

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

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**M.H., Appellant**

**and**

**U.S. POSTAL SERVICE, PROCESSING &  
DISTRIBUTION CENTER, Baltimore, MD,  
Employer**

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**Docket No. 18-1452  
Issued: March 25, 2021**

*Appearances:*

*Alan J. Shapiro, Esq.*, for the appellant<sup>1</sup>  
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
PATRICIA H. FITZGERALD, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On July 24, 2018 appellant, through counsel, filed a timely appeal from a June 29, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 this case.<sup>3</sup>

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<sup>1</sup> In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

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

<sup>3</sup> The Board notes that, following the June 29, 2018 decision, OWCP received additional evidence and that appellant submitted additional evidence on appeal. 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 \$2,722.20 for the period November 7 through December 9, 2017 because OWCP paid her disability compensation after she returned to full-time 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 September 15, 2016 appellant, then a 55-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that she injured her right elbow on September 7, 2016 when she tripped over a mat while in the performance of duty. On December 19, 2016 OWCP accepted contusion of the right elbow. On March 31, 2017 it expanded the acceptance of her claim to include lateral epicondylitis of the right elbow and traumatic rupture of the right radial collateral ligament. Appellant stopped work on June 7, 2017, and Dr. Lorne Weeks, a Board-certified orthopedic surgeon, performed right elbow surgery that day. OWCP paid appellant compensation on the supplemental rolls commencing June 7, 2017 and on the periodic rolls commencing August 20, 2017.

On July 26, 2017 OWCP acknowledged receipt of appellant's direct deposit sign up form dated July 25, 2017.

By letter dated September 12, 2017, OWCP advised appellant that it had placed her on the periodic rolls and notified her of her continuing compensation payments and her responsibility to return to work if she was no longer totally disabled from work in connection with the accepted injury. An attached EN1049 form advised:

“To 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. 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 December 6, 2017 e-mail, an OWCP medical management nurse reported that appellant had returned to limited duty on November 7, 2017. In a compensation termination worksheet dated December 7, 2017, OWCP noted that appellant's compensation should have been terminated on November 7, 2017 when she returned to limited-duty work.

On May 11, 2018 OWCP notified appellant of its preliminary overpayment determination that an overpayment of compensation in the amount of \$2,722.20 had been created for the period November 7 through December 9, 2017 because she received compensation for total disability after she returned to full-time work on November 7, 2017. It provided an overpayment action request form and an overpayment recovery questionnaire (Form OWCP-20). OWCP explained its calculation of the overpayment and allotted 30 days for her to respond. The record includes an

overpayment memorandum explaining its calculations, which OWCP incorporated into its May 11, 2018 preliminary overpayment determination.

Appellant forwarded OWCP a partially completed overpayment recovery questionnaire. She asserted that she thought the compensation was for backpay and disputed the fault finding.

By decision dated June 29, 2018, OWCP finalized its preliminary overpayment determination that appellant received an overpayment of compensation in the amount of \$2,722.20 for the period November 7 through December 9, 2017 for which she was at fault because she continued to receive FECA compensation after her return to full-time work on November 7, 2017. It noted that she had not informed OWCP that she continued to receive compensation after her return to work and requested that she forward a check in the amount of \$2,722.20.

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

Section 8102 of FECA<sup>4</sup> 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>5</sup>

Section 8116(a) 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>6</sup> OWCP's regulations provide 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.<sup>7</sup> An overpayment is created when a claimant returns to work, but continues to receive wage-loss compensation.<sup>8</sup>

OWCP's procedures provide that, once an overpayment was identified, OWCP was responsible for determining whether the claimant was at fault or not at fault, in issuing its preliminary finding, and unless a hearing was requested, OWCP was responsible for issuing a final decision. These procedures noted that, if the claimant was determined to be at fault, a preliminary overpayment determination must be released (along with a Form OWCP-20) within 30 days of the date the overpayment was identified.<sup>9</sup> Both the reason that the overpayment occurred and the reason for the finding of fault must be clearly provided. A preliminary overpayment determination informs the claimant of the right to submit evidence and the right to a precoupment hearing on

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<sup>4</sup> *Supra* note 2.

<sup>5</sup> *Id.* at § 8102.

<sup>6</sup> *Id.* at § 8116(a).

<sup>7</sup> 20 C.F.R. § 10.500(a).

<sup>8</sup> *Danny E. Haley*, 56 ECAB 393 (2005); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(a) (May 2004).

<sup>9</sup> Federal (FECA) Procedure Manual, *id.* at Chapter 6.200.4(a) (May 2004).

the issue of: (a) fact and amount of overpayment; (b) fault; and (c) waiver of recovery of the overpayment. Along with the preliminary overpayment determination, OWCP was to provide a clearly written statement explaining how the overpayment was created.<sup>10</sup>

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

The Board finds that OWCP improperly determined that appellant received an overpayment of compensation in the amount of \$2,722.20 for the period November 7 through December 9, 2017.

As noted, OWCP's procedures provide that an overpayment of compensation is created when a claimant receives paid leave or wages for work, but continues to receive wage-loss compensation for temporary total disability.<sup>11</sup>

On December 6, 2017 OWCP was first placed on notice that appellant had returned to work on December 6, 2017 when a medical management nurse advised OWCP by e-mail that appellant had returned to work on November 7, 2017. As such, on December 6, 2017, an overpayment was identified. It was not until May 11, 2018, however, that OWCP issued a preliminary overpayment determination finding an overpayment in the amount of \$2,722.20 had been created for the period November 7 through December 9, 2017.

By decision dated June 29, 2018, OWCP's hearing representative finalized the preliminary overpayment determination and found appellant was at fault in the creation of the \$2,722.20 overpayment.

The Board finds that OWCP failed to follow its procedures in issuing the June 29, 2018, overpayment decision. As noted, OWCP's procedures provide that a preliminary overpayment determination must be released along with a Form OWCP-20 within 30 days of the date the overpayment is identified.<sup>12</sup> In this case, OWCP first identified the overpayment of compensation on December 6, 2017, but it did not, however, issue a preliminary overpayment determination regarding the overpayment until May 11, 2018, more than 30 days later.

The Board thus finds that OWCP failed to follow its established procedures in determining that appellant received an overpayment of compensation in the amount of \$2,722.20 had been created for the period November 7 through December 9, 2017.<sup>13</sup>

### **CONCLUSION**

The Board finds that OWCP failed to follow its established procedures in determining that appellant received an overpayment of compensation in the amount of \$2,722.20 for the period November 7 through December 9, 2017.

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<sup>10</sup> *Id.* at § 6.200.4(a)(2).

<sup>11</sup> *Id.*

<sup>12</sup> *See supra* note 9.

<sup>13</sup> In light of the Board's disposition of Issue 1, Issue 2 is rendered moot.

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 29, 2018 decision of the Office of Workers' Compensation Programs is reversed.

Issued: March 25, 2021  
Washington, DC

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

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

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