

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

S.S., Appellant)	
)	
and)	Docket No. 20-0776
)	Issued: March 15, 2021
DEPARTMENT OF VETERANS AFFAIRS,)	
MANN-GRANDSTAFF VETERANS AFFAIRS)	
MEDICAL CENTER, Spokane, WA, 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 February 19, 2020 appellant filed a timely appeal from a December 12, 2019 merit decision and a January 22, 2020 nonmerit 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 \$1,094.07 for the period July 9 through 20, 2019 because she received wage-loss compensation for total disability after she had returned to part-time work; (2) whether OWCP

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the January 22, 2020 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.*

properly determined that appellant was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment; and (3) whether it properly denied appellant's request for a prerecoumpment hearing as untimely filed.

FACTUAL HISTORY

On May 1, 2018 appellant, then a 55-year-old registered nurse, filed a traumatic injury claim (Form CA-1) alleging that on April 30, 2018 she sustained bilateral knee, head, and back injuries when she fell forward while attempting to unjam a Xerox photocopy machine. OWCP accepted the claim for right knee contusion and neck muscle, fascia, and tendon strain, and subsequently expanded acceptance of the claim to include thoracic ligaments sprain, and permanent cervical disc aggravation. It paid appellant intermittent wage-loss compensation on the supplemental rolls for the period June 15, 2018 through March 30, 2019 and on the periodic rolls for the period March 31 through July 20, 2019.

In a letter dated April 9, 2019, OWCP advised appellant that she would be paid on the periodic rolls, outlined her entitlement to compensation benefits, and advised her of her responsibility to return to work in connection with the accepted injury. In an attached EN-1049 form, it related:

“OVERPAYMENTS: 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.)

In a report dated July 8, 2019, Ann Mikel, a registered nurse, the field nurse assigned to appellant's claim noted that appellant returned to light-duty work for four hours per day for two weeks on June 27, 2019, which would increase to six hours per day for two weeks, and then increase to eight hours per day.

The record reflects that on July 20, 2019 appellant was paid wage-loss compensation on the periodic rolls for the period June 23 through July 20, 2019.

Appellant filed a claim for intermittent wage-loss compensation (Form CA-7) for the period July 7 through 20, 2019. On the reverse side of the claim form the employing establishment noted that she was working reduced hours and performing limited duties. In an attached time analysis form (Form CA-7a), appellant noted that on July 8, 2019 she had used eight hours of leave without pay (LWOP) because she had not been released to return to duty work, and that she had worked four hours per day and taken four hours of LWOP for the period July 9 through 19, 2019.

In an amended August 7, 2019 fiscal form, OWCP noted that appellant had returned to part-time work on July 9, 2019, but that it continued to pay her compensation for temporary total disability through July 20, 2019. On August 7, 2019 it calculated that she had been overpaid in the amount of \$1,094.07 for the days she received compensation following her return to part-time work on July 9, 2019. OWCP noted that, during this period, appellant had been paid a net payment of \$2,605.98, but she was only entitled to receive a net payment of \$1,511.91 resulting in an overpayment of compensation in the amount of \$1,094.07.

On August 29, 2019 OWCP advised appellant of its preliminary determination that she had received an overpayment of compensation in the amount of \$1,094.07 for the period July 9 through 20, 2019 because she returned to part-time employment on July 9, 2019, but received wage-loss compensation for total disability through July 20, 2019. It further notified her of its preliminary finding that she 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, OWCP informed appellant that, within 30 days, she could request a telephonic conference, a final decision based on the written evidence, or a prerecoumment hearing. It requested that she complete an enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documentation. There was no response from appellant.

By decision dated December 12, 2019, OWCP finalized its preliminary determination that appellant received an overpayment of compensation in the amount of \$1,094.07 for the period July 9 through 20, 2019.³ It determined that she was at fault in the creation of the overpayment and was therefore precluded from waiver of recovery of the overpayment. OWCP required repayment in full within 30 days.

On December 31, 2019 OWCP received appellant's September 5, 2019 request for a prerecoumment telephonic hearing before an OWCP hearing representative, postmarked December 20, 2019.

By decision dated January 22, 2020, OWCP denied appellant's request for a prerecoumment hearing as she did not request a prerecoumment telephonic hearing within 30 days of the preliminary overpayment finding. It also noted that a final overpayment decision was not subject to the hearing provisions of 5 U.S.C. § 8124(b).

LEGAL PRECEDENT -- ISSUE 1

Section 8102 of FECA⁴ 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.⁵

Section 8116 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

³ OWCP noted the period as June 23 through July 20, 2019, but calculated the overpayment based on appellant's July 9, 2019 return to work.

⁴ *Supra* note 1 at § 8102.

⁵ *Id.* at § 8116.

not receive salary, pay, or remuneration of any type from the United States, except in limited circumstances.⁶ OWCP's procedures provide that an overpayment in compensation is created when a claimant returns to work, but continues to receive wage-loss compensation.⁷

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation for the period July 9 through 20, 2019.

The evidence of record establishes that appellant returned to work in a modified position at the employing establishment for four hours a day on July 9, 2019, but she continued to receive wage-loss compensation for temporary total disability through July 20, 2019. As noted above, a claimant is not entitled to receive compensation for total disability during a period in which he or she had actual earnings. Therefore, an overpayment of compensation was created in this case.⁸

In determining the amount of overpayment, OWCP calculated the net amount of disability compensation that appellant had received from July 9 through 20, 2019. It properly determined that she had been paid a net payment of \$2,605.98, but was only entitled to receive a net payment of \$1,511.91 resulting in an overpayment of \$1,094.07. Thus, the Board finds that she received an overpayment of compensation in the amount of \$1,094.07 during the above-noted period.

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 recovery of an overpayment is possible if the claimant is at fault in the creation of 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 only, accepted a payment which the individual knew or should have been expected to know was incorrect.¹¹

⁶ *Id.* at § 8116(a).

⁷ C.A., Docket No. 18-0092 (issued April 2, 2018); *Danny E. Haley*, 56 ECAB 393 (2005); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Action*, Chapter 6.200.2(a) (September 2018).

⁸ *Id.*

⁹ 5 U.S.C. § 8129(b).

¹⁰ *B.W.*, Docket No. 19-0239 (issued September 18, 2020); *C.L.*, Docket No. 19-0242 (issued August 5, 2019).

¹¹ 20 C.F.R. § 10.433(a).

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.¹²

ANALYSIS -- ISSUE 2

The Board finds that OWCP improperly determined that appellant was at fault in the creation of the overpayment from July 9 through 20, 2020.

In cases where a claimant receives compensation through direct deposit, the Board has held that OWCP must establish that at the time the 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 a claimant 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 EFT deposits is that the claimant lacks the requisite knowledge at the time of the first incorrect payment.¹⁵

Appellant returned to work on July 9, 2019. OWCP paid her compensation for the period July 9 through 20, 2019 in a direct deposit payment on July 20, 2019. There is no documentation to demonstrate that appellant had clear knowledge at the time the bank received the July 20, 2019 direct deposit that the payment was incorrect.¹⁶ The Board thus finds that she was without fault in accepting the initial direct deposit covering the period July 9 through 20, 2019.

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 July 9 through 20, 2019. The Board will set aside the December 12, 2019 decision regarding 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 July 9 through 20, 2019.¹⁷

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$1,094.07 for the period July 9 through 20, 2019, because she continued to receive wage-loss compensation after she returned to part-time work. The Board further finds that she was without

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 B.W.*, *supra* note 10; *K.E.*, Docket No. 19-0978 (issued October 25, 2018).

¹⁷ *M.P.*, Docket No. 20-1035 (issued December 1, 2020).

fault in the creation of the overpayment and the case will be remanded to OWCP to consider waiver of recovery of the overpayment.¹⁸

ORDER

IT IS HEREBY ORDERED THAT the January 22, 2020 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part. The December 12, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: March 15, 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

¹⁸ In light of the Board's disposition of issue 2, issue 3 is rendered moot.