



determined that appellant was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment.

### **FACTUAL HISTORY**

On March 25, 2013 appellant, then a 48-year-old secretary, filed a traumatic injury claim (Form CA-1) alleging that on March 25, 2013 she stood up from a stool, and when she went to sit down again, the stool moved and she fell to the floor and hit her head while in the performance of duty. She stopped work as of the date of the incident.

OWCP initially accepted appellant's claim for sprain of the neck and rotator cuff syndrome of the left shoulder and allied disorders. It subsequently expanded acceptance of her claim to include partial tear of the left rotator cuff and temporary aggravation of degenerative disc disease of the cervical spine.

Appellant stopped work on the date of the injury and received continuation of pay from March 26 to May 9, 2013. OWCP paid her compensation benefits on the periodic rolls as of May 10, 2013. On June 27, 2013 appellant underwent a left shoulder arthroscopic subacromial decompression, distal clavicle resection, and debridement of rotator cuff. On May 13, 2014 she had a C7 selective nerve root block. Appellant returned to work in a light-duty capacity, working four hours a day on January 27, 2014. On April 8, 2014 she stopped work and OWCP resumed compensation payments.

By decision dated September 22, 2016, OWCP terminated appellant's wage-loss compensation effective October 16, 2016 finding that the weight of the medical evidence of record established that she was no longer disabled from work as a result of the accepted March 25, 2013 employment injury. It noted that the decision did not affect appellant's entitlement to medical benefits. On September 29, 2016 OWCP reissued this decision with appeal rights.

On September 29, 2016 appellant signed a form electing retirement benefits through Office of Personnel Management (OPM) in lieu of compensation under FECA. On November 22, 2016 she signed a separate form noting the election. Both forms listed the effective date of appellant's election as October 16, 2016.<sup>3</sup>

In a letter dated December 28, 2016, OWCP informed appellant that it had made a preliminary determination that she was overpaid in the amount of \$3,256.30 because her FECA wage-loss benefits had been terminated and she elected OPM benefits effective October 16, 2016, but she received payment on the periodic rolls through November 12, 2016. It also noted that it appeared that appellant was at fault in the creation of this overpayment because she accepted a payment that she knew or reasonably should have known was incorrect. OWCP provided an overpayment action request and overpayment recovery questionnaire (OWCP-20). It afforded appellant 30 days to respond.

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<sup>3</sup> By letter dated November 15, 2016, OWCP informed OPM that appellant elected to receive retirement benefits from OPM effective October 16, 2016 in lieu of compensation benefits from FECA. It requested that OPM reimburse it for \$3,274.00 for the benefits it had paid appellant for the period October 16 to November 12, 2016.

On January 13, 2017 appellant requested a telephone conference with an OWCP hearing representative with regard to the issues of fault and possible waiver of the overpayment. She noted that OWCP had sought repayment from OPM regarding this alleged overpayment and therefore she was not at fault in the creation of the overpayment. Appellant also related that OPM had not yet paid her annuity benefits.

By letter dated April 26, 2017, a claims examiner for OWCP informed appellant that she tried to contact appellant regarding the pending overpayment in her case, but that the call would not go through. She informed appellant that a decision on the overpayment would be deferred for 10 days to afford her the opportunity to contact OWCP and then a decision would be issued based upon the evidence of record.

Appellant submitted answers to the overpayment recovery questionnaire noting a monthly income of \$4,390.74. She listed one dependent, a 19 year-old child. Appellant listed monthly expenses of \$1,410.90 and monthly payment on loans as \$575.00. She forwarded to OWCP supporting documentation with regard to her expenses.

By decision dated June 28, 2017, OWCP finalized the preliminary overpayment determination, finding that appellant received an overpayment of compensation in the amount of \$3,256.30, and that appellant was at fault in the creation of the overpayment as she knowingly accepted compensation to which she was not entitled.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8102 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.<sup>4</sup> A claimant is only entitled to receive wage-loss compensation due to disability for those periods during which his or her work-related medical condition prevents him or her from earning the wages earned before the work-related injury.<sup>5</sup>

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

OWCP terminated appellant's wage-loss compensation benefits by decision dated September 29, 2016, effective October 16, 2016. A review of the record indicates that on September 29, 2016 appellant elected to receive retirement benefits from OPM, effective October 16, 2016. However, on November 12, 2016, OWCP issued appellant compensation for wage loss for the period October 16 through November 12, 2016. Since it had terminated appellant's wage-loss compensation benefits effective October 16, 2016, appellant was clearly not entitled to receive compensation benefits after that date. As appellant received \$3,256.30 in FECA benefits for the period October 16 to November 12, 2016, the Board finds that an overpayment of compensation in that amount was created.

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<sup>4</sup> 5 U.S.C. § 8102(a).

<sup>5</sup> 20 C.F.R. § 10.500; *see also E.S.*, Docket No. 17-0718 (issued August 23, 2017).

## LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA provides that an overpayment in compensation shall be recovered by OWCP unless “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.”<sup>6</sup> Section 10.433(a) of OWCP 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 who:

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

“(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.”<sup>7</sup>

The Board has held that an employee who receives payments from OWCP in the form of a direct electronic 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>8</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>9</sup> Previous cases have held that receiving one erroneous direct deposit payment does not necessarily create the requisite knowledge to find that a claimant was at fault in the creation of the overpayment.<sup>10</sup>

## ANALYSIS -- ISSUE 2

OWCP 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 OWCP failed to establish that, at the time she accepted the initial (and sole) payment of compensation, appellant knew or reasonably should have known the payment was incorrect.

As discussed, in cases where a claimant receives compensation through direct deposit, OWCP must establish that, at that time, a claimant received the direct deposit in question that he

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<sup>6</sup> 5 U.S.C. § 8129(b).

<sup>7</sup> 20 C.F.R. § 10.433(a).

<sup>8</sup> See *Tammy Craven*, 57 ECAB 689 (2006).

<sup>9</sup> *B.K.*, Docket No. 17-1562 (issued October 27, 2017).

<sup>10</sup> *V.S.*, Docket No. 13-1278 (issued October 23, 2013).

or she knew or should have known that the payment was incorrect.<sup>11</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>12</sup> 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 a claimant lacks the requisite knowledge at the time of the first incorrect payment.<sup>13</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>14</sup> 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.<sup>15</sup>

Appellant received wage-loss compensation by direct deposit every 28 days. The evidence of record does not establish that, as of the first direct deposit of compensation on November 12, 2016 that appellant 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 knowledge at the time she received a direct deposit from OWCP that the payment was incorrect, or that a reasonable period of time passed during which she could have reviewed bank statements or been informed of the incorrect payment. Therefore, she is not at fault in the acceptance of the direct deposit covering the overpayment from October 16 through November 12, 2016.

The Board will reverse OWCP's finding of fault, and remand the case for consideration of whether appellant is entitled to a waiver of recovery of the overpayment.<sup>16</sup> A finding of no fault, however, does not mean that the claimant may keep the money, only that OWCP must consider eligibility for waiver for this period and the case must be remanded for it to determine whether appellant is entitled to waiver for this period. After such further development as OWCP may find necessary, it should issue an appropriate decision on the issue of whether the overpayment should be waived for the relevant portion of the October 16, 2016 direct deposit.

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<sup>11</sup> See *C.K.*, Docket No. 12-0746 (issued May 1, 2012).

<sup>12</sup> See *supra* note 8; see also *George A. Hirsch*, 47 ECAB 520 (1996).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*; see also *K.D.*, Docket No. 13-0451 (issued April 12, 2013).

<sup>15</sup> See *K.H.*, Docket No. 06-0191 (issued October 30, 2006).

<sup>16</sup> The Board rejects appellant's argument that as she received a letter indicating that OWCP was seeking reimbursement from OPM, that she reasonably believed that she was entitled to the additional compensation payment. As noted OWCP clearly terminated appellant's compensation effective October 16, 2016.

**CONCLUSION**

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$3,256.30 because she received FECA benefits for the period October 16 through November 12, 2016, after her wage-loss benefits were terminated and she elected receipt of OPM benefits. The Board further finds that OWCP improperly determined that appellant was at fault in the creation of the overpayment of compensation. The case shall be remanded for consideration of waiver of recovery of the overpayment.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the June 28, 2017 decision of the Office of Workers' Compensation Programs is affirmed in part and reversed in part, and that case is remanded for further action consistent with this decision.

Issued: July 3, 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