

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

FACTUAL HISTORY

On May 20, 2014 appellant, then a 33-year-old rural carrier, filed an occupational disease claim (Form CA-2) alleging that on April 19, 2014 she first realized that she sustained an injury due to repeated trauma from her work duties. The employing establishment noted that her last date of exposure was May 3, 2014. OWCP accepted the claim for conditions including: right knee joint effusion; right knee medial meniscus internal derangement; right other muscle, ligament, and fascia disorders; right osteochondritis dissecans; right old anterior cruciate ligament disruption; and right open hip and thigh wound without complications. It paid appellant wage-loss compensation beginning May 3, 2014 and placed appellant on the periodic compensation rolls effective July 27, 2014.

By letter dated August 14, 2014, OWCP advised appellant that she had been placed on the periodic rolls, outlined her entitlement to compensation benefits, and advised her of the responsibility to return to work 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. If you receive your compensation payments *via* paper check, the 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 have already advised OWCP that you are working. 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 two 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 March 8 and 22, 2016 appellant accepted modified-job offers working four hours per day with a return to work on March 8, 2016 with her hours gradually increasing to six hours on May 12, 2016 and then to eight hours per day on August 20, 2016. However, she continued to receive wage-loss compensation for two hours per day following her return to work eight hours per day during the period August 21, 2016 through June 23, 2018.³

In a December 21, 2018 preliminary overpayment determination, OWCP advised appellant that she had been overpaid \$13,426.87 for the period August 21, 2016 through June 23, 2018 because she returned to full-duty work on August 21, 2016, but continued to receive compensation for two hours per day through June 23, 2018. It also determined that appellant was at fault in the creation of the overpayment because she had accepted payment that she knew or reasonably should

³ The first payment was received by EFT deposit on September 17, 2016 and the second payment was received on October 15, 2016.

have known to be incorrect. OWCP informed appellant that she had the right to submit evidence or argument if she disagreed with its findings. It also informed her that she had a right to a prerecoupment hearing before an OWCP hearing representative. Additionally, OWCP instructed appellant to complete an enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documentation.

On January 23, 2019 OWCP received appellant's overpayment action request form and a completed Form OWCP-20. Appellant stated that she continued to attend monthly doctor appointments and physical therapy twice a week. She listed monthly income of \$2,000.00 and assets of \$500.00 in a checking account. Appellant's monthly expenses included \$800.00 for rent or mortgage, \$400.00 for food, \$200.00 for clothing, \$300.00 for utilities, and \$200.00 in miscellaneous expenses, resulting in a total of \$1,100.00 in monthly expenses. No supporting financial documentation was submitted.

By decision dated January 29, 2019, OWCP finalized its preliminary determination that appellant received an overpayment of compensation in the amount of \$13,426.87 for the period August 21, 2016 through June 23, 2018, because she returned to full-duty work on August 21, 2018, but continued to receive compensation for two hours per day through June 23, 2018. It determined that appellant was at fault in the creation of the overpayment, and thereby precluded from waiver of recovery of the overpayment. OWCP required recovery of the overpayment in full 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.⁴

Section 8116(a) of FECA provides that, while an employee is receiving compensation the employee may not receive salary, pay, or remuneration of any type from the United States, except in limited specified instances.⁵ Section 10.500 of OWCP's regulations provides that compensation for wage loss due to disability is only payable for any periods during which an employee's work-related medical condition prevents him or her from earning the wages earned before the work-related injury.⁶

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$13,426.87 for the period August 21, 2016 through June 23, 2018, because she returned to full-duty work on August 21, 2018, but continued to receive compensation for two hours per day through June 23, 2018.

⁴ 5 U.S.C. § 8102(a).

⁵ *Id.* at § 8116(a).

⁶ 20 C.F.R. § 10.500(a).

While appellant initially returned to part-time work, her work hours were increased from six hours to eight hours on August 20, 2016. However, OWCP continued to pay her wage loss for two hours of wage-loss from August 21, 2016 through June 23, 2018. Appellant was not entitled to receive two hours of wage-loss compensation after she had returned to an eight-hour workday.⁷ Thus, an overpayment of compensation was created.

OWCP calculated appellant's net compensation paid for the period August 21, 2016 through June 23, 2018 as \$13,426.87. The Board finds that she received an overpayment of compensation in the amount of \$13,426.87 for the period August 21, 2016 through June 23, 2018.

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 FECA or would be against equity and good conscience.⁸ A claimant who is at fault in the creation of the overpayment is not entitled to waiver.⁹ 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.

The Board has held that an employee who receives payments from OWCP in the form of a direct deposit may not be at fault the first time incorrect funds are deposited into his or her account, as the acceptance of the resulting overpayment lacks the requisite knowledge.¹⁰ 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.¹¹ 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.¹²

⁷ See notes 4 to 5.

⁸ 5 U.S.C. § 8129(b).

⁹ See *B.R.*, Docket No. 18-0339 (issued January 24, 2019); *K.E.*, Docket No. 18-0687 (issued October 25, 2018); *Gregg B. Manston*, 45 ECAB 344, 354 (1994); *Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

¹⁰ *A.B.*, Docket No. 18-0922 (issued January 3, 2019); *Tammy Craven*, 57 ECAB 689 (2006).

¹¹ *S.D.*, Docket No. 17-0309 (issued August 7, 2018).

¹² *D.B.*, Docket No. 15-0258 (issued February 1, 2016); *W.P.*, 59 ECAB 514 (2008).

ANALYSIS -- ISSUE 2

The Board finds that appellant was not at fault in the creation of the overpayment for the period August 21 through September 17, 2016.

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.¹³ 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. 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. 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. 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 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.¹⁴

The record establishes that appellant received compensation by direct deposit for the period August 21, 2016 through June 23, 2018. The evidence of record does not establish that, on the date of the first direct deposit of compensation following the termination of her compensation, September 17, 2016, appellant knew or should have known that she was accepting a direct deposit to which she was not entitled. The record does not contain any documentation or other evidence to demonstrate that appellant had knowledge at the time of the September 17, 2016 direct deposit covering the initial period August 21 to September 17, 2016 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 September 17, 2016 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 September 17, 2016.

The Board further finds, however, that appellant was at fault in the creation of the remaining period of the overpayment of compensation for the period September 18, 2016 through June 23, 2018 and, is thereby precluded from waiver of recovery of the overpayment for this remaining period.

By the time OWCP issued the next compensation payment on October 15, 2016 appellant should have known that she was no longer entitled to compensation, as she had returned to full-

¹³ *K.K.*, Docket No 19-0978 (issued October 21, 2019); *C.K.*, Docket No. 12-0746 (issued May 1, 2012).

¹⁴ *See K.K., id.; K.H.*, Docket No. 06-0191 (issued October 30, 2006).

time work on August 21, 2016 and the requisite period of time had passed for her review of her bank statements. Therefore, the Board finds that appellant was at fault in the creation of the remaining period of the overpayment for the period September 18, 2016 through June 23, 2018 as she knew or should have known at the time of the second incorrect payment that she was no longer entitled to wage-loss compensation for two hours per day. Appellant had the obligation to return all payments she received after that.¹⁵ 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 receiving FECA wage-loss compensation that she was not entitled. As explained above, she knew or should have known by the direct deposit on October 15, 2016 that she was no longer entitled to FECA wage-loss compensation for two hours of wage-loss compensation per day.

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 September 17, 2016. The Board will set aside the January 23, 2019 decision regarding the issue of fault as to the initial September 17, 2016 direct deposit and will remand the case for OWCP to determine whether appellant is entitled to waiver of recovery for that period of overpayment.

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$13,426.87 for the period August 21, 2016 through June 23, 2018 because she continued to receive compensation after she returned to work. The Board further finds that she was not at fault in the creation of the overpayment for the period August 21 through September 17, 2016, but was at fault in the creation of the overpayment of compensation for the period September 18, 2016 through June 23, 2018.

¹⁵ *K.K., supra* note 13; *Sinclair L. Taylor*, 52 ECAB 442 (2001).

ORDER

IT IS HEREBY ORDERED THAT the January 23, 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: March 23, 2021
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