

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

S.N., Appellant

and

**U.S. POSTAL SERVICE, DEERFIELD POST
OFFICE, Deerfield, IL, Employer**

)
)
)
)
)
)
)
)
)
)
)
)

**Docket No. 19-1018
Issued: November 12, 2019**

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 April 9, 2019 appellant filed a timely appeal from a March 22, 2019 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 to consider the merits of this case.

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$611.50 for the period December 24, 2018 through January 5, 2019; and (2) whether OWCP properly found appellant at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

Appellant, a 39-year-old part-time mail carrier, has an accepted traumatic injury claim (Form CA-1) for a left ankle sprain/strain, which arose from a fall on September 28, 2018 while in the performance of duty. On the reverse side of the claim form, the employing establishment indicated that she stopped work on September 25, 2018.

On November 28, 2018 appellant submitted a claim for compensation (Form CA-7) for leave without pay (LWOP) for total disability for the period November 13 through 23, 2018. On the reverse side of the Form CA-7, the employing establishment indicated that she worked a nonregular, as needed schedule, at a base pay rate of \$17.78 per hour. The employing establishment also indicated that appellant's salary the prior year was \$33,197.21, averaging \$638.40 per week. Based on this information, OWCP calculated that she worked an average of 35.9 hours per week.

OWCP placed appellant on the supplemental compensation rolls for the period November 13 through December 10, 2018. For the period December 9, 2018 through January 5, 2019, it paid wage-loss compensation for temporary total disability on the periodic rolls.

In a letter dated December 10, 2018, (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. It advised, "[i]f your physician advises you that you are able to perform some type of work, you are also expected to report this to OWCP." In an attached EN1049, OWCP further 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 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.)

In a December 20, 2018 medical report, Dr. Mark Levin, a Board-certified sports medicine specialist and orthopedic surgeon, indicated that appellant's left ankle sprain was healing, and recommended additional therapy. He noted that she was capable of returning to work with restrictions, and scheduled a follow-up in one month. In a duty status report (Form CA-17), Dr. Levin indicated that appellant could return to work on December 20, 2018 with restrictions against climbing stairs and lifting more than 50 pounds. He also restricted her from any climbing and limited her walking to five to six hours per day.

On January 5, 2019 OWCP made a temporary total disability payment to appellant for the period December 9, 2018 through January 5, 2019 *via* direct deposit (electronic fund transfer) in the amount of \$1,915.23.

In a January 8, 2019 follow-up report, Dr. Levin noted that appellant had been attending physical therapy, but that she reported that her ankle felt worse. Appellant reported that she had been working, but that the employing establishment wanted her to climb stairs. Dr. Levin reiterated that she could work without stair climbing, and that she could lift a maximum of 50 pounds. In an accompanying duty status report (Form CA-17), he diagnosed an ankle sprain and indicated that appellant could return to work with restrictions.

In a January 22, 2019 telephone call, the employing establishment advised OWCP that appellant returned to work on December 24, 2018.

A time analysis form (Form CA-7a) submitted by the employing establishment indicated that appellant worked: 4.55 hours on December 24, 2018; 3.40 hours on December 27, 2018; 5.15 hours on December 29, 2018; 2.53 hours on December 30, 2018; 4.35 hours on December 31, 2018; 8.63 hours on January 2, 2019; and 5.73 hours on January 3, 2019. The employing establishment further related that appellant took LWOP for 2.75 hours on December 31, 2018, and that she received 16 hours of holiday pay between December 25, 2018 and January 1, 2019. It calculated that the gross amount paid was \$837.50.

By letter dated February 20, 2019, OWCP advised appellant of its preliminary determination that she had received a \$611.50 overpayment of compensation because she paid total disability compensation for the period December 24 2018 through January 5, 2019 and during this time she had returned to part-time modified work. It also made a preliminary finding that she was at fault in the creation of the overpayment because she had accepted payments that she knew, or reasonably should have known, to be incorrect. OWCP found that appellant received compensation benefits in the amount of \$889.21 for the period December 24, 2018 through January 5, 2019. It calculated that \$1,915.23 divided by 28 (the number of days in the pay period) multiplied by 13 (the number of days she worked during the pay period) = \$889.21. OWCP noted that appellant's pay rate when injured was \$638.41 per week, and determined that her wage-earning capacity was \$450.96 weekly. It calculated \$450.96 by dividing appellant's actual earnings for the period (\$837.50) by 13 and then multiplying by 7 ($\$837.50/13 \times 7 = \450.96). Then, taking her wage earning capacity (\$450.96) and dividing by the pay rate when injured (\$638.41), OWCP determined her wage-earning capacity percentage was 71 percent which when multiplied by the pay rate salary (\$638.41), yielded a wage-earning capacity amount of \$453.27. To determine the loss of wage-earning capacity (LWEC), it subtracted the wage-earning capacity amount (\$453.27) from appellant's weekly pay rate when injured (\$638.41) to find a LWEC of \$185.14 per week. OWCP then multiplied the LWEC, \$185.14, by the total disability percentage that she was entitled to, 75 percent to determine that her weekly compensation amount was \$138.85. It determined that appellant was entitled to receive compensation in the amount of \$277.71 for the period December 24, 2018 through January 5, 2019. When OWCP deducted \$277.71 from the \$889.21 in disability compensation that she was paid for the period, this resulted in an overpayment of \$611.50. It advised appellant that she could submit evidence challenging the fact, amount, or finding of fault, and request waiver of recovery of the overpayment. Additionally, OWCP informed her that, within 30 days, she could request a telephone conference,

a final decision based on the written evidence, or a prerecoupment hearing. It requested that appellant complete the overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documentation. OWCP afforded her 30 days for a response.

In the returned overpayment recovery questionnaire (Form OWCP-20) dated March 5, 2019, appellant stated that she thought the incorrect payment was due to her, “because my job only paid for Monday for next Friday because I only work on Monday, but the rest of the days they have me off.” She requested a waiver of recovery of the overpayment on the grounds that, “[w]hen I started working, my job contact you all and you all know how much I was get[ting] before I did and therefore I only got pa[id] only for Monday, when I started working.” Appellant did not challenge the calculation of the overpayment.

By decision dated March 22, 2019, OWCP finalized the overpayment of compensation in the amount of \$611.50 for the period December 24, 2018 through January 5, 2019. It determined that appellant was at fault in the creation of the overpayment as she accepted compensation payments which she knew or should have known were incorrect. OWCP requested installment payments of \$50.00 per month for 13 months.

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.² 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.³

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 instances.⁴ OWCP’s procedures provide that an overpayment of compensation is created when a claimant returns to work, but continues to receive wage-loss compensation.⁵

ANALYSIS -- ISSUE 1

The Board finds that an overpayment of compensation was created.

OWCP accepted appellant’s claim and paid wage-loss compensation, placing her on the periodic compensation rolls. The record establishes that appellant returned to work on

² 5 U.S.C. § 8102(a).

³ *Id.* at § 8129(a).

⁴ *Id.* at § 8116(a).

⁵ *B.H.*, Docket No. 09-0292 (issued September 1, 2009).

December 24, 2018 and worked 4.55 hours on December 24, 2018; 3.40 hours on December 27, 2018; 5.15 hours on December 29, 2018; 2.53 hours on December 30, 2018; 4.35 hours on December 31, 2018; 8.63 hours on January 2, 2019; and 5.73 hours on January 3, 2019. The sum total of the daily hour calculations indicates that she worked 34.34 hours between December 24, 2018 and January 5, 2019.⁶ The employing establishment further related that appellant received 16 hours of holiday pay, split evenly between December 25, 2018 and January 1, 2019. The employing establishment calculated that the gross amount paid to her was \$837.50 for the period December 24, 2018 through January 5, 2019. This resulted in an overpayment of compensation, as appellant received total disability compensation during the same time period.⁷ She was not entitled to receive temporary total disability benefits and actual earnings for the same time period.⁸

With regard to the amount of overpayment, OWCP found an overpayment of compensation in the amount of \$611.50 for the period December 24, 2018 through January 5, 2019.

In its overpayment determination, OWCP calculated the amount of the overpayment by taking the amount of total disability compensation received for the 13-day period December 24, 2018 and January 5, 2019, \$889.21, and then subtracted \$277.71 for wage-loss compensation that appellant would have been entitled to for that 13-day period. After review, the Board finds that the amount of wage-loss disability compensation that she was entitled to, \$277.71, was calculated incorrectly.

OWCP correctly determined appellant's weekly LWEC, \$185.14, multiplied by 75 percent was \$138.85. Dividing this amount of weekly compensation that appellant was entitled to for LWEC, \$138.85, by 7 ($\$138.85/7 = \19.84) and multiplying by 13 (the amount of days during the period worked) yields a wage-loss compensation amount of \$257.86, not \$277.71. During the Board's review of the record, the Board discovered that OWCP incorrectly multiplied \$19.84 by 14, rather than 13, to arrive at \$277.71 ($\$138.85/7 \times 14 = \277.71). After correction for this error, the overpayment amount is \$631.35 ($\$889.21 - \$257.86 = \631.35). The Board therefore finds that an overpayment amount of \$631.35 has been established for the period December 24, 2018 through January 5, 2019.

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

⁶ The employing establishment indicated that appellant worked a total of 34.42 hours; however, this figure does not match the sum total of the hours added together as listed on the Form CA-7a.

⁷ *K.L.*, Docket No. 16-1490 (issued May 26, 2017).

⁸ *Id.*

against equity and good conscience.⁹ No waiver of an overpayment is possible if the claimant is at fault in creating the overpayment.¹⁰

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; (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.¹¹

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.¹²

ANALYSIS -- ISSUE 2

OWCP determined that appellant was at fault in the creation of the overpayment because she accepted payments that she knew or should have known to be incorrect. The Board finds, however, that she was without fault with regard to OWCP's first direct deposit following her return to part-time work.¹³

In cases where a claimant receives compensation through direct deposit, the Board has held that 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.¹⁴ 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.¹⁵ 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 lacks the requisite knowledge at the time of the first incorrect payment.¹⁶ 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

⁹ 5 U.S.C. § 8129(b).

¹⁰ *C.L.*, Docket No. 19-0242 (issued August 5, 2019).

¹¹ 20 C.F.R. § 10.433(a).

¹² *Id.* at § 10.433(b).

¹³ *J.S.*, Docket No. 17-0260 (issued December 28, 2017).

¹⁴ See *Claude T. Green*, 42 ECAB 174, 278 (1990).

¹⁵ See *Tammy Craven*, 57 ECAB 589 (2006); see also *George A. Hirsch*, 47 ECAB 520 (1996).

¹⁶ *Id.*

overpayment.¹⁷ 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.¹⁸

The record establishes that for the overpayment period, December 9, 2018 through January 5, 2019, appellant received compensation by direct deposit payments every 28 days. She received a partial overpayment for the 28-day pay period December 9, 2018 through January 5, 2019, having returned to part-time work beginning December 24, 2018. This was an overpayment because appellant was improperly paid wage-loss compensation for total disability without adjustment for actual wages earned from December 24, 2018 through January 5, 2019. The funds were directly deposited into her account *via* direct deposit on January 5, 2019.

The Board finds that appellant was without fault for the initial direct deposit of the paid amount into her account for the December 9, 2018 through January 5, 2019 overpayment period.¹⁹ Although, appellant accepted the overpayment at the time it was deposited into her account, OWCP has not shown that she knew or should have known at the time of the deposit that the payment was incorrect.²⁰ She had no reason to suspect at the time of the January 5, 2019 deposit that OWCP had issued an incorrect payment since this was the first incorrect payment made. Additionally, appellant was entitled to some wage-loss compensation for total disability for the period December 9, 2018 through January 5, 2019 and thus the circumstances surrounding the overpayment were more complex than usual.²¹ As such, the Board finds that she was not at fault in either creating or accepting the overpayment for the period December 24, 2018 through January 5, 2019.²² A finding of no fault does not mean, however, that appellant may keep the initial payment amount; only that OWCP must consider eligibility for waiver for this period, and the case must be remanded for OWCP to determine whether she is entitled to waiver of recovery for this portion of the overpayment.²³

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 December 24, 2018 through January 5, 2019.

¹⁷ *Id.*; *see also K.D.*, Docket No. 13-0451 (issued April 12, 2013).

¹⁸ *See K.H.*, Docket No. 06-0191 (issued October 30, 2006).

¹⁹ *J.S.*, Docket No. 12-1707 (issued June 10, 2013).

²⁰ *See also C.K.*, Docket No. 12-0746 (issued May 1, 2012).

²¹ *See W.B.*, Docket No. 09-1440 (issued April 12, 2010).

²² *J.S.*, Docket No. 17-0260 (issued December 28, 2017).

²³ *Id.*

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.²⁴

CONCLUSION

The Board finds that OWCP correctly determined that an overpayment of compensation for the period December 24, 2018 through January 5, 2019 was created. The Board further finds that the amount of the overpayment is affirmed, as modified, in the amount of \$631.35. Finally, the Board finds that appellant was without fault in the creation of the overpayment for the period December 24, 2018 through January 5, 2019. The case is remanded to determine whether waiver of recovery is warranted.

ORDER

IT IS HEREBY ORDERED THAT the March 22, 2019 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part. The case is remanded for further action consistent with this decision of the Board.

Issued: November 12, 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

²⁴ *Id.*