

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

J.K., Appellant)	
)	
and)	Docket No. 20-0606
)	Issued: March 11, 2021
U.S. POSTAL SERVICE, FLORENCE POST OFFICE, Florence, AL, Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On January 22, 2020 appellant filed a timely appeal from November 15 and December 6, 2019 merit decisions 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 has met her burden of proof to establish disability from work on August 17, 2019 due to her accepted conditions; (2) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$1,189.30

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the December 6, 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.*

during the period February 21 to March 30, 2019 because she was paid disability compensation after she returned to part-time work; and (3) whether OWCP properly found appellant at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment.

FACTUAL HISTORY

On September 25, 2018 appellant, then a 32-year-old city carrier assistant, filed a traumatic injury claim (Form CA-1) alleging that she was injured in a motor vehicle accident (MVA) the previous day while in the performance of duty. She stopped work on September 24, 2018. OWCP accepted the claim for closed fractures of the right foot and right patella, fracture of the left orbital floor, fracture of nasal bones, concussion without loss of consciousness, mechanical complication of internal fixation device of right leg bone, complete loss of teeth due to trauma, post-traumatic osteoarthritis of the right ankle and foot, and other joint disorders of the right ankle and foot.

In an October 11, 2018 acceptance letter, OWCP advised appellant of her responsibilities regarding any return to work in connection with her accepted injuries and noted that she should notify OWCP immediately of a return to work. It related that for payments sent by electronic funds transfer (EFT), a notification of the date and amount of payment would appear on the statement from her financial institution, and she was expected to monitor the EFT deposits carefully, at least every two weeks. If she had worked for any portion of the period for which a compensation deposit was made, appellant was to advise OWCP immediately so that an overpayment could be collected. OWCP paid her wage-loss compensation on the supplemental rolls as of November 10, 2018 and on the periodic rolls as of January 6, 2019.

On February 21, 2019 appellant returned to modified-duty work for two hours daily.

On March 2, 2019 OWCP paid appellant wage-loss compensation on the periodic rolls for the period February 3 to March 2, 2019. On March 30, 2019 it paid her wage-loss compensation on the periodic rolls for the period March 3 to 30, 2019.

On April 26, 2019 OWCP issue a preliminary determination, finding that an overpayment of compensation had been created for the period February 21 through March 30, 2019 in the amount of \$2,607.45. It explained that the overpayment occurred because appellant was paid disability compensation after she returned to modified part-time work on February 21, 2019. OWCP found her at fault in the creation of the overpayment because she accepted a payment she knew or should have known was incorrect. It asked appellant to verify her actual earnings for the overpayment period, and informed her of her appeal rights. OWCP provided an overpayment action request form and an overpayment recovery questionnaire (Form OWCP-20). It requested that appellant provide documentation including income tax returns, bank account statements, bills and cancelled checks, pay slips, and any other records which supported income and expenses listed, and allotted her 30 days to respond.

On April 29, 2019 appellant requested a prerecoupmnt hearing before a representative of OWCP's Branch of Hearings and Review. She attached a completed Form OWCP-20 which listed no monthly income, no additional funds or assets, and monthly expenses of \$2,890.00. No supporting financial documentation was received.

By decision dated June 5, 2019, an OWCP hearing representative found that, following preliminary review, the case was not in posture for decision because additional information was needed regarding the number of hours appellant worked for the period February 21 through March 30, 2019. On remand OWCP was directed to document the number of hours appellant worked for this period, and then recalculate the amount of the overpayment.

On June 10, 2019 the employing establishment forwarded documentation showing the number of hours appellant worked from February 16 to March 22, 2019.

By report dated July 1, 2019, Dr. A. John Young, a Board-certified orthopedic surgeon, indicated that appellant had reflex sympathetic dystrophy of the right foot. He advised that she was limited to an eight-hour workday with limited standing and walking. Dr. Young related that he would evaluate appellant again in a routine follow up after three months, unless she required additional evaluation. The record reflects that appellant again sought treatment with Dr. Young on September 25, 2019. Dr. Young advised that appellant should continue restricted duty until evaluated by a foot/ankle specialist.

On July 3, 2019 the employing establishment forwarded additional information regarding the number of hours appellant worked. It indicated that during pay period 5, from February 16 through 22, 2019, she worked 5 hours with actual pay of \$91.45; from February 23 through March 1, 2019, she worked 13.21 hours for actual pay of \$241.61; from March 2 through 8, 2019 she worked 12.25 hours for actual pay of \$224.05; from March 9 through 15, 2019 she worked 10 hours for actual pay of \$182.90; and from March 16 through 22, 2019 she worked 10 hours for actual pay of \$182.90. The employing establishment indicated that appellant did not work from March 23 through 30, 2019. It also noted that she had taken 37 hours of annual leave, during an unspecified period, which equated to \$676.73.

Overpayment worksheets of record indicate that for the period February 21 to March 30, 2019, a period of 38 days, appellant was paid gross FECA compensation of \$2,642.93 with a miscellaneous deduction of \$35.48 for net compensation of \$2,607.45. OWCP noted that she had received gross pay from the employing establishment of \$1,599.64 for a daily rate of \$42.10. It applied the *Shadrick* formula³ and noted that the current weekly pay rate for the job when injured was \$649.14, and that appellant's actual weekly earning capacity was \$294.67. Appellant therefore had 45 percent wage-earning capacity, which resulted in a weekly wage-earning capacity of \$292.11, and a weekly loss of wage-earning capacity of \$357.03. Her weekly compensation rate, when multiplied by the augmented compensation rate totaled \$267.77 and her four-week compensation amount equaled \$1,071.09, a daily rate of \$38.25. This daily rate multiplied by 38 yielded gross compensation due of \$1,453.63 less a miscellaneous deduction of \$35.48, for net compensation of \$1,418.15. OWCP deducted \$1,418.15 (the compensation she should have received) from \$2,607.45 (the compensation she actually received), which yielded an overpayment of compensation in the amount of \$1,189.30.

On July 23, 2019 OWCP issued a preliminary determination, finding that an overpayment of compensation had been created for the period February 21 through March 30, 2019 in the amount of \$1,189.30. It explained that the overpayment occurred because appellant was paid

³ *Albert C. Shadrick*, 5 ECAB 376 (1953).

disability compensation after she returned to part-time work on February 21, 2019. OWCP found her at fault in the creation of the overpayment because she accepted a payment she knew or should have known was incorrect. It informed appellant of the actions she could take and provided an overpayment action request form and a Form OWCP-20 for her completion. OWCP requested that she provide supporting documentation including income tax returns, bank account statements, bills and cancelled checks, pay slips, and any other records, and allotted her 30 days to respond.

In an undated overpayment action request received by OWCP on August 15, 2019, appellant requested a prerecoupment hearing by teleconference. She indicated that the overpayment occurred through no fault of her own and requested waiver of recovery. Appellant attached a completed Form OWCP-20. It listed unspecified monthly income of \$3,000.00 and monthly expenses of \$3,110.00. Itemized expenses included \$550.00 for rent or mortgage, \$1,000.00 for food, \$500.00 for clothing, \$400.00 for utilities, \$300.00 for miscellaneous expenses, and \$360.00 for a bank loan. Appellant noted cash on hand of \$10.00. She attached a bank statement that documented deposits and withdrawals from June 14 to July 15, 2019.

Relevant medical evidence indicates that on August 22, 2019 appellant received authorized dental treatment from Dr. Patrick R. Wilson, D.M.D., who discussed appellant's clinical examination and recommended dental surgery.

Appellant continued to receive intermittent FECA compensation for medical appointments. On September 9, 2019 she filed a claim for compensation (Form CA-7) for disability from work for the period August 17 to 30, 2019. In an accompanying time analysis form (Form CA-7a) appellant claimed eight hours wage loss for "foot pain" on August 17, 2019 and eight hours of wage loss for a "doctor's appointment" on August 22, 2019.

By development letter dated September 20, 2019, OWCP informed appellant that the evidence submitted was insufficient to establish her claim for wage-loss compensation on August 17 and 22, 2019. It informed her of the evidence needed to establish her claim.

A hearing was held telephonically on November 5, 2019 regarding the preliminary overpayment decision. Appellant testified regarding her claimed expenses.

In a letter dated November 15, 2019, OWCP informed appellant that her claim was not payable in its entirety. It noted that it had authorized payment for four hours on August 22, 2019. OWCP advised that if appellant was claiming compensation for more than four hours to obtain medical care she should submit documentation to support her claim for additional hours. Appellant was also advised that she would be afforded 30 days to submit the requested information for the remaining dates claimed. On November 20, 2019 OWCP processed payment for four hours of compensation on August 22, 2019.

By decision dated November 15, 2019, OWCP denied appellant's claim for compensation or disability from work on August 17, 2019.

By decision dated December 6, 2019, OWCP's hearing representative finalized the preliminary overpayment determination, finding that appellant had received an overpayment of compensation in the amount of \$1,189.30 for which she was at fault in the creation of the overpayment because she continued to receive wage-loss compensation after her return to part-

time work. She discussed appellant's income and expenses, noting that she had not documented her claimed expenses for food and clothing. The hearing representative required recovery of the overpayment at \$100.00 per month.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA⁴ has the burden of proof to establish the essential elements of his or her claim by the weight of the reliable, probative, and substantial evidence, including the fact that the individual is an employee of the United States within the meaning of FECA, that the claim was timely filed within the applicable time limitation period of FECA, that an injury was sustained in the performance of duty as alleged, and that any disability or medical condition for which compensation is claimed is causally related to the employment injury.⁵ These are the essential elements of every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.⁶

Under FECA, the term "disability" means the incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.⁷ Disability is thus not synonymous with physical impairment, which may or may not result in an incapacity to earn wages. An employee who has a physical impairment causally related to a federal employment injury, but who nevertheless has the capacity to earn the wages he or she was receiving at the time of injury, has no disability as that term is used in FECA.⁸

For each period of disability claimed, the employee has the burden of proof to establish that he or she was disabled from work as a result of the accepted employment injury.⁹ Whether a particular injury causes an employee to become disabled from work, and the duration of that disability, are medical issues that must be proven by a preponderance of reliable, probative and substantial medical opinion evidence.¹⁰

The Board will not require OWCP to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability for which compensation is

⁴ *Supra* note 1.

⁵ *A.B.*, Docket No. 18-0834 (issued June 11, 2020); *N.S.*, 59 ECAB 422 (2008).

⁶ *Id.*

⁷ 20 C.F.R. § 10.5(f); *see J.M.*, Docket No. 18-0763 (issued April 29, 2020); *B.K.*, Docket No. 18-0386 (issued September 14, 2018).

⁸ *See B.C.*, Docket No. 18-0692 (issued June 5, 2020).

⁹ *See C.E.*, Docket No. 19-1617 (issued June 3, 2020).

¹⁰ 20 C.F.R. § 10.5(f); *see W.C.*, Docket No. 19-1740 (issued June 4, 2020); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

claimed. To do so, would essentially allow an employee to self-certify their disability and entitlement to compensation.¹¹

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met her burden of proof to establish total disability from work on August 17, 2019 due to her accepted conditions.

Appellant claimed eight hours of wage-loss compensation for disability from work on August 17, 2019 due to “foot pain.”

In support of her claim, appellant submitted a July 1, 2019 report from Dr. Young, who advised that she was limited to an eight-hour workday with limited standing and walking. In a September 25, 2019 report, Dr. Young advised that she should continue restricted duty until evaluated by a foot/ankle specialist. Dr. Young did not address whether appellant was disabled from work on August 17, 2019.

As noted, the Board will not require OWCP to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability for which compensation is claimed.¹² As the medical evidence of record does not address the claimed date of disability, the Board finds that appellant has not met her burden of proof.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

LEGAL PRECEDENT -- ISSUE 2

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.¹³ 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.¹⁴

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

¹¹ *J.K.*, Docket No. 19-0488 (issued June 5, 2020); *Sandra D. Pruitt*, 57 ECAB 126 (2005).

¹² *Supra* note 11.

¹³ 5 U.S.C. § 8102(a).

¹⁴ *Id.* at § 8129(a).

instances.¹⁵ OWCP's procedures provide that an overpayment of compensation is created when a claimant returns to work, but continues to receive wage-loss compensation.¹⁶

ANALYSIS -- ISSUE 2

The Board finds that appellant received an overpayment of compensation in the amount of \$1,189.30 for the period February 21 through March 30, 2019 because she continued to receive wage-loss compensation for total disability after she returned to part-time work.

Appellant resumed part-time employment on February 21, 2019. OWCP, however, continued to pay her wage-loss compensation for total disability following her return to work. Appellant was not entitled to receive temporary total disability benefits and actual earnings for the same time period.¹⁷ The Board thus finds that appellant received an overpayment of compensation.

In determining the amount of overpayment, OWCP properly calculated the net amount of disability compensation that appellant should have received from February 21 through March 30, 2019, which it subtracted from the amount of compensation she actually received, to yield \$1,189.30. Thus, the Board finds that appellant received an overpayment of compensation in the amount of \$1,189.30 during the above-noted period.¹⁸

LEGAL PRECEDENT -- ISSUE 3

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.¹⁹ 20 C.F.R. § 10.433(a) provides that no waiver of recovery of an overpayment is possible if the claimant is at fault in the creation of the overpayment.²⁰

On the issue of fault, section 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

¹⁵ *Id.* at § 8116(a).

¹⁶ *B.W.*, Docket No. 19-0239 (issued September 18, 2020); *K.K.*, Docket No. 19-0978 (issued October 21, 2019); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Determinations in an Overpayment*, Chapter 6.300.4(g) (September 2018).

¹⁷ *L.T.*, Docket No. 19-1389 (issued March 27, 2020); *S.N.*, Docket No. 19-1018 (issued November 12, 2019).

¹⁸ *See A.D.*, Docket No. 19-1411 (issued March 2, 2020).

¹⁹ 5 U.S.C. § 8129(b).

²⁰ 20 C.F.R. § 10.433(a); *see B.W.*, *supra* note 16.

only, accepted a payment which the individual knew or should have been expected to know was incorrect.²¹

With respect to whether an individual is without fault, section 10.433(b) of OWCP regulations provides 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.²²

ANALYSIS -- ISSUE 3

The Board finds that OWCP improperly determined that appellant was at fault in the creation of the overpayment for the period February 21 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.²³ 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.²⁴ Because fault is defined by what the claimant knew or should have known at the time of acceptance, one of the consequences of EFT is that the claimant lacks the requisite knowledge at the time of the first incorrect payment.

Appellant resumed part-time employment on February 21, 2019. OWCP paid her compensation for the period February 21 through March 2, 2019 *via* a direct deposit payment on March 2, 2019. There is no documentation to demonstrate that appellant had clear knowledge at the time she received the March 2, 2019 direct deposit that the payment was incorrect.²⁵ The Board therefore finds that this case is not in posture for decision regarding the issue of waiver of recovery of the overpayment for the period February 21 through March 2, 2019. The Board will set aside the December 6, 2019 decision with regard to the issue of fault for that period and remand the case to OWCP to determine whether appellant is entitled to waiver of recovery of the overpayment covering the period February 21 through March 2, 2019 followed by a *de novo* decision on waiver.²⁶ The Board further finds, however, that OWCP properly found appellant at fault in the creation of the overpayment for the period March 3 through 30, 2019.

²¹ *Id.*

²² *Id.* at § 10.433(b).

²³ *See B.W.*, *supra* note 16.

²⁴ *Id.*; *Tammy Craven*, 57 ECAB 589 (2006).

²⁵ *See E.N.*, Docket No. 19-1687 (issued May 27, 2020).

²⁶ *See M.P.*, Docket No. 20-1035 (issued December 1, 2020); *L.T.*, Docket No. 19-1389 (issued March 27, 2020).

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.²⁷ 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.²⁸ By the time of the second payment made on March 30, 2019, 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 21, 2019.²⁹

On October 11, 2018 OWCP advised appellant that an overpayment would be created if she returned 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, issued on March 30, 2019 covering the period March 3 to 30, 2019, she knew or should have known that the continued payment was incorrect. The Board therefore finds that OWCP properly found that she was at fault in the creation of the overpayment from March 3 to 30, 2019.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish total disability from work on August 17, 2019. The Board further finds that appellant received an overpayment of compensation in the amount of \$1,189.30 for the period February 21 to March 30, 2019 because she continued to receive wage-loss compensation after she returned to work. The Board also finds that she was not at fault in the creation of the overpayment from February 21 through March 2, 2019, but was at fault in the creation of the overpayment for the period March 3 through 30, 2019. The case will be remanded to OWCP to consider waiver of recovery of the overpayment for the period February 21 through March 2, 2019.

²⁷ See *B.W.*, *supra* note 16; *P.B.*, Docket No. 19-0329 (issued December 31, 2019).

²⁸ See *L.T.*, *supra* note 17.

²⁹ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the November 15, 2019 decision of the Office of Workers' Compensation Programs is affirmed. The December 6, 2019 decision is affirmed in part and set aside in part, and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: March 11, 2021
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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