

FACTUAL HISTORY

On July 26, 2011 appellant, then a 58-year-old mail carrier, filed a traumatic injury claim (Form CA-1) alleging that on July 22, 2011 she injured both knees when she tripped on uneven pavement when trying to deliver mail while in the performance of duty. She stopped work on July 27, 2011 and returned to intermittent limited duty on July 31, 2011. Appellant was placed on disability retirement effective January 13, 2014.

On November 28, 2011 OWCP accepted appellant's claim for bilateral knee and lower leg contusions and contusion of the bilateral wrists and hands.

On May 22, 2012 Dr. Mark S. McMahon, a Board-certified orthopedist, performed a right knee arthroscopy and diagnosed right knee torn medial meniscus with degenerative joint disease, partial tear of the medial collateral ligament and chondromalacia of the patella.

On December 4, 2012 OWCP expanded the acceptance of appellant's claim to include the additional conditions of bilateral chondromalacia patellae, bilateral tear of the medial meniscus of the knee, and right lower leg osteoarthritis unspecified.

On January 28, 2014 Dr. Frank DiMaio, a Board-certified orthopedist, performed a cemented right total knee replacement and diagnosed traumatic arthritis of the right knee.

Appellant was placed on the periodic rolls effective May 4, 2014. On May 28, 2014 she elected FECA benefits.

In a letter dated July 21, 2014, OWCP advised appellant's then-counsel that a third party may be liable for her work-related injury. It informed her to promptly take action to seek damages and to contact OWCP if there was a recovery against a third party. OWCP requested that appellant respond to an attached questionnaire.

On June 2, 2015 appellant's then-counsel advised the Department of Labor that he represented appellant in a third-party claim for bodily injury arising out of her July 22, 2011 work-related injury. He indicated that the defendant wished to discuss settlement and therefore he was requesting a printout of the employing establishment charges against any recovery or judgement obtained.

In a letter dated June 8, 2015, OWCP advised appellant's then-counsel that a Form CA-1108 must be filed once appellant received a settlement. The purpose of the form is to calculate the refund owed to the United States.

In a September 29, 2015 letter, OWCP informed counsel that \$132,860.46 in wage-loss compensation and \$54,965.32 in medical benefits had been paid in connection with the claim, for a total of \$187,825.78 in payments issued to appellant as of that date.

On November 25, 2015 her then-counsel indicated that appellant agreed to accept the third-party's settlement offer in the amount of \$600,000.00. He attached a copy of the November 14, 2015 settlement agreement.

In a December 1, 2015 letter, OWCP informed appellant's then-counsel that on that date \$138,756.46 in wage-loss compensation and \$54,965.32 in medical benefits had been paid in connection with the claim, for a total of \$193,721.78 in payments issued to appellant.

In a letter dated December 2, 2015, her then-counsel again advised the Department of Labor that appellant had received a third-party settlement as a result of the injury. He enclosed a completed Form CA-1108 dated December 14, 2015. The gross recovery noted was \$600,000.00. After deducting attorney fees (\$199,980.00), court costs (\$4,852.30), and an additional 20 percent (\$79,033.54), the remainder was \$316,134.16. The amount of benefits paid by the government was noted as \$193,721.78 and the government's allowable portion attorney fees was noted as \$64,567.47. The form indicated that a refund of \$129,154.31 was owed to the Department of Labor. It also noted that the credit against future benefits (surplus) was \$122,412.38.

In a letter dated December 22, 2015, OWCP informed appellant's then-counsel of the approval of the Form CA-1108 which had been submitted. It noted the United States Government's statutory right to a refund of compensation benefits in the amount of \$129,154.31 and provided repayment instructions.

On January 4, 2016 appellant, through counsel, submitted a check to OWCP in the amount of \$129,154.31.

In a letter dated January 20, 2016, appellant elected to terminate wage-loss compensation benefits under FECA and instead collect from a disability annuity under the Federal Employees Retirement System.

On February 16, 2016 OWCP confirmed the refund had been received. It advised counsel that a surplus remained in appellant's case in the amount of \$122,412.38. OWCP advised him that until the surplus had been exhausted, she was not entitled to further wage-loss compensation or medical benefits under FECA. It indicated that it would resume compensation payments only after the amount of the surplus had been absorbed.

Appellant continued to receive compensation payments under FECA. She received compensation in the amount of \$1,527.16, representing her wage-loss compensation for the period February 16 to March 5, 2016; \$2,259.40, representing her wage loss for each 28-day period from March 6 to June 25, 2016; \$1,371.78, representing her wage-loss compensation for the period June 26 to July 12, 2016; and medical payments in the amount of \$716.25. The total amount of the overpayment was \$12,652.79.

In an election form dated July 13, 2016, appellant elected to receive benefits from the Office of Personnel Management (OPM) effective July 13, 2016.

In a letter dated July 26, 2016, OWCP informed OPM that appellant elected to receive retirement benefits from OPM in lieu of FECA compensation benefits.²

On April 5, 2017 OWCP issued a preliminary determination of an overpayment of compensation in the amount of \$12,652.79 for the period February 16 to July 12, 2016 because she received wage-loss compensation during a period of a third-party surplus. It found that appellant was at fault in the creation of the overpayment because she knowingly accepted payments which she knew or reasonably should have known were incorrect. The preliminary determination provided an explanation of the calculation of the overpayment. OWCP requested that appellant complete the enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documentation. Additionally, it notified her that, within 30 days of the date of the letter, she could request a telephone conference, a final decision based on the written evidence, or a precoupment hearing.

In a letter dated May 11, 2017, appellant responded to OWCP's preliminary determination and indicated that she was unaware of a surplus in her claim. She indicated that counsel provided her with letters dated January 4 and February 11, 2016 from OWCP, but they had not mentioned a surplus. Appellant explained that nobody had explained to her that a surplus existed and thus she believed that the error was not of her own fault. She submitted argument and supportive correspondence and other paperwork in her response. Appellant also submitted bank statements, tax forms, annuities, monthly expenses, investment statements, and grocery receipts. She completed an overpayment action request form and requested OWCP make a decision based on the evidence in the file. Appellant indicated that her monthly income was \$2,367.35 and her monthly expenses were \$4,498.69. She indicated that she had \$338,784.13 at her disposal.

By decision dated July 31, 2017, OWCP finalized its determination that appellant received an overpayment of compensation in the amount of \$12,652.79 and that she was with fault in the creation of the overpayment. It required that she forward payment for the full amount of \$12,652.79 within 30 days.

LEGAL PRECEDENT -- ISSUE 1

Section 8102 of FECA provides that the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.³ Section 8132 of FECA outlines that where an injury or death for which compensation is payable is caused under circumstances creating a legal liability in a person other than the United States to pay damages and a beneficiary entitled to compensation from the United States for that injury or death receives money or other property in satisfaction of that liability as a result of suit or settlement by him or her in his or her behalf, the beneficiary, after deducting there from the costs of suit and a reasonable attorney's fee, shall refund to the United States the amount of compensation paid by the United States and credit any surplus on future payments of compensation

² OWCP indicated that appellant's compensation benefits had ceased on July 23, 2016. It requested that OPM forward \$932.42 as reimbursement for the period July 13 to 23, 2016. On December 27, 2016 OWCP received a check in the amount of \$932.42 from OPM as reimbursement for compensation paid from July 13 to 23, 2016.

³ *Id.* at § 8102.

to him or her for the same injury.⁴ The applicable regulations reiterate that, after the refund owed to the United States is calculated, FECA beneficiary retains any surplus remaining and this amount is credited, dollar for dollar, against future compensation for the same injury.⁵ OWCP will resume the payment of compensation only after FECA beneficiary has been awarded compensation which exceeds the amount of the surplus.⁶ Where a beneficiary who has received a third-party recovery has made the required refund, but subsequent events result in payment of compensation benefits, including medical benefits, this may result in an overpayment of compensation.⁷

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$12,652.79 for the period February 16 to July 12, 2017.

Appellant received a third-party recovery of \$600,000.00. She was properly provided, through her then-counsel of record, a December 14, 2015 Form CA-1108 which provided the calculations of the amount that needed to be refunded directly to the United States Government, as well as any surplus funds that would offset future compensation benefit payments. After appropriate deductions for the costs of the third-party suit and attorney fees, a surplus was created against future compensation in the amount of \$122,412.38. Future compensation payments are to be charged against a surplus until it has been exhausted.⁸

For the period February 16 to March 5, 2016, appellant received benefits in the amount of \$12,652.79 in her FECA claim. This amount was required to be credited against the remaining surplus rather than paid to her.⁹ Therefore, the Board finds that OWCP properly found an overpayment of compensation in the amount of \$12,652.79.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of FECA provides that, when an overpayment of compensation has been made because of an error of fact or law, adjustment shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is when an incorrect payment has been made to an individual who is without fault and when adjustment or recovery

⁴ *Id.* at § 8132. *See also T.D.*, Docket No. 16-0565 (issued May 5, 2016).

⁵ 20 C.F.R. § 10.712.

⁶ *Id.*

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *FECA Third-Party Subrogation Guidelines*, Chapter 2.1100.10 (March 2006).

⁸ 20 C.F.R. § 10.712.

⁹ *See B.G.*, Docket No. 14-0850 (issued September 17, 2014).

would defeat the purpose of FECA or be against equity and good conscience.¹⁰ No waiver of payment is possible if appellant is with fault in helping to create the overpayment.¹¹

In determining whether an individual is at fault, section 10.433(a) of OWCP's regulations provides in relevant part:

“An individual is with fault in the creation of an overpayment who--

Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or

Failed to provide information which he or she knew or should have known to be material; or accepted a payment which he or she knew or should have known to be incorrect.”¹²

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly determined that appellant was at fault in the creation of the overpayment of compensation, thereby precluding waiver of recovery of the overpayment.

OWCP found that appellant was at fault in the creation of the overpayment because she accepted payments she knew or should have known were incorrect. In a letter dated February 16, 2016, it informed appellant's then-counsel of record that she had a surplus in the amount of \$122,412.38 as a result of her third-party settlement. The letter also informed her then-counsel that, until the surplus had been exhausted, appellant was not entitled to further wage-loss compensation or medical benefits, but her compensation payments would resume after the amount of the surplus had been absorbed. Following receipt of the February 16, 2016 letter, appellant received payments for wage-loss compensation and reimbursement for medical payments in the amount of \$12,652.79.

Although OWCP may have erred in not applying the third-party surplus when issuing the wage-loss compensation and medical reimbursement payments, this does not relieve appellant from her obligation to repay the overpayment. Fault can be established if the circumstances show that the claimant accepted a payment she should have known was incorrect.¹³ It has been established that OWCP provided a specific explanation regarding the nature of the nature and amount of the surplus and the resultant impact on appellant's entitlement to further compensation payments until the surplus had been absorbed. Therefore, appellant should have known that the wage-loss compensation benefits and medical reimbursements were incorrect.¹⁴ Thus, OWCP

¹⁰ 5 U.S.C. § 8129(b).

¹¹ *Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

¹² 20 C.F.R. § 10.433(a).

¹³ *P.B.*, Docket No. 17-1046 (issued January 2, 2018); *B.G.*, Docket No. 14-850 (issued September 17, 2014).

¹⁴ *Id.*

properly found her at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment.

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$12,652.79 for the period February 16 to July 12, 2017 and that appellant was at fault in the creation of the overpayment of compensation thereby precluding waiver of recovery of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the July 31, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 26, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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