United States Department of Labor
Employees' Compensation Appeals Board

M.S., Appellant	)	
and	)	**Docket No. 20-0676**
	)	**Issued: May 6, 2021**
U.S. POSTAL SERVICE, RINCON STATION POST OFFICE, Tucson, AZ, 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 6, 2020 appellant filed a timely appeal from October 3 and December 13, 2019 merit decisions of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (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 OWCP met its burden of proof to terminate appellant's wage-loss compensation and entitlement to a schedule award, effective October 3, 2019, as she refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2); (2) whether appellant received an overpayment of compensation in the amount of $1,028.45 for the period October 3 through 12,

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that OWCP received additional evidence following the December 13, 2019 decision. 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.*

2019, because she continued to receive wage-loss compensation after the termination of her wage-loss benefits; and (3) 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 January 8, 2016 appellant, then a 55-year-old city carrier, filed an occupational disease claim (Form CA-2) alleging that she sustained a hand condition due to repeated trauma caused by casing and carrying mail while in performance of duty. OWCP accepted the claim for right hand synovitis and tenosynovitis, and primary osteoarthritis of the right hand. It paid appellant wage-loss compensation on the supplemental rolls, effective October 29, 2016, and then on the periodic rolls, effective April 2, 2017.

In a May 4, 2018 report, Dr. Mark A. Braunstein, a Board-certified orthopedic surgeon, noted that appellant had a triangular fibrocartilage complex (TFCC) tear of the right wrist. He explained that the tear developed from overuse at work while performing repetitive activities sorting mail, resulting in micro tears in her TFCC that led, over time, to a full thickness TFCC tear. Appellant's condition resulted in the need for a right wrist arthroscopy with debridement, which she underwent on January 3, 2018. Dr. Braunstein opined that appellant was disabled from work from October 29, 2016 to the present, as she was still recovering from her surgical procedure. He explained that she could not grip or hold any objects, which was an important function of her job duties, and that she still required additional time for recovery to improve mobility and force grip.

On September 28, 2018 OWCP referred appellant for a second opinion examination with Dr. Michael A. Steingart, an osteopathic physician specializing in sports medicine, to assess the extent of appellant's injury, periods of total temporary disability, treatment recommendations, and work restrictions.

In a November 13, 2018 report, Dr. Steingart noted appellant's history of injury and medical treatment. He related that she had undergone an authorized surgical procedure on February 23, 2017 for right second metacarpophalangeal joint replacement, and right de Quervain's tenosynovitis release, and that she had undergone right wrist arthroscopy on January 3, 2018 for TFCC debridement. Dr. Steingart opined that further diagnostic testing was unnecessary as the surgery for her work-related conditions was successful. He advised that appellant could perform a sedentary job, but would not be able to case mail or do a lot of lifting based on index finger metacarpocarpal joint replacement. Dr. Steingart noted some inherent weakness in the finger to grip and handle and utilizing the hand itself. He noted that appellant continued to suffer residuals of weakness of the hand as a joint replacement of the index finger would not necessarily make the finger new again nor would repair of the de Quervain's make her able to resume a repetitive job. Dr. Steingart opined that the TFCC condition was age related and would "not have much of an effect on her job at this time." He found that appellant had reached maximum medical improvement (MMI) and no further treatment was necessary. In response to whether appellant was capable of returning to work, Dr. Steingart explained that she was not totally disabled due to her finger issue or her de Quervain's, that the TFCC tear was very common, and that he had "never seen anybody disabled from a TFCC tear." He opined that appellant was not totally disabled and was capable of working in a sedentary to light-duty job without repetitive activities and was capable of participating in vocational rehabilitation.

In a November 15, 2018 work capacity evaluation (Form OWCP-5c), Dr. Steingart indicated that appellant could not perform her usual job without restrictions. He advised that she could perform sedentary or light work. Appellant's restrictions were related as no operating a motor vehicle, up to four hours of repetitive movements of the wrists, pushing, pulling, and lifting 10 pounds for four to six hours, and up to six hours of climbing. Dr. Steingart indicated that appellant had reached MMI and her restrictions would be indefinite.

By letter dated November 28, 2018, OWCP advised appellant that she had been referred to vocational rehabilitation to assist her to return to work within her medical restrictions.

In an April 10, 2019 report, Dr. Braunstein noted that he had reviewed Dr. Steingart's report and concurred that appellant was unable to perform repetitive activities and that she could not case mail. He indicated that he disagreed with the restrictions on the OWCP-5c form, which indicated that appellant could perform up to four hours of repetitive activities. Dr. Braunstein opined that appellant "is limited from doing any repetitive wrist movements whatsoever and is only allowed to lift 10 pounds."

On April 12, 2019 OWCP requested clarification from the second opinion physician regarding his assessment of appellant's work tolerance limitations.

In an April 15, 2019 report, Dr. Steingart explained that he had previously related that appellant could work in a sedentary job, but that she should avoid repetitive activities. He specifically noted that appellant should not case mail or lift anything heavy. Dr. Steingart again advised that appellant could not operate a motor vehicle, but could engage in repetitive motions of the wrists, limited to four hours per day, push and pull up to 10 pounds, four to six hours per day, lift up to 10 pounds, four to six hours per day, and climb six hours. He specified the limitations were based on the index finger, the wrist, and the hand.

In a letter dated May 9, 2019, addressed to the treating physician, Dr. Braunstein, OWCP requested that he review the April 15, 2019 report with clarified restrictions from Dr. Steingart and provide a response within 20 days. It also requested that Dr. Braunstein complete a Form OWCP-5c listing appellant's work restrictions. OWCP did not receive a response.

On May 30, 2019 the employing establishment offered appellant a position as a modified city carrier. The duties included: assisting customer at window in lobby providing verbal information and directions for six to seven hours per day; safety observations, intermittently observing inside work areas and outside areas for potential safety hazards and reporting to management for one to three hours per day; and answering telephones intermittently for zero to one hour per day. The physical requirements included: sitting/walking/standing and changing positions as needed for up to eight hours; zero to rare repetitive movement of the right wrist (per IME limit of four hours per day); occasionally pushing, pulling, and lifting no more than 10 pounds intermittently from one to four hours per day; no heavy lifting, intermittent simple grasp, nonrepetitive up to four hours per day; no casing mail; and no driving work vehicle.

On June 24, 2019 appellant rejected the job offer and noted "medical restricted" and "can't have any repetitive motion."

In a letter dated June 26, 2019, the employing establishment confirmed that the job offer remained available and was indefinite, and that appellant had refused the offer. It also indicated

that the position did not require repetitive right-hand movements and all duties were self-paced and intermittent.

By notice dated July 15, 2019, OWCP advised appellant that it had determined that appellant had refused or failed to report to the offered position as a modified city carrier. It informed appellant that it had reviewed the offered position and found that it was suitable and in accordance with the restrictions provided by Dr. Steingart. Pursuant to 5 U.S.C. § 8106(c)(2), OWCP afforded her 30 days to accept the position or provide reasons for the refusal. It informed appellant that an employee who refuses an offer of suitable work without cause is not entitled to wage-loss or schedule award compensation.

In an August 10, 2019 response to the proposed job offer, appellant noted that the job offer included, "rare repetitive motion" and argued that Dr. Steingart provided contradictory opinions. She noted that Dr. Steingart completed the Form OWCP-5c on November 13, 2018 and noted that she could perform four hours of repetitive wrist movements, which was directly contrary to his opinion that she was unable to perform repetitive activities.

By notice dated September 12, 2019, OWCP informed appellant her reasons for refusal of the offered job were not valid. It confirmed that the offered position remained available and provided her 15 days to accept the position or have her benefits terminated.

In a response dated September 17, 2019, appellant argued that OWCP did not properly take into account Dr. Steingart's work capacity evaluation form, which indicated "[a]t this time, she could be working in a sedentary to a light-duty job without repetitive activities." She enclosed a November 5, 2017 Form OWCP-5c from Dr. John R. Klein, a Board-certified orthopedic surgeon. Dr. Klein advised that appellant was able to perform zero hours of repetitive work. Appellant argued that the job was unsuitable because she could not perform repetitive work.

In an October 3, 2019 letter, the employing establishment confirmed that the job offer remained available and noted that there were "no repetitive movements with the duties of the job offer. All are self-paced and intermittent." The employing establishment further indicated that they were "continuing to work with and accommodate [appellant] per the second opinion examination restrictions listed on the [Form OWCP-5c]."

By decision dated October 3, 2019, OWCP terminated appellant's wage-loss compensation and entitlement to schedule award benefits, effective October 3, 2019, based on her refusal of suitable work. It explained that Dr. Steingart provided a well-reasoned opinion as to appellant's current work limitations and the employing establishment offered her a job well within those restrictions.

In an October 15, 2019 memorandum of telephone call, the employing establishment confirmed that appellant returned to work on October 8, 2019.

In a preliminary overpayment letter dated November 12, 2019, OWCP notified appellant that she had received an overpayment of compensation in the amount of $1,028.45 because she received wage-loss compensation during the period October 3 through 12, 2019, despite the fact that her compensation was terminated on October 3, 2019. It found her at fault because she accepted a payment that she knew, or reasonably should have known, to be incorrect.

In the accompanying overpayment memorandum, OWCP noted that, for the period October 3 to 12, 2019, appellant was paid a wage-loss compensation gross benefit of $1,283.22, minus health benefit cost of $126.60, life insurance of $78.37, and dental/vision of $49.80, resulting in net compensation of $1,028.45. It also noted that on October 12, 2019 an electronic deposit in the amount of $2,879.65 was deposited into her checking account. OWCP explained that $1,028.45 of that amount was based on the net compensation paid for the period October 3 to 12, 2019, and that appellant was not entitled to disability compensation as of October 3, 2019. It found that appellant was at fault in the creation of the overpayment because she accepted a payment she knew or reasonably should have known, to be incorrect. OWCP enclosed an overpayment recovery questionnaire (Form OWCP-20) for her completion, advised appellant of her appeal rights, and afforded her 30 days to respond. No further evidence was received.

By decision dated December 13, 2019, OWCP finalized the overpayment determination in the amount of $1,028.45 for the period October 3 through 12, 2019. It determined that appellant was at fault in the creation of the overpayment because she accepted a compensation payment, which she knew or should have known was incorrect.[3]

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim and pays compensation, it has the burden of justifying termination or modification of an employee's compensation benefits.[4] Section 8106(c)(2) of FECA provides that a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee is not entitled to compensation.[5] To justify termination of compensation, OWCP must show that the work offered was suitable, that the employee was informed of the consequences of refusal to accept such employment, and that he or she was allowed a reasonable period to accept or reject the position or submit evidence to provide reasons why the position is not suitable.[6] Section 8106(c) will be narrowly construed as it serves as a penalty provision, which may bar an employee's entitlement to compensation based on a refusal to accept a suitable offer of employment.[7]

Section 10.517(a) of FECA's implementing regulations provides that an employee who refuses or neglects to work after suitable work has been offered or secured, has the burden of showing that such refusal or failure to work was reasonable or justified.[8] Pursuant to section

[3] OWCP instructed that appellant to remit a payment for the full amount of $1,028.45 within 30 days.

[4] *See K.S.*, Docket No. 19-1650 (issued April 28, 2020); *J.R.*, Docket No. 19-0206 (issued August 14, 2019); *R.P.*, Docket No. 17-1133 (issued January 18, 2018); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005).

[5] 5 U.S.C. § 8106(c)(2); *see also Geraldine Foster*, 54 ECAB 435 (2003).

[6] *See R.A.*, Docket No. 19-0065 (issued May 14, 2019); *Ronald M. Jones*, 52 ECAB 190 (2000).

[7] *S.D.*, Docket No. 18-1641 (issued April 12, 2019); *Joan F. Burke*, 54 ECAB 406 (2003).

[8] 20 C.F.R. § 10.517(a).

10.516, the employee shall be provided with the opportunity to make such a showing before a determination is made with respect to termination of entitlement to compensation.[9]

The determination of whether an employee is physically capable of performing a modified assignment is a medical question that must be resolved by medical evidence.[10] OWCP's procedures provide that acceptable reasons for refusing an offered position include withdrawal of the offer or medical evidence of inability to do the work or travel to the job.[11] In a suitable work determination, OWCP must consider preexisting and subsequently-acquired medical conditions in evaluating an employee's work capacity.[12]

ANALYSIS -- ISSUE 1

The Board finds that OWCP met it burden of proof to terminate appellant's wage-loss compensation and entitlement to schedule award benefits, effective October 3, 2019, for refusing an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2).

On May 30, 2019 the employing establishment offered appellant a position as a modified city carrier and on July 15, 2019 OWCP determined that the position was suitable. The duties of the position included assisting customers by providing verbal instructions and directions for six to seven hours a day, conducting safety observations for one to three hours a day, and answering telephones intermittently for zero to one hour a day. The physical requirements of the position included: sitting/walking/standing and changing positions as needed, for up to eight hours; no repetitive right wrist activities, with zero to rare repetitive movement of the right wrist (per IME limit of four hours per day); occasional pushing, pulling, and lifting no more than 10 pounds intermittently, from one to four hours per day; no heavy lifting; intermittent simple grasp, nonrepetitive activity, up to four hours per day; no casing mail, and no driving work vehicle.

The Board finds that the May 30, 2019 job offer was within the restrictions as prescribed by the second opinion physician, Dr. Steingart. Dr. Steingart reported that appellant could perform sedentary work; however, she could not case mail, perform heavy lifting, or drive a motor vehicle. He also related that she could perform repetitive motions of the wrists, up to four hours a day, and lift, push, pull up to 10 pounds four to six hours a day. The Board notes that the actual duties of the modified city carrier position did not require casing mail, heavy lifting, or driving a motor vehicle. Additionally, none of the actual job duties required repetitive motion of the wrists, or lifting more than 10 pounds.

The Board finds that OWCP properly accorded the weight of medical opinion to the reports of Dr. Steingart who opined that, while appellant required work restrictions including no mail casing, no lifting over 10 pounds, and no driving, she was capable of returning to work. Dr. Steingart based his opinion on a proper factual and medical history. He also provided

[9] *Id.* at § 10.516.

[10] *M.A.*, Docket No. 18-1671 (issued June 13, 2019); *Gayle Harris,* 52 ECAB 319 (2001).

[11] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.5a (June 2013); *see E.B.*, Docket No. 13-0319 (issued May 14, 2013).

[12] *See G.R.*, Docket No. 16-0455 (issued December 13, 2016); *Richard P. Cortes,* 56 ECAB 200 (2004).

appropriate physical examination findings. OWCP properly relied on his reports to determine that the offered position, which defined work activities with even further work restrictions was suitable.[13]

Appellant's physician, Dr. Braunstein, in an April 10, 2019 report, advised that appellant was limited from doing any repetitive wrist movements whatsoever. However, while the position as a modified city carrier included zero to rare repetitive movements of the right wrist (per IME limit of four hours per day), the employing establishment, in a letter dated June 26, 2019, confirmed that there were no repetitive movements and all duties were self-paced and intermittent. Further, the limitations were limited to appellant's right hand and there is no evidence to support that appellant could not use her left hand and self-pace in the rare repetitive movement, if any.

Appellant also resubmitted Dr. Klein's November 5, 2017 work restrictions and argued that his restrictions did not allow her to perform any repetitive hand movements. While appellant indicated that these restrictions were provided in November 2018, they were actually provided in 2017, prior to appellant's January 3, 2018 surgical procedure, and were, therefore, of limited probative value.

The Board finds that OWCP properly followed its established procedures prior to the termination of appellant's compensation pursuant to 5 U.S.C. § 8106(c)(2), including providing her with an opportunity to accept the position offered by the employing establishment after informing her that her reasons for initially refusing the position were not valid.[14]

For these reasons, OWCP properly terminated appellant's entitlement to wage-loss and schedule award compensation, effective October 3, 2019, because she refused an offer of suitable work.[15]

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 his or her duty.[16] 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.[17]

[13] *S.V.*, Docket No. 19-0349 (issued October 18, 2019).

[14] *See K.S.*, *supra* note 4; *C.H.*, Docket No. 17-0938 (issued November 27, 2017).

[15] *See M.H.*, Docket No. 17-0210 (issued July 3, 2018).

[16] 5 U.S.C. § 8102(a).

[17] *Id*. at § 8129(a).

ANALYSIS -- ISSUE 2

The Board finds that appellant received an overpayment of compensation in the amount of $1,028.45 for the period October 3 through 12, 2019, because she received wage-loss compensation following the termination of her compensation.

The Board finds that the evidence of record establishes that OWCP terminated appellant's compensation, effective October 3, 2019, based on a refusal of suitable work, but she continued to receive wage-loss compensation by electronic deposit for the period October 3 through 12, 2019. Therefore, an overpayment of compensation was created in this case.

With regard to the amount of overpayment, the Board finds that OWCP properly calculated appellant's compensation paid for the period October 3 through 12, 2019. Thus, the Board finds that appellant received an overpayment of compensation in the amount of $1,028.45 for the period October 3 through 12, 2019.

LEGAL PRECEDENT -- ISSUE 3

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 conscience."[18] A claimant who is at fault in the creation of the overpayment is not entitled to waiver.[19] 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.[20] Section 10.433(b) of OWCP's regulations provides that whether or not 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.[21]

ANALYSIS -- ISSUE 3

The Board finds that OWCP improperly determined that appellant was at fault in the creation of the overpayment.

OWCP explained on October 12, 2019 an electronic deposit in the amount of $2,879.65. It explained that $1,028.45 of the amount was based on net compensation paid for the dates of October 3 to 12, 2019. OWCP further explained that this represented her overpayment of

[18] 5 U.S.C. § 8129(b).

[19] *R.G.*, Docket 18-1251(issued November 26, 2019).

[20] 20 C.F.R. § 10.433(a).

[21] *Id*. at § 10.433(b); *see also R.G., supra* note 19.

compensation. The Board notes that this was the first direct deposit she received after her benefits were terminated based on her job refusal, effective October 3, 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, they knew or should have known that the payment was incorrect.[22] The Board has held that an employee who receives payments from OWCP in the form of a direct deposit is not 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.[23] Because fault is defined by what the claimant knew or should have known at the time of acceptance, one of the consequences of electronic funds transfers (EFTs) is that the claimant lacks the requisite knowledge at the time of the first incorrect payment.[24]

There is no evidence to demonstrate that she had clear knowledge at the time the bank received the October 12, 2019 electronic deposit that the payment was incorrect.[25] Therefore, the Board finds that at the time the improper direct deposit was made, appellant had no knowledge that it was incorrect. Appellant, therefore, cannot be found to be at fault in the acceptance of the October 12, 2019 direct deposit. The case must, therefore, be remanded to OWCP for a *de novo* decision to determine whether she is entitled to waiver of recovery of the overpayment in the amount of $1,028.45.

CONCLUSION

The Board finds that OWCP met its burden of proof to terminate appellant's wage-loss compensation and entitlement to schedule award benefits, effective October 3, 2019, as she refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2). The Board also finds that appellant received an overpayment of compensation in the amount of $1,028.45 for the period October 3 to 12, 2019. The Board further finds, however, that OWCP improperly determined that appellant was at fault in the creation of the overpayment.

[22] *See C.H.*, Docket No. 19-1470 (issued January 24, 2020); *see also Claude T. Green*, 42 ECAB 174, 278 (1990).

[23] *C.H., id.*; *Tammy Craven*, 37 ECAB 589 (2006).

[24] *Id*.

[25] *See B.W.*, Docket No. 19-0239 (issued September 18, 2020); *K.P.*, Docket No. 19-1151 (issued March 18, 2020).

ORDER

IT IS HEREBY ORDERED THAT the October 3, 2019 decision of the Office of Workers' Compensation Programs is affirmed. The December 13, 2019 decision is affirmed in part and reversed in part. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: May 6, 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