

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

C.D., Appellant)

and)

U.S. POSTAL SERVICE, WESTCHESTER)
STATION, Los Angeles, CA, Employer)

Docket No. 17-0472
Issued: December 18, 2017

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 January 3, 2017 appellant filed a timely appeal from an August 22, 2016 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 the case.²

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$27,143.48 for January 6, 7, 13, and 23, 2014 and continuously for the period July 17, 2014 to May 30, 2015, because she continued to receive FECA compensation after she returned

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that appellant submitted evidence to OWCP following issuance of the August 22, 2016 decision. The Board cannot consider this evidence as its jurisdiction is limited to the evidence that was before OWCP at the time it issued its final decision. 20 C.F.R. § 501.2(c)(1); *P.W.*, Docket No. 12-1262 (issued December 5, 2012).

to work; and (2) whether OWCP properly found appellant at fault and thus not entitled to waiver of recovery of the overpayment.

On appeal appellant asserts that she notified her supervisor that she had returned to work and thought the monies were for a schedule award. She maintains that she should not be held responsible for the overpayment.

FACTUAL HISTORY

On March 9, 2012 appellant, then a 48-year-old sales and service distribution associate, filed an occupational disease claim (Form CA-2) alleging that constant walking and standing at work caused injuries to her mid and low back and to both ankles and feet. OWCP accepted the conditions of lumbar sprain, bilateral ankle sprains, sprain of left knee cruciate ligament, old bucket handle tear of right knee meniscus, and bilateral plantar fibromatosis.

Appellant stopped work on November 17, 2012. On November 19, 2012 she underwent authorized right knee arthroscopic surgery. Appellant received wage-loss compensation and was placed on the periodic compensation rolls in January 2013. She returned to modified duty on April 22, 2013. Appellant continued to receive compensation on the periodic rolls. She stopped work on May 30, 2013 and on May 31, 2013 for authorized left foot surgery.

On June 26, 2014 Dr. Richard A. Rogachefsky, a Board-certified orthopedic surgeon and OWCP referral physician, advised that appellant could return to modified duty with permanent restrictions on standing, walking, and lifting.

In a December 12, 2014 report, Dr. Charles Xeller, an attending Board-certified orthopedic surgeon, noted that appellant was working modified duty at a call center. He advised that she had two percent right lower extremity permanent impairment for a right medial meniscus tear. Dr. Leonard A. Simpson, an orthopedic surgeon and an OWCP medical adviser, reviewed the medical record on February 11, 2015, including Dr. Xeller's report. He indicated that clarification should be obtained from Dr. Xeller regarding appellant's right knee and bilateral fibromatosis diagnoses. In correspondence dated February 20, 2015, OWCP requested clarification from Dr. Xeller regarding appellant's impairment. Appellant was copied on the letter. In a March 20, 2015 report, Dr. Xeller advised that appellant could return to limited duty. For a diagnosis of bilateral plantar fibromatosis, he indicated that she had two percent impairment of each lower extremity.

By letter dated June 10, 2015, OWCP informed appellant that her compensation was suspended effective May 31, 2015 because she had not completed a requested OWCP Form EN1032.

On June 25, 2015 the employing establishment informed OWCP that it had just been informed that appellant had been working at the employing establishment's call center since July 2014.

On June 26, 2015 appellant submitted a schedule award claim (Form CA-7).

On a Form CA-3, report of termination of disability and/or payment, dated August 3, 2015, the employing establishment indicated that appellant returned to work on July 17, 2014 as a customer care agent.

The employing establishment's Office of Inspector General (OIG) provided OWCP an investigation report dated August 18, 2015. An attached memorandum of interview dated June 29, 2015 indicated that appellant had been interviewed by special agents A.C. and C.P. with a union steward present. Appellant maintained that she thought FECA compensation she received was for a schedule award. She refused to provide a written statement, and informed the employing establishment that she was going to discuss the situation with the union president. Documentation for the period January 6, 7, 13, and 23, 2014 and from July 17, 2014 to May 30, 2015 indicated that appellant had received wage-loss compensation totaling \$25,335.01 for this period.

On July 20, 2016 OWCP issued a preliminary determination of an overpayment of compensation in the amount of \$27,143.48 for the days January 6, 7, 13, and 23, 2014 and continuously from July 17, 2014 to May 30, 2015, as she continued to receive FECA wage-loss compensation after she returned to work. It determined to recover the debt by deducting \$150.00 each from continuing compensation payments. OWCP explained that the amount of the overpayment totaled \$25,493.48, with the addition of \$1,650.00 due to an outstanding prior unpaid obligation for a total of \$27,143.48. It found appellant at fault because she had not contacted OWCP when she returned to work and had accepted compensation to which she knew or reasonably should have known that she was not entitled. OWCP also noted that, while she maintained that she believed that the continued receipt of compensation after her return to work was for a schedule award, the record established that no final schedule award had been issued at that time. Appellant was provided an overpayment action request and an overpayment questionnaire (OWCP-20) and was asked to attach supporting documentation, including copies of income tax returns, bank account statements, bills, cancelled checks, pay slips, and any other record which supported the income and expenses listed. She was informed of the actions she could take and was allotted 30 days to respond.

By decision dated August 22, 2016, OWCP finalized the preliminary determination that appellant was at fault in the creation of an overpayment of compensation in the amount of \$27,143.48 for the period January 6, 7, 13, and 23, 2014 and continuously from July 17, 2014 to May 30, 2015. It noted that no response was received from the preliminary determination. As appellant was no longer receiving FECA compensation, OWCP directed her to repay the entire amount or to contact OWCP to make appropriate arrangements for recovery.

LEGAL PRECEDENT -- ISSUE 1

Section 8102 of FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.³

³ 5 U.S.C. § 8102(a).

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.⁴ Section 10.500 of OWCP's regulations provides 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."⁵

ANALYSIS -- ISSUE 1

The Board finds that an overpayment of compensation in the amount of \$27,143.48 was created because appellant continued to receive FECA wage-loss compensation through May 30, 2015 after she returned to work, first for a brief period in January 2014 and began to work continuously in the summer 2014. As noted, both FECA and implementing regulations of OWCP provide that a claimant may not receive wage-loss compensation concurrently with a federal salary or other remuneration.⁶ An overpayment of compensation was therefore created.⁷

As to the amount of the overpayment, appellant did not dispute the fact that she worked on the dates in question. The August 18, 2015 OIG investigative report noted that appellant was interviewed by special agents on June 29, 2015. During the interview, appellant maintained that she thought FECA compensation she received was for a schedule award. The OIG provided documentation regarding the days appellant worked and the amount of FECA compensation she received for the period January 6, 7, 13, and 23, 2014, and from July 17, 2014 to May 30, 2015. In its July 20, 2016 preliminary overpayment determination, OWCP clearly explained its calculations for finding an overpayment of compensation in the amount of \$27,143.48. As noted above, section 8116(a) 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, not found in this case.⁸ Thus, the Board finds an overpayment of compensation in the amount of \$27,143.48.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA provides that an overpayment in compensation shall be recovered by OWCP unless "incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience."⁹

⁴ *Id.* at § 8116(a); *see Danny E. Haley*, 56 ECAB 393 (2005).

⁵ 20 C.F.R. § 10.500.

⁶ 5 U.S.C. § 8116(a); *id.*

⁷ *Id.*

⁸ *Id.*; *see Danny E. Haley*, *supra* note 4.

⁹ 5 U.S.C. § 8129.

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

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

‘(1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or

‘(2) Failed to provide information which he or she knew or should have known to be material; or

‘(3) Accepted a payment which he or she knew or should have known to be incorrect. (This provision applies only to the overpaid individual).”¹⁰

To determine if an individual was at fault with respect to the creation of an overpayment, OWCP examines the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual’s capacity to realize that he or she is being overpaid.¹¹

Even if an overpayment resulted from negligence by OWCP, this does not excuse the employee from accepting payment, which the employee knew or should have been expected to know she was not entitled.¹²

ANALYSIS -- ISSUE 2

OWCP found that appellant was at fault in creating the overpayment of compensation because she knew or should have reasonably known that she was not entitled to receive wage-loss compensation after she returned to work. The record indicates that she continued to receive FECA compensation through May 30, 2015.

Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives are proper¹³ and the recipient must show good faith and exercise a high degree of care in reporting events that may affect entitlement to or the amount of benefits.¹⁴ In an April 27, 2012 letter, OWCP accepted several conditions as related

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

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

¹² *Diana L. Booth*, 52 ECAB 370 (2001).

¹³ *Danny E. Haley*, *supra* note 4.

¹⁴ *Sinclair L. Taylor*, *supra* note 10.

to her employment. It clearly advised her that she was to immediately inform OWCP upon her return to work to avoid an overpayment in compensation and that, if she worked during any period covered by a compensation payment, she had to return the payment to OWCP.

Thus, appellant should have known that she could not receive wage-loss compensation after her return to work.¹⁵ Although she maintained that she thought the payments were for a schedule award, she had no basis in fact for this assumption as she had not filed a schedule award claim until June 26, 2015, after her compensation had stopped.

The Board therefore finds that appellant should have known that at the time she returned to work, she was not entitled to continue to receive compensation and had an obligation to return payments she knew or should have known were incorrect.¹⁶ Under section 10.433(a) of OWCP's regulations, appellant is at fault. As she was at fault in creating the overpayment, she is not eligible for waiver of recovery of the overpayment of compensation.¹⁷

With respect to recovery of the overpayment of compensation, the Board's jurisdiction is limited to reviewing those cases where OWCP seeks recovery from continuing compensation benefits under FECA.¹⁸ As appellant is no longer receiving wage-loss compensation, the Board does not have jurisdiction with respect to the recovery of the overpayment under the Debt Collection Act.¹⁹

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$27,143.48 because she continued to receive compensation after her return to work in 2014. The Board further finds that OWCP properly found her at fault and thus, she was not entitled to waiver of recovery of the overpayment.

¹⁵ *Neill D. Dewald, supra* note 11.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Cheryl Thomas, 55 ECAB 610 (2004).*

¹⁹ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the August 22, 2016 decision of the Office of Workers' Compensation Programs is affirmed.²⁰

Issued: December 18, 2017
Washington, DC

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

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

²⁰ Colleen Duffy Kiko, Judge, participated in the original decision, but was no longer a member of the Board effective December 11, 2017.