

of the overpayment, thereby precluding waiver of recovery of the overpayment; and (3) whether OWCP properly determined that it would recover the overpayment by receiving a payment of \$100.00 every month from appellant.

FACTUAL HISTORY

On August 2, 2014 appellant, then a 40-year-old mail carrier, filed a traumatic injury claim (Form CA-1) alleging that on July 1, 2014 she injured her right ring finger delivering mail while in the performance of duty. On September 18, 2014 OWCP accepted her claim for right fourth digit trigger finger. Appellant performed modified work from August 4 through September 23, 2014 and returned to regular duty on September 24, 2014. On December 2, 2014 OWCP authorized wage-loss compensation from August 22 through September 24, 2014 for approximately two hours per workday of leave without pay.

On October 2, 2017 appellant underwent right fourth finger pulley release. Her attending physician, Dr. Charles Herring, a Board-certified orthopedic surgeon, found that she was totally disabled from October 2, 2017 through January 2, 2018. OWCP authorized wage-loss compensation benefits. In a February 22, 2018 note, Dr. Herring released appellant to return to part-time modified duty on February 26, 2018. Appellant continued to perform part-time modified duty on March 21, 2018.

On April 3, 2018 appellant informed OWCP by telephone that she had returned to work part time for two hours a day at the employing establishment on February 26, 2018.

On April 3, 2018 OWCP notified appellant that it terminated her periodic compensation payments effective February 26, 2018 as she had returned to work for two hours a day.

Appellant submitted a claim for compensation (Form CA-7) indicating that from February 28 through March 31, 2018 she had worked four hours or less each day and was requesting wage-loss compensation for her use of leave without pay.

In a report dated April 9, 2018, Dr. Christopher DeCarlo, physiatrist and appellant's attending physician, found that appellant could return to her usual and customary work within six months. Dr. Herring continued to support appellant's work restrictions on April 9, 2018.

By letter dated April 19, 2018, OWCP advised appellant of its preliminary determination that she had received a \$1,778.70 overpayment of compensation because she received total disability compensation for the period February 26 through March 31, 2018, after she had returned to part-time limited-duty work. It also made a preliminary finding that she was at fault in creating the overpayment because she was aware or should have been aware that it had incorrectly paid compensation. OWCP noted that during the period February 26 through March 31, 2018 appellant received \$4,254.53 in wage-loss compensation, but was entitled to only \$2,475.83 for 112.55 hours, resulting in an overpayment of \$1,778.70. It advised her that she could submit evidence challenging the fact, amount, or finding of fault, and request waiver of recovery of the overpayment. Additionally, OWCP informed appellant that, within 30 days, she could request a telephone conference, a final decision based on the written evidence, or a precoupment hearing.

It requested that she complete the enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documents. OWCP afforded appellant 30 days for a response.

On May 4, 2018 OWCP received appellant's April 30, 2018 overpayment recovery questionnaire (OWCP-20). Appellant requested that OWCP make a decision based on the written evidence on the issues of fault and possible waiver of recovery of the overpayment. She indicated that her monthly income was \$4,200.00. Appellant listed her monthly expenses including mortgage of \$1,700.00, \$475.00 for food, \$500.00 for clothing, \$780.00 for utilities, \$947.00 for school tuition, and \$300.00 for miscellaneous household expenses. She also owed \$155.00 in monthly credit card debt resulting in total monthly expenses of \$3,900.00. Appellant reported assets of \$1,900.00 in savings and checking accounts.

Appellant asserted that on February 26, 2018 she had returned to work two hours a day. She noted that on March 6, 2018 she received a check from OWCP for \$3,400.00 which included dates on which she had worked, and that she knew then that it was unaware of her return to work. Appellant reported her work to OWCP, but cashed the check because she needed the money. She requested waiver of recovery of the overpayment of compensation.

OWCP authorized payment of additional wage-loss compensation benefits on May 14, 2018.

By decision dated May 22, 2018, OWCP finalized the overpayment determination, finding that an overpayment of compensation in the amount of \$1,778.70 had been created for the period February 26 through March 31, 2018. It found that appellant was at fault as she had accepted compensation payments she knew were incorrect. OWCP noted that based on her overpayment recovery questionnaire, appellant had monthly income of \$4,200.00 and monthly expenses of \$3,900.00 such that she had money available to repay the overpayment. It directed her to repay the overpayment with a direct monthly payment by check of \$100.00.

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.³ 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.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 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

³ 5 U.S.C. § 8102(a).

⁴ *Id.* at § 8129(a).

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 appellant received an overpayment of compensation in the amount of \$1,778.70 for the period February 26 through March 31, 2018.

The evidence of record shows that appellant returned to part-time limited-duty work for the employing establishment on February 26, 2018, but continued to receive TTD compensation through March 31, 2018.

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.⁹ Therefore, an overpayment of compensation was created in this case.¹⁰

Appellant received disability compensation in the net amount of \$4,254.53 for the period February 26 through March 31, 2018, but she was only entitled to the net amount of \$2,475.83 for that period. This yielded an overpayment of compensation in the amount of \$1,778.70 for the period February 26 through March 31, 2018. Thus, the Board finds that appellant received an overpayment of compensation in the amount of \$1,778.70 for the period February 26 through March 31, 2018.¹¹ Appellant has not challenged either the fact or amount of the 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

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 6 and 7.

¹⁰ See *supra* note 8.

¹¹ *K.E., supra* note 7; *A.J.*, Docket No. 17-0622 (issued August 9, 2017).

good conscience.¹² A claimant who is at fault in the creation of the overpayment is not entitled to waiver.¹³ On the issue of fault, 20 C.F.R. § 10.433(a) provides that an individual is at 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.¹⁴

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 of compensation because she knew or should have known that she was not entitled to receive wage-loss compensation after she returned to work. Appellant admitted that when she received her wage-loss compensation payment on March 6, 2018 she recognized that it included payment for dates on which she had worked.¹⁵ She then reported her return to work to OWCP, but cashed the check because she needed the money.

The Board therefore finds that appellant knew, at the time she returned to work, she was not entitled to continue to receive wage-loss compensation and thus had an obligation to return payments she knew or should have known were incorrect.¹⁶ Under section 10.433(a) of OWCP's regulations, appellant is at fault. As she was at fault in the creation of the overpayment, she is not eligible for waiver of recovery of the overpayment of compensation.¹⁷

LEGAL PRECEDENT -- ISSUE 3

Section 10.441(a) of OWCP's regulations provides that when an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to OWCP the amount of the overpayment as soon as the error is discovered or his or her attention is called to the same. If no refund is made, OWCP shall decrease later payments of compensation, taking

¹² 5 U.S.C. § 8129(b).

¹³ *K.E.*, *supra* note 7; *Gregg B. Manston*, 45 ECAB 344, 354 (1994).

¹⁴ 20 C.F.R. § 10.433. *See K.E.*, *supra* note 7; *Kenneth E. Rush*, 51 ECAB 116, 118 (1999).

¹⁵ *A.H.*, Docket No. 11-1101 (issued May 1, 2012).

¹⁶ *C.D.*, Docket No. 17-0472 (issued December 18, 2017).

¹⁷ *Id.*

into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize hardship.¹⁸

Section 10.441(b) of OWCP's regulations provides that when an overpayment has been made to an individual who is not entitled to further payments, the individual shall refund to OWCP the amount of the overpayment as soon as the error is discovered or his or her attention is called to same. If the individual fails to make such refund, OWCP may recover the same through any available means, including offset of salary, annuity benefits, or other federal payments, including tax refunds as authorized by the Tax Refund Offset Program or referral to the debt to a collection agency or to the Department of Justice.¹⁹

ANALYSIS -- ISSUE 3

The Board finds that OWCP improperly found that the overpayment of compensation should be recovered through payments by appellant of \$100.00 per month.

The case record indicates that appellant had only returned to work part time four hours a day as of March 2018. She was, therefore, entitled to additional payments of wage-loss compensation until the time at which she returned to full-time work or the medical evidence established that she could do so.²⁰ Thus, the Board finds that recovery of the overpayment could be made from any continual wage-loss compensation benefits.

OWCP directed appellant to repay the overpayment of compensation with monthly payments of \$100.00. Rather than decreasing later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, appellant's financial circumstances, and any other relevant factors, so as to minimize hardship in keeping with 20 C.F.R. § 10.441(a), OWCP instead directed appellant to repay the overpayment through personal payments of \$100.00 per month. The Board notes that this is not a case in which appellant's wage-loss compensation payments had ceased before OWCP's May 22, 2018 final overpayment decision or one in which she had no further entitlement to wage-loss compensation benefits therefore 20 C.F.R. § 10.441(b) is inapplicable.²¹

Although the request for direct payment of \$100.00 per month rather than deductions from appellant's continuing wage-loss compensation payments appears administratively straightforward, the Board finds that it eliminates established legal procedures and protections afforded appellant under 20 C.F.R. § 10.441(a).

¹⁸ 20 C.F.R. § 10.441(a); *V.T.*, Docket No. 18-0628 (issued October 25, 2018); *P.E.*, Docket No. 16-0321 (issued May 29, 2018).

¹⁹ 20 C.F.R. § 10.441(b).

²⁰ On April 9, 2018 Dr. DeCarlo indicated that appellant should return to full duty within six months.

²¹ *D.B.*, Docket No. 14-0397 (issued June 3, 2014).

On remand, OWCP should develop the issue of recovery of the overpayment of compensation by applying the correct standards and requirements of 20 C.F.R. § 10.441(a) and then issue an appropriate decision on the issue of recovery of the overpayment of compensation.

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$1,778.70 for the period February 26 through March 31, 2018. The Board further finds that she was at fault in creating the overpayment, and that she is not eligible for waiver of recovery of the overpayment of compensation. The Board finds, however, that OWCP improperly determined that the overpayment should be recovered through payments by appellant of \$100.00 per month. Therefore, the case is not in posture for a decision on this issue.

ORDER

IT IS HEREBY ORDERED THAT the May 22, 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: February 15, 2019
Washington, DC

Christopher J. Godfrey, 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