

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

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C.R., Appellant	)	
	)	
and	)	<b>Docket No. 17-0117</b>
	)	<b>Issued: April 4, 2018</b>
<b>DEPARTMENT OF VETERANS AFFAIRS,</b>	)	
<b>VETERANS HEALTH ADMINISTRATION,</b>	)	
<b>CONNECTICUT HEALTHCARE SYSTEM,</b>	)	
<b>West Haven, CT, Employer</b>	)	
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*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
ALEC J. KOROMILAS, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On October 25, 2016 appellant filed a timely appeal from a July 19, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to 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 \$966.94 for the period November 3 through 15, 2014; and (2) whether OWCP properly determined that appellant was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment.

## **FACTUAL HISTORY**

On January 17, 2014 appellant, then a 69-year-old health technician, filed a traumatic injury claim (Form CA-1) alleging that she felt excruciating, searing pain in her right arm while opening a drawer at work on January 10, 2014.

The claim was initially administratively handled as it appeared to be a minor injury that resulted in minimal or no lost time from work. When appellant did not return to work in a full-time capacity, OWCP formally adjudicated the claim on April 28, 2014 and accepted it for rotator cuff tear of the right shoulder. Appellant underwent an authorized July 18, 2014 surgical repair of the right shoulder on July 18, 2014.

In a letter dated September 23, 2014, OWCP notified appellant that she would be receiving compensation payments on the periodic compensation rolls as of August 29, 2014. To minimize the possibility of an overpayment of compensation, she was instructed to notify OWCP immediately when she went back to work. For payments sent by electronic funds transfer (EFT), a notification of the date and amount of payment appeared on the statement from her financial institution. Appellant was expected to monitor her EFT deposits carefully, at least every two weeks. If she worked for any portion of the period for which a deposit was made, she was to advise OWCP immediately so that the overpayment could be collected. OWCP noted that appellant's first payment would be for the period July 18 to August 23, 2014 in the net amount of \$2,703.65.

On November 10, 2014 appellant informed OWCP that she had returned to full-time work on November 3, 2014.

On November 15, 2014 OWCP paid appellant compensation for the period October 19 through November 15, 2014. In a November 17, 2014 compensation worksheet, it noted that appellant had returned to full-time limited duty on November 3, 2014. For the period November 3 to 15, 2014, OWCP calculated that she had received compensation in the net amount of \$966.94. This worksheet verified that appellant received gross compensation every 28 days in the amount of \$2,258.27.<sup>1</sup> During the 13-day period of overpayment appellant was entitled to gross compensation of \$1,048.49, however, after a health insurance premium in the amount \$81.55 was subtracted, appellant received net compensation in the amount of \$966.94.

By letter dated November 26, 2014, OWCP advised appellant of its preliminary determination that an overpayment of compensation in the amount of \$966.94 had been created during the period November 3 through 15, 2014, as she was paid compensation after her return to full-duty work on November 3, 2014. It found that she was at fault in creating the overpayment as she knew or should have known that she was not entitled to receive wage-loss compensation after returning to full-time work. OWCP informed appellant that she had a right to a precoupment hearing before an OWCP hearing representative. Appellant was also advised to complete the enclosed Form OWCP-20 overpayment recovery questionnaire and submit

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<sup>1</sup> Appellant's daily wage rate was calculated as \$80.6525.

supporting financial documentation, as this was necessary information on the issues of waiver and recovery of the overpayment.

On January 8, 2015 OWCP received appellant's December 26, 2014 overpayment recovery questionnaire, which listed monthly income, monthly expenses, and additional funds. Appellant requested a telephonic conference with OWCP on the issues of fault and possible waiver of recovery of the overpayment. She stated on the overpayment questionnaire as well as in a December 26, 2014 letter that the overpayment was not her fault as she had made several calls to OWCP advising that she was going back to work on November 3, 2014 and that OWCP had the letter from her doctor which also advised that she was going back to work on November 3, 2014. Appellant stated that, when the deposit was received at her bank, she thought it represented her earned salary. OWCP received an updated Form OWCP-20 on January 14, 2015. No further action was taken by OWCP.

The July 18, 2016 scheduled overpayment telephone conference did not take place.<sup>2</sup>

By decision dated July 19, 2016, OWCP finalized the overpayment determination that an overpayment of compensation in the amount of \$966.94 was created for the period November 3 through 15, 2014 for which appellant was with fault as she had accepted compensation payments she knew or reasonably should have known she was not entitled. It requested that she repay the full amount of \$966.94 within 30 days.

### **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.<sup>3</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>4</sup> Section 10.500 of 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>5</sup>

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<sup>2</sup> On appeal appellant acknowledges that the telephone conference did not take place because of scheduling difficulties.

<sup>3</sup> 5 U.S.C. § 8102(a).

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

<sup>5</sup> 20 C.F.R. § 10.500.

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

The Board finds that an overpayment of compensation was created.

OWCP accepted appellant's claim and paid wage-loss compensation, placing her on the periodic compensation rolls as of August 29, 2014. The record establishes that appellant returned to full-time work on November 3, 2014, however, she continued to receive FECA wage-loss compensation through November 15, 2014. Appellant was not entitled to receive FECA wage-loss compensation and federal salary for the same time period.<sup>6</sup>

The record establishes that appellant returned to full-time work on November 3, 2014. Appellant continued to receive wage-loss compensation until November 15, 2014. The record reflects that she received wage-loss compensation for the period October 19 through November 15, 2014 in one direct deposit payment. In a compensation termination worksheet, OWCP noted appellant's gross compensation for the 13-day period November 3 to 15, 2014 totaled \$1,048.49, and that after the premium for health benefits was subtracted she received a net overpayment in the amount of \$966.94. Appellant has not disputed the fact or amount of overpayment. The Board finds that an overpayment of compensation in the amount of \$966.94 was created in this case.<sup>7</sup>

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

5 U.S.C. § 8129(b) provides: 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 FECA or would be against equity and good conscience.<sup>8</sup> A claimant who is at fault in the creation of the overpayment is not entitled to waiver.<sup>9</sup> On the issue of fault, 20 C.F.R. § 10.433(a) 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.

The Board has held that an employee who receives payments from OWCP in the form of direct deposit may not be at fault the first time incorrect funds are deposited into his or her account, as the acceptance of the resulting overpayment lacks the requisite knowledge.<sup>10</sup> The Board has also held in cases involving a series of incorrect payments, where the requisite knowledge is established by a letter or telephone call from OWCP or simply with the passage of time and a greater opportunity for discovery, the claimant will be at fault for accepting the payments

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<sup>6</sup> *Supra* note 4.

<sup>7</sup> *See supra* note 4.

<sup>8</sup> 5 U.S.C. § 8129(b).

<sup>9</sup> *See Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

<sup>10</sup> *See Tammy Craven*, 57 ECAB 689 (2006).

subsequently deposited.<sup>11</sup> Previous cases have held that receiving one or two erroneous direct deposit payments does not necessarily create the requisite knowledge to find that a claimant was at fault in the creation of the overpayment.<sup>12</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 were incorrect. The Board finds, however, that it failed to establish that she knew or should have known that the initial payment she received after she resumed work on November 3, 2014 was erroneous.

In cases where a claimant receives compensation through direct deposit, 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>13</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>14</sup> Because fault is defined by what the claimant knew or should have known at the time of acceptance, one of the consequences of EFT is that the claimant lacks the requisite knowledge at the time of the first incorrect payment.<sup>15</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>16</sup> It is inappropriate, 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>17</sup>

OWCP paid appellant compensation by EFT every 28 days. Appellant returned to work on November 3, 2014. On November 15, 2014 OWCP paid her compensation for the period October 19 through November 15, 2014. There is no documentation or other evidence to demonstrate that appellant had clear knowledge at the time the bank received the November 15, 2014 direct deposit that a portion of the payment was incorrect.<sup>18</sup> The Board thus finds that

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<sup>11</sup> *Id.*

<sup>12</sup> *V.S.*, Docket No. 13-1278 (issued October 23, 2015).

<sup>13</sup> *See C.K.*, Docket No. 12-0746 (issued May 1, 2012).

<sup>14</sup> *Supra* note 10.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*; *see also K.D.*, Docket No. 13-0451 (issued April 12, 2013).

<sup>17</sup> *See V.S.*, *supra* note 12.

<sup>18</sup> *See M.M.*, Docket No. 15-0265 (issued May 27, 2015); *Danny E. Haley*, 56 ECAB 393 (2005); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(a) (May 2004).

appellant was without fault in accepting the initial direct deposit covering the period of the overpayment November 3 through 15, 2014.

The Board finds that the case is not in posture for decision regarding the issue of waiver of recovery of the overpayment for the period November 3 to 15, 2014. The Board will set aside the July 19, 2016 decision regarding the issue of fault for this period and remand the case for OWCP to determine whether appellant is entitled to wavier of recovery of the overpayment covering the period November 3 to 15, 2014.<sup>19</sup>

### **CONCLUSION**

The Board finds that OWCP properly determined that appellant received an overpayment of compensation during the period November 3 to 15, 2014 in the amount of \$966.94. The Board further finds that she was without fault for the period of the overpayment from November 3 to 15, 2014. The case will be remanded for OWCP to consider waiver of recovery of the overpayment from November 3 to 15, 2014.<sup>20</sup>

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<sup>19</sup> The Board does not have jurisdiction to review the recovery of the overpayment as its jurisdiction is limited to reviewing those cases where OWCP seeks recovery from continuing compensation under FECA. *See* 20 C.F.R. § 10.441(a); *Ronald E. Ogden*, 56 ECAB 278 (2005).

<sup>20</sup> Due to the disposition of this case, appellant's arguments on appeal will not be addressed.

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 19, 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 proceedings consistent with this opinion of the Board.

Issued: April 4, 2018  
Washington, DC

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

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

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