

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

_____)	
T.C., Appellant)	
)	
and)	Docket No. 20-0302
)	Issued: November 12, 2020
U.S. POSTAL SERVICE, SAINT PETERS POST OFFICE, St. Peters, MO, 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 November 25, 2019 appellant filed a timely appeal from a September 24, 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 appellant received an overpayment of compensation in the amount of \$14,822.09 for the period December 28, 2018 through April 27, 2019 due to receipt of duplicate schedule award compensation; and (2) whether OWCP properly determined that

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that following the September 24, 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.*

appellant was at fault in the creation of the overpayment thereby precluding waiver of recovery of the overpayment.

FACTUAL HISTORY

On February 1, 2014 appellant, then a 35-year-old clerk, filed a notice of traumatic injury alleging that she sustained bilateral knee and back injuries on that date when she fell on ice in the employing establishment parking lot while in the performance of duty. OWCP accepted the claim for lumbosacral, cervical, bilateral knee and leg sprains, and tear of the right knee lateral meniscus. Appellant underwent an OWCP-authorized right knee arthroscopy on July 24, 2014 and an authorized left knee arthroscopy on June 1, 2017. OWCP paid her intermittent wage-loss compensation on the supplemental rolls as of March 27, 2014.

On January 19, 2019 appellant filed a claim for a schedule award (Form CA-7).

By decision dated March 6, 2019, OWCP denied appellant's schedule award claim. On April 4, 2019 appellant requested reconsideration.

An April 25, 2019 memorandum of a telephone call (Form CA-110) reflects that an OWCP representative left a voice mail for appellant informing her that there had been a computer error and that while she should have been paid for nine percent permanent impairment of the left lower extremity, approximately \$22,002.50, she may have received a payment in excess of that amount. Appellant was also advised that this was "just a courtesy call" to let her know that some monies should be kept in reserve as an overpayment would be established.

On April 26, 2019 OWCP paid appellant schedule award compensation in the net amount of \$33,310.89 for the period June 29, 2018 through March 30, 2019. On April 27, 2019 it paid her schedule award compensation in the net amount of \$3,446.00 for the period March 31 through April 27, 2019.

By decision dated May 3, 2019, OWCP granted appellant a schedule award for nine percent permanent impairment of the left lower extremity. The award was in the amount of \$21,934.80 and ran for a period of 25.92 weeks from June 29 through December 27, 2018. This decision also noted that appellant had received payment in excess of the schedule award and she would be notified of the overpayment under separate cover.

In a preliminary determination dated May 3, 2019, OWCP notified appellant that she had received an overpayment of compensation in the amount of \$14,822.09 for the period December 28, 2018 through April 27, 2019 because she was overpaid for her schedule award. It explained that she received \$14,822.09 in error because payment of her nine percent schedule award had been extended from the correct end date of December 27, 2018 to April 27, 2019, creating an overpayment for the period December 28, 2018 through April 27, 2019. OWCP advised appellant that she was without fault in the creation of the overpayment because it had created the error and it had not been shown she had actual knowledge of the calculation error. It informed her of her review rights and instructed her to complete an enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting documentation within 30 days.

In a memorandum to the file dated May 6, 2019, a claims examiner noted that appellant's schedule award was supposed to be paid for nine percent permanent impairment of the left lower

extremity, with a start date of June 29, 2018 for a period of 181.44 days (25.92 weeks) with an end date of December 27, 2018. An error extended the period of the award. As such, there was an overpayment for the period December 28, 2018 through April 27, 2019. The claims examiner noted that appellant had been paid \$33,310.89 initially and \$3,446.00 subsequently on this schedule award, totaling compensation in the amount of \$36,756.89. The total schedule award payment for 181.44 days was \$21,934.80. The difference between these two figures, \$14,822.09, represented the amount of the overpayment.

In a printout from the Automated Compensation Payment System (ACPS) dated May 2, 2019, OWCP documented that appellant had been paid an excess of \$14,822.09 for the period December 28, 2018 through April 27, 2019 over the amount to which she was entitled under the schedule award decision of May 3, 2019.

On May 16, 2019 appellant requested a decision based on the written evidence regarding possible waiver of recovery of the overpayment. She argued that she should be able to keep the overpaid amount because she was without fault in creation of the overpayment. Appellant submitted a completed Form OWCP-20 outlining her income, assets, and expenses, including supporting documentation.

OWCP issued a second preliminary determination on July 2, 2019. The overpayment amount remained the same at \$14,822.09 for the period December 28, 2018 through April 27, 2019. OWCP however advised appellant that she was at fault in the creation of the overpayment, because she accepted a payment she knew or reasonably should have known was incorrect. It noted that it had placed her on notice of the overpayment of compensation by telephone call on April 25, 2019. OWCP again informed appellant of her review rights and instructed her to complete an enclosed Form OWCP-20 with supporting documentation within 30 days.

Appellant, on July 8, 2019, requested that OWCP make a decision based on the written evidence regarding the issues of fault and waiver of recovery of the overpayment. She enclosed her prior response to OWCP's preliminary determination dated May 3, 2019.

By decision dated September 24, 2019, OWCP finalized the preliminary overpayment decision, finding that appellant was overpaid in the amount of \$14,822.09 for the period December 28, 2018 through April 27, 2019 because she received continued schedule award compensation after her schedule award had expired on December 27, 2018. It found that appellant was at fault in the creation of the overpayment, because she had received a compensation payment deposited by electronic funds transfer (EFT) and over 30 days had elapsed since the EFT deposit was made; and because the dates of the schedule award overlapped with the ending date and she had been placed on notice that she was not entitled to compensation after December 27, 2018. OWCP instructed that the overpayment be recovered in full.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provisions of FECA³ and its implementing regulations⁴ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members or functions of the body. Section 10.404 of the regulations provides that compensation is provided for specified periods of time for the permanent loss or loss of use of certain members.⁵ FECA provides for 288 weeks of compensation for 100 percent loss or loss of use of a lower extremity⁶ and the implementing regulation provides that compensation for proportionate periods of time is payable for partial loss.⁷

OWCP's procedures provide that an overpayment is created when a schedule award expires, but compensation continues to be paid.⁸

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$14,822.09 for the period December 28, 2018 through April 27, 2019.

OWCP granted appellant a schedule award for nine percent permanent impairment of the left lower extremity on May 3, 2019 for the period June 29 through December 27, 2018. The Board has reviewed the evidence of record and concludes that nine percent of the 288 weeks of compensation allowable for total loss of use of a lower extremity equals 25.92 weeks of compensation entitlement. Appellant was therefore only entitled to receive compensation through December 27, 2018. The evidence of record establishes that OWCP continued to pay appellant schedule award compensation after December 27, 2018, the date the award expired. Consequently, the \$14,822.09 in compensation received for the period December 28, 2018 through April 27, 2019 constituted an overpayment of compensation.

The Board accordingly finds that OWCP has properly determined the fact and amount of the overpayment.

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

³ *Supra* note 1 at § 8107.

⁴ 20 C.F.R. § 10.404.

⁵ *Id.*

⁶ 5 U.S.C. § 8107(c)(2).

⁷ 20 C.F.R. § 10.404.

⁸ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(c) (May 2004).

conscience.”⁹ A claimant who is at fault in the creation of the overpayment is not entitled to waiver.¹⁰ 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.¹¹

With respect to whether an individual is without fault, section 10.433(b) of OWCP’s 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 \$14,822.09 overpayment.

In *Tammy Craven*,¹³ the Board explained that an employee who receives payment 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 at the time of acceptance, which occurs at the time of receipt of the direct deposit, the employee may lack requisite knowledge. The Board has recognized that, in the case of EFTs, an employee would not receive notification of the date and amount of payment until after the deposit was made and the overpayment created.¹⁴ Because fault is defined by what the claimant knew or should have known at the time of acceptance, one of the consequences of EFTs is that the claimant lacks the requisite knowledge at the time of the first incorrect payment.¹⁵ The Board has previously also 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.¹⁶

Under the facts and circumstances of this case, the Board finds that there is no sufficient documentation or other evidence to demonstrate that appellant had knowledge at the time she received the closely timed April 26 and 27, 2019 direct deposits from OWCP that the payments

⁹ 5 U.S.C. § 8129(b).

¹⁰ See *C.Y.*, Docket No. 18-0263 (issued September 14, 2018).

¹¹ 20 C.F.R. § 10.433(a).

¹² *Id.* at § 10.433(b); see also *D.M.*, Docket No. 17-0983 (issued August 3, 2018).

¹³ Docket No. 05-0249 (issued June 20, 2005), *Order Granting Petition for Reconsideration and Reaffirming Prior Decision*, Docket No. 05-0249 (issued July 24, 2006).

¹⁴ *L.L.*, Docket No. 19-1690 (issued February 25, 2020); see *J.H.*, Docket No. 15-0195 (issued March 17, 2015).

¹⁵ *L.L.*, *id.*; *George A. Hirsch*, 47 ECAB 520 (1996).

¹⁶ *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, or that a reasonable period of time passed during which she could have reviewed bank statements or been informed of the incorrect payment. While an OWCP representative left a voice mail message for appellant on April 25, 2019 that an overpayment in some amount had been created, prior to actual payment by EFT, the schedule award decision containing the precise period and amount of the schedule award compensation to which appellant was actually entitled was not issued until May 3, 2019, after the EFT transfers had been made. Under these circumstances, the voice mail message alone is insufficient to establish that appellant knew prior to issuance of the actual schedule award decision that she had received an overpayment of compensation to which she was not entitled. The Board thus finds that appellant was without fault in the creation of the overpayment.

The Board will, therefore, reverse OWCP's finding of fault and remand the case for consideration of whether appellant is entitled to a waiver of recovery of the overpayment. After such further development as OWCP may deem necessary, it shall issue a *de novo* decision on the issue of 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 \$14,822.09 for the period December 28, 2018 through April 27, 2019 due to receipt of duplicate schedule award compensation. The Board further finds that OWCP improperly determined that appellant was at fault in the creation of the overpayment of compensation.

ORDER

IT IS HEREBY ORDERED THAT the September 24, 2019 decision of the Office of Workers' Compensation Programs is affirmed in part and reversed in part and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: November 12, 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