

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

C.L., Appellant)	
)	
and)	Docket No. 19-0242
)	Issued: August 5, 2019
DEPARTMENT OF THE ARMY, CORPUS)	
CHRISTI ARMY DEPOT, Corpus Christi, TX,)	
Employer)	
)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On November 14, 2018 appellant filed a timely appeal from an October 24, 2018 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 over the merits of this case.²

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received a \$10,289.19 overpayment of compensation for the period April 9 through July 21, 2018; and

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that following the October 24, 2018 decision, OWCP received additional evidence. The Board also notes that appellant submitted additional evidence on appeal. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

(2) whether OWCP properly found that appellant was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment.

FACTUAL HISTORY

On May 23, 2017 appellant, then a 63-year-old composite fabricator, filed a traumatic injury claim (Form CA-1) alleging that, while in the performance of duty, she sustained injuries due to tripping on an ergonomic mat that was protruding approximately 12 inches “from the ending side of a tool box.” By decision dated June 8, 2017, OWCP accepted the claim for left knee sprain, right knee sprain, sprain of muscle, fascia, and tendon of left hip, and sprain of right shoulder joint.

OWCP referred appellant to Dr. Walter Del Gallo, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine the nature and extent of her accepted employment-related conditions. In a November 15, 2017 report, Dr. Del Gallo reviewed a statement of accepted facts, history of the injury, and the medical evidence of record. He conducted a physical examination and found that appellant had reached maximum medical improvement on October 31, 2017. Dr. Del Gallo opined that her bilateral knee and left hip conditions had resolved. He found that while appellant persisted with right shoulder pain, weakness, and limited mobility due to her right shoulder rotator cuff partial thickness tear and strain, she declined surgical intervention. Dr. Del Gallo concluded that she had reached a permanent and stationary status after completion of physical therapy and provided the following work restrictions: pushing and pulling no more than 20 pounds for 2 hours per day; lifting no more than 10 hours for 2 hours per day; and no reaching, reaching above the shoulder, or climbing with the right upper extremity.

In a letter dated August 15, 2017 (CA-1049), OWCP advised that appellant had been placed on the periodic rolls and outlined her entitlement to compensation benefits and her responsibility to return to work in connection with the accepted injury.³ In an attached EN1049 OWCP provided:

“To minimize the possibility of an overpayment of compensation, NOTIFY THIS OFFICE IMMEDIATELY WHEN YOU GO BACK TO WORK. If you receive your compensation payments *via* paper check, the payment shows the period for which payment is made. If you have worked for any portion of this period, return the payment to this office, even if you have already advised the OWCP that you are working. For payments sent by electronic funds transfer (EFT), a notification of the date and amount of payment appears on the statement from your financial institution. You are expected to monitor your EFT deposits carefully, at least every 2 weeks. If you have worked for any portion of the period for which a deposit was made, advise OWCP immediately so that the overpayment can be collected.”
(Emphasis in the original.)

³ In a letter dated April 22, 2014, OWCP informed appellant that it made a preliminary determination that she received an overpayment of compensation in the amount of \$731.70 because health benefits were not deducted for the period October 20, 2013 to April 5, 2014. By decision dated April 17, 2015, it finalized its preliminary determination finding that she was at fault in the creation of an overpayment in the amount of \$731.70 and requested payment in full within 30 days.

In a duty status report (Form CA-17) dated April 5, 2018, Dr. Del Gallo released appellant to full-time, regular-duty work without restrictions effective April 9, 2018.

In a report of work status (Form CA-3) dated April 9, 2018, the employing establishment advised OWCP that appellant had returned to work that day.

In a compensation termination sheet dated July 19, 2018, OWCP indicated that appellant had returned to work on April 9, 2018. It noted that for the period April 9 through July 21, 2018 she was overpaid compensation in the amount of \$10,289.19. OWCP calculated this amount by taking the gross compensation paid from April 9 to 28, 2018, \$2,433.88, and subtracting \$368.30 for health benefits insurance (HBI), \$12.21 for basic life insurance (BLI), \$19.29 for optional life insurance (OLI), and \$67.12 for miscellaneous which yielded \$1,966.92. For the period April 29 to May 26, 2018, appellant's gross compensation was \$3,407.43, and subtracting \$515.62 for HBI, \$17.10 for BLI, \$27.00 for OLI, and \$94.02 for miscellaneous yielded \$2,753.69. For the period May 27 to June 23, 2018, her gross compensation was \$3,407.43, and subtracting \$515.62 for HBI, \$0.00 for BLI, \$27.00 for OLI, and \$94.02 for miscellaneous yielded \$2,770.79. For the period June 24 to July 21, 2018, appellant's gross compensation was \$3,407.43, and subtracting \$515.62 for HBI, \$0.00 for BLI, \$0.00 for OLI, and \$94.02 for miscellaneous yielded \$2,797.79. OWCP calculated the total amount of the overpayment to be \$10,289.19.

In a September 20, 2018 letter, OWCP informed appellant that it made a preliminary determination that she received an overpayment of compensation in the amount of \$10,289.19 for the period April 9 through July 21, 2018, because she received compensation benefits after she returned to work on April 9, 2018. It found that she was at fault in creating the overpayment because she accepted payment that she knew or reasonably should have known to be incorrect. OWCP informed appellant that she had the right to submit evidence or argument if she disagreed with its finding. It also informed her that she had a right to a precoupment hearing before an OWCP hearing representative. OWCP instructed appellant to complete an enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting documentation. No additional information was received.

By decision dated October 24, 2018, OWCP finalized the preliminary determination of a \$10,289.19 overpayment of compensation for the period April 9 through July 21, 2018. It determined that appellant was at fault in the creation of the overpayment and therefore she was not entitled to waiver of recovery of the overpayment. OWCP required recovery in full 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 duty.⁴

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

⁴ 5 U.S.C. § 8102(a).

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.⁵ 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 condition prevents him or her from earning the wages earned before the work-related injury.⁶ A claimant is not entitled to receive temporary total disability (TTD) benefits and actual earnings for the same time period.⁷ 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.⁸

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$10,289.19 for the period April 9 through July 21, 2018.

The record establishes that appellant returned to work full time at the employing establishment on April 9, 2018. She received wage-loss compensation for total disability through July 21, 2018. As noted above, appellant is not entitled to receive compensation for total disability after she has returned to work.⁹ Thus, an overpayment of compensation was created.

OWCP calculated appellant's net compensation paid for the period April 9 through July 21, 2018 at \$10,289.19. However, appellant was not entitled to receive any compensation for the period April 9 through July 21, 2018, as she returned to full-time regular-duty work without restrictions on April 9, 2018.

Appellant has not contested the fact or amount of the overpayment. Thus, the Board finds that she received an overpayment of compensation in the amount of \$10,289.19 for the period April 9 through July 21, 2018.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of FECA provides as follows 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

⁵ *Id.* at § 8116(a).

⁶ 20 C.F.R. § 10.500(a).

⁷ *See K.E.*, Docket No. 18-0687 (issued October 25, 2018); *M.S.*, Docket No. 16-0289 (issued April 21, 2016); *L.S.*, 59 ECAB 350, 352-53 (2008).

⁸ *K.E., id.; 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).

⁹ *See supra* notes 5-7.

against equity and good conscience.¹⁰ No waiver of an overpayment is possible if the claimant is at fault in creating the overpayment.¹¹

On the issue of fault, 20 C.F.R. § 10.433(a) provides that an individual is with fault in 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.¹²

With respect to whether an individual is without fault, section 10.433(b) of OWCP regulations provide that 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.¹³

Section 10.430(a) of OWCP regulations advise that OWCP includes on each periodic check a clear indication of the period for which payment is being made. A form is sent to the recipient with each supplemental check which states the period for which payment is being made.¹⁴ Section 10.430(b) notes that, by these means, OWCP puts the recipient on notice that a payment was made and the amount of the payment.¹⁵

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly determined that appellant was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment.

OWCP found that appellant was at fault in the creation of the overpayment because she accepted a payment which she knew or should have known to be incorrect, applying the third criterion listed above.¹⁶ To establish that she was at fault, it must establish that at the time she accepted the compensation check in question she knew or should have known that the payment was incorrect.

When a disabled employee is placed on the periodic compensation rolls, OWCP routinely advises the employee of this fact and issues a CA-1049 identifying the weekly pay rate, the

¹⁰ 5 U.S.C. § 8129(b).

¹¹ See *Gregg B. Manston*, 45 ECAB 344 (1994).

¹² 20 C.F.R. § 10.433(a).

¹³ *Id.* at § 10.433(b).

¹⁴ *Id.* at § 10.430(a).

¹⁵ *Id.* at § 10.430(b).

¹⁶ *Id.* at § 10.433(a)(3).

compensation rate, the gross payment, any applicable deductions, and the net amount to be disbursed.¹⁷ The CA-1049 is generally accompanied by an EN1049, which explains the employee's rights and responsibilities with respect to the receipt of compensation.¹⁸ This latter document provides pertinent information regarding returning to work and how to avoid an overpayment of benefits. It also includes a certification that the benefits recipient has read and understands the terms and conditions under which he or she may receive compensation. OWCP provided appellant this same information by letter dated August 15, 2017.

Under these factual circumstances, appellant knew or should have known that she could not receive wage-loss compensation during any period that she worked or continued to receive wages from the employing establishment.¹⁹

The Board therefore finds that appellant knew or should have known at the time she returned to work on April 9, 2018 and began to receive wages from the employing establishment that she was not entitled to concurrently receive wage-loss compensation for the same period. Under section 10.433(a) of OWCP regulations,²⁰ appellant is at fault in the creation of the overpayment and is not entitled to waiver of recovery of the overpayment in the amount of \$10,289.19.

CONCLUSION

The Board finds that OWCP properly determined that appellant received a \$10,289.19 overpayment of compensation for the period April 9 through July 21, 2018. The Board further finds that OWCP properly found that she was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment.

¹⁷ *Supra* note 8 at Part 2 -- Claims, *Periodic Review of Disability Cases*, Chapter 2.812.4 (March 2010).

¹⁸ *Id.*

¹⁹ *See G.S.*, Docket No. 11-0459 (issued October 27, 2011); *Neill D. Dewed*, 57 ECAB 451 (2006).

²⁰ *See supra* note 14.

ORDER

IT IS HEREBY ORDERED THAT the October 24, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 5, 2019
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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