

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

T.N., Appellant)

and)

U.S. POSTAL SERVICE, PROCESSING &)
DISTRIBUTION CENTER, Santa Ana, CA,)
Employer)

**Docket No. 17-0387
Issued: November 28, 2018**

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
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On December 8, 2016 appellant filed a timely appeal from a November 2, 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 to consider the merits of this case.

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$2,919.61 for the period April 5 to July 8, 2016; and (2) whether appellant was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment.

On appeal appellant contends that OWCP erred in finding an overpayment and in requiring repayment.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On October 23, 2013 appellant, then a 55-year-old clerk, filed a traumatic injury claim (Form CA-1) alleging that, on October 22, 2013, she hit her right eye lid and neck when walking through a turnstile. On November 15, 2013 she accepted a modified job offer for four hours of work per day. OWCP paid partial wage-loss compensation on the supplemental rolls as of December 6, 2013.

Appellant sought treatment from Dr. Edward Mittleman, a treating physician specializing in family medicine, beginning November 14, 2013. In various duty status (Forms CA-17) and medical reports, Dr. Mittleman provided work restrictions which he attributed were due to her accepted conditions. He released appellant to working four hours per day in a modified job, which was increased to five and one-half hours per day. Dr. Mittleman noted that the accepted employment injury diagnoses included neck sprain and contusion of the neck, face, and scalp (except eyes).

On August 25, 2015 OWCP referred appellant, a statement of accepted facts, and list of questions, to Dr. Michael J. Einbund, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine the extent of her disability and work capacity.

In a report dated October 6, 2015, Dr. Einbund noted appellant's history of injury and that appellant has been working a modified job part-time since December 26, 2013. He related that appellant's physical examination revealed tenderness on the left trapezius and left side of her neck, negative Spurling's test and cervical compression test, full bilateral shoulder, elbow, wrist, and hand range of motion, normal upper extremity sensation, and no evidence of biceps, triceps or deltoid muscle weakness. Dr. Einbund reviewed x-ray interpretation and found no evidence of dislocation or fracture and very mild C5 and C6 anterior aspect degeneration. He noted that a November 18, 2013 magnetic resonance imaging scan revealed clinically insignificant very small disc bulges and no evidence of spondylosis. Dr. Einbund also reviewed a December 18, 2013 electromyography (EMG) study which he found showed no evidence of cervical radiculopathy. He opined that appellant no longer had any residuals or disability due to the accepted October 22, 2013 employment injury based on the lack of any objective findings. Dr. Einbund observed that appellant had preexisting and nonwork-related mild degeneration and the degenerative changes which were consistent with her age.

In a November 25, 2015 report, Dr. Mittleman reviewed Dr. Einbund's report and concurred with Dr. Einbund's opinion that appellant no longer had any residuals from the accepted October 22, 2013 employment injury. However, he disagreed with Dr. Einbund regarding appellant's physical restrictions. Dr. Mittleman imposed a 25-pound lifting and carrying intermittently weight restriction to prevent any further aggravation of appellant's back or neck symptoms. He noted the work restrictions from a March 5, 2015 functional capacity evaluation (FCE).

In a letter dated March 3, 2016, OWCP proposed to terminate appellant's wage-loss compensation and medical benefits as the evidence of record established that appellant was no

longer partially disabled and could resume full-time work without restrictions.² It accorded the weight of the medical evidence to Dr. Einbund and noted that Dr. Mittleman, in his November 25, 2015 report, indicated that his work restrictions were only to prevent further injury to her neck and back. OWCP afforded appellant 30 days to respond to the proposed termination. By decision dated April 5, 2016, it finalized the termination of appellant's wage-loss compensation and medical benefits, effective that date.³ OWCP, however, continued to pay partial wage-loss compensation benefits until July 8, 2016.⁴

On September 9, 2016 OWCP issued a preliminary determination of an overpayment of compensation in the amount of \$2,919.61 for the period April 5 to July 8, 2016 as she continued to receive compensation following the termination of her benefits. It found that appellant was at fault in the creation of the overpayment as she had accepted a payment, which she knew or reasonably should have known was incorrect.

In a letter dated October 1, 2016, received by OWCP on October 6, 2016, appellant disagreed with the proposed overpayment determination. She contended that she was not at fault in its creation and that her treating physician never received anything from OWCP regarding the closing of her claim. Appellant further requested that OWCP reimburse her for her leave without pay until she returns to full-duty work.

By decision dated November 2, 2016, OWCP finalized its determination that appellant had received an overpayment of compensation in the amount of \$2,919.61 for the period April 5 to July 8, 2016, and that she was at fault in its creation. It directed recovery of the overpayment in full.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) 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.⁵ Section 8129(a) of FECA provides, in pertinent part:

“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

² The letter was addressed and mailed to her last known address in Huntington Beach, CA.

³ The decision was addressed and mailed to her last known address in Huntington Beach, CA. On April 4, 2016 the day prior to the final termination decision, appellant had filed a claim for leave buy-back (Form CA-7) on which appellant had reported the same address as that used by OWCP as its address of record.

⁴ The record contains OWCP payment records and calculation sheets showing that appellant was overpaid \$397.33, \$127.30, \$305.33, \$442.56, \$451.41, \$404.64, \$408.07, and \$382.97 totaling \$2,919.61 for the period April 5 to July 8, 2016. The initial payment made by direct deposit covered the period April 5 to 15, 2016 was made on May 2, 2016. The second payment was made on May 9, 2016.

⁵ 5 U.S.C. § 8102(a).

prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.”⁶

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.⁷ 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.⁸ OWCP’s regulations state in pertinent part that compensation for wage loss due to disability is available only for any periods during which the employee’s work-related medical condition prevents her from earning the wages earned before the work-related injury.⁹

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$2,919.61 for the period April 5 to July 8, 2016. The record reflects that OWCP terminated appellant’s wage-loss compensation and medical benefits, effective April 5, 2016. However, appellant continued to receive wage-loss compensation on the supplemental rolls until July 8, 2016.

The case record contains OWCP payment records and calculations showing that payments totaling \$2,919.61 in compensation benefits for the period April 5 to July 8, 2016 were electronically deposited into appellant’s bank account.¹⁰ As appellant was paid compensation from April 5 to July 8, 2016 following the termination of her benefits as of April 5, 2016, the entire amount of compensation appellant received during this period, \$2,919.61, constituted an overpayment of compensation. The Board thus finds that appellant received an overpayment of compensation in the amount of \$2,919.61 for the period April 5 to July 8, 2016.¹¹

On appeal appellant contends that she never received the April 5, 2016 termination decision. As she was unaware that her benefits had been terminated, she contended that OWCP should have continued to pay wage-loss compensation for the period April 5 to July 8, 2016 as her wage loss was due to her accepted employment injuries. Appellant also contends that she continues to have problems with her neck injury and OWCP should have paid for her lost wages from July 8 to September 17, 2016 when she returned to full-time work.

⁶ *Id.* at § 8129(a).

⁷ 5 U.S.C. § 8102.

⁸ *Id.* at § 8116(a).

⁹ 20 C.F.R. § 10.500.

¹⁰ *Supra* note 4.

¹¹ *See K.D.*, Docket No. 13-0451 (issued April 12, 2013); *M.G.*, Docket No. 08-1942 (issued September 3, 2009).

In the absence of evidence to the contrary, it is presumed that a decision mailed to an addressee in the ordinary course of business was received by the addressee.¹² The April 5, 2016 decision was properly addressed to appellant's last known address and there is no evidence that it was returned as undeliverable.¹³ Consequently, the decision is presumed to be received under the "mailbox rule."

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of FECA¹⁴ 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."¹⁵

OWCP may consider waiving an overpayment of compensation 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 received 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 with respect to 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; (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.¹⁶

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.¹⁷

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 OWCP failed to establish that, at the time appellant accepted the initial payment of compensation, she knew or should have known that the payment was incorrect.

¹² See *R.H.*, Docket No. 09-1981 (issued June 11, 2010); *Joseph R. Giallanza*, 55 ECAB 186 (2003); *Larry L. Hill*, 42 ECAB 596, 600 (1991).

¹³ 20 C.F.R. § 10.127 provides that a copy of the decision shall be mailed to the employee's last known address.

¹⁴ 5 U.S.C. § 8129(b).

¹⁵ *J.K.*, Docket No. 08-1761 (issued January 8, 2009); *Joan Ross*, 57 ECAB 694 (2006); *Desiderio Martinez*, 55 ECAB 245 (2004).

¹⁶ 20 C.F.R. § 10.433(a).

¹⁷ *Id.* at § 10.433(b).

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, he or she should have known that the payment was incorrect.¹⁸ The Board has held that an employee who receives payments from OWCP in the form of a direct deposit might 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.¹⁹ 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.²⁰ 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.²¹ 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.²²

The record establishes that appellant received compensation by direct deposit for the period April 5 to July 8, 2016. The evidence of record does not establish that, on the date of the first direct deposit of compensation following the termination of her compensation, appellant knew or should have known that she was accepting a direct deposit to which she was not entitled. The record does not contain any documentation or other evidence to demonstrate that appellant had knowledge at the time of the May 2, 2016 direct deposit covering the period April 5 to 15, 2016 that 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. Thus, the Board finds that when the initial direct deposit was made, appellant had no knowledge that this direct deposit was incorrect. Appellant, therefore, cannot be found to be at fault in the acceptance of the initial May 2, 2016 direct deposit. The case must therefore be remanded for OWCP to determine whether she is entitled to waiver of the recovery of the overpayment for the first incorrect compensation payment made on May 2, 2016.

The Board had held that for subsequent payments through direct deposit, a claimant may be found to have accepted payments he or she knew or should have known to be incorrect.²³ By the time OWCP issued the second compensation payment on May 9, 2016, appellant should have known that she was no longer entitled to compensation, as OWCP had notified her that her compensation was formally terminated, effective April 5, 2016. Therefore, the Board finds that

¹⁸ *C.K.*, Docket No. 12-0746 (issued May 1, 2012).

¹⁹ *Tammy Craven*, 57, ECAB 589 (2006).

²⁰ *Id.*

²¹ *Id.*

²² *See K.H.*, Docket No. 06-0191 (issued October 30, 2006).

²³ *Supra* note 18.

appellant was at fault in the creation of the remainder of the overpayment as she knew or should have known at the time of the second incorrect payment that she was no longer entitled to additional wage-loss compensation. Appellant had the obligation to return all payments she received after that.²⁴ The Board, therefore, finds that appellant was at fault for the remaining portion of the period of overpayment

On appeal, appellant contends that she did not know of the termination decision and believed that she was entitled to wage-loss compensation benefits until returning to full-duty work on September 17, 2016. Her contentions, however, are without merit. The Board notes that, even if OWCP may have been negligent in issuing continuing compensation for temporary disability, it does not excuse her acceptance of such checks, which she knew or should have been expected to know should be returned to OWCP.²⁵ As discussed above, under the “mailbox rule” the April 5, 2016 decision was presumed to be delivered to appellant as it had been properly addressed and it had not been returned to OWCP. The Board therefore finds that OWCP has established that appellant accepted payments which she knew or should have known to be incorrect.

The Board finds that this case is not in posture for decision regarding the issue of waiver of the overpayment for the initial direct deposit made on May 2, 2016. The Board will set aside the November 2, 2016 decision regarding the issue of fault as to the initial May 2, 2016 direct deposit and will remand the case for OWCP to determine whether appellant is entitled to waiver of recover for the remaining period of overpayment.

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$2,919.61 for the period April 5 to July 8, 2016. The Board further finds that appellant was not at fault in the creation of the portion of the \$2,919.61 overpayment for the period April 5 to 15, 2016, and the case is remanded to OWCP to consider whether waiver of recovery is warranted. The Board further finds that appellant was at fault in the creation of the remaining portion of the overpayment of compensation for the period April 16 to July 8, 2016 and, therefore, is ineligible for waiver of recovery for this remaining portion.

²⁴ *Sinclair L. Taylor*, 52 ECAB 442 (2001).

²⁵ *Supra* note 18.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 2, 2016 is affirmed in part and set aside in part. The case is remanded for further proceedings consistent with this decision.²⁶

Issued: November 28, 2018
Washington, DC

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

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

²⁶ Colleen Duffy Kiko, Judge, participated in this decision, but was no longer a member of the Board effective December 11, 2017.