

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

_____)	
L.W., Appellant)	
)	
and)	Docket No. 18-0105
)	Issued: April 26, 2018
U.S. POSTAL SERVICE, POST OFFICE,)	
Ukiah, CA, Employer)	
_____)	

Appearances:
Appellant, pro se
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 October 13, 2017 appellant filed a timely appeal from an April 17, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP).¹ Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

¹ 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 April 17, 2017, the date of OWCP's last decision was October 14, 2017, a Saturday; consequently, the period for filing the appeal ran to the next business day, Monday, October 16, 2017. See 20 C.F.R. § 501.3(f)(2). Since using October 17, 2017, the date the appeal was received by the Clerk of the Appellate Boards would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is October 13, 2017, rendering the appeal timely filed. See 20 C.F.R. § 501.3(f)(1).

² 5 U.S.C. § 8101 *et seq.*

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$7,430.53 during the period September 28, 2015 to March 18, 2016; 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.

On appeal appellant asserts that she was not at fault in the creation of the overpayment because she followed instructions provided by the employing establishment and OWCP.

FACTUAL HISTORY

On June 7, 2014 appellant, then a 59-year-old part-time distribution clerk working four hours of modified duty daily, filed a traumatic injury claim (Form CA-1) alleging that reaching up to case mail that day caused a right shoulder injury. She stopped work that day. In an attached statement, appellant indicated that she had previously injured her right shoulder in 1994 and after her return to work in January 2013, had no problems with her right shoulder until the claimed June 7, 2014 employment incident. She referenced OWCP File No. xxxxxx583. The record indicates that, effective January 23, 2013, appellant began a four-hour daily modified position under that File No. The instant claim was adjudicated as a new injury under File No. xxxxxx141. The two claim files have not been administratively combined.

Under the instant claim, OWCP accepted right shoulder sprain. Appellant received continuation of pay from June 8 to July 22, 2014. She received FECA compensation on the supplemental disability rolls beginning July 23, 2014, and OWCP placed her on the periodic compensation rolls effective September 21, 2014. On March 31, 2015 Dr. Eric S. Schmidt, a Board-certified orthopedic surgeon, performed right shoulder arthroscopic repair of recurrent subacromial impingement.

On September 28, 2015 appellant returned to modified duty for four hours daily and filed claims for compensation, CA-7 forms, for approximately four hours daily, beginning September 28, 2015. OWCP paid wage-loss compensation for 386.6 intermittent hours for the period September 28, 2015 through March 18, 2016.

By letter dated April 12, 2016, OWCP requested that the employing establishment explain why it was certifying compensation under File No. xxxxxx141 when she was receiving compensation for loss of wage-earning capacity under File No. xxxxxx583.

On July 25, 2016 OWCP issued a preliminary determination that appellant received an overpayment of compensation in the amount of \$7,430.52 because she claimed wage loss for periods to which she was not entitled for the period September 28, 2015 to March 18, 2016. It explained that appellant, who was a part-time worker on the date of injury June 7, 2014, claimed wage-loss compensation for a full-time job under this claim, File No. xxxxxx141, and also received compensation for partial disability due to a loss of wage-earning capacity determination under File No. xxxxxx583. The preliminary overpayment determination included calculations showing that appellant was paid a total of \$7,751.51 in FECA compensation for this period under File No. xxxxxx141. It noted that she was entitled to 16 hours of intermittent wage loss for medical

appointments totaling \$320.98. This yielded an overpayment of compensation of \$7,430.53. It found appellant at fault because she accepted a payment that she knew or reasonably should have known was incorrect. OWCP enclosed an overpayment action request form and an overpayment recovery questionnaire (Form OWCP-20). Computer print-outs and an overpayment worksheet with these calculations are found in the record.

Appellant timely requested a hearing before an OWCP hearing representative. She disagreed that the overpayment occurred and contested the fault finding.

On January 24, 2017 OWCP additionally accepted adhesive capsulitis of the right shoulder.

During the hearing, held on March 13, 2017, OWCP's hearing representative explained that appellant was being compensated under the instant claim, File No. xxxxxx141, and also received compensation for partial disability due to a loss of wage-earning capacity determination under File No. xxxxxx583. Appellant agreed that she was overpaid, but maintained that she was not at fault because errors were made by the employing establishment and OWCP. She indicated that she had recently retired. Appellant thereafter submitted an overpayment recovery questionnaire indicating total monthly income of \$4,985.30 and monthly expenses of \$3,996.75.

By decision dated April 17, 2017, an OWCP hearing representative finalized the preliminary overpayment determination. She found the overpayment of compensation was created because appellant was working part time when injured and should have been aware when she returned to exactly the same work hours on September 28, 2015 that she was not entitled to additional compensation. The hearing representative further found appellant at fault in the creation of the overpayment and thus not entitled to waiver of recovery because she filed CA-7 claims for compensation although she was not entitled to additional compensation. She noted that appellant's income exceeded her expenses by over \$900.00 per month and set repayment at \$200.00 per month.

LEGAL PRECEDENT -- ISSUE 1

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 his or her duty.³ 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.⁴

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$7,430.53 for the period September 18, 2015 to March 18, 2016.

³ 5 U.S.C. § 8102(a).

⁴ *Id.* at § 8129(a).

The record indicates that when appellant was injured on June 7, 2014, she was working modified duty for four hours daily due to a previous injury, adjudicated by OWCP under File No. xxxxxx583 and was receiving compensation for partial disability due to a loss of wage-earning capacity determination under that claim. OWCP adjudicated the instant claim, File No. xxxxxx141, as a new injury and after appellant returned to work paid wage-loss compensation totaling 386.6 hours for the period September 28, 2015 through March 18, 2016 in the amount of \$7,751.51. Appellant also continued to receive compensation under File No. xxxxxx583 for this period. OWCP determined that appellant was entitled to 16 hours of compensation for medical appointments under File No. xxxxxx141, totaling \$320.98 which was deducted from total compensation of \$7,751.51. The record thus establishes that an overpayment of compensation in the amount of \$7,430.52 was created because appellant received compensation under two OWCP claims for the period September 18, 2015 to March 18, 2016.⁵

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.”⁶

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).”⁷

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.⁸

⁵ See *R.H.*, Docket No. 09-1981 (issued June 11, 2010).

⁶ 5 U.S.C. § 8129; see *Linda E. Padilla*, 45 ECAB 768 (1994).

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

⁸ *Id.* at § 10.433(b); *Neill D. Dewald*, 57 ECAB 451 (2006).

ANALYSIS -- ISSUE 2

OWCP determined that appellant was at fault in the creation of the overpayment because she filed CA-7 claims for wage-loss compensation after she returned to work on September 28, 2015, even though she was also collecting wage-loss compensation under her prior claim resulting from a loss of wage-earning capacity determination. As noted, after appellant returned to work on September 28, 2015 she continued to receive wage-loss compensation under File No. xxxxxx141, although she was properly receiving wage-loss compensation under File No. xxxxxx583, thus creating a duplicate payment. Therefore, the evidence of record establishes that when appellant claimed compensation she made an incorrect statement of material fact, the Board finds that appellant was at fault in creating the overpayment and waiver of recovery of the overpayment is precluded.⁹

As to appellant's assertion on appeal that she was merely following instructions of the employing establishment and OWCP, OWCP regulations provide that an error by a government entity, including OWCP, which resulted in an overpayment does not relieve a claimant from liability for repayment.¹⁰

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.¹¹ As appellant is no longer receiving wage-loss compensation under File No. xxxxxx141, the Board does not have jurisdiction with respect to the recovery of the overpayment under the Debt Collection Act.¹²

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$7,430.53 during the period September 28, 2015 to March 18, 2016. The Board further finds that OWCP properly found her at fault in the creation of the overpayment and thus, she was not entitled to waiver of recovery of the overpayment.

⁹ See W.A., Docket No. 14-0350 (issued October 28, 2014).

¹⁰ 20 C.F.R. § 10.435(a); see *J.O.*, Docket No. 09-264 (issued August 10, 2009).

¹¹ *Cheryl Thomas*, 55 ECAB 610 (2004).

¹² *Id.*

ORDER

IT IS HEREBY ORDERED THAT the April 17, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 26, 2018
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