

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

_____)	
B.N., Appellant)	
)	
and)	Docket No. 22-1337
)	Issued: November 7, 2023
DEPARTMENT OF VETERANS AFFAIRS,)	
SEATTLE VA MEDICAL CENTER,)	
Seattle, WA, 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
PATRICIA H. FITZGERALD, Deputy Chief Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On September 12, 2022 appellant filed a timely appeal from a May 10, 2022 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 \$8,720.71 for the period February 19, 2019 through February 1, 2020 for which she was at fault because she continued to receive wage-loss compensation for total disability following her

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the May 10, 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.*

return to part-time 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 March 15, 2017 appellant, then a 40-year-old dental assistant, filed a traumatic injury claim (Form CA-1) alleging that on March 7, 2017 she sustained an injury to her left ankle, lower back, and right side when tripped and fell while in the performance of duty. She stopped work on March 15, 2017. On May 17, 2017 OWCP accepted the claim for a sprain of unspecified ligament of the left ankle and strains of the lower back and right knee. It later expanded the acceptance of the claim to include intervertebral disc disorders with radiculopathy at L5-S1. OWCP paid appellant wage-loss compensation on the supplemental rolls from April 24, 2017 through November 10, 2018 and on the periodic rolls November 11, 2018.

On May 17, 2017 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 December 3, 2018, OWCP outlined appellant's entitlement to wage-loss compensation benefits and attached EN1049 forms advising that, if she returned to work, she should notify OWCP at once.

Appellant returned to modified work for four hours per day on February 19, 2019. She resumed part-time work for five hours per day on December 23, 2019. However, OWCP continued to pay appellant wage-loss compensation on the periodic rolls through February 1, 2020.³

In an overpayment calculation memorandum dated February 17, 2022, OWCP noted that, for the compensation period February 19, 2019 through February 1, 2020, appellant received an overpayment in the amount of \$8,720.71. It explained that she was paid \$26,422.03, but owed \$17,701.32 from February 19, 2019 through February 1, 2020, for a total overpayment of \$8,720.71. OWCP noted that appellant had returned to work for four hours per day on February 19, 2019 and to five hours per day on December 2, 2019; however, it correctly calculated the overpayment based on her return to work for four hours per day from February 19 through December 21, 2019 and for five hours per day from December 22 through February 1, 2020.

In a preliminary overpayment determination dated February 18, 2022, OWCP advised appellant of its finding that she had received an overpayment of compensation in the amount of \$8,720.71 for the period February 19, 2019 through February 1, 2020 because she received compensation for total disability after she returned to part-time 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

³ The first direct deposit appellant received after her February 19, 2019 return to work was made on March 2, 2019 and covered the period February 3 through March 2, 2019.

OWCP-20) and submit supporting financial documentation. Additionally, it informed her that she could request a final decision based on the written evidence or a prerecoupment hearing within 30 days.

By decision dated May 10, 2022, OWCP finalized the preliminary overpayment determination, finding that appellant received an overpayment of compensation in the amount of \$8,720.71 for the period February 19, 2019 through February 1, 2020 because she continued to receive wage-loss compensation following her return to part-time 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 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.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 OWCP's procedures provide that an overpayment of compensation is created when a claimant returns to work, but continues to receive wage-loss compensation.⁶

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation for the period February 19, 2019 through February 1, 2020 because she received wage-loss compensation for total disability following her return to part-time work.

OWCP found that appellant received an overpayment of compensation because she continued to receive wage-loss compensation for total disability during the period February 19, 2019 through February 1, 2020. However, appellant continued to receive wage-loss compensation for total disability through February 1, 2020. 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.⁷

⁴ 5 U.S.C. § 8102(a).

⁵ *Id.* at § 8116(a).

⁶ 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).

⁷ *Id.*

The Board further finds that OWCP properly determined the amount of the overpayment. In an overpayment calculation memorandum dated February 17, 2022, OWCP explained that for the compensation period February 19, 2019 through February 1, 2020, appellant was paid \$26,422.03 but was owed \$17,701.32, for a total overpayment of \$8,720.71. The Board has reviewed these calculations and finds that OWCP properly determined that an overpayment in the amount of \$8,720.71 was created.⁸

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.⁹ A claimant who is at fault in the creation of the overpayment is not entitled to waiver.¹⁰

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.¹¹

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.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 Previous cases have held that receiving one erroneous direct

⁸ See *K.B.*, Docket No. 23-0139 (issued May 18, 2023); *L.W.*, Docket No. 22-1155 (issued January 19, 2023).

⁹ 5 U.S.C. § 8129(b).

¹⁰ 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).

¹¹ 20 C.F.R. § 10.433(a).

¹² *Id.* at § 10.433(b); see also *C.C.*, *supra* note 10; *M.P.*, Docket No. 20-1035 (issued December 1, 2020).

¹³ See *C.C.*, *id.*; *A.B.*, Docket No. 18-0922 (issued January 3, 2019); see also *Tammy Craven*, 57 ECAB 689 (2006).

¹⁴ See *Tammy Craven*, *id.*; see also *S.D.*, Docket No. 17-0309 (issued August 7, 2018).

deposit payment does not necessarily create the requisite knowledge to find that a claimant was at fault in the creation of the overpayment.¹⁵

ANALYSIS -- ISSUE 2

The Board finds that OWCP improperly determined that appellant was at fault in creation of the overpayment for the period February 19 through March 2, 2019, but properly found her at fault in the creation of the overpayment for the period March 3, 2019 through February 1, 2020.

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 February 19, 2019. The Board finds, however, that OWCP failed to establish that, at the time she accepted the first compensation payment *via* EFT covering the period February 19 through March 2, 2019, she knew or should have known the payment was incorrect.

The first direct deposit appellant received after her February 19, 2019 return to work was made on March 2, 2019 and covered the period February 3 through March 2, 2019. There is no documentation or other evidence to demonstrate that appellant had clear knowledge at the time the bank received the March 2, 2019 direct deposit that the payment was incorrect.¹⁶ The Board thus finds that she was without fault in accepting the initial compensation payment covering the period of the overpayment from February 19 through March 2, 2019.

The Board further finds, however, that appellant was at fault in the creation of the overpayment for the subsequent compensation payments covering the period March 3, 2019 through February 1, 2020.¹⁷

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 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 February 19, 2019.²⁰ After her receipt of the first direct deposit following her return to work, she knew or should have

¹⁵ See *C.C.*, *supra* note 10; *C.H.*, Docket No. 19-1470 (issued January 24, 2020).

¹⁶ See *L.W.*, *supra* note 8; *M.P.*, *supra* note 12; *K.K.*, Docket No. 19-0978 (issued October 21, 2019).

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

¹⁸ See *L.W.*, *supra* note 8; *C.C.*, *supra* note 10; *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).

¹⁹ See *L.W.*, *id.*; *G.H.*, Docket No. 22-0890 (issued January 9, 2023); *D.R.*, Docket No. 21-0234 (issued November 17, 2022).

²⁰ *Id.*

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 period March 3, 2019 through February 1, 2020.

As the case is not in posture for decision regarding the issue of waiver of recovery of the overpayment for the period February 19 through March 2, 2019, the case must be remanded for OWCP to determine whether appellant is entitled to waiver of recovery of the overpayment covering that period.²¹ On remand, OWCP shall request updated financial information from appellant to evaluate her current financial situation.²² Following this and other such further development as deemed necessary, it shall issue a *de novo* decision regarding waiver of recovery of the overpayment.

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$8,720.71 for the period February 19, 2019 through February 1, 2020. The Board further finds that she was without fault in the creation of the overpayment for the period February 19 through March 2, 2019, but at fault in the creation of the overpayment for the period March 3, 2019 through February 1, 2020.

²¹ *Id.*

²² *See C.C.*, Docket No. 18-0079 (issued May 2, 2018); *E.H.*, Docket No. 15-0848 (issued July 6, 2016).

ORDER

IT IS HEREBY ORDERED THAT the May 10, 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: November 7, 2023
Washington, DC

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

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

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