

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

_____)	
L.T., Appellant)	
)	
and)	Docket No. 19-1389
)	Issued: March 27, 2020
U.S. POSTAL SERVICE, OLD HICKORY POST)	
OFFICE, Old Hickory, TN, Employer)	
_____)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 10, 2019 appellant filed a timely appeal from a May 23, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$1,708.67 for the period February 2 through March 2, 2019 because she continued to receive disability compensation following her return to

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the May 23, 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 evidence for the first time on appeal. *Id.*

work; and (2) whether OWCP properly determined that appellant was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment.

FACTUAL HISTORY

On March 25, 2017 appellant, then a 42-year-old mail carrier, filed a traumatic injury claim (Form CA-1) alleging that on March 21, 2017 she injured her left knee as a result of pushing a gurney of mail while in the performance of duty. She stopped work on March 30, 2017. On April 24, 2017 OWCP accepted the claim for sprains of the anterior cruciate ligament and medial collateral ligament of the left knee. It subsequently expanded acceptance of appellant's claim to include chondral fracture of the left patella and chondromalacia patellae of the left knee. OWCP paid her intermittent wage-loss compensation on the supplemental rolls as of May 24, 2017.

In a July 5, 2018 letter, OWCP advised appellant that she would be receiving wage-loss compensation on the periodic rolls and outlined her entitlement to compensation benefits and her responsibility to return to work in connection with her accepted injuries. In an attached EN1049, it further provided: “[t]o minimize the possibility of an overpayment of compensation, NOTIFY THIS OFFICE IMMEDIATELY WHEN YOU GO BACK TO WORK. For payments sent by electronic funds transfer (EFT), a notification of the date and amount of payment appears on the statement from your financial institution. You are expected to monitor your EFT deposits carefully, at least every 2 weeks. If you have worked for any portion of the period for which a deposit was made, advise OWCP immediately so that the overpayment can be collected.” (Emphasis in the original.)

On February 2, 2019 appellant accepted a modified job offer from the employing establishment to work as a limited-duty city carrier for 30 hours a week effective that date. In a February 25, 2019 letter, OWCP outlined her entitlement to compensation benefits and noted that her first payment was \$2,261.67 for the period January 6 through February 2, 2019. In an attached EN1049, it repeated the information relayed in its July 5, 2018 EN1049 regarding careful monitoring of appellant's EFT deposits.

A March 1, 2019 compensation termination worksheet indicated that for the period February 2 to March 2, 2019 appellant was paid the amount of \$2,342.82.

In a March 15, 2019 letter, OWCP indicated that the employing establishment notified it that appellant returned to alternate work as a modified mail carrier working 30 hours a week effective February 2, 2019. It stated that a final 28-day compensation payment that partially covered a period following her return to work was issued, resulting in a payment of compensation for \$2,342.82.

An April 4, 2019 OWCP supplemental rolls payment worksheet indicated that appellant had been entitled to receive \$634.15 in compensation benefits for the period February 2 through March 2, 2019.

In an April 5, 2019 manual adjustment form, OWCP noted that appellant had returned to work on February 2, 2019 and had been paid compensation on the periodic rolls through March 2, 2019. It noted that she received a net payment of \$2,342.82 for the period February 2

through March 2, 2019, and indicated that during this time period she was entitled to 42 intermittent hours. OWCP calculated that the correct entitlement for appellant during this time period was \$634.15, and further calculated that the net difference between the compensation that she was entitled to and the compensation she received was \$1,708.67.

In an April 8, 2019 preliminary determination, OWCP informed appellant that she received an overpayment of compensation in the amount of \$1,708.67 for the period February 2 through March 2, 2019, because she returned to part-time work on February 2, 2019 and received compensation for total disability through March 2, 2019. It explained that it had subtracted her actual entitlement of \$634.15 from the \$2,342.82 compensation paid. OWCP found that appellant was at fault in the creation of the overpayment because she accepted a payment that she knew or reasonably should have known, was incorrect. Additionally, it informed her that within 30 days that she could request a telephone conference, a final decision based on the written evidence, or a prerecoupment hearing. OWCP requested that appellant complete an enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documentation. Appellant did not respond.

By decision dated May 23, 2019, OWCP finalized the overpayment of compensation in the amount of \$1,708.67 for the period February 2 through March 2, 2019. It determined that appellant was at fault in the creation of the overpayment because she accepted compensation payments which she knew or should have known were incorrect. OWCP requested payment for the full amount of \$1,708.67 within 30 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 duty.³ 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.⁴

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

³ 5 U.S.C. § 8102(a).

⁴ *Id.* at § 8129(a).

instances.⁵ OWCP's procedures provide that an overpayment of compensation is created when a claimant returns to work, but continues to receive wage-loss compensation.⁶

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$1,708.67 for the period February 2 through March 2, 2019 because she continued to receive disability compensation following her return to work.

Appellant resumed part-time work on February 2, 2019 for 30 hours a week. However, OWCP continued to pay her wage-loss compensation for temporary total disability following her return to work, which resulted in an overpayment of compensation. Appellant was not entitled to receive temporary total disability benefits and actual earnings for the same time period.⁷

In its overpayment determination, OWCP calculated the amount of the overpayment by taking the amount of total disability compensation received for the February 2 through March 2, 2019, \$2,342.82, and subtracting \$634.15, the amount of wage-loss compensation that appellant was entitled to receive during that time period. Appellant has not disputed fact or amount of the overpayment. Thus, the Board finds that she received an overpayment of compensation in the amount of \$1,708.67 during the above-noted period.⁸

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of FECA provides as follows 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.⁹ No waiver of an overpayment is possible if the claimant is at fault in creating the overpayment.¹⁰

On the issue of fault, 20 C.F.R. § 10.433(a) provides that an individual is with 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; (2) failed to furnish information which the individual knew or should have known to be material; or (3) with respect to the overpaid individual

⁵ *Id.* at § 8116(a).

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

⁷ *S.N.*, Docket No. 19-1018 (issued November 12, 2019).

⁸ *See R.Q.*, Docket No. 18-0964 (issued October 8, 2019).

⁹ 5 U.S.C. § 8129(b).

¹⁰ *C.L.*, Docket No. 19-0242 (issued August 5, 2019).

only, accepted a payment which the individual knew or should have been expected to know was incorrect.¹¹

With respect to whether an individual is without fault, section 10.433(b) of OWCP regulations provide that 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.¹²

ANALYSIS -- ISSUE 2

The Board finds that OWCP improperly determined that appellant was at fault in the creation of the overpayment for February 2, 2019. The Board further finds that OWCP properly determined that she was at fault in the creation of the overpayment for the period February 3 through March 2, 2019.

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 that he or she knew or should have known that the payment was incorrect.¹³ The Board has held that an employee who receives payments 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 the acceptance of the overpayment, at the time of receipt of the direct deposit, lacks the requisite knowledge.¹⁴ 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.¹⁵

Appellant returned to work on February 2, 2019, but OWCP paid her compensation for the period January 6 through February 2, 2019 in a direct deposit payment on February 2, 2019. There is no documentation or other evidence to demonstrate that she had clear knowledge at the time the bank received the February 2, 2019 direct deposit that the payment was incorrect.¹⁶ The Board thus finds that appellant was without fault in accepting the initial direct deposit covering February 2, 2019, the first day of the period of the overpayment.

¹¹ 20 C.F.R. § 10.433(a).

¹² *Id.* at § 10.433(b).

¹³ *See C.H.*, Docket No. 19-1470 (issued January 24, 2020); *see also Claude T. Green*, 42 ECAB 174, 278 (1990).

¹⁴ *C.H., id.*; *See Tammy Craven*, 57 ECAB 589 (2006); *see also George A. Hirsch*, 47 ECAB 520 (1996).

¹⁵ *Id.*

¹⁶ *See K.E.*, Docket No. 19-0978 (issued October 25, 2018).

Although OWCP may have been negligent in making incorrect payments, this does not excuse a claimant from accepting payments he or she knew or should have known to be incorrect.¹⁷ 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, a claimant will be at fault for accepting the payments subsequently deposited. By the time of the second payment, appellant should have known that she was not entitled to the same amount of wage-loss compensation as she had received prior to her return to work on February 2, 2019.¹⁸

In the EN1049 forms dated July 5, 2018 and February 25, 2019, OWCP advised appellant that an overpayment would be created if she returned to work, but continued to receive wage-loss compensation. It informed her that she should monitor her EFT deposits carefully, and immediately advise OWCP if she worked for any portion of the period for which a deposit was made. Therefore, by the time appellant received the second direct deposit on March 2, 2019, she knew or should have known that she should not accept a payment in an amount representing temporary total disability.

The Board finds that this case is not in posture for decision regarding the issue of waiver of recovery of the overpayment for February 2, 2019. The Board will set aside the May 23, 2019 decision regarding the issue of fault for that day and remand the case to OWCP to determine whether appellant is entitled to waiver of recovery of the overpayment covering February 2, 2019.¹⁹

The Board further finds that appellant was at fault in the creation of the overpayment resulting from the remaining direct deposit payment for the period February 3 through March 2, 2019.²⁰

On appeal appellant requests a payment plan. The Board notes that it lacks jurisdiction over the issue of a payment plan as appellant is no longer receiving wage-loss compensation benefits.

CONCLUSION

The Board finds that OWCP properly determined that appellant received a \$1,708.67 overpayment of compensation for the period February 2 through March 2, 2019 because she continued to receive disability compensation following her return to work. The Board further finds that she was without fault in the creation of the overpayment for February 2, 2019, and that she was at fault in the creation of the overpayment for the period February 3 through March 3, 2019.

¹⁷ *P.B.*, Docket No. 19-0329 (issued December 31, 2019); *see C.G.*, Docket No. 15-0701 (issued December 9, 2015).

¹⁸ *Id.*

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

²⁰ *Id.*

The case will be remanded to OWCP to consider waiver of recovery of the overpayment for February 2, 2019.

ORDER

IT IS HEREBY ORDERED THAT the May 23, 2019 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part, and the case is remanded for further action consistent with this decision of the Board.

Issued: March 27, 2020
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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