

properly determined that appellant was at fault in the creation of the overpayment and thus not entitled to waiver of recovery of the overpayment.

FACTUAL HISTORY

On December 7, 2012 appellant, then a 44-year-old rural carrier associate, filed a traumatic injury claim (Form CA-1) alleging that she fell when a cat ran between her legs, injuring her shoulder while in the performance of duty on that date. The employing establishment noted on the claim form that appellant worked an average of 21 hours per week. OWCP accepted the claim for right shoulder contusion and a right rotator cuff tear. It paid wage-loss compensation on the supplemental rolls and then on the periodic rolls effective February 23, 2013.³

On April 15, 2013 appellant elected to receive her compensation benefits by direct deposit.

In an April 30, 2013 letter, OWCP advised appellant that she had been placed on the periodic compensation rolls and outlined her entitlement to compensation benefits and her responsibility to return to work in connection with the accepted employment injury. It informed her that if she worked for any portion of the period she received disability compensation, she must return checks received to OWCP or an overpayment of compensation might result. For payments sent by electronic funds transfer (EFT), she was advised to notify OWCP immediately if she worked for a portion of the period for which a deposit was made so that the overpayment could be collected.

In a completed Form EN1032 dated February 5, 2016, appellant reported employment as a cashier for a home improvement store beginning in May 2015.

On May 8, 2017 OWCP requested information about appellant's employment from her private sector employer. In a May 30, 2017 response, it indicated that she was hired on May 9, 2015 as a full-time pro account sales associate. It summarized appellant's pay for the years 2015, 2016, and 2017, noting that she was paid weekly.

By decision dated October 19, 2017, OWCP found that appellant's full-time employment as a pro account sales associate in the private sector, effective May 9, 2015, fairly and reasonably represented her wage-earning capacity. It formally terminated her monetary compensation effective June 25, 2017 based on her wage-earning capacity in that position. OWCP noted that an overpayment determination would be issued under separate cover for the periods she had not been entitled to wage-loss compensation.

Worksheets detailing overpayment calculations were of record. The worksheets noted that appellant had returned to work on May 9, 2015 in the private sector. In a worksheet dated September 27, 2017, OWCP indicated that, for the period May 9 to August 22, 2015, it paid

³ By decision dated September 11, 2015, OWCP granted appellant a schedule award for seven percent permanent impairment of her right upper extremity. The period of the award ran for 21.84 weeks from August 23, 2015 to January 22, 2016. Following the end of the schedule award, appellant was placed back on the periodic compensation rolls.

\$4,497.43 in wage-loss compensation,⁴ but appellant should have received \$1,196.29, following offset from her actual earnings. This resulted in \$3,301.14 overpayment. In an October 18, 2017 worksheet, OWCP noted that, for the period January 23, 2016 through June 24, 2017, it had paid \$22,283.95 in wage-loss compensation, but appellant had been entitled to only \$836.65, following offset from her actual earnings. This resulted in an overpayment of \$21,447.30.

By letter dated December 13, 2017, OWCP made a preliminary determination that appellant received an overpayment of compensation in the amount of \$24,748.44 for the period May 19 through August 22, 2015 (\$3,301.14) and from January 23, 2016 through June 24, 2017 (\$21,447.30), because she was in receipt of total disability compensation benefits after she returned to work in the private sector and that she was at fault because she accepted payments she knew or should have reasonably known were incorrect.⁵ In an accompanying memorandum, OWCP explained how the overpayment was calculated, including compensation after computation of outside wages and earnings. It informed appellant of her review rights and instructed her to complete an enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting documentation within 30 days.⁶

On January 16, 2018 OWCP received appellant's January 8, 2018 request for a telephonic hearing with an OWCP hearing representative on the issues of fault and possible waiver. Appellant indicated that she had notified OWCP of her employment and had done everything required of her. With the request she provided a completed Form OWCP-20, copies of pay slips from The Home Depot, and copies of Form W-2s for calendar years 2015 and 2016. Appellant also submitted a list of medical bills. A telephone conference was held on August 14, 2018.

By decision dated September 14, 2018, OWCP finalized the determination that appellant received an overpayment of compensation in the amount of \$24,748.44 for the periods May 19 through August 22, 2015 (\$3,301.14) and from January 23, 2016 through June 24, 2017 (\$21,447.30), because she was in receipt of total disability compensation benefits after she returned to full-time employment in the private sector and that she was at fault in the creation of the overpayment.⁷ It noted that it had considered waiver/compromise of the principle and explained why it was not applicable. OWCP directed her to repay the \$24,748.44 overpayment in the amount of \$100.00 per month, commencing November 1, 2018.

LEGAL PRECEDENT -- ISSUE 1

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

⁴ The record reflects that appellant received periodic payments of \$1,188.00 for the periods May 3 to 30, 2015; May 31 to June 27, 2015; June 28 to July 25, 2015, and July 26 to August 22, 2015.

⁵ On its cover letter OWCP erroneously noted in part that the overpayment period of May 9 through August 22, 2015 was from May 19 through August 22, 2015.

⁶ By decision dated January 16, 2018, OWCP finalized the preliminary overpayment determination.

⁷ See *supra* note 5.

duty.⁸ 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.⁹

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.¹⁰ OWCP's regulations provide in pertinent part: 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.¹¹ A claimant is not entitled to receive temporary total disability benefits and actual earnings for the same period.¹² OWCP's procedures also provide that an overpayment in compensation is created when a claimant returns to work, but continues to receive wage-loss compensation.¹³

If the claimant is entitled to compensation for partial wage loss after return to work, the claims examiner should compute entitlement using the *Shadrick* formula and authorize compensation on a 28-day payment cycle.¹⁴

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$24,748.44 for the periods May 9 through August 22, 2015 (\$3,301.14) and January 23, 2016 through June 24, 2017 (\$21,447.30) because she continued to receive total disability compensation after her return to work in the private sector.

OWCP accepted appellant's claim and paid wage-loss compensation, placing her on the periodic rolls beginning February 23, 2013. The record indicates that, beginning May 9, 2015, appellant returned to full-time work in the private sector as a pro account sales associate. However,

⁸ 5 U.S.C. § 8102.

⁹ *Id.* at § 8129(a).

¹⁰ *Id.* at § 8116(a).

¹¹ 20 C.F.R. § 10.500.

¹² *See J.L.*, Docket No. 18-1266 (issued February 15, 2019); *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).

¹³ *See J.S.*, Docket No. 17-0260 (issued December 28, 2017); *B.H.*, Docket No. 09-0292 (issued September 1, 2009); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.1 (September 2018).

¹⁴ *Id.* at Chapter 2.815.3(b) (June 2013); *see N.C.*, Docket No. 18-1070 (issued January 9, 2019); *J.S.*, *id.*; *Albert C. Shadrick*, 5 ECAB 376 (1953).

OWCP paid her wage-loss compensation for total disability for the period May 9 through August 22, 2015 resulting in an overpayment of compensation.¹⁵

As previously noted, a claimant is not entitled to receive temporary total disability benefits and actual earnings for the same time period.¹⁶ Utilizing the *Shadrick* formula,¹⁷ OWCP provided worksheets detailing how much appellant earned weekly in her employment. It reported that, had proper adjustments been made to her disability compensation to reflect her full-time employment in the private sector, for the period May 9 to August 22, 2015, an overpayment of \$3,301.14 resulted as it paid \$4,497.43, but she should have received \$1,196.29. The Board finds that OWCP properly offset appellant's actual earnings during the period May 9 to August 22, 2015 and determined that appellant received an overpayment of compensation in the amount of \$3,301.14.

During the period August 23, 2015 to January 22, 2016 OWCP found that appellant was entitled to receive schedule award compensation. However, following the end of the schedule award, it again paid appellant wage-loss compensation on the periodic rolls. OWCP calculated that for the period, January 23, 2016 through June 24, 2017, an overpayment of \$21,447.30 resulted as it paid \$22,283.95, but appellant was entitled to only \$836.65 following offset of her actual earnings. The Board also finds that OWCP properly offset appellant's actual earnings during the period January 23, 2016 through June 24, 2017.

Appellant has not disputed either the fact or the amount of the overpayment. Accordingly, the Board finds that OWCP properly determined that she received an overpayment of compensation in the amount of \$24,748.44.¹⁸

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 FECA or would be against equity and good conscience.¹⁹ A claimant who is at fault in the creation of the overpayment is not entitled to waiver.²⁰ On the issue of fault, 20 C.F.R. § 10.433(a) provides that an individual will be found at fault if he or she has done any of the following: (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 was incorrect.

¹⁵ See *supra* notes 9 and 10; see also *J.S.*, *supra* note 13; *J.W.*, Docket No. 15-1163 (issued January 13, 2016).

¹⁶ *Id.*

¹⁷ See *Albert C. Shadrick*, *supra* note 14.

¹⁸ *J.S.*, *supra* note 13; *V.G.*, Docket No. 07-0916 (issued November 15, 2007).

¹⁹ 5 U.S.C. § 8129(b).

²⁰ See *B.R.*, Docket No. 18-0339 (issued January 24, 2019); *K.E.*, Docket No. 18-0687 (issued October 25, 2018); *Gregg B. Manston*, 45 ECAB 344, 354 (1994); *Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

The Board has held that an employee who receives payments from OWCP in the form of a 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.²¹ 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.²² 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.²³

ANALYSIS -- ISSUE 2

The Board finds that appellant was not at fault with regard to the creation of the overpayment for the periods May 9 through 30, 2015 and February 23 through March 5, 2016, but she was at fault in the creation of the overpayment for the periods May 31 through August 22, 2015 and March 6, 2016 through June 24, 2017.

OWCP paid appellant compensation by direct deposit every 28 days. Appellant returned to work at the private sector employer on May 9, 2015. OWCP issued a direct deposit on May 30, 2015 for the period May 3 through 30, 2015. There is no documentation or other evidence to demonstrate that appellant had clear knowledge at the time the bank received the May 30, 2015 direct deposit that the payment would be made and that it was incorrect.²⁴ Similarly, OWCP returned appellant to the periodic rolls for wage-loss compensation on January 23, 2016 following the expiration of her schedule award; however, there is no documentation to demonstrate that appellant had clear knowledge at the time the bank received the March 5, 2016 direct deposit that the payment was incorrect. The Board thus finds that appellant was not at fault in accepting the initial direct deposit payment for the periods May 9 through 30, 2015, and February 23 through March 5, 2016. The case is therefore not in posture for decision regarding the issue of waiver of recovery of the overpayment for these periods. The Board will set aside the September 14, 2018 decision regarding the issue of fault for these periods and remand the case to OWCP to determine whether appellant is entitled to waiver of recovery of the overpayment.²⁵

The Board further finds that appellant was at fault in the creation of the overpayment resulting from the remaining direct deposits for the period May 31 through August 22, 2015 and

²¹ See *Tammy Craven*, 57 ECAB 689 (2006).

²² *Id.*

²³ *K.K.*, Docket No. 19-0978 (issued October 21, 2019); see *D.B.*, Docket No. 16-0258 (issued February 1, 2016); *W.P.*, 59 ECAB 514 (2008).

²⁴ See *C.Y.*, Docket No. 18-0263 (issued September 14, 2018); see also *M.M.*, Docket No. 15-0265 (issued May 27, 2015); *Danny E. Haley*, 56 ECAB 393 (2005).

²⁵ See *K.K.*, *supra* note 23.

the period March 6, 2016 through June 24, 2017.²⁶ In an April 30, 2013 letter, appellant was notified that, to avoid an overpayment of compensation, she must immediately notify OWCP of her return to work. She was required to return any check to OWCP which included a period during which she worked. Appellant was also informed on September 11, 2015, in the schedule award decision, that the period of the schedule award would run from August 23, 2015 to January 22, 2016. Although OWCP may have been negligent in making incorrect payments, this does not excuse a claimant from accepting payments she knew or should have known to be incorrect.²⁷ 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. By the time of the second periodic compensation rolls payment on May 31, 2015 and March 6, 2017, after her return to work in the private sector and after her schedule award payment ended, appellant should have known that she was not entitled to the same amount of wage-loss compensation as she had received prior to her return to work on May 9, 2015.²⁸

The fact that OWCP may have been negligent in issuing the payments does not mitigate this finding.²⁹ As appellant was at fault in the creation of the overpayment for the periods May 31 through August 22, 2015 and March 6, 2016 through June 24, 2017, she is not eligible for waiver of recovery with respect to the portion of the overpayment for those periods.³⁰

The Board finds that this case is not in posture for decision regarding the issue of waiver of the recovery of the overpayment for the period May 9 to 30, 2015 and January 23, 2016 through March 5, 2017. The Board will remand the case for OWCP to determine whether appellant is entitled to waiver of recovery of the overpayment created for this period.³¹ As appellant was at fault under the third fault standard outlined above, recovery of the remaining overpayment of compensation may not be waived.³²

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$24,748.44 for the periods May 9 through August 22, 2015 (\$3,301.14) and January 23, 2016 through June 24, 2017 (\$21,447.30). The Board further finds that she was not at fault for the creation of the overpayment for the period May 9 through 30, 2015

²⁶ *D.W.*, Docket No. 14-0229 (issued April 17, 2014).

²⁷ *See C.G.*, Docket No. 15-0701 (issued December 9, 2015).

²⁸ *Id.*

²⁹ *C.F.*, Docket No. 16-1718 (issued August 21, 2017).

³⁰ *V.D.*, Docket No. 16-0578 (issued November 3, 2016).

³¹ *D.W.*, *supra* note 26.

³² No waiver of an overpayment is possible if the claimant is at fault in creating the overpayment. *L.J.*, 59 ECAB 264 (2007).

and January 23 through March 5, 2017, but that she was at fault for the creation of the overpayment for the periods May 31 through August 22, 2015 and March 6, 2016 through June 24, 2017.

ORDER

IT IS HEREBY ORDERED THAT the September 14, 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: December 31, 2019
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board