

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

K.K., Appellant)	
)	
and)	Docket No. 19-0978
)	Issued: October 21, 2019
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION FACILITY, Abilene, TX,)	
Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 2, 2019 appellant filed a timely appeal from a February 13, 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 over the merits of this case.

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received a \$4,310.21 overpayment of compensation for the period October 9 through November 10, 2018; and (2) whether OWCP properly found that appellant was 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

On June 4, 2015 appellant, then a 56-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that she sustained left shoulder strain as a result of pushing a can from a dock through a vestibule while in the performance of duty. By decision dated July 20, 2015, OWCP accepted the claim for sprain of the shoulder and upper arm with a left superior glenoid labrum lesion, disorder of bursae and tendons of the left shoulder region, sprain of the shoulder and upper arm, and other affections of the left shoulder region not elsewhere classified.

On May 25, 2018 appellant underwent an OWCP-approved left shoulder arthroscopy with Dr. Jeremy B. Britten, an orthopedic surgeon.

In a form dated June 29, 2018, appellant enrolled in direct deposit for her compensation payments. OWCP received her enrollment form for direct deposit on July 17, 2018.

By letter dated July 2, 2018, OWCP advised appellant that she had been placed on the periodic rolls, outlined her entitlement to compensation benefits, and advised her of her responsibility to return to work in connection with the accepted injury. 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 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 two 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 work status report dated August 29, 2018, Dr. Britten advised that appellant could return to work with restrictions of no overhead reaching or carrying more than 20 pounds with the left upper extremity. On September 26, 2018 he released she to return to work, as of that date, without restrictions.

A closure report completed by a registered nurse, dated October 26, 2018, noted that appellant had returned to work at full duty on October 9, 2018. The nurse noted that, although appellant had been released to return to work on September 26, 2018, she sustained a nonwork-related wrist fracture, which prevented her from returning to work until she was cleared by her personal physician, and that appellant took personal leave.

OWCP continued to pay appellant wage-loss compensation for temporary total disability through November 10, 2018. On October 13, 2018 appellant received a direct deposit in the amount of \$3,657.15 for the period September 16 through October 13, 2018, and on November 10,

2018 she received a direct deposit in the amount of \$3,657.15 for the period October 14 through November 10, 2018.

In a compensation termination sheet dated November 7, 2018, OWCP indicated that appellant had returned to work on October 9, 2018 at full duty. It noted that for the period October 9 through November 10, 2018, she was overpaid compensation in the amount of \$4,310.21. OWCP calculated this amount by taking the gross compensation paid from October 9 through 13, 2018, \$682.32, and subtracting \$3.32 for basic life insurance (BLI) and \$25.94 for miscellaneous, which yielded \$653.06. For the period October 14 through November 10, 2018, appellant's gross compensation was \$3,821.01; subtracting \$18.60 for BLI and \$145.26 for miscellaneous yielded \$3,657.15. OWCP calculated the total amount of the overpayment to be \$4,310.21.

In a November 19, 2018 preliminary determination, OWCP advised appellant that she had received an overpayment of compensation in the amount of \$4,310.21 for the period October 9 through November 10, 2018 because she had returned to full-time work on October 9, 2018, but continued to receive total disability compensation through November 10, 2018. It also determined that she was at fault in the creation of the overpayment because she had accepted payments that she knew or reasonably should have known were 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 preresoupment hearing before an OWCP hearing representative. OWCP instructed appellant to complete an enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting documentation.

On December 2, 2018 appellant contested the finding of fault and requested a waiver with regard to the overpayment. She responded to the overpayment recovery questionnaire, noting a monthly income of \$6,500.00. Appellant listed five people she supported either fully or in part, including her spouse, a 29-year-old son, and three sons with ages not listed. She listed monthly expenses of \$5,603.00 and noted that she was in bankruptcy.

By decision dated February 13, 2019, OWCP finalized the preliminary determination of a \$4,310.21 overpayment of compensation for the period October 9 through November 10, 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.²

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

² 5 U.S.C. § 8102(a).

receive salary, pay, or remuneration of any type from the United States, except in limited specified instances.³ 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.⁴ A claimant is not entitled to receive temporary total disability (TTD) benefits and actual earnings for the same time period.⁵ 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.⁶

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$4,310.21 for the period October 9 through November 10, 2018.

The record established that appellant returned to work full time at the employing establishment on October 9, 2018. However, appellant continued to receive wage-loss compensation for total disability through November 10, 2018. As noted above, she was not entitled to receive compensation for total disability after she had returned to work.⁷ Thus, an overpayment of compensation was created.

OWCP calculated appellant's net compensation paid for the period October 9 through November 10, 2018 as \$4,310.21. 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 \$4,310.21 for the period October 9 through November 10, 2018.

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.⁸ A claimant who is at fault in the creation of the overpayment is not entitled to waiver.⁹ 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

³ *Id.* at § 8116(a).

⁴ 20 C.F.R. § 10.500(a).

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

⁶ *C.L.*, *id.*; *B.H.*, Docket No. 09-0292 (issued September 1, 2009); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Determinations in an Overpayment*, Chapter 6.300.4(g) (September 2018).

⁷ *See supra* notes 3-5.

⁸ 5 U.S.C. § 8129(b).

⁹ *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).

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.

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.¹⁰ 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.¹¹ 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.¹²

ANALYSIS -- ISSUE 2

The Board finds that appellant was not at fault with regard to OWCP's first direct deposit following her return to work, but she was at fault in the creation of the overpayment resulting from the subsequent deposits.

OWCP paid appellant compensation by direct deposit every 28 days. Appellant returned to work on October 9, 2018. OWCP paid her compensation for the period October 9 through November 10, 2018. There is no documentation or other evidence to demonstrate that appellant had clear knowledge at the time the bank received the October 13, 2018 direct deposit that the payment was incorrect.¹³ The Board thus finds that appellant was without fault in accepting the initial direct deposit covering the period of the overpayment from October 9 through 13, 2018.

The Board finds that the case is not in posture for decision regarding the issue of waiver of recovery of the overpayment for the period October 9 through 13, 2018. The Board will set aside the February 13, 2019 decision regarding the issue of fault for that period and remand the case to OWCP to determine whether appellant is entitled to waiver of recovery of the overpayment covering the period October 9 through 13, 2018.¹⁴

The Board further finds that appellant was at fault in the creation of the overpayment resulting from the remaining direct deposit payment for the period October 14 through November 10, 2018.¹⁵

¹⁰ See *Tammy Craven*, 57 ECAB 689 (2006).

¹¹ *Id.*

¹² See *D.B.*, Docket No. 16-0258 (issued February 1, 2016); *W.P.*, 59 ECAB 514 (2008).

¹³ 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); Federal (FECA) Procedure Manual, *supra* note 6.

¹⁴ See *B.R.*, *supra* note 9.

¹⁵ See *C.Y.*, *supra* note 13; *D.W.*, Docket No. 14-0229 (issued April 17, 2014).

In a July 2, 2018 letter, OWCP notified appellant that, to avoid an overpayment of compensation, she must immediately notify it of her return to work. She was required to reimburse OWCP for compensation paid during a period which she worked. Although OWCP may have been negligent in making incorrect payments, this does not excuse a claimant from accepting payments he or she knew or should have known to be incorrect.¹⁶ 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, a claimant will be at fault for accepting the payments subsequently deposited. By the time of the second payment, 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 October 9, 2018.¹⁷ After her receipt of the first direct deposit following her return to work, she was on notice that OWCP began to make payments to her in error and knew or should have known that she was not entitled to the benefit of the subsequent direct deposit.

CONCLUSION

The Board finds that OWCP properly determined that appellant received a \$4,310.21 overpayment of compensation for the period October 9 through November 10, 2018. The Board further finds that she was without fault in the creation of the overpayment for the period October 9 through 13, 2018, and that she was at fault in the creation of the overpayment for the period October 14 through November 10, 2018. The case will be remanded to OWCP to consider waiver of recovery of the overpayment for the period October 9 through 13, 2018.

¹⁶ See *C.G.*, Docket No. 15-0701 (issued December 9, 2015).

¹⁷ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the February 13, 2019 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: October 21, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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