

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

E.N., Appellant	)	
	)	
and	)	<b>Docket No. 19-1687</b>
	)	<b>Issued: May 27, 2020</b>
PEACE CORPS, VOLUNTEER SERVICES,	)	
Washington, DC, Employer	)	
	)	

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chief Judge  
CHRISTOPHER J. GODFREY, Deputy Chief Judge  
PATRICIA H. FITZGERALD, Alternate Judge

**JURISDICTION**

On August 6, 2019 appellant filed a timely appeal from a May 1, 2019 merit decision and a July 17, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).<sup>1</sup> Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the overpayment decision. The most recent merit decision regarding the termination of appellant's wage-loss compensation was a June 15, 2018 OWCP decision. As more than 180 days had elapsed from the June 15, 2018 decision to the filing of this appeal, pursuant to FECA<sup>3</sup> and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of the termination decision.

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<sup>1</sup> The Board notes that following the July 17, 2019 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.*

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> *Id.*

## **ISSUES**

The issues are: (1) whether OWCP properly denied appellant's request for reconsideration of the merits of the termination of her wage-loss compensation claim pursuant to 5 U.S.C. § 8128(a); (2) whether appellant received an overpayment of compensation in the amount of \$16,679.93 for the period June 24, 2018 through March 2, 2019 because she continued to receive wage-loss compensation following the termination of her compensation payments; and (3) whether OWCP properly found that appellant was at fault in creation of the overpayment, thereby precluding waiver of recovery of the overpayment.

## **FACTUAL HISTORY**

On July 30, 2015 appellant, then a 64-year-old Peace Corps volunteer, filed an occupational disease claim (Form CA-2) alleging that, since May 9, 2013, she experienced ongoing left leg problems due to factors of her federal employment. She stopped work on March 30, 2015. OWCP accepted the claim for left medial meniscus tear and left gluteal medius insertional tendinopathy, and subsequently expanded acceptance of the claim to include left hip primary unilateral osteoarthritis. It paid appellant wage-loss compensation on the supplemental rolls as of March 21, 2015 and on the periodic rolls as of February 7, 2016.

In a January 3, 2017 report, Dr. John A. Maltry, a Board-certified orthopedic surgeon, released appellant to return to her date-of-injury position without restrictions. Physical examination findings revealed that appellant was well healed and had no left hip pain during a range of motion evaluation. An x-ray showed excellent left total hip arthroplasty fit fill and position. Dr. Maltry, in a work status form dated January 3, 2017, released appellant to return to regular work that day.<sup>4</sup>

In an October 20, 2017 report, Dr. Mark Maxwell, a Board-certified family medicine physician, noted that appellant's preexisting osteoarthritis had been aggravated by her work with the employing establishment and had required left hip replacement. He opined that the injury resulted in a permanent impairment with respect to her prosthetic hip, but that she was able to return to her date-of-injury position without restrictions.

In a letter dated April 9, 2018, OWCP proposed to terminate appellant's wage-loss compensation as the evidence then of record established that she was no longer disabled from work due to her accepted employment injury. It found that both her treating physicians, Dr. Maltry and Dr. Maxwell, opined that she was able to return to her date-of-injury position. OWCP afforded appellant 30 days to respond to the proposed termination.

In response to OWCP's proposal to terminate appellant's wage-loss compensation, OWCP received hospital records regarding her June 22, 2016 left hip surgery. It also received a May 8, 2018 letter in which she discussed applying for positions with the employing establishment. Appellant also requested a permanent impairment rating.

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<sup>4</sup> On February 15, 2017 OWCP issued a notice proposing to terminate appellant's wage-loss compensation and medical benefits, which was finalized on April 21, 2017. Effective April 1, 2018, however, it reinstated her on the periodic rolls.

By decision dated June 15, 2018, OWCP finalized the termination of appellant's wage-loss compensation, effective June 24, 2018, finding that the weight of the medical evidence then of record established that she was no longer disabled from work due to the accepted employment injury. It noted, however, that the termination decision did not affect her entitlement to medical benefits.

In a September 13, 2018 report, Dr. Maltry provided examination findings, reviewed a left hip x-ray interpretation, and diagnosed total left hip arthroplasty. He advised that appellant could return to work with no restrictions.

In a report dated January 24, 2019, Dr. Thomas O. Coury, a Board-certified physiatrist, noted appellant's medical history, provided examination findings, and diagnosed left femur neck fracture and post-traumatic hip osteoarthritis. He reported that she had a good result with her total hip arthroplasty and was functioning at a relatively high level. Dr. Coury also provided a permanent impairment rating using the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).<sup>5</sup>

On March 6, 2019 OWCP issued a preliminary determination that an overpayment had been created in the amount of \$16,679.93 as appellant continued to receive payment on the periodic rolls through March 2, 2019, after her FECA wage-loss compensation had been terminated on June 24, 2018. It also found that she was at fault in the creation of this overpayment because she accepted a payment that she knew or reasonably should have known was incorrect. OWCP issued an overpayment action request and an overpayment recovery questionnaire (Form OWCP-20). It afforded appellant 30 days to respond. No response was received.

By decision dated May 1, 2019, OWCP finalized its determination that an overpayment of compensation had been created in the amount of \$16,679.93 for the period June 24, 2018 through March 2, 2019, and that she was at fault in its creation. It required recovery of the overpayment in full.

On June 4, 2019 appellant requested reconsideration of the June 15, 2018 decision which terminated her wage-loss compensation, effective June 24, 2018. She asserted the termination was improper as she had not been reemployed by the employing establishment or resumed gainful employment. In support of her request for reconsideration, appellant submitted a June 22, 2016 left hip x-ray interpretation, June 23, 2016 inpatient hospital surgical reports, and a June 23, 2019 hospital discharge summary.

By decision dated July 17, 2019, OWCP denied reconsideration without reviewing the merits of appellant's claim finding that the evidence submitted was either previously considered or had no bearing on the underlying termination of wage-loss compensation.

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<sup>5</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

## **LEGAL PRECEDENT -- ISSUE 1**

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. It may review an award for or against payment of compensation at any time based on its own motion or on application.<sup>6</sup>

A claimant seeking reconsideration of a final decision must present arguments or provide evidence which: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.<sup>7</sup> If OWCP determines that at least one of these requirements is met, it reopens and reviews the case on its merits.<sup>8</sup> If the request is timely, but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.<sup>9</sup>

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.<sup>10</sup> If it chooses to grant reconsideration, it reopens and reviews the case on its merits.<sup>11</sup> If the request is timely, but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.<sup>12</sup>

## **ANALYSIS -- ISSUE 1**

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

Appellant has not shown that OWCP erred in its application of the law when it terminated her wage-loss compensation as she no longer had any disability due to her accepted employment conditions. On reconsideration she asserted that OWCP erred in terminating her wage-loss compensation as she had not resumed gainful employment or been reemployed by the employing establishment. However, whether appellant had actually returned to work is not a relevant argument to the underlying issue of whether she had the capability of returning to work based upon

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<sup>6</sup> *Supra* note 2.

<sup>7</sup> 20 C.F.R. § 10.606(b)(3); *see also M.S.*, Docket No. 18-1041 (issued October 25, 2018); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

<sup>8</sup> *Id.* at § 10.608(a); *see also C.K.*, Docket No. 18-1019 (issued October 24, 2018).

<sup>9</sup> *Id.* at § 10.608(b).

<sup>10</sup> *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of OWCP's decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the Integrated Federal Employees' Compensation System (iFECS). Chapter 2.1602.4b.

<sup>11</sup> *Id.* at § 10.608(a); *see J.W.*, Docket No. 19-1795 (issued March 13, 2020).

<sup>12</sup> *Id.* at § 10.608(b).

her medical restrictions. Thus, the Board finds that her request for reconsideration did not show that OWCP erroneously applied or interpreted a specific point of law, or advance a new and relevant legal argument not previously considered by OWCP.<sup>13</sup> Accordingly, appellant has not established a basis for further merit review under the first and second above-noted requirements of 20 C.F.R. § 10.606(b)(3).

In support of her request for reconsideration, appellant submitted a September 13, 2018 report from Dr. Maltry which indicated that she had no work restrictions and a January 24, 2019 impairment rating report from Dr. Coury. The Board notes that the underlying issue of this case, *i.e.*, whether rationalized medical evidence establishes appellant has disability due to her accepted employment injuries, is a medical issue which must be established by relevant medical evidence.<sup>14</sup> While Dr. Maltry's September 13, 2018 report and Dr. Coury's January 23, 2019 impairment rating are new, they are not relevant to the underlying issue as Dr. Maltry reiterated that appellant had no work restrictions and Dr. Coury did not address whether appellant was disabled from work due to her accepted employment injuries and. The submission of evidence that does not address the particular issue involved does not constitute a basis for reopening a case.<sup>15</sup> Appellant also resubmitted hospital and medical reports concerning her June 22, 2016 left hip surgery. The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.<sup>16</sup> Moreover, as noted above, the Board also has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a claim.<sup>17</sup> As such, appellant is not entitled to a review of the merits based on the third requirement under 20 C.F.R. § 10.606(b)(3).

The Board accordingly finds that appellant has not met any of the requirements of 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

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

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>18</sup> 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

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<sup>13</sup> See *supra* note 7.

<sup>14</sup> See *Bobbie F. Cowart*, 55 ECAB 746 (2004).

<sup>15</sup> *E.G.*, Docket No. 17-1955 (issued September 10, 2018); *Alan G. Williams*, 52 ECAB 180 (2000); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

<sup>16</sup> See *L.R.*, Docket No. 18-0400 (issued August 24, 2018).

<sup>17</sup> See *M.E.*, Docket No. 18-0553 (issued November 5, 2018); *S.T.*, Docket No. 17-0790 (issued May 22, 2018); *M.E.*, 58 ECAB 694 (2007).

<sup>18</sup> *Supra* note 2 at § 8102(a).

law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.”<sup>19</sup>

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.<sup>20</sup> Section 8116 of FECA defines the limitations on the right to receive compensation benefits. This section of FECA provides that, while an employee is receiving compensation, he or she may not receive salary, pay, or remuneration of any type from the United States, except in limited circumstances.<sup>21</sup> OWCP’s regulations provide in pertinent part that compensation for wage loss due to disability is available only for any periods during which the employee’s work-related medical condition prevents her from earning the wages earned before the work-related injury.<sup>22</sup>

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

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$16,679.93 for the period June 24, 2018 through March 2, 2019 because she continued to receive wage-loss compensation following the termination of her compensation payments.

OWCP terminated appellant’s wage-loss compensation effective June 24, 2018 based on the opinions of treating physicians, Dr. Maltry and Dr. Maxwell. However, appellant continued to receive wage-loss compensation on the supplemental rolls until March 2, 2019. Since OWCP had terminated her wage-loss compensation benefits, effective June 24, 2018, appellant was not entitled to receive compensation benefits after that date. As she received \$16,679.93 in FECA wage-loss compensation for the period June 24, 2018 through March 2, 2019, the Board finds that an overpayment of compensation in that amount was created.

### **LEGAL PRECEDENT -- ISSUE 3**

Section 8129(b) of FECA<sup>23</sup> 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>24</sup>

OWCP may consider waiving an overpayment of compensation only if the individual to whom it was made was not at fault in accepting or creating the overpayment. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments

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<sup>19</sup> *Id.* at § 8129(a).

<sup>20</sup> *Id.* at § 8102.

<sup>21</sup> *Id.* at § 8116(a).

<sup>22</sup> 20 C.F.R. § 10.500.

<sup>23</sup> 5 U.S.C. § 8129(b).

<sup>24</sup> *T.N.*, Docket No. 17-0387 (issued November 28, 2018); *J.K.*, Docket No. 08-1761 (issued January 8, 2009), *Joan Ross*, 57 ECAB 694 (2006); *Desiderio Martinez*, 55 ECAB 245 (2004).

he or she received from OWCP are proper. The recipient must show good faith and exercise a high degree of care in reporting events, which may affect entitlement to or the amount of benefits. A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment: (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 to be incorrect.<sup>25</sup>

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.<sup>26</sup>

### **ANALYSIS -- ISSUE 3**

The Board finds that appellant was not at fault in the creation of the overpayment for the period June 24 through July 21, 2018. The Board further finds, however, that she was at fault in the creation of the remaining period of the overpayment of compensation for the period July 22, 2018 through March 2, 2019 and, therefore, is ineligible for waiver of recovery of the overpayment for this remaining period.

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, he or she should have known that the payment was incorrect.<sup>27</sup> The Board has held that an employee who receives payments from OWCP in the form of a direct deposit might 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.<sup>28</sup> 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.<sup>29</sup> 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 overpayment.<sup>30</sup> 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

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<sup>25</sup> 20 C.F.R. § 10.433(a).

<sup>26</sup> *Id.* at § 10.433(b).

<sup>27</sup> *T.N., supra* note 24; *C.K.*, Docket No. 12-0746 (issued May 1, 2012).

<sup>28</sup> *T.N., supra* note 24; *Tammy Craven*, 57 ECAB 589 (2006).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

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.<sup>31</sup>

The record establishes that appellant received compensation by direct deposit for the period June 24, 2018 to March 2, 2019. The evidence of record does not establish that, on the date of the first direct deposit of compensation following the termination of her compensation, appellant knew or should have known that she was accepting a direct deposit to which she was not entitled. The record does not contain documentation or other evidence to demonstrate that appellant had knowledge at the time of the July 21, 2018 direct deposit covering the initial period June 24 to July 21, 2018 that the payment was incorrect or that a reasonable period of time passed during which she could have reviewed bank statements or been informed of the incorrect payment. Thus, the Board finds that when the initial direct deposit was made, appellant had no knowledge that this direct deposit was incorrect. Appellant, therefore, cannot be found to be at fault in the acceptance of the initial July 21, 2018 direct deposit. The case must therefore be remanded for OWCP to determine whether she is entitled to waiver of the recovery of the overpayment for the first incorrect compensation payment made on July 21, 2018.

When OWCP issued the next compensation payment on August 18, 2018, appellant should have known that she was no longer entitled to compensation as OWCP had notified her that her compensation was formally terminated, effective June 24, 2018. Therefore, the Board finds that she was at fault in the creation of the remaining period of the overpayment for the period July 22, 2018 through March 2, 2019 as she knew or should have known at the time of the second incorrect payment that she was no longer entitled to additional wage-loss compensation. Appellant had the obligation to return all payments she received after that time forward.<sup>32</sup> The Board, therefore, finds that she was at fault in the creation of the remaining period of the overpayment.

On appeal appellant asserts that she was not at fault in the creation of the overpayment as she did not know that she was paid FECA wage-loss compensation that she was not entitled to receive. As explained above, she knew or should have known by the direct deposit on August 18, 2018 that she was no longer entitled to FECA wage-loss compensation.

The Board finds that this case is not in posture for decision regarding the issue of waiver of the overpayment for the initial direct deposit made on July 21, 2018. The Board will set aside the May 1, 2018 decision regarding the issue of fault as to the initial July 21, 2018 direct deposit and will remand the case for OWCP to determine whether appellant is entitled to waiver of recover for that period of the overpayment.

### **CONCLUSION**

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of the June 15, 2018 termination decision pursuant to 5 U.S.C. § 8128(a). The Board also finds that she received an overpayment of compensation in the amount of \$16,679.93 for the period June 24, 2018 through March 2, 2019. With regard to OWCP's finding of fault, the Board finds that appellant was not at fault in the creation of the overpayment for the period June 24 through

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<sup>31</sup> See *T.N.*, *supra* note 24; *K.H.*, Docket No. 06-0191 (issued October 30, 2006).

<sup>32</sup> *T.N.*, *supra* note 24; *Sinclair L. Taylor*, 52 ECAB 442 (2001).

July 21, 2018, but was at fault in the creation of the overpayment of compensation for the period July 22, 2018 through March 2, 2019 and, therefore, precluded from waiver of recovery for that remaining period.

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 17, 2019 decision of the Office of Workers' Compensation Programs is affirmed. The May 1, 2019 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: May 27, 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