 37-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that she developed a bilateral arm and elbow injury as a result of her repetitive employment duties. OWCP accepted the claim for bilateral carpal tunnel syndrome, bilateral cubital tunnel syndrome, bilateral epicondylitis, and bilateral de Quervains tenosynovitis. Appellant underwent surgery in August and November 1990. She was off work intermittently following her injury and received wage-loss compensation. On September 5, 1995 appellant returned to work in a limited-duty position. On November 10, 2008 she stopped work due to withdrawal of her limited-duty assignment. Appellant received wage-loss compensation on the supplemental rolls from November 10, 2008 through June 5, 2010. On June 6, 2010 she began receiving wage-loss and medical benefit compensation on the periodic rolls.

By letter dated June 9, 2010, OWCP advised appellant that she had been placed on periodic rolls beginning June 6, 2010 and outlined her entitlement to compensation benefits and her responsibility to return to work in connection with the accepted employment injury. Appellant's weekly pay rate was calculated at the 75 percent augmented rate, amounting to \$985.62. OWCP explained to her that she should be aware that "payment of compensation will be terminated without such notice whenever this office is notified that you have earnings equal to or higher than the wages being paid for the job you held when injured." Its letter further provided that 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 this office. Otherwise, an overpayment of compensation may result."

On June 15, 2010 appellant elected to receive her compensation benefits by direct deposit.

By letter dated November 5, 2010, OWCP requested information from appellant regarding her wages and compensation for the prior 15-month period and provided a Form CA-1032 for completion. On November 12, 2010 appellant completed the form stating that she did not work for any employing establishment during the past 15 months.

By letter dated March 25, 2011, appellant noted that she was currently receiving 75 percent of her wages and asked whether she could earn more wages from part-time employment. She stated that it was her understanding that she could earn the remaining 25 percent of her lost wages and not jeopardize her workers' compensation as long as the work performed was not in violation of her current physical restrictions.

By letter dated April 6, 2011, OWCP responded to appellant's inquiry writing, "[Appellant] additionally asked if [she] could perform part-time employment while collecting workers' compensation benefits. If you are able to work you are encouraged to do so. If you

return to work, whether it be volunteer or paid, you will need to report your earnings on the annual CA-1032 forms so that we can report your earnings to the Social Security Administration. Working in any capacity could affect your workers' compensation payments.”

On December 9, 2011 appellant notified OWCP that she was training with West Noble School Corporation to be a substitute school bus driver. She reported that, on the days that she worked, she would be driving approximately three hours that day. Appellant further reported that she would begin earning income in 2012. She stated that it was her understanding that since she was receiving 75 percent disability compensation, she was permitted to earn up to the remaining 25 percent of lost compensation. Appellant requested that OWCP send her verification of the gross pay of a city letter carrier so that she could calculate what the allowable 25 percent income.

In a January 6, 2012 CA-110 telephone memorandum, the claims examiner reported that she attempted to call appellant and left a message to discuss her December 9, 2011 letter, as more information was needed since a return to work would affect her wage-loss compensation benefits.

By letter dated November 5, 2012, OWCP requested information from appellant regarding her wages and compensation for the prior 15-month period and provided a Form CA-1032 for completion. On November 12, 2012 appellant completed the form and indicated that she had been working as a substitute bus driver in the private sector beginning in January 2012.<sup>3</sup>

By letter dated November 12, 2012, appellant notified OWCP that she had been working as a substitute bus driver part time since January 2012. She submitted pay stubs of her earnings from October 22 to November 4, 2012.

In a December 13, 2012 CA-110 telephone memorandum, OWCP's claims examiner notified appellant that, while she was allowed to earn an income, OWCP would have to offset that amount from her compensation benefits.

In a December 30, 2014 CA-110 telephone memorandum, OWCP's claims examiner notified appellant that her compensation should be based on a loss of wage-earning capacity (LWEC), based on her wages earned in her new employment.

On March 8, 2015 OWCP began offsetting appellant's compensation based on the wages she earned in her new employment. By letter dated March 20, 2015, it advised her that she was taken off the periodic rolls effective March 7, 2015 and would be issued wage-loss compensation reduced by her actual earnings.

By letter dated July 2, 2015, OWCP made a preliminary determination that appellant received an overpayment of compensation in the amount of \$18,871.08 from January 1, 2012 through March 7, 2015, because she was in receipt of total disability compensation benefits after she returned to part-time work in the private sector and she was at fault because she accepted

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<sup>3</sup> The record reflects that appellant submitted subsequent EN1032 forms dated November 27, 2013 and December 1, 2014 disclosing her part-time employment as a substitute bus driver with accompanying pay stubs.

payments she knew or should have reasonably known were incorrect. It informed her of her review rights and instructed her to complete an enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting documentation within 30 days.

An accompanying OWCP memorandum determined that appellant was paid total disability compensation benefits in the amount of \$135,021.03 for the period January 2, 2012 through March 7, 2015. Utilizing the *Shadrick* Formula, it determined that she was only due compensation based on her ability to earn an average weekly salary of \$163.63. Thus, the total compensation due to appellant for the time period of January 2, 2012 to March 7, 2015 amounted to \$116,149.95. Taking the \$135,021.03 paid and subtracting the \$116,149.95 of compensation owed for that period resulted in an overpayment of \$18,871.08. A *Shadrick* formula documentation memorandum and pay rolls computer printouts were provided showing the overpayment calculations.

On July 21, 2015 appellant, through her representative, requested a prerecoupment hearing before an OWCP hearing representative. She contested the amount of overpayment, finding of fault, and requested waiver of recovery of the overpayment as it would cause her financial hardship. Appellant's representative explained that appellant was without fault in the creation of the overpayment because she had notified OWCP in December 2011 that she would be working as a substitute bus driver. Appellant also properly disclosed that information on the EN1032 forms she submitted to OWCP. He referenced OWCP's June 9, 2010 letter, which outlined her compensation on the periodic rolls and asserted: "[Appellant] should be aware that payment of compensation will be terminated without such notice whenever this office is notified that you have earnings equal to or higher than the wages being paid for the job [she] held when injured." He explained that appellant believed that, because she was only receiving 75 percent of her compensation benefits, she could work in the private sector earning the remaining 25 percent and an overpayment of compensation would not occur unless she earned more than 100 percent of her income. Appellant's representative argued that she had requested clarification from OWCP multiple times regarding her wage-loss compensation when returning to part-time work, yet OWCP failed to provide her that information. He further argued that the amount of overpayment was incorrect as the payments received for the period January 1, 2012 through March 7, 2015 were less than the \$135,021.04 as alleged by OWCP. Appellant's representative requested that the debt be waived as repayment would cause appellant great financial hardship.

In support of her appeal, appellant submitted documents indicating when she had contacted OWCP regarding her employment as a substitute bus driver, as well as requests for clarification from OWCP, copies of previously submitted EN1032 forms, and supplemental rolls payment printouts for compensation received for the period of the overpayment claimed.

In a completed Form OWCP-20 dated July 16, 2015, appellant reported a monthly income of \$4,201.65 with \$1,320.00 in her checking account. She noted her husband as her dependent, listed her monthly expenses, and argued that repayment of the debt would cause her financial hardship. Appellant reported that she properly notified OWCP about her job as a substitute bus driver. She argued that she sought clarification from OWCP numerous times regarding whether her employment as a substitute bus driver would affect her wage-loss compensation, and she reiterated that she believed that she could earn wages as long as she was not making more than 100 percent of her income as a letter carrier.

A hearing was held on March 17, 2016 where appellant and her representative contested the amount of overpayment and finding of fault, and requested that recovery of the overpayment be waived due to financial hardship. She again reiterated that she never made any false statements to OWCP and that the overpayment occurred through no fault of her own. Appellant again explained her belief that she could earn wages equaling 25 percent of her lost income, without the creation of an overpayment. Appellant's representative argued that appellant only had an 11<sup>th</sup> grade education and could not be expected to understand that she was being overpaid. Appellant reported having \$101,652.00 in debt and that repayment should be waived as it would cause her a great financial hardship to repay the debt.

On April 12, 2016 appellant, through her representative, submitted a post hearing brief in support of her claim. Appellant provided bills and listed her monthly expenses amounting to \$4,497.00, which included \$758.00 for food, \$920.00 mortgage, \$541.00 revolving credit, \$253.00 telephone, \$185.00 television and internet Verizon Wireless, \$210.00 gas and electric, \$317.00 health insurance, \$414.00 out of pocket medical costs, \$105.00 Medicare Part B, \$243.00 life insurance, \$123.00 additional life insurance, \$32.00 insurance, \$78.00 automobile insurance, \$243.00 fuel and maintenance, \$25.00 charitable donation to church, and \$50.00 miscellaneous expenses.

By decision dated June 16, 2016, OWCP finalized the preliminary overpayment determination, finding that appellant was overpaid in the amount of \$18,871.08 from January 1, 2012 through March 7, 2015, because she was in receipt of total disability compensation benefits after she returned to part-time work in the private sector. It found that she was at fault in the creation of the overpayment because she accepted payments that she knew or should have known to be incorrect and thus, she was not entitled to waiver of recovery of the overpayment. OWCP determined that the overpayment would be recovered by deduction of \$150.00 from appellant's continuing compensation payments every 28 days.

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

Section 8102 of FECA provides that the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.<sup>4</sup>

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.<sup>5</sup> OWCP's regulations state in pertinent part: 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> A claimant is not entitled to receive temporary total disability and actual earnings for the

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<sup>4</sup> 5 U.S.C. § 8102.

<sup>5</sup> *Id.* at § 8116(a).

<sup>6</sup> 20 C.F.R. § 10.500.

same period. OWCP's procedures provide that an overpayment in compensation is created when a claimant returns to work, but continues to receive wage-loss compensation.<sup>7</sup>

Section 8129(a) of FECA provides that 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.<sup>8</sup>

If the claimant is entitled to compensation for partial wage loss after return to work, the claims examiner should compute entitlement using the *Shadrick* formula and authorize compensation on a 28-day payment cycle. The claims examiner should make every effort to avoid interruption of income to the claimant.<sup>9</sup> Earnings of a sporadic or intermittent nature which do not fairly and reasonably represent the claimant's LWEC should be deducted from continuing compensation payments using the *Shadrick* formula (past earnings must be declared an overpayment). Sporadic or intermittent earnings should not be used as the basis for an LWEC determination, but they should be used to help establish the kind of work the claimant can perform.<sup>10</sup>

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

The Board finds that appellant received an overpayment of compensation in the amount of \$18,871.08 from January 1, 2012 through March 7, 2015, because she continued to receive total disability compensation after her return to part-time work. OWCP accepted appellant's claim and paid wage-loss compensation, placing her on periodic rolls beginning June 6, 2010. The record indicates that, beginning January 1, 2012, appellant returned to part-time work in the private sector as a substitute school bus driver. However, OWCP subsequently paid her wage-loss compensation for total disability from January 1, 2012 through March 7, 2015, resulting in an overpayment of compensation.<sup>11</sup> Accordingly, the Board finds that appellant received an overpayment of compensation.<sup>12</sup>

During the period January 1, 2012 to March 8, 2015, appellant received wages from part-time employment in the amount of \$27,185.27. As previously noted, a claimant is not entitled to receive temporary total disability benefits and actual earnings for the same time period.<sup>13</sup>

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<sup>7</sup> *B.H.*, Docket No. 09-0292 (issued September 1, 2009); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(a) (May 2004).

<sup>8</sup> 5 U.S.C. § 8129(a).

<sup>9</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on Actual Earnings*, Chapter 2.815.3(b) (June 2013). See *Albert C. Shadrick*, 5 ECAB 376 (1953).

<sup>10</sup> *Id.* at Chapter 2.815.4(b).

<sup>11</sup> See *J.W.*, Docket No. 15-1163 (issued January 13, 2016).

<sup>12</sup> *R.W.*, Docket No. 13-1108 (issued September 10, 2013).

<sup>13</sup> *L.S.*, 59 ECAB 350, 352-53 (2008).

Utilizing the *Shadrick* formula,<sup>14</sup> OWCP took the \$27,185.27 total earnings and divided it by the 1163 calendar days for this time period to calculate her daily compensation rate. It multiplied the total by seven, resulting in \$163.63 earned weekly in appellant's part-time employment as a substitute bus driver. OWCP reported that, had proper adjustments been made to her disability compensation to reflect her part-time employment, she would have received \$116,149.95 for this time period. However, appellant received compensation for this period in the amount of \$135,021.03. The difference between these two amounts, \$18,871.08, is the amount of the overpayment, as calculated by OWCP.<sup>15</sup> Accordingly, the Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$18,871.08 from January 1, 2012 through March 7, 2015 as she had earnings from part-time employment and was not entitled to compensation for total disability.<sup>16</sup>

On appeal appellant's representative argues that the calculations showing the amount of overpayment were not attached with the preliminary overpayment determination and he references a July 22, 2015 letter from OWCP apologizing for not sending the calculations with the decision. The Board notes that the record reflects that the *Shadrick* documentation memorandum and supplemental pay rolls printouts were sent with the July 2, 2015 preliminary overpayment determination. By letter dated July 19, 2015, appellant informed OWCP that the pages reflecting payment were not included with the July 2, 2015 preliminary determination. By letter dated July 22, 2015, OWCP responded to her apologizing for the oversight and resubmitted the worksheets calculating her overpayment. The Board notes that appellant's representative has not established that OWCP failed to provide appellant with the requisite documentation such that she was unable to dispute the fact and the amount of overpayment.

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

Section 8129(b) of FECA<sup>17</sup> provides that an overpayment of 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.<sup>18</sup> Thus, OWCP may not waive the overpayment of compensation unless appellant was without fault.<sup>19</sup> Adjustment or recovery must, therefore, be made when an incorrect payment has been made to an individual who is with fault.<sup>20</sup>

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<sup>14</sup> See *Shadrick*, *supra* note 9.

<sup>15</sup> *C.F.*, Docket No. 16-1718 (issued August 21, 2017).

<sup>16</sup> *V.G.*, Docket No. 07-0916 (issued November 15, 2007).

<sup>17</sup> 5 U.S.C. § 8129(b).

<sup>18</sup> *Michael H. Wacks*, 45 ECAB 791, 795 (1994).

<sup>19</sup> *Norman F. Bligh*, 41 ECAB 230 (1989).

<sup>20</sup> *Diana L. Booth*, 52 ECAB 370, 373 (2001); *William G. Norton, Jr.*, 45 ECAB 630, 639 (1994).

On the issue of fault, section 10.433 of OWCP's regulations, 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.”<sup>21</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>22</sup>

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

OWCP determined that appellant was at fault in the creation of the overpayment because she accepted payments that she knew or should have known to be incorrect. The Board finds, however, that she was without fault with regard to OWCP's first direct deposit following her return to part-time work, but was at fault in creating the overpayment resulting from the subsequent deposits.<sup>23</sup>

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>24</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>25</sup> Because 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>26</sup> Whether or not OWCP determines that an individual is at fault with respect to the creation of an overpayment depends

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<sup>21</sup> 20 C.F.R. § 10.433(a).

<sup>22</sup> *Id.* at § 10.433(b).

<sup>23</sup> *M.L.*, Docket No. 15-1683 (issued June 20, 2016).

<sup>24</sup> *See Claude T. Green*, 42 ECAB 174, 278 (1990).

<sup>25</sup> *See Tammy Craven*, 57 ECAB 589 (2006); *see also George A. Hirsch*, 47 ECAB 520 (1996).

<sup>26</sup> *Id.*

on the circumstances surrounding the overpayment.<sup>27</sup> It is not appropriate, however, to make a finding that a claimant has accepted an overpayment *via* 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 documentation 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>28</sup>

The record establishes that for the overpayment period, January 1, 2012 to March 7, 2015, appellant received compensation by direct deposit payments every 28 days. She received a partial overpayment for the 28-day pay period of December 18, 2011 to January 14, 2012, having returned to part-time work beginning January 1, 2012. Following this initial overpayment, appellant was improperly paid wage-loss compensation for total disability without adjustment for actual wages earned from January 15, 2012 through March 7, 2015. The funds were directly deposited into her account and the remaining disbursements amounted to an overpayment.

The Board finds that appellant was without fault for the initial direct deposit of the paid amount into her account for the January 1 to 14, 2012 overpayment period.<sup>29</sup> Although she accepted the overpayment at the time it was deposited into her account, OWCP has not shown that she knew or should have known at the time of the deposit that the payment was incorrect.<sup>30</sup> Appellant had no reason to suspect at the time of the January 14, 2012 deposit that OWCP had issued an incorrect payment since this was the first incorrect payment made. Additionally, she was entitled to some wage-loss compensation for total disability for the period December 18, 2011 to January 14, 2012 and thus the circumstances surrounding the overpayment were more complex than usual.<sup>31</sup> As such, the Board finds that appellant was not at fault in either creating or accepting the overpayment for the period of January 1 to 14, 2012.<sup>32</sup> A finding of no fault does not mean, however, that appellant may keep the initial payment amount; only that OWCP must consider eligibility for waiver for this period, and the case must be remanded for OWCP to determine whether she is entitled to waiver of recovery for this portion of the overpayment.

The Board further finds that appellant was at fault in the creation of the overpayment resulting from the remaining direct deposits for the period January 15, 2012 to March 7, 2015.<sup>33</sup> In a June 6, 2010 letter, appellant was notified that, to avoid an overpayment of compensation, she must immediately notify OWCP of her return to work. She was required to return any check to OWCP which included a period during which she worked. Although OWCP may have been negligent in making incorrect payments, this does not excuse a claimant from accepting

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<sup>27</sup> *Id.*; see also *K.D.*, Docket No. 13-0451 (issued April 12, 2013).

<sup>28</sup> See *K.H.*, Docket No. 06-0191 (issued October 30, 2006).

<sup>29</sup> *J.S.*, Docket No. 12-1707 (issued June 10, 2013).

<sup>30</sup> See also *C.K.*, Docket No. 12-0746 (issued May 1, 2012).

<sup>31</sup> See *W.B.*, Docket No. 09-1440 (issued April 12, 2010).

<sup>32</sup> *V.A.*, Docket No. 12-0637 (issued August 27, 2012).

<sup>33</sup> *D.W.*, Docket No. 14-0229 (issued April 17, 2014).

payments she knew or should have known to be incorrect.<sup>34</sup> 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. By the time of the second payment dated February 11, 2012, appellant should have known that she was not entitled to the same amount of wage-loss compensation as she had received prior to her return to part-time work on January 1, 2012.<sup>35</sup> After her receipt of the first direct deposit following her return to part-time work, she was on notice that OWCP was making payments to her in error and knew or should have known that she was not entitled to the benefit of the subsequent direct deposit.

Despite OWCP's explicit instructions regarding receipt of wage-loss compensation while working, appellant claimed she believed that she was entitled to the payments received from OWCP. She argued that, by letter dated March 25, 2011, she requested more information from OWCP as she thought she could earn the remaining 25 percent of her unpaid compensation. The Board notes that, by letter dated April 6, 2011, the claims examiner informed appellant that working in any capacity could affect her workers' compensation payments.

Appellant also referenced OWCP's June 9, 2010 letter, which provided notice that her compensation would be terminated if she had earnings equal to or higher than the wages being paid for the job she held when injured. As the letter noted that her wage-loss compensation amounted to 75 percent of her earnings, she thought that she could earn the remaining 25 percent without creating an overpayment.<sup>36</sup> The Board notes that OWCP's June 6, 2010 letter also explicitly stated that appellant was required to return any check to OWCP which included a period during which she worked because an overpayment could occur. As noted by appellant, OWCP informed her that an overpayment could occur. She was specifically instructed to return payment during any period worked so that OWCP could determine her LWEC.

Appellant further argued that she was not at fault because she notified the claims examiner in December 2011 that she was going to start part-time work and again notified OWCP about her return to part-time work in November 2011 when OWCP requested the information on the EN1032 form. She argued that she was confused by the process and attempted to contact the claims examiner regarding her part-time employment, but failed to receive an explanation. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payment appellant receives from OWCP is proper.<sup>37</sup> The fact that OWCP may have been negligent in issuing the payments does not mitigate this finding.<sup>38</sup> In light of OWCP's clear mandate to provide notification of a return to work and to return any payment received, which included a period during which appellant worked, a reasonable person would have known that an

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<sup>34</sup> See *C.G.*, Docket No. 15-0701 (issued December 9, 2015).

<sup>35</sup> *Id.*

<sup>36</sup> Under section 8110 of FECA, an employee is entitled to compensation at the augmented rate of 75 percent of her weekly pay if she has one or more dependents. 5 U.S.C. § 8110.

<sup>37</sup> *K.M.*, Docket No. 16-0802 (issued November 23, 2016).

<sup>38</sup> *C.F.*, Docket No. 16-1718 (issued August 21, 2017).

overpayment had occurred.<sup>39</sup> As appellant was at fault in creating the overpayment for the period January 15, 2012 to March 7, 2015, she is not eligible for waiver of recovery with respect to the portion of the overpayment for this period.<sup>40</sup>

Appellant has also not established that she was without fault in the overpayment because she only had an 11<sup>th</sup> grade education and could not understand that she was receiving an overpayment. There is no support to establish that she was of diminished mental capacity due to the extent of her education.<sup>41</sup>

The Board finds that this case is not in posture for decision regarding the issue of waiver of the recovery of the overpayment for the period January 1 to 14, 2012. The Board will remand the case for OWCP to determine whether appellant is entitled to waiver of recovery of the overpayment created for this period.<sup>42</sup> The Board finds that OWCP properly determined that she was at fault for the remaining period of overpayment, January 15, 2012 to March 7, 2015. As appellant was at fault under the third fault standard outlined above, recovery of the remaining overpayment of compensation may not be waived.<sup>43</sup>

Finally, as appellant's eligibility for waiver for a portion of the overpayment cannot yet be determined, the issue of recovery will not be considered in the present appeal. On remand, she will have an opportunity to submit and have OWCP consider relevant financial evidence on this issue. Following this and all other development deemed necessary, OWCP shall issue a *de novo* decision in the case.<sup>44</sup>

### CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$18,871.08 from January 1, 2012 through March 7, 2015. The Board further finds that she was without fault for the creation of the overpayment for the period January 1 to 14, 2012, and that she was at fault for the creation of the overpayment for the period January 15, 2012 to March 7, 2015.

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<sup>39</sup> *Supra* note 16.

<sup>40</sup> *V.D.*, Docket No. 16-0578 (issued November 3, 2016).

<sup>41</sup> *J.C.*, Docket No. 16-1889 (issued May 17, 2017).

<sup>42</sup> *Supra* note 33.

<sup>43</sup> No waiver of an overpayment is possible if the claimant is at fault in creating the overpayment. *L.J.*, 59 ECAB 264 (2007).

<sup>44</sup> *P.L.*, Docket No. 16-0127 (issued May 3, 2016).

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 16, 2016 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 of the Board.

Issued: December 28, 2017  
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