

FACTUAL HISTORY

On August 17, 2018 appellant, then a 46-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that she fractured her right ankle while in the performance of duty when her carrier fell over due to uneven pavement on a driveway. She stopped work the same day. On September 20, 2018 OWCP accepted the claim for a displaced fracture of the lateral malleolus of the right fibula.

In a work capacity evaluation (Form OWCP-5c) dated August 22, 2018, appellant's attending physician, Dr. Pat Peters, a Board-certified orthopedic surgeon, indicated that she would be unable to work for four-to-six weeks.

In a letter dated November 5, 2018, OWCP advised appellant that it had placed her on the periodic rolls and outlined her entitlement to compensation, retroactive to October 2, 2018. It notified her of her continuing compensation payments and her responsibility to return to work if she was no longer totally disabled in connection with the accepted injury. In an attached EN1049 form, OWCP provided:

“To minimize the possibility of an overpayment of compensation, NOTIFY THIS OFFICE IMMEDIATELY WHEN YOU GO BACK TO WORK. Each 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 already advised OWCP that you are working.” (Emphasis in the original.)

In a work capacity evaluation (Form OWCP-5c) dated December 11, 2018, Dr. Peters indicated that appellant could return to work with restrictions beginning December 17, 2018.

On December 18, 2018 the employing establishment offered appellant a light-duty position as a modified rural carrier. Appellant accepted the job offer on December 26, 2018. OWCP received notice from the employing establishment on December 27, 2018 advising that appellant had returned to full-time, modified work on December 26, 2018.

In a compensation termination sheet dated January 9, 2019, OWCP noted that appellant had returned to work on December 26, 2018 and received an overpayment of \$1,447.89 for the period December 26, 2018 through January 5, 2019.

In a January 24, 2019 preliminary determination, OWCP advised appellant that she had received an overpayment of compensation in the amount of \$1,447.89 for the period December 26, 2018 through January 5, 2019 because she had returned to full-time modified-duty work on December 26, 2018, but continued to receive compensation for TTD through January 5, 2019. It also made a preliminary determination that she was at fault in the creation of the overpayment because she had accepted payments that she knew, or reasonably should have known, to be incorrect. OWCP noted that, during the period December 9, 2018 through January 5, 2019, appellant received a net amount of \$3,685.55, which resulted in an overpayment in the amount of \$1,447.89 for the period December 26, 2018 through January 5, 2019. 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 prerecouplement hearing. It requested that she complete the overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documentation. OWCP afforded appellant 30 days for a response. No additional evidence concerning appellant's preliminary overpayment determination was received.

By decision dated March 11, 2019, OWCP finalized the preliminary determination, finding that appellant received an overpayment of compensation in the amount of \$1,447.89 for the period December 26, 2018 to January 5, 2019 because she had returned to full-time modified-duty work on December 26, 2018, but continued to receive compensation for TTD through January 5, 2019. It also found that appellant was at fault in the creation of the overpayment as she had accepted compensation payments she knew were incorrect. OWCP required payment in full within 30 days from the date of the decision.

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.² 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.³

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.⁴ Section 10.500 of OWCP's regulations provides that compensation for wage loss due to disability is available only for periods during which an employee's work-related medical condition prevents him or her from earning the wages earned before the work-related injury.⁵ A claimant is not entitled to receive temporary total disability (TTD) benefits and actual earnings for the same time period.⁶ 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.⁷

² 5 U.S.C. § 8102(a).

³ *Id.* at § 8129(a).

⁴ *Id.* at § 8116(a).

⁵ 20 C.F.R. § 10.500(a).

⁶ *See K.K.*, Docket No. 19-0978 (issued October 21, 2019); *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).

⁷ *K.K.*, *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).

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of wage-loss compensation in the amount of \$1,447.89 during the period December 26, 2018 to January 5, 2019 because she had returned to full-time modified-duty work on December 26, 2018, but continued to receive compensation for TTD through January 5, 2019.

The evidence of record established that appellant returned to full-time modified work for the employing establishment on December 26, 2018, but continued to receive full wage-loss compensation through January 5, 2019. As noted above, appellant was not entitled to receive compensation for total disability during a period in which she had actual earnings.⁸ Therefore, an overpayment of compensation was created in this case.

Appellant received her January 5, 2019 compensation payment, in the net amount of \$3,685.55 for the 28-day period December 9, 2018 through January 5, 2019, *via* direct deposit. OWCP correctly calculated that she received an overpayment of compensation in the amount of \$1,447.89 for the period December 26, 2018 through January 5, 2019, as she returned to work on December 26, 2018 and therefore, was only entitled to 11 days of compensation.⁹ Appellant has not challenged either the fact or amount of overpayment. Thus, the Board finds that she received an overpayment of compensation in the amount of \$1,447.89 during the period December 26, 2018 through January 5, 2019.¹⁰

LEGAL PRECEDENT -- ISSUE 2

Section 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 this subchapter or would be against equity and good conscience.¹¹ A claimant who is at fault in the creation of the overpayment is not entitled to waiver.¹² On the issue of fault 20 C.F.R. § 10.433(a) provides that an individual is at fault in the creation of an overpayment who: (1) made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or (2) failed to furnish information which the individual knew or should have known to be material; or (3) with respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect.¹³

The Board has held that an employee who receives payments from OWCP in the form of a direct electronic deposit may not be at fault the first time incorrect funds are deposited into his

⁸ *Id.*

⁹ $\$3,685.55 \div 28 = \$131.6267 \times 11 = \$1,447.89$.

¹⁰ *A.J.*, Docket No. 17-0622 (issued August 9, 2017).

¹¹ 5 U.S.C. § 8129(b).

¹² *See K.E.*, Docket No. 18-0687 (issued October 25, 2018); *Gregg B. Manston*, 45 ECAB 344, 354 (1994).

¹³ 20 C.F.R. § 10.433. *See K.E.*, *supra* note 12; *Kenneth E. Rush*, 51 ECAB 116, 118 (1999).

or her account, as the acceptance of the resulting overpayment lacks the requisite knowledge.¹⁴ 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.¹⁵ Previous cases have held that receiving one erroneous direct deposit payment does not necessarily create the requisite knowledge to find that a claimant was at fault in the creation of the overpayment.¹⁶ 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.¹⁷

ANALYSIS -- ISSUE 2

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

OWCP paid appellant compensation by direct deposit every 28 days. Appellant returned to work on December 26, 2018. OWCP paid her compensation for the period December 26, 2018 through January 5, 2019. There is no documentation or other evidence to demonstrate that appellant had clear knowledge at the time the bank received the January 5, 2019 direct deposit that the payment was incorrect.¹⁸ The Board, thus, finds that appellant was without fault in the creation of the overpayment in the amount of \$1,447.89 from December 26, 2018 through January 5, 2019.

As such, the Board will set aside the March 11, 2019 decision regarding the issue of fault, and remand the case to OWCP to determine whether appellant is entitled to waiver of recovery of the overpayment.

CONCLUSION

The Board finds that OWCP properly determined that appellant received a \$1,447.89 overpayment of compensation for the period December 26, 2018 through January 5, 2019 because she had returned to full-time modified-duty work on December 26, 2018, but continued to receive compensation for TTD through January 5, 2019. The Board further finds that OWCP improperly determined that appellant was at fault in the creation of the overpayment of compensation.

¹⁴ See *Tammy Craven*, 57 ECAB 689 (2006).

¹⁵ *D.P.*, Docket No. 17-1787 (issued July 16, 2018); *B.K.*, Docket No. 17-1562 (issued October 27, 2017).

¹⁶ *P.B.*, Docket No. 19-0329 (issued December 31, 2019); *V.S.*, Docket No. 13-1278 (issued October 23, 2013).

¹⁷ 20 C.F.R. § 10.433(b).

¹⁸ 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).

ORDER

IT IS HEREBY ORDERED THAT the March 11, 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: March 5, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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