

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

T.L., Appellant)

and)

U.S. POSTAL SERVICE, GREEN RIVER POST)
OFFICE, Green River, WY, Employer)
-----)

**Docket No. 23-0424
Issued: December 28, 2023**

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

VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On February 3, 2023 appellant filed a timely appeal from a January 11, 2023 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 \$3,008.33, during the period July 30 through September 10, 2022, because she continued to receive wage-loss compensation for total disability after she returned to full-time

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the January 11, 2023 decision, OWCP received additional evidence. 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.*

work; and (2) whether OWCP properly determined that she was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment.

FACTUAL HISTORY

On February 17, 2022 appellant, then a 45-year-old city carrier assistant, filed a traumatic injury claim (Form CA-1) alleging that on February 2, 2022 she injured three ribs, experienced numbness in her right arm and hand, and pinched a nerve in her right upper back when she pushed a cage into doors that had unexpectedly locked while in the performance of duty. She explained that. Appellant stopped work on February 3, 2022.

By decision dated April 18, 2022, OWCP accepted appellant's claim for carpal tunnel syndrome, left and right upper limbs, and lesion of ulnar nerve, right upper limb. It instructed her to return any checks that included a payment for a period in which she had worked immediately to avoid an overpayment of compensation. OWCP further stated:

“If you receive compensation *via* Electronic Funds Transfer (EFT), a notification of the date and amount of payment will appear on the statement from your financial institution. You are expected to monitor your EFT deposits carefully, at least every 2 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.”

Thereafter, OWCP paid appellant wage-loss compensation on the supplemental rolls from March 20 through May 21, 2022, and on the periodic rolls effective May 22, 2022. She received all wage-loss compensation by EFT payments.

On August 13, 2022 OWCP issued an EFT payment for the period July 17 through August 13, 2022 in the net amount of \$1,958.91. On September 10, 2022 it issued an EFT payment for the period August 14 through September 10, 2022 in the net amount of \$1,958.91.

An August 19, 2022 report of work status (Form CA-3) indicated that appellant had returned to work on July 27, 2022 with restrictions.

A September 9, 2022 field nurse memorandum related that appellant had returned to full-time light-duty work on July 30, 2022.

In a September 14, 2022 memorandum of telephone call (Form CA-110), OWCP indicated that appellant reported that she had returned to work on July 30, 2022.

In an October 19, 2022 preliminary overpayment determination, OWCP notified appellant that she had received an overpayment of compensation of \$3,008.33, for the period July 30 through September 10, 2022, because she returned to work full time on July 30, 2022, but continued to receive wage-loss compensation through September 10, 2022. It determined that she received \$1,958.91 in compensation for the period July 17 through August 13, 2022, and another \$1,958.91 for the period August 14 through September 10, 2022. OWCP then deducted \$909.49, the amount that appellant was due for the period July 17 through July 29, 2022, which it calculated by dividing \$1,958.91 by 28 days and then multiplying by 13, the number of days that she was entitled to be paid from July 17 through 29, 2022. The result of \$1,958.91 plus \$1,958.91 minus \$909.49

equaled \$3,008.33, the amount that appellant was overpaid for the period July 30 through September 10, 2022. OWCP further advised her of its preliminary overpayment determination that she was at fault in the creation of the overpayment because she had received a compensation payment deposited by EFT and ample time had elapsed since the EFT deposit for her to receive and review a statement from her financial institution showing the details of an improper payment. It requested that appellant complete an overpayment action request form and overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documentation, including copies of income tax returns, bank account statements, bills, pay slips, and any other records to support income and expenses. Additionally, OWCP informed her that, within 30 days, she could request a final decision based on the written evidence or a prerecoupmment hearing. It mailed the preliminary overpayment determination to appellant's last known address of record and afforded her 30 days to respond. No response was received.

By decision dated January 11, 2023, OWCP finalized its preliminary overpayment determination that appellant had received an overpayment of compensation in the amount of \$3,008.33 for the period July 30 through September 10, 2022 and that she was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment. It directed recovery of the overpayment in full.

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 duty.³ 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.⁴

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.⁵ Section 10.500 of OWCP's regulations provides that compensation for wage loss due to disability is available only for periods during which an employee's work-related medical condition prevents him or her from earning the wages earned before the work-related injury.⁶ A claimant is not entitled to receive temporary total disability benefits and actual earnings for the same time period.⁷ OWCP's procedures provide that an overpayment of compensation is created

³ *Supra* note 1 at § 8102(a).

⁴ *Id.* at § 8129(a).

⁵ *Id.* at § 8116(a).

⁶ 20 C.F.R. § 10.500(a).

⁷ *See S.S.*, Docket No. 20-0776 (issued March 15, 2021); *L.T.*, Docket No. 19-1389 (issued March 27, 2020); *C.H.*, Docket No. 19-1470 (issued January 24, 2020); *L.S.*, 59 ECAB 350, 352-53 (2008).

when a claimant returns to work, but continues to receive wage-loss compensation for temporary total disability.⁸

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$3,008.33 during the period July 30 through September 10, 2022, because she continued to receive wage-loss compensation for total disability after she returned to full-time work.

Appellant resumed full-time modified-duty employment on July 30, 2022. OWCP, however, continued to pay her wage-loss compensation for total disability following her return to work through September 10, 2022. As noted above, a claimant is not entitled to receive compensation for disability during a period in which she had actual earnings.⁹ Therefore, an overpayment of compensation was created in this case.

OWCP calculated appellant's net compensation paid for the period July 30 through September 10, 2022 as \$3,008.33. It explained how it calculated the amount of the overpayment. The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$3,008.33 for the period July 30 through September 10, 2022.

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.¹⁰ No waiver of recovery of an overpayment is possible if the claimant is at fault in the creation of the overpayment.¹¹

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.¹²

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

⁸ *S.S., L.T., C.H., id.*; Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Identifying and Calculating an Overpayment*, Chapter 6.200.1a (September 2020).

⁹ *See supra* note 7.

¹⁰ 5 U.S.C. § 8129(b).

¹¹ *S.S.*, Docket No. 20-0776 (issued March 15, 2021); *B.W.*, Docket No. 19-0239 (issued September 18, 2020); *R.G.*, Docket No. 18-1251 (issued November 26, 2019); *C.L.*, Docket No. 19-0242 (issued August 5, 2019).

¹² 20 C.F.R. § 10.433(a).

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.¹³

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.¹⁴ 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.¹⁵

ANALYSIS -- ISSUE 2

The Board finds that appellant was without fault in the creation of the overpayment for the period July 30 through August 13, 2022, and that she was at fault in the creation of the overpayment for the period August 14 through September 10, 2022.

OWCP paid appellant compensation by direct deposit every 28 days. As noted, appellant returned to full-time, modified-duty work on July 30, 2022. OWCP issued the first direct deposit she received after her return to work on August 13, 2022. There is no documentation or other evidence to demonstrate that appellant had clear knowledge at the time her bank received the August 13, 2022 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 of the overpayment from July 30 through August 13, 2022.

The Board further finds that the case is not in posture for decision regarding the issue of waiver of recovery of the overpayment for the period July 30 through August 13, 2022. The Board will reverse the January 11, 2023 decision regarding the issue of fault as to the August 13, 2022 direct deposit covering the period July 30 through August 13, 2022 and will remand the case for OWCP to determine whether appellant is entitled to waiver of recovery for the portion of the overpayment covering the period July 30 through August 13, 2022.

¹³ *Id.* at § 10.433(b); *see also R.G.*, *supra* note 11; *D.M.*, Docket No. 17-0983 (issued August 3, 2018).

¹⁴ *L.W.*, Docket No. 22-1155 (issued January 19, 2023); *M.T.*, Docket No. 20-1353 (issued May 9, 2022); *C.H.*, Docket No. 19-1470 (issued January 24, 2020). *See Tammy Craven*, 57 ECAB 689 (2006); *see also A.B.*, Docket No. 18-0922 (issued January 3, 2019).

¹⁵ *Id.*

¹⁶ *M.T.*, *supra* note 14; *C.C.*, Docket No. 18-1268 (issued April 2, 2021); *K.P.*, Docket No. 19-1151 (issued March 18, 2020); *K.K.*, Docket No. 19-0978 (issued October 21, 2019); *C.Y.*, Docket No. 18-0263 (issued September 14, 2018); *see also M.M.*, Docket No. 15-0265 (issued May 27, 2015); *Danny E. Haley*, 56 ECAB 393 (2005); Federal (FECA) Procedure Manual, *supra* note 8.

The Board also finds that appellant was at fault in the creation of the overpayment for the remaining direct deposit payment for the period August 14 through September 10, 2022.¹⁷

In an April 18, 2022 letter, OWCP notified appellant that to avoid an overpayment of compensation, she must immediately notify it of her return to work. Appellant was required to reimburse OWCP for compensation paid during a period in which she worked. 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.¹⁸ As noted above, 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.¹⁹ 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 July 30, 2022.²⁰ After her receipt of the first direct deposit following her return to work, she was on notice that OWCP began to make payments to her in error and knew or should have known that she was not entitled to the benefits of the subsequent direct deposits. The Board therefore finds that OWCP properly found that appellant was at fault in the creation of the overpayment from August 14 through September 10, 2022, thereby precluding waiver of the overpayment.

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$3,008.33 during the period July 30 through September 10, 2022. The Board further finds that she was without fault in the creation of the overpayment for the period July 30 through August 13, 2022, and that she was at fault in the creation of the overpayment for the period August 14 through September 10, 2022. The case will be remanded to OWCP to consider waiver of recovery of the overpayment for the period July 30 through August 13, 2022.

¹⁷ *M.T., C.C., id.; D.W.*, Docket No. 15-0229 (issued April 17, 2014).

¹⁸ *L.W., supra* note 14; *M.T., id.; C.G.*, Docket No. 15-0701 (issued December 9, 2015).

¹⁹ *Supra* note 15.

²⁰ *Supra* note 18.

ORDER

IT IS HEREBY ORDERED THAT the January 11, 2023 decision of the Office of Workers' Compensation Programs is reversed in part, affirmed in part, and set aside in part; the case is remanded for further proceedings consistent with this decision of the Board.

Issued: December 28, 2023
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board