

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

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**R.K., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Baltimore, MD, Employer**  
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**Docket No. 20-1322  
Issued: May 27, 2021**

*Appearances:*  
*Appellant, pro se*  
*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 June 22, 2020 appellant filed a timely appeal from an April 28, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>2</sup>

**ISSUES**

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$68,988.07 because she continued to receive FECA wage-loss compensation for the period July 22, 2018 through February 29, 2020 following

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> The Board notes that, following the April 28, 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.*

the termination of her benefits; and (2) whether it properly determined that appellant was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment.

### **FACTUAL HISTORY**

On December 16, 1989 appellant, then a 36-year-old letter sorter, filed an occupational disease claim (Form CA-2) alleging that she sustained bilateral hand conditions due to the repetitive use of her hands while the performance of duty. OWCP accepted her claim for bilateral hand and wrist tenosynovitis, bilateral carpal tunnel syndrome, left lateral epicondylitis, right elbow and forearm sprain, and strain of an unspecified muscle, fascia and tendon at the right wrist and hand level. The record reflects that OWCP paid appellant wage-loss compensation on the periodic rolls as of February 2, 2002.

On June 4, 2018 OWCP issued appellant a proposed notice of termination of her wage-loss compensation and medical benefits, as the weight of the evidence established that she no longer had any employment-related residuals or disability due to her accepted employment injuries. It afforded her 30 days to submit additional evidence or argument if she disagreed with the proposed termination. No response was received.

By decision dated July 6, 2018, OWCP terminated appellant's wage-loss compensation and medical benefits, effective July 22, 2018. However, it continued to pay her wage-loss compensation benefits.<sup>3</sup>

On July 13, 2018 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. The hearing was held on December 20, 2018. By decision dated March 6, 2019, OWCP's hearing representative affirmed OWCP's July 6, 2018 termination decision.

A compensation termination record dated March 12, 2020 reflects that appellant received an overpayment of compensation for the period July 22, 2018 through February 29, 2020. It indicated that OWCP had not terminated appellant's compensation as ordered in its July 6, 2018 decision. A March 27, 2020 compensation payment history sheet documented that OWCP continued to pay appellant wage-loss compensation from July 22, 2018 through February 29, 2020 and calculated that the overpayment totaled \$68,988.07.

A March 13, 2020 OWCP intra-office memorandum indicated that appellant was overpaid because OWCP did not terminate her compensation as ordered in its July 6, 2018 termination decision. It included information about her compensation payments from July 22, 2018 through February 29, 2020 and calculated that she received an overpayment of \$68,988.07.

On March 27, 2020 OWCP issued a preliminary overpayment determination and memorandum, which indicated that appellant was overpaid for the period July 22, 2018 through

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<sup>3</sup> On August 18, 2018 appellant received a payment *via* electronic funds transfer (EFT) in the amount of \$3,249.00 for the period July 22 through August 18, 2018. On September 15, 2018 she received a payment *via* EFT in the amount of \$3,249.00 for the period August 19 through September 15, 2018. OWCP continued to pay appellant compensation on the periodic rolls through February 29, 2020.

February 29, 2020 because it continued to pay her compensation after its July 6, 2018 decision terminating appellant's compensation, effective July 22, 2018. It calculated that she received an overpayment of \$68,988.07. OWCP further advised that it found that appellant was at fault in the creation of the overpayment because she accepted payments that she knew or reasonably should have known to be incorrect. It requested that she complete the enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documentation. Additionally, OWCP notified appellant that within 30 days of the date of the letter she could request a telephone conference, a final decision based on the written evidence, or a preresoupment hearing. No information was received.

By decision dated April 28, 2020, OWCP finalized the preliminary overpayment determination, finding that appellant had received an overpayment of compensation in the amount of \$68,988.07, for the period July 22, 2018 through February 29, 2020, because it continued to pay her wage-loss compensation through February 29, 2020 despite terminating appellant's compensation benefits in its July 6, 2018 decision, effective July 22, 2018. It found that she was at fault in the creation of the overpayment because she accepted payment that she knew or should have known to be incorrect. OWCP explained that appellant received a compensation payment deposited by EFT and over 30 days had elapsed since the deposit was made. It additionally stated that she should have known that the payment was incorrect because the dates overlapped with a period she worked, specifically August 18, 2018 through February 1, 2020, and more recently February 29, 2020. OWCP required recovery of the overpayment by requesting that appellant forward the full amount of the overpayment within 30 days of the date of the decision.

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

Section 8102 of FECA 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>4</sup>

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 not receive salary, pay, or remuneration of any type from the United States, except in limited circumstances.<sup>5</sup> Section 10.500 of OWCP's regulations provides that compensation for wage loss due to disability is available only 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.<sup>6</sup>

Section 8129(a) of FECA provides that, when an overpayment of compensation has been made to an individual because of an error of fact or law, adjustment shall be made under regulations

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<sup>4</sup> *Supra* note 1 at § 8102.

<sup>5</sup> *Id.* at § 8116(a).

<sup>6</sup> 20 C.F.R. § 10.500(a).

prescribed by the Secretary of Labor by decreasing later payments to which the individual is entitled.<sup>7</sup>

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

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$68,988.07 for the period July 22, 2018 through February 29, 2020 because she continued to receive wage-loss compensation through February 29, 2020 after her compensation benefits were terminated by OWCP effective July 22, 2018.

The record reflects that OWCP terminated appellant's wage-loss compensation and medical benefits in its decision dated July 6, 2018, effective July 22, 2018, and an OWCP hearing representative affirmed its decision on March 6, 2019. However, appellant continued to receive wage-loss compensation on the periodic rolls from July 22, 2018 through February 29, 2020. Thus, the record establishes that she received an overpayment of FECA wage-loss compensation for the period July 22, 2018 through February 29, 2020.

OWCP calculated that appellant was overpaid \$68,988.07 for the period July 22, 2018 through February 29, 2020. The Board has reviewed OWCP's March 27, 2020 overpayment memorandum, which provided calculations for the above-noted overpayment and finds that an overpayment of compensation in the amount of \$68,988.07 was created for the period July 22, 2018 through February 29, 2020.

### **LEGAL PRECEDENT -- ISSUE 2**

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."<sup>8</sup> A claimant who is at fault in the creation of the overpayment is not entitled to waiver.<sup>9</sup> 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.<sup>10</sup>

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

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<sup>7</sup> 5 U.S.C. § 8129(a).

<sup>8</sup> *Id.* at § 8129(b).

<sup>9</sup> *See K.P.*, Docket No. 19-1151 (issued March 18, 2020); *R.G.*, Docket No. 18-1251 (issued November 26, 2019); *C.Y.*, Docket No. 18-0263 (issued September 14, 2018).

<sup>10</sup> 20 C.F.R. § 10.433(a).

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.<sup>11</sup>

### **ANALYSIS -- ISSUE 2**

The Board finds that appellant was not at fault in creation of the overpayment for the period July 22 through August 18, 2018.

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.<sup>12</sup> 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.<sup>13</sup> 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.<sup>14</sup> 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.<sup>15</sup> 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.<sup>16</sup>

On August 18, 2018 OWCP paid appellant wage-loss compensation in the amount of \$3,249.00 for the period July 22 through August 18, 2018, even though her entitlement to compensation benefits had been terminated as of July 22, 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, appellant knew or should have known that she was accepting a direct deposit to which she was not entitled. The record does not contain documentation or other evidence to demonstrate that appellant had knowledge at the time of the August 18, 2018 direct deposit covering the initial period July 22 through August 18, 2018 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 August 18, 2018 direct deposit. The

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<sup>11</sup> *Id.* at § 10.433(b); *see also D.M.*, Docket No. 17-0983 (issued August 3, 2018).

<sup>12</sup> *S.N.*, Docket No. 19-1018 (issued November 12, 2019). *See Claude T. Green*, 42 ECAB 174, 278 (1990).

<sup>13</sup> *K.K.*, Docket No. 19-0978 (issued October 21, 2019); *see Tammy Craven*, 57 ECAB 689 (2006).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*; *see also K.D.*, Docket No. 13-0451 (issued April 12, 2013).

<sup>16</sup> *S.N.*, *supra* note 12; *see K.H.*, Docket No. 06-0191 (issued October 30, 2006).

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 August 18, 2018.<sup>17</sup>

The Board further finds, however, that appellant was at fault in the creation of the overpayment of compensation for the period August 19, 2018 through February 29, 2020 and is, therefore, precluded from waiver of recovery of the overpayment for this remaining period.

When OWCP issued the compensation payment on September 15, 2018 covering the period August 19 through September 15, 2018, appellant should have known that she was no longer entitled to compensation as OWCP had notified her that her compensation was formally terminated, effective July 22, 2018. OWCP continued to pay appellant compensation on the periodic rolls through February 29, 2020. Therefore, the Board finds that she was at fault in the creation of the remaining period of the overpayment for the period August 19, 2018 through February 29, 2020 as she knew or should have known at the time of the second incorrect payment that she was no longer entitled to additional wage-loss compensation. The Board, thus, finds that appellant was at fault in the creation of the remaining period of the overpayment.<sup>18</sup>

As appellant's eligibility for waiver for a portion of the overpayment cannot yet be determined, on remand she will be granted an opportunity to submit and have OWCP consider relevant financial evidence on this issue. Following this and all other development deemed necessary, OWCP shall issue a *de novo* decision.

### CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$68,988.07 for the period July 22, 2018 through February 29, 2020 because her compensation benefits were terminated by OWCP, effective July 22, 2018, and she continued to receive compensation benefits through February 29, 2020. With regard to OWCP's finding of fault, the Board finds that appellant was not at fault in the creation of the overpayment for the period July 22 through August 18, 2018, but was at fault in the creation of the overpayment of compensation for the period August 19 through February 29, 2020 and was, thereby, precluded from waiver of recovery for that remaining period.

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<sup>17</sup> *E.N.*, Docket No. 19-1687 (issued May 27, 2020).

<sup>18</sup> *See T.N.*, Docket No. 17-0387 (issued November 28, 2018); *K.H.*, *supra* note 16.

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 28, 2020 decision of the Office of Workers' Compensation Programs 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: May 27, 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