

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

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<b>K.F., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 19-1016</b>
	)	<b>Issued: February 14, 2020</b>
<b>DEPARTMENT OF HOMELAND SECURITY,</b>	)	
<b>TRANSPORTATION SECURITY</b>	)	
<b>ADMINISTRATION, WILMINGTON</b>	)	
<b>INTERNATIONAL AIRPORT, Wilmington, NC,</b>	)	
<b>Employer</b>	)	
_____	)	

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge  
JANICE B. ASKIN, Judge  
ALEC J. KOROMILAS, Alternate Judge

**JURISDICTION**

On April 8, 2019 appellant filed a timely appeal from a December 10, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>2</sup>

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> The Board notes that following the December 10, 2018 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

## **ISSUES**

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$58,182.25 during the period December 22, 2011 to March 31, 2018; (2) whether OWCP properly determined 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 \$250.00 from appellant's continuing compensation every 28 days.

## **FACTUAL HISTORY**

On August 11, 2007 appellant, then a 44-year-old part-time transportation security officer, filed a traumatic injury claim (Form CA-1) alleging that she injured her left knee on that date when she slipped and fell in a restroom while in the performance of duty. OWCP accepted the claim for left medial collateral ligament sprain, torn left medial meniscus, left medial meniscal bucket tear, and left knee osteoarthritis. It paid appellant wage-loss compensation benefits on the supplemental rolls for intermittent part-time wage loss from November 17, 2007 through March 15, 2008. OWCP paid her part-time wage-loss compensation on the periodic rolls from March 16, 2008 through her return to part-time light-duty work on May 15, 2011.<sup>3</sup>

Appellant stopped work again on December 22, 2011 and underwent an OWCP-approved revision total left knee arthroplasty. On February 10, 2012 she received a supplemental rolls payment, by direct deposit, in the amount of \$3,384.12 for the period December 22, 2011 through February 10, 2012. On March 16, 2012 appellant received a supplemental payment, by direct deposit, for the period February 11 through March 10, 2012 in the amount of \$1,900.89.

On March 13, 2012 OWCP notified appellant that, effective February 11, 2012, she would be retained on its periodic compensation rolls at the gross weekly pay rate of \$614.98, with the net first payment of \$1,900.89 for the period February 11 to March 10, 2012. It indicated that her regular net compensation payment every 28 days would be \$1,835.44 and that the first regular payment would be for the period March 11 to April 7, 2012.

On February 28, March 14 and 16, 2012 appellant contacted OWCP to discuss her compensation.

On March 7, 2018 OWCP, in an amended recurrence payment memorandum, noted that appellant, a permanent part-time employee with a fixed 24-hour-per-week schedule with rotating hours, had a total weekly pay rate of \$374.25 on the December 22, 2011 date of recurrence.<sup>4</sup> It provided its calculations.

On April 1, 2018 OWCP adjusted appellant's wage-loss compensation payments based on the total weekly pay rate of \$374.25 as a part-time employee.

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<sup>3</sup> Appellant's last periodic rolls payment at that time was in the net sum of \$1,208.30.

<sup>4</sup> This included a base weekly pay rate of \$339.30, a night differential weekly rate of \$10.57, a Sunday premium weekly rate of \$17.61, and a holiday premium weekly rate of \$6.77 at the augmented compensation rate due to having a spouse.

In a letter dated April 6, 2018, OWCP advised appellant that her wage-loss compensation benefits beginning April 1, 2018 had been adjusted to the weekly pay rate of \$374.25. It indicated that her net compensation payment every 28 days would be \$1,166.89.

In a preliminary determination dated June 29, 2018, OWCP advised appellant that she had received a \$58,182.25 overpayment of compensation for the period December 22, 2011 through March 31, 2018 because she received wage-loss compensation at the incorrect pay rate for a full-time employee when she was a part-time employee. It advised her that, for the above period, she had received \$155,658.61 based on the weekly pay rate of \$614.98 for a full-time employee, but she was only entitled to a weekly pay rate of \$374.25 for a part-time employee or \$97,476.36. OWCP provided a detailed accounting of its calculations during the period December 22, 2011 through March 31, 2018. It found that appellant was overpaid \$58,182.25 by subtracting the total amount it should have paid her using the proper pay rate from the date of recurrence for a part-time employee from the amount it had paid her using the incorrect pay rate for a full-time employee. OWCP also made a preliminary finding that she was at fault in the creation of the overpayment of compensation because she was aware or should have reasonably been aware that it had incorrectly paid compensation at the higher weekly pay rate for a full-time employee. 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 prerecoumment hearing. It requested that appellant complete the enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documentation.

On July 23, 2018 appellant requested a prerecoumment hearing on the issues of fault and a possible waiver of the overpayment before OWCP's Branch of Hearings and Review. She asserted that she did not know that she was being overpaid and that it was OWCP's mistake. Appellant indicated that she was unable to repay the overpayment. She submitted a completed overpayment recovery questionnaire (Form OWCP-20) and supporting financial documentation. Appellant indicated that her total monthly income was \$3,264.00 and that her total monthly expenses were \$3,162.92. She noted that neither she nor her spouse owned any valuable property or real estate.

During the November 8, 2018 prerecoumment hearing, appellant did not contest the fact or amount of the overpayment or that she was a part-time employee. Rather, she indicated that she did not know how her pay rate and compensation rate were computed. The hearing representative, in questioning appellant, noted that she had previously been compensated at the correct pay rate, and she had gone back to work. However, he questioned whether she had noticed that when she became disabled again in December 22, 2011, her wage-loss compensation payments were approximately \$700.00 greater every 28 days than her previous compensation payments. Appellant responded that she trusted OWCP to pay the correct amount of compensation. Regarding her income, she indicated that "we live paycheck to paycheck." Appellant verified the expenses listed on the Form OWCP-20, noting that she does not have a mortgage, but paid condo fees and taxes.

By decision dated December 10, 2018, an OWCP hearing representative finalized the determination that appellant received an overpayment of compensation in the amount of \$58,182.25 for the period December 22, 2011 through March 31, 2018 due to receipt of compensation at the incorrect pay rate. The hearing representative found that appellant was at fault in the creation of the overpayment as she had accepted compensation payments she knew

were incorrect and that her testimony about confusion regarding the matter was not credible. Appellant was directed to repay the overpayment in the amount of \$250.00 every 28 days from her ongoing compensation benefits.

### **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.<sup>5</sup> 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.<sup>6</sup>

OWCP's Federal (FECA) Procedure Manual further provides that the claims examiner should determine the basis of payment under 5 U.S.C. § 8114 and whether the claimant is a full-time, part-time, temporary, seasonal, casual, etc. worker.<sup>7</sup>

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

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$58,182.25 for the period December 22, 2011 to March 31, 2018.

OWCP accepted that appellant, a part-time employee, sustained injury to her left knee on August 11, 2007. Following a period of disability after the employment injury, for which appellant received wage-loss compensation on OWCP's periodic compensation rolls, appellant returned to part-time work on May 15, 2011. She stopped working on December 22, 2011 and underwent an OWCP-approved revision total left knee arthroplasty. Appellant was eventually placed on OWCP's periodic compensation rolls. For the period December 22, 2011 through March 31, 2018, she was paid at the incorrect pay rate for a full-time employee, for a total amount of \$155,658.61. However, appellant was only entitled to \$97,476.36 based on the pay rate for a part-time employee. This amounted to an overpayment of \$58,182.25. Appellant was not entitled to receive compensation for that of a full-time employee, when she retained a part-time employee status.<sup>8</sup>

The Board finds that OWCP properly determined the amount of the overpayment as \$58,182.25. OWCP provided worksheets detailing how much appellant actually received for the period December 22, 2011 through March 31, 2018 and how much she was entitled to receive based on the pay rate of a part-time employee.<sup>9</sup> Appellant has not disputed either the fact or

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<sup>5</sup> 5 U.S.C. § 8102(a).

<sup>6</sup> *Id.* at § 8129(a).

<sup>7</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.2(a) (March 2011).

<sup>8</sup> *See generally S.D.*, Docket No. 19-0618 (issued October 29, 2019).

<sup>9</sup> The Board notes that OWCP found that the recurrence pay rate of \$374.25 was higher than the date-of-injury pay rate of \$319.56.

amount of the overpayment. Accordingly, the Board finds that OWCP properly determined that she received an overpayment of compensation in the amount of \$58,182.25.

### **LEGAL PRECEDENT -- ISSUE 2**

5 U.S.C. § 8129(b) provides: “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.”<sup>10</sup> A claimant who is at fault in the creation of the overpayment is not entitled to waiver.<sup>11</sup> 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.

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.<sup>12</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>13</sup> The Board has previously 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.<sup>14</sup>

### **ANALYSIS -- ISSUE 2**

The Board finds that appellant was without fault with regard to the creation of the overpayment for the periods December 22, 2011 through February 10, 2012 and February 11 through March 10, 2012, but she was at fault in the overpayments for the period March 11, 2012 through March 31, 2018.

The record reflects that on February 10, 2012 appellant received a supplemental rolls payment, by direct deposit, in the amount of \$3,384.12 for the period December 22, 2011 through February 10, 2012. On March 16, 2012 appellant received a supplemental payment, by direct deposit, for the period February 11 through March 10, 2012 in the amount of \$1,900.89. There is no documentation or other evidence to demonstrate that appellant had clear knowledge at the time the bank received the above direct deposits that the payment would be made and that the payments

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<sup>10</sup> 5 U.S.C. § 8129(b).

<sup>11</sup> See *C.Y.*, Docket No. 18-0263 (issued September 14, 2018); *Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

<sup>12</sup> See *P.B.*, Docket No. 19-0329 (issued December 31, 2019); see *Tammy Craven*, 57 ECAB 689 (2006).

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

<sup>14</sup> *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).

were incorrect.<sup>15</sup> The Board thus finds that appellant was not at fault in accepting the direct deposit payments for the periods December 22, 2011 through February 10, 2012 and February 11 through March 10, 2012.

The Board further finds that appellant was at fault in the creation of the overpayment resulting from the remaining direct deposits for the period March 11, 2012 through March 31, 2018.<sup>16</sup> In the March 13, 2012 letter, appellant was advised that the weekly pay rate used to compute her gross compensation was \$614.98 and that the first regular periodic rolls payment for the period March 11 through April 7, 2012 would be in the net amount of \$1,835.34. She should thereafter have known that her regular compensation payments were being paid at an incorrect pay rate. By the time the April 7, 2012 compensation payment was deposited, appellant should have known that she was receiving a substantial increase in compensation than what she had previously received, based upon her part-time work status and pay rate. Although OWCP may have been negligent in making incorrect payments, this does not excuse a claimant from accepting payments she knew or should have known to be incorrect.<sup>17</sup> 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, the claimant will be at fault for accepting the payments subsequently deposited. By the time regular periodic compensation rolls payment commenced, appellant should have known that she was not entitled to a substantially greater amount of wage-loss compensation, based upon a full-time pay rate, than she had received prior to her return to part-time work on May 15, 2011.<sup>18</sup> As she was at fault in the creation of the overpayment for the period March 11, 2012 through March 31, 2018, she is not eligible for waiver of recovery with respect to the portion of the overpayment for those periods.<sup>19</sup>

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 periods December 22, 2011 through February 10, 2012 and February 11 through March 10, 2012. The Board will set aside the December 10, 2018 decision and remand the case for OWCP to determine whether appellant is entitled to waiver of recovery of the overpayment created for this period.<sup>20</sup> As appellant was at fault under the third fault standard outlined above, recovery of the remaining overpayment of compensation may not be waived.<sup>21</sup>

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<sup>15</sup> 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).

<sup>16</sup> *P.B.*, Docket No. 19-0329 (issued December 31, 2019); *D.W.*, Docket No. 14-0229 (issued April 17, 2014).

<sup>17</sup> *E.M.*, Docket No. 19-0857 (issued December 31, 2019); see *C.G.*, Docket No. 15-0701 (issued December 9, 2015).

<sup>18</sup> *Id.*

<sup>19</sup> *E.M.*, *supra* note 17; *V.D.*, Docket No. 16-0578 (issued November 3, 2016).

<sup>20</sup> *D.W.*, *supra* note 16.

<sup>21</sup> No waiver of an overpayment is possible if the claimant is at fault in creating the overpayment. *L.J.*, 59 ECAB 264 (2007).

## **CONCLUSION**

The Board finds that OWCP properly determined that appellant received an overpayment of compensation during the period December 22, 2011 through March 31, 2018 in the amount of \$58,182.25. The Board further finds that she was without fault in the creation of the overpayment for the periods December 22, 2011 through February 10, 2012 and February 11 through March 10, 2012, but that she was at fault in the creation of the overpayment for the period March 11, 2012 through March 31, 2018. The case will be remanded for OWCP to consider waiver of recovery of the overpayment from December 22, 2011 through March 10, 2012.<sup>22</sup>

## **ORDER**

**IT IS HEREBY ORDERED THAT** the December 10, 2018 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: February 14, 2020  
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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

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<sup>22</sup> In light of the Board's disposition of issue 2, issue 3 is rendered moot. *See C.G.*, Docket No. 19-0760 (issued October 1, 2019).