

FACTUAL HISTORY

On August 5, 2011 appellant, then a 36-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that, on that date, she sustained a contusion and bruises with skin intact on her right ankle when she was struck by an over the road container (OTR) while in the performance of duty. She stopped work on the date of injury.

On September 26, 2011 OWCP accepted appellant's claim for left ankle sprain. It advised appellant that:

“If you receive a compensation check which includes payment for a period you have worked, return it to us immediately to prevent an overpayment of compensation. Checks may be returned to the following address: US Department of Treasury, 13000 Townsend Road, Philadelphia, PA 19154.

“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 as of September 19, 2011 and on the periodic rolls effective February 12, 2012. Appellant received wage-loss compensation by EFT payments.

A memorandum of telephone call (Form CA-110) on February 2, 2022 indicated that appellant notified OWCP that she had returned to work. She advised that the employing establishment had not notified OWCP about her return to work because she had received another compensation “check.”

By letter dated February 2, 2022, OWCP requested that the employing establishment provide information regarding appellant's salary and work schedule for her alternate/new position.

In response, the employing establishment provided information regarding appellant's salary. It provided a copy of its December 7, 2021 job offer for a full-time, modified mail handler position with restrictions, which appellant accepted on that day.

The record indicates that on January 1, 2022 the EFT payment for the period December 5, 2021 through January 1, 2022 was deposited into appellant's bank account in the net amount of \$3,000.52. On January 29, 2022 the EFT payment for the period January 2 through 29, 2022 was deposited into appellant's bank account in the amount of \$2,972.06. On February 26, 2022 the EFT payment for the period January 30 through February 26, 2022 was deposited into appellant's bank account in the amount of \$2,972.06.

In a preliminary overpayment determination dated March 7, 2022, OWCP notified appellant that she had received an overpayment of compensation in the amount of \$8,730.32 for the period December 7, 2021 through February 26, 2022 because she returned to full-time

modified employment on December 7, 2021, but received wage-loss compensation for total disability through February 26, 2021. It related that she was receiving a net compensation payment every 28 days in the amount of \$3,000.52 for the period December 5, 2021 through January 1, 2022 and \$2,972.06 for each period from January 2 through 29, 2022 and January 30 through February 26, 2022. OWCP then calculated that \$3,000.52 divided by 28 days and then multiplied by 26 days which equaled \$2,786.20 for the period December 7, 2021 through January 1, 2022, and \$2,972.06 for each period from January 2 through 29, 2022 and January 30 through February 26, 2022, resulting in a total overpayment of \$8,730.32. It further advised appellant of its preliminary determination that she was at fault in the creation of the overpayment because she had received a compensation payment deposited by EFT and over 30 days had elapsed since the EFT deposit was made, allowing ample time for her to receive and review a statement from her financial institution showing the details of an improper payment. OWCP requested that she complete an overpayment action request form and an 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 appellant that within 30 days, she could request a final decision based on the written evidence, or a precoupment hearing.

In a Form CA-110 dated March 24, 2022, appellant asked OWCP if she had to complete the Form OWCP-20. OWCP responded that it would be a good idea to complete the Form OWCP-20 but, advised her that she did not have to do so. Appellant contended that she was without fault in the creation of the overpayment. She related that she still had “two compensation checks.” OWCP advised appellant to return the compensation checks and that they would be applied to the overpayment.

By decision dated May 2, 2022, OWCP finalized the March 7, 2022 preliminary overpayment determination, finding that appellant received an overpayment of compensation in the amount of \$8,730.32 for the period December 7, 2021 through February 26, 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.² 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.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

² *Id.* at § 8102(a).

³ *Id.* at § 8129(a).

receive salary, pay, or remuneration of any type from the United States, except in limited specified instances.⁴ 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.⁵ A claimant is not entitled to receive temporary total disability benefits and actual earnings for the same time period.⁶ OWCP's procedures provide that an overpayment of compensation is created when a claimant returns to work, but continues to receive wage-loss compensation for temporary total disability.⁷

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$8,730.32 during the period December 7, 2021 through February 26, 2022 because she continued to receive wage-loss compensation for temporary total disability after she returned to full-time work.

Appellant resumed full-time modified-duty employment on December 7, 2021. OWCP, however, continued to pay her wage-loss compensation for total disability following her return to work through February 26, 2022. As noted above, a claimant is not entitled to receive compensation for disability during a period in which she had actual earnings.⁸ Therefore, an overpayment of compensation was created in this case.

OWCP calculated appellant's net compensation paid for the period December 7, 2021 through February 26, 2022 as \$8,730.32. The Board finds that OWCP properly calculated that she received an overpayment of compensation in the amount of \$8,730.32 for the period December 7, 2021 through February 26, 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

⁴ *Id.* at § 8116(a).

⁵ 20 C.F.R. § 10.500(a).

⁶ *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).

⁷ *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).

⁸ *See supra* note 6.

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

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

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.¹³ 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.¹⁴

ANALYSIS -- ISSUE 2

The Board finds that appellant was without fault in the creation of the overpayment, for the period December 7, 2021 through January 1, 2022, and that she was at fault in the creation of the overpayment for the period January 2 through February 26, 2022.

OWCP paid appellant compensation by direct deposit every 28 days. As noted, appellant returned to full-time, modified-duty work on December 7, 2021. The first direct deposit she received after her return to work was made on January 1, 2022. There is no documentation or other evidence to demonstrate that appellant had clear knowledge at the time her bank received the

⁹ 5 U.S.C. § 8129(b).

¹⁰ *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).

¹¹ 20 C.F.R. § 10.433(a).

¹² *Id.* at § 10.433(b); *see also R.G.*, *supra* note 10; *D.M.*, Docket No. 17-0983 (issued August 3, 2018).

¹³ *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).

¹⁴ *Id.*

January 1, 2022 direct deposit that the payment was incorrect.¹⁵ The Board thus finds that she was without fault in accepting the initial direct deposit covering the period of the overpayment from December 7, 2021 through January 1, 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 December 7, 2021 through January 1, 2022. The Board will set aside the May 2, 2022 decision regarding the issue of fault as to the January 1, 2022 direct deposit covering the period December 7, 2021 through January 1, 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 December 7, 2021 through January 1, 2022.

The Board also finds that appellant was at fault in the creation of the overpayment for the remaining direct deposit payments for the period January 2 through February 26, 2022.¹⁶

In a September 26, 2011 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.¹⁷ 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.¹⁸ By the time of the second and third payments, 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 December 7, 2021.¹⁹ 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 she was at fault in the creation of the overpayment from January 2 to February 26, 2022, thereby precluding waiver of the overpayment.

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$8,730.32 during the period December 7, 2021 through February 26, 2022. The Board further finds that appellant was without fault in the creation of the overpayment for the period December 7,

¹⁵ *M.T.*, *supra* note 13; *C.C.*, Docket No. 18-1268 (issued April 2, 2021); *K.P.*, Docket No. 19-1151 (issued March 18, 2020); *K.K.*, 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 7.

¹⁶ *M.T.*, *C.C.*, *K.P.*, *K.K.*, *C.Y.*, *id.*; *D.W.*, Docket No. 15-0229 (issued April 17, 2014).

¹⁷ *M.T.*, *K.P.*, *K.K.*, *id.*; *C.G.*, Docket No. 15-0701 (issued December 9, 2015).

¹⁸ *Supra* note 14.

¹⁹ *Supra* note 17.

2021 through January 1, 2022, and that she was at fault in the creation of the overpayment for the period January 2 through February 26, 2022. The case will be remanded to OWCP to consider waiver of recovery of the overpayment for the period December 7, 2021 through January 1, 2022.

ORDER

IT IS HEREBY ORDERED THAT the May 2, 2022 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: January 19, 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