

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$2,013.76 for the period June 26 through August 4, 2017 because she concurrently received wage-loss compensation and schedule award compensation for the same extremity; (2) whether OWCP properly found that appellant was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment; and (3) whether OWCP properly required recovery of the overpayment by deducting \$100.00 from appellant's continuing compensation payments every 28 days.

FACTUAL HISTORY

On November 14, 2013 appellant, then a 53-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on that date she sustained a right leg injury when ascending a step while in the performance of duty. OWCP assigned the claim File No. xxxxxx401 and it was accepted for sprain of the right knee and leg. It paid appellant intermittent wage-loss compensation on the supplemental rolls commencing December 30, 2013.⁴

In a letter dated April 12, 2016, OWCP informed appellant that she was then receiving intermittent wage-loss compensation under OWCP File No. xxxxxx401, but had a pending appeal for a schedule award under OWCP File No. xxxxxx886. It advised her that a schedule award for one injury may be paid concurrently with compensation for wage loss paid for another injury, as long as the two injuries did not involve the same part of the body and/or extremity. However, as appellant's claims under OWCP File Nos. xxxxxx401 and xxxxxx886 both pertained to her right lower extremity, she had to elect to receive either her continuing intermittent wage-loss compensation or the schedule award. On April 19, 2016 appellant responded, indicating that she opted to receive schedule award compensation.

By decision dated June 29, 2017, OWCP granted appellant a schedule award for 12 percent permanent impairment of her right lower extremity, under OWCP File No. xxxxxx886. The decision noted that the period of the award ran from August 8 through December 27, 2016.

On July 10, 2017 under OWCP File No. xxxxxx401, appellant filed a claim for compensation (Form CA-7) for leave without pay for the period June 26 through July 7, 2017.

By revised decision dated July 18, 2017, under OWCP File No. xxxxxx886, OWCP granted appellant a schedule award for 12 percent permanent impairment of her right lower extremity. The revised decision noted that the award ran for 20.16 weeks from June 24 through November 12, 2017. OWCP indicated that the June 29, 2017 decision had incorrectly paid the schedule award from August 8, 2016 through December 27, 2017, as appellant had received wage-loss compensation under File No. xxxxxx401 through June 23, 2017. It noted that because a schedule award was not payable concurrently with an award for wage loss for the same extremity,

⁴ Appellant has a prior claim for an April 23, 2007 traumatic injury, as signed OWCP File No. xxxxxx886, accepted for closed fracture of the right fibula and a closed trimalleolar fracture of the right ankle. OWCP File No. xxxxxx658 involves a July 8, 2013 occupational disease for post-traumatic osteoarthritis of the right ankle and foot. No wage-loss compensation has been paid under OWCP File No. xxxxxx658. OWCP has administratively combined OWCP File Nos. xxxxxx886, xxxxxx401, and xxxxxx658, with File No. xxxxxx886 serving as the master file.

the starting date of the schedule award had been adjusted in its revised decision to commence payment as of June 24, 2017.

On July 24, 2017 appellant filed a Form CA-7 for leave without pay from July 10 through 21, 2017.

In a letter dated July 25, 2017, OWCP noted that appellant's Form CA-7 claim for compensation for the period July 10 through 21, 2017 would not be processed, as payment for a schedule award and leave without pay are not payable concurrently for injury to the same part of the body.

On August 7, 2017 appellant filed a Form CA-7 for leave without pay from July 24 through August 4, 2017.

The record reflects that OWCP paid appellant wage-loss compensation for the period June 26 through August 4, 2017, under OWCP File No. xxxxxx401, by direct deposit on December 22 and 29, 2017.

On December 12, 2018 OWCP advised appellant of its preliminary determination that she had received an overpayment of compensation in the amount of \$2,013.76 for the period June 26 through August 4, 2017, because she received wage-loss compensation for her accepted right lower extremity condition during that period under OWCP File No. xxxxxx401 while she was paid schedule award compensation for the period June 24 through November 12, 2017 for her accepted right lower extremity condition under OWCP File No. xxxxxx886. It also made a preliminary determination that she was at fault in the creation of the overpayment, as she had accepted a payment that she knew, or reasonably should have known, to be incorrect. OWCP advised appellant that she could submit evidence challenging the fact and amount of the overpayment, and finding of fault. It informed her that she could submit additional evidence in writing or at prerecoupment hearing, but that a prerecoupment hearing must be requested within 30 days of the date of the written notice of the overpayment. OWCP requested that appellant complete and return an enclosed overpayment recovery questionnaire (Form OWCP-20) within 30 days if she was unable to pay the full amount at that time.

An OWCP worksheet, which detailed the amount of compensation paid due to concurrent payment of wage-loss compensation and the schedule award for the right lower extremity, noted a total overpayment of \$2,013.76 for the period June 26 through August 4, 2017.

On January 2, 2019 appellant requested a prerecoupment hearing with a representative of OWCP's Branch of Hearings and Review. She contested the finding of fault and requested waiver of recovery of the overpayment.

Appellant subsequently submitted an overpayment recovery questionnaire (Form OWCP-20), completed on January 7, 2019, in which she listed monthly income of \$1,500.00, monthly expenses of \$2,895.00, and assets of \$240.00. She explained that she contested the preliminary finding of fault because her checks were held back for a long time and "accounts were combined," which resulted in penalties.

At the prerecoupment hearing, held on April 4, 2019, counsel argued that appellant had not realized that she had been overpaid and requested that she be found without fault along with consideration of waiver. Appellant testified regarding her finances, noting that she received

monthly income of \$3,000.00 including payments from OWCP, a minimum of \$700.00 monthly for housing, \$650.00 in monthly utilities, and \$700.00 of other expenses.

By decision dated May 7, 2019, a representative of OWCP's Branch of Hearings and Review determined that appellant received an overpayment of compensation in the amount of \$2,013.76 for the period June 26 through August 4, 2017 because she concurrently received wage-loss compensation and schedule award compensation for accepted right lower extremity conditions. She found that appellant was at fault in the creation of the overpayment, as the payments were received by electronic funds transfer (EFT) and would have been accompanied by payment statements outlining the periods for which compensation was being paid. The hearing representative further noted that appellant was "well aware of" and "vociferously active" about her compensation entitlements. She required recovery of the overpayment by deducting \$100.00 from her continuing compensation payments every 28 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 his or her duty.⁵ Section 8129(a) of FECA provides, in pertinent part:

"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."⁶

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.⁷

Under OWCP's procedures, a schedule award for one injury may be paid concurrently with compensation for wage loss paid for another injury, only if the two injuries do not involve the same part of the body and/or extremity.⁸

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$2,013.76.

⁵ 5 U.S.C. § 8102(a).

⁶ *Id.* at § 8129(a).

⁷ *Id.* at § 8116(a).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.4a(5) (February 2013). *See also L.D.*, Docket No. 18-1317 (issued April 17, 2019); *E.S.*, Docket No. 16-1248 (issued May 15, 2017); *M.B.*, Docket No. 12-1344 (issued December 21, 2012).

Appellant received a schedule award for 12 percent permanent impairment of her right lower extremity, which represented an increased schedule award of 7 percent under OWCP File No. xxxxxx886. In its initial decision, OWCP listed the dates of compensation as August 8 through December 27, 2016. However, as appellant had previously been paid wage-loss compensation for these dates under OWCP File No. xxxxxx401, it issued a revised decision on July 18, 2017 adjusting the starting date of the schedule award to June 24, 2017. OWCP also paid her wage-loss compensation for the period June 26 through August 4, 2017 under File No. xxxxxx401 for another right lower extremity injury. It found that an overpayment of compensation in the amount of \$2,013.76 resulted, as appellant was not entitled to concurrently receive both wage-loss and schedule award compensation for the same part of the body.

As appellant was not entitled to concurrent wage-loss and schedule award compensation for both right lower extremity injuries, the Board finds that OWCP properly determined that an overpayment of compensation was created.⁹

The Board further finds that OWCP properly calculated the amount of the overpayment as \$2,013.76, the amount that appellant received in wage-loss compensation for the period June 26 through August 4, 2017.

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.¹⁰ A claimant who is at fault in the creation of the overpayment is not entitled to waiver.¹¹ 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. Whether or not an individual was at fault 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

The Board finds that OWCP improperly found that appellant was at fault in the creation of the overpayment.

The Board has explained that an employee who receives payment 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

⁹ See *P.J.*, Docket No. 18-0248 (issued August 14, 2018); *Robert Atchison*, 41 ECAB 83, 87 (1989).

¹⁰ 5 U.S.C. § 8129(b).

¹¹ 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).

¹² *V.H.*, Docket No. 18-1124 (issued January 16, 2019); *P.H.*, Docket No. 13-0642 (issued August 12, 2013).

the acceptance of the overpayment, at the time of receipt of the direct deposit, lacks requisite knowledge. 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.¹³ The Board has previously also 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.¹⁴ The Board has recognized that, in the case of EFTs, an employee would not receive notification of the date and amount of payment until after the deposit was made and the overpayment created.¹⁵ Because fault is defined by what the claimant knew or should have known at the time of acceptance, one of the consequences of EFTs is that the claimant lacks the requisite knowledge at the time of the incorrect payment.¹⁶

Under the circumstances of this case, the Board finds that there is no sufficient documentation or other evidence to demonstrate that appellant had knowledge at the time she received the closely timed December 22 and 29, 2017 direct deposits from OWCP that the payments were incorrect, or that a reasonable period of time passed during which she could have reviewed bank statements or been informed of the incorrect payment. The Board thus finds that appellant was without fault in the creation of the overpayment.

The Board will, therefore, 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. 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 deem necessary, it shall issue a *de novo* decision on the issue of waiver of recovery of the overpayment.¹⁷

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$2,013.76 for the period June 26 through August 4, 2017. The Board further finds that OWCP improperly determined that appellant was at fault in the creation of the overpayment of compensation.

¹³ *K.F.*, Docket No. 19-1016 (issued February 14, 2020); *see Tammy Craven*, 57 ECAB 689 (2006).

¹⁴ *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).

¹⁵ *L.L.*, Docket No. 19-1690 (issued February 25, 2020); *see J.H.*, Docket No. 15-0195 (issued March 17, 2015).

¹⁶ *L.L.*, *id.*; *George A. Hirsch*, 47 ECAB 520 (1996).

¹⁷ In light of the Board's disposition of Issue 2, Issue 3 is rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the May 7, 2019 decision of the Office of Workers' Compensation Programs is affirmed in part and reversed in part and the case is remanded for further action consistent with this decision of the Board.

Issued: April 10, 2020
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

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

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board