

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

K.E., Appellant	)	
	)	
and	)	<b>Docket No. 18-0687</b>
	)	<b>Issued: October 25, 2018</b>
U.S. POSTAL SERVICE, POST OFFICE,	)	
Frankfurt, IL, Employer	)	
	)	

*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 February 12, 2018 appellant filed a timely appeal from a January 24, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP).<sup>1</sup> 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 OWCP properly determined that appellant received an overpayment of compensation in the amount of \$504.06 during the period October 10 to 14, 2017; and (2) whether OWCP properly determined that appellant was at fault in the creation of the overpayment of compensation, thereby precluding waiver of recovery of the overpayment.

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<sup>1</sup> Appellant indicated on the AB-1 form that she was appealing from a January 29, 2018 OWCP decision. The Board notes, however, that the record does not contain an adverse final decision issued by OWCP on that date. The only final adverse decision within the Board's jurisdiction is the January 24, 2018 merit decision.

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

## **FACTUAL HISTORY**

On July 6, 2015 appellant, then a 54-year-old rural letter carrier, filed an occupational disease claim (Form CA-2) alleging left hand carpal tunnel syndrome and trigger finger in the performance of her federal employment duties.<sup>3</sup> On October 9, 2015 OWCP accepted the claim for left carpal tunnel syndrome and paid appellant wage-loss compensation and medical benefits on the supplemental rolls as of July 15, 2016.

On July 26, 2017 OWCP expanded acceptance of appellant's claim to include left middle trigger finger. It authorized a tenovagnectomy and reconstruction of the A1 pulley of the left middle finger performed by Dr. James D. Schlenker, a Board-certified orthopedic hand surgeon, on August 11, 2017. OWCP paid supplemental rolls payments for temporary total disability from August 12 to September 16, 2017.

On September 26, 2017 OWCP placed appellant on the periodic rolls and paid her temporary total disability compensation in the net amount of \$2,822.76 from September 17 through October 14, 2017. Appellant received the \$2,822.76 direct deposit by electronic funds transfer (EFT) on October 14, 2017, representing her compensation for the period September 17 to October 14, 2017.

OWCP, by letter dated September 29, 2017, notified appellant of her continuing compensation payments and her responsibility to return to work if she no longer was totally disabled. 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 EFT, a notification of the date and amount of payment appeared on the statement from appellant's 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 September 2 to 16, 2017 in the net amount of \$1,512.19.

On October 19, 2017 appellant informed OWCP by telephone that she had returned to part-time, limited-duty work for the employing establishment on October 10, 2017.

By letter dated November 8, 2017, OWCP advised appellant of its preliminary determination that she received a \$504.06 overpayment of compensation for the period October 10 to 14, 2017 because she continued to receive total disability compensation after her return to part-time, limited-duty work on October 10, 2017. It also made a preliminary finding that she was at fault in creating the overpayment because she was aware or should have been reasonably aware

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<sup>3</sup> Appellant has a prior claim, in which OWCP accepted that she sustained right thumb trigger finger; right radial styloid tenosynovitis, right carpal tunnel syndrome, and right hand and thumb localized primary osteoarthritis on or after September 11, 2012 due to delivering and sorting mail. OWCP assigned that claim OWCP File No. xxxxxx899. On March 20, 2015 appellant underwent authorized right carpal tunnel release, tenovagnectomy of the first dorsal compartment, flap reconstruction of the retinacular pulley, right thumb tenovagnectomy of the annular pulley, resection arthroplasty with tendon implant of the trapeziometacarpal joint, reconstruction of the volar ligament with flexor carpi radialis tendon transfer, and bone graft of the metacarpal. OWCP File No. xxxxxx899 has been administratively combined with the present claim, OWCP File No. xxxxxx382, with File No. xxxxxx382, serving as the master file.

that it had incorrectly paid compensation. OWCP advised appellant that she could submit evidence challenging the fact, amount, or finding of fault and request waiver of recovery of the overpayment. Additionally, it informed her that, within 30 days, she could request a telephone conference, a final decision based on the written evidence, or a prerecoumpment hearing. OWCP requested that appellant complete the enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documents.

The record includes OWCP computer print-outs of overpayment worksheets indicating that appellant returned to part-time, limited-duty work on October 10, 2017. The worksheets contained calculations showing that from September 17 to October 14, 2017 she received compensation in the net amount of \$2,822.76, when she was entitled to only the net amount of \$2,318.70 for the period September 17 to October 9, 2017. This yielded an overpayment of compensation in the amount of \$504.06 for the period October 10 to 14, 2017.

On November 21, 2017 OWCP received appellant's November 16, 2017 overpayment recovery questionnaire, which listed monthly income, monthly expenses, and additional funds. Appellant requested that OWCP make a decision based on the written evidence regarding the issues of fault and possible waiver of recovery of the overpayment.

By decision dated January 24, 2018, OWCP finalized the overpayment determination that an overpayment of compensation in the amount of \$504.06 was created for the period October 10 to 14, 2017 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 \$504.06 within 30 days.

### **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 his duty.<sup>4</sup> Section 8129(a) of FECA provides, in pertinent part, that 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 prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.<sup>5</sup>

Section 8116(a) of FECA provides that, while an employee is receiving compensation or if he or she has been paid a lump sum in commutation of installment payments until the expiration of the period during which the installment payments would have continued, the employee may not receive salary, pay, or remuneration of any type from the United States, except in limited specified instances.<sup>6</sup> 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

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<sup>4</sup> 5 U.S.C. § 8102(a).

<sup>5</sup> *Id.* at § 8129(a).

<sup>6</sup> *Id.* at § 8116(a).

condition prevents him or her from earning the wages earned before the work-related injury.<sup>7</sup> A claimant is not entitled to receive temporary total disability (TTD) benefits and actual earnings for the same time period.<sup>8</sup> OWCP procedures provide that an overpayment of compensation is created when a claimant returns to work, but continues to receive wage-loss compensation for TTD.<sup>9</sup>

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

The Board finds that appellant received an overpayment of compensation in the amount of \$504.06 for the period October 10 to 14, 2017.

The evidence of record shows that appellant returned to part-time, limited-duty work for the employing establishment on October 10, 2017, but continued to receive TTD compensation on the periodic rolls through October 14, 2017.

As noted above, a claimant is not entitled to receive compensation for total disability during a period in which he or she had actual earnings.<sup>10</sup> Therefore, an overpayment of compensation was created in this case.<sup>11</sup>

Appellant received disability compensation in the net amount of \$2,822.76 for the period September 17 to October 14, 2017, but she was only entitled to the net amount of \$2,318.70 for the period September 17 to October 9, 2017. This yielded an overpayment of compensation in the amount of \$504.06 for the period October 10 to 14, 2017. Thus, the Board finds that appellant received an overpayment of compensation in the amount of \$504.06 during the period October 10 to 14, 2017.<sup>12</sup> Appellant has not challenged either the fact or amount of overpayment.

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

5 U.S.C. § 8129(b) provides that 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 this subchapter or would be against equity and good conscience.<sup>13</sup> A claimant who is at fault in the creation of the overpayment is not entitled to waiver.<sup>14</sup> On the issue of fault, 20 C.F.R. § 10.433(a) provides that an individual is with fault in

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<sup>7</sup> 20 C.F.R. § 10.500(a).

<sup>8</sup> See *M.S.*, Docket No. 16-0289 (issued April 21, 2016); *L.S.*, 59 ECAB 350, 352-53 (2008).

<sup>9</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>10</sup> See *supra* notes 7 and 8.

<sup>11</sup> See *supra* note 9.

<sup>12</sup> *A.J.*, Docket No. 17-0622 (issued August 9, 2017).

<sup>13</sup> 5 U.S.C. § 8129(b).

<sup>14</sup> *Gregg B. Manston*, 45 ECAB 344, 354 (1994).

the creation of an overpayment who: (1) made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or (2) failed to furnish information which the individual knew or should have known to be material; or (3) with respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect.<sup>15</sup>

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>16</sup> It is not appropriate to make a finding that a claimant has accepted an overpayment through direct deposit until such a time as a reasonable person would have been aware that this overpayment had occurred.<sup>17</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 subsequently deposited.<sup>18</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>19</sup>

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

OWCP applied the third standard, as set forth above, and determined that appellant was at fault in the creation of the overpayment because she accepted a payment that she knew or should have known was incorrect. The Board finds, however, that it failed to establish that appellant knew or should have known that the initial payment she received after she resumed work on October 10, 2017 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>20</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>21</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

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<sup>15</sup> 20 C.F.R. § 10.433. See *Kenneth E. Rush*, 51 ECAB 116, 118 (1999).

<sup>16</sup> *D.B.*, Docket No. 15-0258 (issued February 1, 2016).

<sup>17</sup> *P.L.*, Docket No. 16-0127 (issued May 3, 2016).

<sup>18</sup> *Tammy Craven*, 57 ECAB 689, 693 (2006).

<sup>19</sup> *V.S.*, Docket No. 13-1278 (issued October 23, 2015).

<sup>20</sup> See *C.K.*, Docket No. 12-0746 (issued May 1, 2012).

<sup>21</sup> *Supra* note 18.

is that the claimant lacks the requisite knowledge at the time of the first incorrect payment.<sup>22</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>23</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>24</sup>

OWCP paid appellant compensation by EFT every 28 days. Appellant returned to work on October 10, 2017. On October 14, 2017 OWCP paid her compensation for the period September 17 through October 14, 2017. There is no documentation or other evidence to demonstrate that appellant had clear knowledge at the time the bank received the October 14, 2017 direct deposit that a portion of the payment was incorrect.<sup>25</sup> The Board thus finds that appellant was without fault in accepting the initial direct deposit covering the period of the overpayment October 10 through 14, 2017.

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 October 10 through 14, 2017. The Board will set aside the January 24, 2018 decision regarding the issue of fault for this period and remand the case for OWCP to determine whether appellant is entitled to waiver of recovery of the overpayment covering the period October 10 through 14, 2017.

### **CONCLUSION**

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$504.06 for the period October 10 to 14, 2017. The Board further finds that appellant was without fault for the period of the overpayment from October 10 to 14, 2017. The case will be remanded for OWCP to consider waiver of recovery of the overpayment from October 10 to 14, 2017.

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.*; *see also K.D.*, Docket No. 13-0451 (issued April 12, 2013).

<sup>24</sup> *See V.S.*, *supra* note 19.

<sup>25</sup> *See M.M.*, Docket No. 15-0265 (issued May 27, 2015); *Danny E. Haley*, 56 ECAB 393 (2005).

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 24, 2018 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: October 25, 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