

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

D.R., Appellant)	
)	
and)	Docket No. 21-0234
)	Issued: November 17, 2022
DEPARTMENT OF THE TREASURY,)	
INTERNAL REVENUE SERVICE)	
Philadelphia, PA, Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On December 1, 2020 appellant filed a timely appeal from a June 24, 2020 merit 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 \$2,694.40 for the period March 10 through April 6, 2015 for which she was at fault

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the June 24, 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 additional evidence for the first time on appeal. *Id.*

because she continued to receive wage-loss compensation following her return to full-duty work; and (2) whether OWCP properly found that appellant was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment.

FACTUAL HISTORY

On May 4, 2012 appellant, then a 43-year-old customer service representative, filed a traumatic injury claim (Form CA-1) alleging that she sustained an injury to her left wrist when she opened an overhead cabinet to remove equipment while in the performance of duty. She did not stop work. On June 19, 2012 OWCP accepted the claim for a left wrist contusion. It later expanded the acceptance of the claim to include sprain of left wrist; left wrist triangular fibrocartilage complex tear, other acquired deformity of forearm excluding fingers, left and sprain of back, and thoracic region consequential. OWCP paid appellant wage-loss compensation on the supplemental rolls from April 2 through September 20, 2014, on the periodic rolls from September 21, 2014 through April 4, 2015, and again on the supplemental rolls from April 5 through 6, 2015.

On June 19, 2012 OWCP informed appellant that wage-loss compensation for total disability was available only if she was unable to perform the duties of her regular position and that she should notify OWCP if she returned to work or obtained new employment. It also advised that, if she received compensation payments by electronic funds transfer (EFT), she should monitor her EFT deposits carefully, at least every two weeks. OWCP explained that, if appellant worked during a period in which she received compensation, she must notify OWCP. In a letter dated October 6, 2014, it outlined her entitlement to wage-loss compensation benefits and attached EN1049 forms advising that, if she returned to work, she should notify OWCP at once. OWCP further 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.)

In a report of work status dated March 12, 2015, the employing establishment informed OWCP that appellant had returned to full-time modified-duty work on March 10, 2015.

On April 2, 2015 appellant filed a claim for compensation (Form CA-7) for disability from work for the period March 22 through April 4, 2015. In an attached time analysis (Form CA-7a), she claimed that she used 5.5 hours of LWOP on April 1, 2015.

On April 4, 2015 OWCP paid appellant wage-loss compensation for total disability on the periodic rolls for the period March 8 through April 4, 2015 in the net amount of \$2,766.01. On April 17, 2015 it paid her wage-loss compensation for total disability on the supplemental rolls for April 5 and 6, 2015 in the net amount of \$201.13.

In an overpayment calculation memorandum dated April 17, 2015, OWCP noted that, for the compensation period March 10 through April 6, 2015, appellant received an overpayment of \$2,694.40. It explained that she was paid \$2,769.57, but was owed \$75.17 representing four hours of compensation for a medical appointment on April 1, 2015, for a total overpayment of \$2,694.40.

In a preliminary overpayment determination dated April 17, 2015, OWCP advised appellant of its finding that she had received an overpayment of compensation in the amount of \$2,694.40 for the period March 10 through April 6, 2015 because she received compensation for total disability after she returned to full-duty work. It also made a preliminary finding that she was at fault in the creation of the overpayment because she had accepted payments that she knew or reasonably should have known to be incorrect. OWCP requested that appellant complete an overpayment action request form and an overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documentation. Additionally, it informed her that she could request a telephone conference, a final decision based on the written evidence, or a prerecoumment hearing.

On May 4, 2015 appellant requested a final decision based on the written evidence, and she indicated that she disagreed with OWCP's April 17, 2015 preliminary determination because she believed that the overpayment occurred through no fault of her own. She requested waiver of recovery of the overpayment and submitted a Form OWCP-20 dated April 28, 2015. Appellant reported total monthly income of \$2,062.44 and total monthly expenses of \$2,107.21, which included a monthly payment of \$220.00 in relation to a bankruptcy proceeding. She also reported assets of \$2,643.58 from cash and checking and savings accounts. Appellant explained that she first became aware that the April 4, 2015 payment was made in error when she received a benefit statement on April 7, 2015.

On September 10, 2015 OWCP placed appellant's preliminary finding debt record into a suspended status due to a bankruptcy order.

By decision dated June 24, 2020, OWCP finalized the preliminary overpayment determination, finding that appellant received an overpayment of compensation in the amount of \$2,694.40 for the period March 10 through April 6, 2015, because she continued to receive wage-loss compensation following her return to full-duty work. It determined that she was at fault in the creation of the overpayment as she accepted compensation payments which she knew or should have known were incorrect. OWCP required recovery of the overpayment \$2,694.40 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 his or her duty.³

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 instances.⁴ OWCP's procedures provide that an overpayment of compensation is created when a claimant returns to work, but continues to receive wage-loss compensation.⁵

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation for the period March 10 through April 6, 2015 because she received wage-loss compensation following her return to work.

OWCP found that appellant received an overpayment of compensation because she continued to receive wage-loss compensation for total disability during the period March 10 through April 6, 2015 after she returned to full-time work on March 10, 2015. The evidence of record establishes that she returned to full-time work on March 10, 2015. However, appellant continued to receive wage-loss compensation through April 6, 2015. 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.⁶

The Board further finds that OWCP properly determined the amount of the overpayment. In an overpayment memorandum dated April 17, 2015, OWCP explained that appellant was overpaid \$2,694.40 for the period March 10 through April 6, 2015. It calculated the amount of the overpayment, accounting for four hours of wage-loss compensation due to a medical appointment on April 1, 2015. The Board has reviewed these calculations and finds that OWCP properly determined that an overpayment in the amount of \$2,694.40 was created.

³ 5 U.S.C. § 8102(a).

⁴ *Id.* at § 8116(a).

⁵ *See L.H.*, Docket No. 20-0115 (issued September 4, 2020); *E.R.*, Docket No. 19-1365 (issued December 23, 2019); *J.L.*, Docket No. 18-1266 (issued February 15, 2019); *K.E.*, Docket No. 18-0687 (issued October 25, 2018); *B.H.*, Docket No. 09-0292 (issued September 1, 2009); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.1(a) (September 2018).

⁶ *Id.*

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA 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.⁷ A claimant who is at fault in the creation of the overpayment is not entitled to waiver.⁸

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.⁹

With respect to whether an individual is without fault, section 10.433(b) of OWCP's regulations provide 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.¹⁰

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.¹¹ 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.¹² 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.¹³

⁷ 5 U.S.C. § 8129(b).

⁸ See *C.C.*, Docket No. 19-1268 (issued April 2, 2021); *J.S.*, Docket No. 19-1363 (issued April 10, 2020); *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).

⁹ 20 C.F.R. § 10.433(a).

¹⁰ *Id.* at § 10.433(b); see also *C.C.*, *supra* note 8; *M.P.*, Docket No. 20-1035 (issued December 1, 2020).

¹¹ See *C.C.*, *id.*; *A.B.*, Docket No. 18-0922 (issued January 3, 2019); see also *Tammy Craven*, 57 ECAB 689 (2006).

¹² See *Tammy Craven*, *id.*; see also *S.D.*, Docket No. 17-0309 (issued August 7, 2018).

¹³ See *C.C.*, *supra* note 8; *C.H.*, Docket No. 19-1470 (issued January 24, 2020).

ANALYSIS -- ISSUE 2

The Board finds that OWCP improperly determined that appellant was at fault in creation of the overpayment for the period March 10 through April 4, 2015, but properly found her at fault in the creation of the overpayment for the period April 5 through 6, 2015.

OWCP found that appellant was at fault in the creation of the overpayment because she accepted payments she knew or should have known to be incorrect after she returned to work on March 10, 2015. The Board finds, however, that OWCP failed to establish that, at the time she accepted the first two compensation payments *via* EFT covering the period March 10 through April 4, 2015, she knew or should have known the payments were incorrect.

The first direct deposit appellant received after her March 10, 2015 return to work was made on April 4, 2015 covering the period March 8 through April 4, 2015. There is no documentation or other evidence to demonstrate that she had clear knowledge at the time the bank received the April 4, 2015 direct deposit that the payment was incorrect.¹⁴ The Board thus finds that appellant was without fault in accepting the initial compensation payment covering the period of the overpayment from March 10 through April 4, 2015.

The Board further finds, however, that appellant was at fault in the creation of the overpayment for the subsequent compensation payment covering the period April 5 through 6, 2015.¹⁵

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.¹⁶ 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.¹⁷ By the time of the second payment, 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 March 10, 2015.¹⁸ After her receipt of the first direct deposit following her return to work, she knew or should have known that OWCP had begun to make payments to her in error and that she was not entitled to the benefits of the subsequent direct deposit.

The Board therefore finds that OWCP properly found that appellant was at fault in the creation of the overpayment for the periods April 5 and 6, 2015.

¹⁴ See *C.C., id.*; *M.P., supra* note 10; *K.K.*, 19-0978 (issued October 21, 2019).

¹⁵ See *M.P., id.*; *K.P.*, Docket No. 19-1151 (issued March 18, 2020); *D.W.*, Docket No. 15-0229 (issued April 17, 2014).

¹⁶ See *C.C., supra* note 8; *M.P., id.*; *B.W.*, Docket No. 19-0239 (issued September 18, 2020); *P.B.*, Docket No. 19-0329 (issued December 31, 2019); *C.G.*, Docket No. 15-0701 (issued December 9, 2015).

¹⁷ See *C.C., id.*; *B.W., id.*

¹⁸ *Id.*

As the case is not in posture for decision regarding the issue of waiver of recovery of the overpayment for the period March 10 through April 4, 2015, the case must be remanded for OWCP to determine whether appellant is entitled to waiver of recovery of the overpayment covering that period.¹⁹ On remand, OWCP shall request updated financial information from her to evaluate her current financial situation.²⁰ Following this and other such further development as deemed necessary, it shall issue a *de novo* decision regarding waiver.

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$2,694.40 for the period March 10 through April 6, 2015. The Board further finds that she was without fault in the creation of the overpayment for the period March 10 through April 4, 2015, and that she was at fault in the creation of the overpayment for the period April 5 through 6, 2015.

ORDER

IT IS HEREBY ORDERED THAT the June 24, 2020 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: November 17, 2022
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board

¹⁹ *Id.*

²⁰ *See C.C.*, Docket No. 18-0079 (issued May 2, 2018); *E.H.*, Docket No. 15-0848 (issued July 6, 2016).