

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$39,681.18; 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.

FACTUAL HISTORY

On February 22, 2011 appellant, then a 46-year-old nursing assistant, filed an occupational disease claim (Form CA-2) alleging a right arm injury while at work due to using her right arm to care for patients. She indicated that she first became aware of her claimed injury on January 17, 2011 and first realized on February 15, 2011 that it was caused or aggravated by her federal employment. OWCP initially accepted that appellant sustained a right wrist sprain and enthesopathy of the right wrist/carpus. It later expanded the acceptance of her claim to include the conditions of tenosynovitis of the right hand/wrist, joint derangement of the right hand, joint pain of the right forearm, and depressive disorder (not elsewhere classified).³

Appellant underwent a series of OWCP-approved right upper extremity surgeries, including right wrist arthroscopy with scapholunate debridement on June 17, 2011, right radial styloidectomy, scapholunate joint reconstruction, and posterior interosseous nerve neurectomy on August 30, 2011, and right wrist hardware removal and proximal carpectomy on March 9, 2012.

On June 19, 2014 appellant filed a claim for compensation (Form CA-7) seeking a schedule award due to her accepted employment injuries.

In a January 17, 2014 report, Dr. Neil Allen, an attending Board-certified internist and neurologist, determined that appellant had 14 percent permanent impairment of her right upper extremity under the standards of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).⁴

In a November 24, 2014 report, Dr. David H. Garelick, a Board-certified orthopedic surgeon serving as an OWCP medical adviser, expressed agreement with Dr. Allen's assessment that appellant had 14 percent permanent impairment of her right upper extremity.

By decision dated September 8, 2015, OWCP granted appellant a schedule award for 14 percent permanent impairment of her right upper extremity. The award ran for 43.68 weeks from December 14, 2014 to October 15, 2015. It listed this period on line 3 of the form as "Period of

³ Appellant stopped work on June 21, 2011 and OWCP began paying her disability compensation on the daily rolls effective that date.

⁴ A.M.A., *Guides* (6th ed. 2009).

Award” and noted, “Payment of your award ends when you have been paid for the last day shown” in line 3.⁵

Per the September 8, 2014 schedule award, OWCP began paying appellant schedule award compensation on the periodic rolls beginning effective December 14, 2014. Beginning August 23, 2015, the payments for schedule award compensation began to appear in the computerized Integrated Federal Employees’ Compensation System (iFECS) as payments for disability compensation. A certified September 3, 2015 payment record in the case record noted, “The [periodic rolls] plate for the [schedule award] was terminated in error per decision dated December 16, 2014. [Appellant] is being placed back on the [periodic rolls]; however, the system will show the payment as disability and not [schedule award], due to a glitch in the program that will not allow the pay type to be changed to [schedule award].”

In a June 29, 2017 notice, OWCP advised appellant of its preliminary determination that she received a \$39,681.18 overpayment of compensation for the period October 16, 2015 to February 4, 2017 because she received compensation for this period despite the fact that the period of her September 8, 2015 schedule award ended on October 15, 2015.⁶ It also made a preliminary determination that she was at fault in the creation of the overpayment because she accepted payments which she knew or should have known to be incorrect.⁷ OWCP advised appellant that she could submit evidence challenging the fact, amount, or finding of fault, and request waiver of recovery of the overpayment. It informed her that she could submit additional evidence in writing or at prerecoumment hearing, but that a prerecoumment hearing must be requested within 30 days of the date of the written notice of overpayment. OWCP requested that appellant complete and return an enclosed overpayment recovery questionnaire (Form OWCP-20) within 30 days even if she was not requesting waiver of recovery of the overpayment.

On July 10, 2017 appellant requested a prerecoumment telephone hearing with a representative of OWCP’s Branch of Hearings and Review. She contested the issues of fact, amount, and fault, and requested waiver of recovery of the overpayment. Appellant asserted that she was without fault in the creation of the overpayment because she spoke to “the caseworker”

⁵ OWCP previously issued appellant a schedule award on December 16, 2014 for 14 percent permanent impairment of her right upper extremity which contained the incorrect period of award from December 14, 2014 to January 10, 2015. It issued its September 8, 2015 schedule award in order to correct this error.

⁶ The case record contains payment records showing that appellant received \$39,681.18 in compensation for the period October 16, 2015 to February 4, 2017. As noted above, the payments were identified as being for “disability” rather than for “schedule award” in iFECS for the period August 23, 2015 to February 4, 2017.

⁷ OWCP noted that the September 8, 2015 schedule award advised appellant of the period during which schedule award compensation would be paid, *i.e.*, December 14, 2014 to October 15, 2015. It determined that she, therefore, knew that she was not entitled to receive compensation after October 15, 2015.

about whether she was entitled to the payment she received and then submitted information as requested by OWCP.

Appellant submitted an overpayment recovery questionnaire (Form OWCP-20), completed on July 21, 2017, in which she listed monthly income of \$2,102.32, monthly expenses of \$2,404.00, and assets of \$15,075.42.

During the prerecoumment hearing held on December 6, 2017, counsel argued that appellant telephoned OWCP on an unspecified date and an OWCP claims examiner told her that she was entitled to keep all the monies she received. Appellant provided testimony regarding her financial situation, including her monthly income, and monthly expenses.

By decision dated March 1, 2018, OWCP's hearing representative determined that appellant received an overpayment of compensation in the amount of \$39,681.18 for the period October 16, 2015 to February 4, 2017 because she received compensation for this period despite not being entitled to same. She found that appellant was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment. The hearing representative explained that appellant was apprised of the fact that her schedule award compensation ended on October 15, 2015 and that she knew or should have known that she was not entitled to receive compensation thereafter. She required recovery of the overpayment by deducting \$200.00 from appellant's continuing compensation payments every 28 days.⁸

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 or her duty.⁹ 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 prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.”¹⁰

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

⁸ With respect to the recovery of an overpayment, the Board's jurisdiction is limited to those cases where OWCP seeks recovery from continuing compensation benefits. *D.R.*, 59 ECAB 148 (2007); *Miguel A. Muniz*, 54 ECAB 217 (2002). As appellant was not in receipt of continuing compensation at the time of OWCP's March 1, 2018 overpayment determination, the Board does not have jurisdiction over the method of recovery of the overpayment in this case. See *Lorenzo Rodriguez*, 51 ECAB 295 (2000); 20 C.F.R. § 10.441. In her March 1, 2018 decision, OWCP's hearing representative noted that appellant paid back \$14,772.25 of the overpayment with a check dated July 18, 2017.

⁹ 5 U.S.C. § 8102(a).

¹⁰ *Id.* at § 8129(a).

receive salary, pay, or remuneration of any type from the United States, except in limited specified instances.¹¹

The schedule award provisions of FECA¹² and its implementing federal regulations,¹³ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members or functions of the body.

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$39,681.18.

By decision dated September 8, 2015, OWCP granted appellant a schedule award for 14 percent permanent impairment of her right upper extremity. The award ran for 43.68 weeks from December 14, 2014 to October 15, 2015. It listed this period on line 3 of the form as “Period of Award” and noted, “Payment of your award ends when you have been paid for the last day shown” in line 3. Appellant received compensation for the period October 16, 2015 to February 4, 2017 despite the fact that her schedule award ended on October 15, 2015 and she had no entitlement to compensation after that date.¹⁴ The Board thus finds that she received a \$39,681.18 overpayment of compensation.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of FECA 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.¹⁵ No waiver of recovery is possible if the claimant is at fault in the creation of the overpayment.¹⁶ Section 10.433 of OWCP’s implementing regulations provides that in determining whether a claimant is at fault, it will consider all pertinent circumstances. An individual is with fault in the creation of an overpayment when he or she:

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

¹¹ *Id.* at § 8116(a).

¹² *Id.* at § 8107.

¹³ 20 C.F.R. § 10.404.

¹⁴ The Board notes that appellant had no entitlement to schedule award compensation or any other type of compensation, including disability compensation, for the period October 16, 2015 to February 4, 2017. *See supra* note 6.

¹⁵ 5 U.S.C. § 8129(b).

¹⁶ *L.J.*, 59 ECAB 264 (2007).

“(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.”¹⁷

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.¹⁸ 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.¹⁹ 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.²⁰

ANALYSIS -- ISSUE 2

OWCP determined that appellant was at fault in the creation of the \$39,681.18 overpayment of compensation 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 she accepted the initial payment of compensation following the expiration of her schedule award on October 15, 2015, she knew or should have known the payment was incorrect.

As discussed, 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.²¹ 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 and, in some cases, the second incorrect deposit, since the acceptance of the overpayment, at the time of receipt of the direct deposit, lacks the requisite knowledge.²² 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 may lack the requisite knowledge at the time of such incorrect payment.²³ Whether or not OWCP determines that an individual is at fault with respect to the creation of an overpayment

¹⁷ 20 C.F.R. § 10.433.

¹⁸ See *Tammy Craven*, 57 ECAB 689 (2006).

¹⁹ *Id.*

²⁰ *V.S.*, Docket No. 13-1278 (issued October 23, 2013).

²¹ See *C.K.*, Docket No. 12-0746 (issued May 1, 2012).

²² See *supra* note 18; see also *George A. Hirsch*, 47 ECAB 520 (1996).

²³ *Id.*

depends on the circumstances surrounding the overpayment.²⁴ 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.²⁵

Appellant received compensation by direct deposit payments every 28 days. The evidence of record does not establish that, as of the first and second direct deposits of compensation after the expiration of her schedule award on October 15, 2015, she knew or should have known that she was accepting a direct deposit to which she was not entitled. There is no documentation or other evidence to demonstrate that appellant had clear knowledge at the time she received the first direct deposit from OWCP on October 17, 2015, covering the period September 20 to October 17, 2015 (containing only two days of compensation to which she was not entitled -- October 16 and 17, 2015), that this portion of the payment was incorrect. In addition, there is no documentation/evidence showing that she had clear knowledge at the time she received the second direct deposit on November 14, 2015, covering the period October 18 to November 14, 2015, that the payment was incorrect. The Board notes that a reasonable period of time had not passed during which appellant could have reviewed bank statements or been informed of the incorrect payments. Therefore, she is not at fault in the acceptance of the direct deposits covering the period of the overpayment from October 16 to November 14, 2015.

Even though OWCP may have been negligent in making incorrect payments, this does not excuse a claimant from accepting payments he or she knew or should have known to be incorrect.²⁶ In cases involving a series of incorrect payments, where the requisite knowledge is established by documentation from OWCP or simply with the passage of time and opportunity for discovery, the claimant will be at fault for accepting the payments subsequently deposited.²⁷

By the time of the third payment dated December 12, 2015 (covering the period November 15 to December 12, 2015), appellant knew or should have known that she was no longer entitled to compensation. Her schedule award had expired on October 15, 2015 and, given the passage of time, she would have realized by the time of the third direct deposit that she was not entitled to further compensation. Appellant had been clearly advised by OWCP regarding the period of her schedule award. In the September 8, 2015 decision granting her schedule award, OWCP advised her that the schedule award ran for 43.68 weeks and that the period of the award was December 14, 2014 to October 15, 2015. It listed this period on line 3 of the form as "Period of Award" and noted, "Payment of your award ends when you have been paid for the last day shown" in line 3. Despite such knowledge, appellant accepted compensation payments for the period November 15, 2015 to February 4, 2017 which she knew or should have known to be

²⁴ *Id.*; see also *K.D.*, Docket No. 13-451 (issued April 12, 2013).

²⁵ See *K.H.*, Docket No. 06-191 (issued October 30, 2006).

²⁶ See *William E. McCarty*, 54 ECAB 525 (2003).

²⁷ See *J.W.*, Docket No. 10-1271 (issued February 3, 2011); see also *Karen Dixon*, 56 ECAB 145 (2004).

incorrect.²⁸ Therefore, she was at fault in the creation of the overpayment during this period under the third prong of the test denoted above.²⁹

Accordingly, the Board will affirm the finding of fault for the remaining period of the overpayment, *i.e.*, November 15, 2015 to February 4, 2017. When an employee is at fault in the creation of an overpayment of compensation, no waiver of recovery of the overpayment is possible under FECA, and therefore appellant would not be entitled to waiver of recovery of the overpayment for the period November 15, 2015 to February 4, 2017.³⁰

The Board finds that this case is not in posture for decision regarding the issue of waiver of recovery of the overpayment for the direct deposits on October 17 and November 14, 2015 covering the period of the overpayment from October 16 to November 14, 2015. The Board will set aside the March 1, 2018 decision regarding the issue of fault as to the October 17 and November 14, 2015 direct deposits and will remand the case for OWCP to determine whether appellant is entitled to waiver of recovery of the overpayment for the direct deposits of compensation covering the period of the overpayment from October 16 to November 14, 2015.³¹

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$39,681.18 for the period October 16, 2015 to February 4, 2017. The Board further finds that she was without fault for the period of the overpayment from October 16 to November 14, 2015, but at fault for the period of the overpayment from November 15, 2015 to February 4, 2017. The case will be remanded for consideration of waiver of the recovery of the overpayment from October 16 to November 14, 2015.

²⁸ After OWCP issued its June 29, 2017 preliminary overpayment determination, appellant asserted that she had been misled regarding the date when her payments for schedule award compensation would end and therefore she was not aware that she impermissibly received compensation after her schedule award had ended. However, she failed to present evidence supporting this contention. During the December 6, 2017 prerecoupment hearing, counsel contended that appellant telephoned OWCP on an unspecified date and an OWCP claims examiner told her that she was entitled to keep all the monies she received. The case record does not contain a record of such a telephone conversation. The Board notes that there is no indication in the case record that appellant had any basis to believe that she was entitled to additional compensation after her schedule award ended on October 15, 2015.

²⁹ See *supra* note 17. See also *T.F.*, Docket No. 16-0436 (issued August 2, 2016).

³⁰ See *supra* note 16.

³¹ As noted above, the Board does not have jurisdiction over the method of recovery of the overpayment. See *supra* note 8. In her March 1, 2018 decision, OWCP's hearing representative noted that appellant paid back \$14,772.25 of the overpayment with a check dated July 18, 2017.

ORDER

IT IS HEREBY ORDERED THAT the March 1, 2018 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part, and the case is remanded for further action consistent with this decision of the Board.

Issued: October 24, 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