

properly found that appellant was at fault in the creation of the overpayment and, therefore, precluded from waiver of recovery.

FACTUAL HISTORY

On June 24, 2021 appellant, then a 22-year-old rural carrier associate, filed a traumatic injury claim (Form CA-1) alleging that on June 23, 2021 she sustained a left leg injury exiting her vehicle when her leg got caught between a tray and the driver's seat of her postal vehicle while in the performance of duty. She stopped work on June 23, 2021. OWCP accepted the claim for left knee sprain. It paid appellant wage-loss compensation on the supplemental rolls as of August 14, 2021 and on the periodic rolls as of January 30, 2022.

On February 28, 2022 OWCP advised appellant that she was expected to return to work as soon as she was able to do so, and it was her responsibility to advise the employing establishment once her physician found her capable of returning to work. It also advised her that once she returned to work she should notify OWCP and return payment for any period worked to prevent an overpayment of compensation. OWCP further advised appellant that, if she worked during any portion of the covered period and compensation payments were received *via* either paper check or for payments sent by electronic funds transfer (EFT), she was to return the payment to OWCP even if she had already advised OWCP that she was working.

The employing establishment offered appellant a full-time modified assignment as a rural carrier associate on May 12, 2022, which appellant accepted on that date. Appellant returned to work on May 16, 2022.

In an automated compensation payment system (ACPS) worksheet dated August 4, 2022, OWCP calculated that appellant's overpayment amount for the period May 16 through July 16, 2022 was \$3,906.29. It noted that she was paid \$378.03 for the period May 16 through 21, 2022 and \$1,764.13 for each subsequent 28-calendar-day period through July 16, 2022.³

In a preliminary overpayment determination dated August 4, 2022, OWCP advised appellant that an overpayment of compensation in the amount of \$3,906.29 had been created because she returned to work full time on May 16, 2022 but continued to receive wage-loss compensation through July 16, 2022. Appellant's 28-day net compensation payment for the periods May 22 through June 18, 2022 and June 19 through July 16, 2022 was \$1,764.13 for each period. Her net compensation for the period May 16 through 21, 2022 was \$378.03. OWCP provided its computation of the amount of the overpayment for this period, dividing appellant's 28-day compensation during the relevant periods by 28 to arrive at a daily rate, then multiplying the daily rate by the number of days she was overpaid. It made the preliminary finding that she was at fault in the creation of the overpayment, as she accepted payments she knew or should have known to be incorrect. OWCP requested that appellant submit a completed overpayment recovery questionnaire (Form OWCP-20) to determine a reasonable payment method and advised her that she could request waiver of recovery of the overpayment. It further requested that she provide

³ The record reflects that on May 21, 2022 appellant received via EFT a payment of \$1,764.13 for the period April 24, 2022 through May 21, 2022. On June 18 and July 16, 2022 she again received payments via EFT in the amount of \$1,764.13 for the periods May 22 through June 18, 2022 and June 19 through July 16, 2022.

supporting financial documentation, including copies of income tax returns, bank account statement, bills, and canceled check, pay slips, and any other records that support income and expenses. Additionally, OWCP provided an overpayment action request form and notified appellant that, within 30 days of the date of the letter, she could request a final decision based on the written evidence, or a precoupment hearing. It afforded her 30 days to submit additional evidence/argument and to request a hearing. No response was received.

By decision dated September 13, 2022, OWCP finalized the preliminary overpayment decision of August 4, 2022, finding that appellant had received an overpayment of compensation in the amount of \$3,906.29 for the period May 16 through July 16, 2022. It found her at fault in the creation of the overpayment and required recovery in full.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of FECA⁴ 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 duty.⁵ 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.⁶

A claimant is not entitled to receive temporary total disability and actual earnings for the same period.⁷ OWCP regulations provide 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.⁸

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$3,906.29 for the period May 16 through July 16, 2022 because she continued to receive disability compensation following her return to full-time modified duty.

Appellant returned to work, full time, on May 16, 2022 while continuing to receive wage-loss compensation through July 16, 2022. A claimant is not entitled to receive temporary total

⁴ 5 U.S.C. §§ 8101-8193.

⁵ *Id.* at § 8102(a).

⁶ *Id.* at § 8129(a).

⁷ *See M.S.*, Docket No. 16-0289 (issued April 21, 2016); *D.B.*, Docket No. 15-0258 (issued February 1, 2016).

⁸ *See C.V.*, Docket No. 16-0986 (issued September 1, 2016); 20 C.F.R. § 10.500.

disability benefits and actual earnings for the same time period.⁹ Accordingly, the Board finds that appellant received an overpayment of compensation.¹⁰

The record reflects that OWCP calculated that, from May 16 through July 16, 2022, appellant received \$3,906.29 in total net compensation. OWCP explained that appellant was paid \$378.03 for the period May 16 through 21, 2022 and \$1,764.13 for each subsequent 28-calendar-day period through July 16, 2022. The Board has reviewed OWCP's calculations and finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$3,906.29 for the period May 16 through July 16, 2022.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) 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 this subchapter or would be against equity and good conscience.¹¹ No waiver of an overpayment is possible if the claimant is at fault in creating the overpayment.¹²

Section 10.433(a) of OWCP's regulations provides that an individual is at 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.¹³ With respect to whether an individual is not at fault, section 10.433(b) 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.¹⁴

The Board has held that an employee who receives payments from OWCP in the form of direct deposit may not be at fault the first or second time incorrect funds are deposited into his or her account, as the acceptance of the resulting overpayment lacks the requisite knowledge.¹⁵ The Board has also held in cases involving a series of incorrect payments, where the requisite

⁹ *Supra* note 7.

¹⁰ *J.M.*, Docket No. 17-1574 (issued February 8, 2018).

¹¹ 5 U.S.C. § 8129(b).

¹² *Gregg B. Manston*, 45 ECAB 344, 354 (1994).

¹³ 20 C.F.R. § 10.433(a); *see C.L.*, Docket No. 19-0242 (issued August 5, 2019); *see also* 20 C.F.R. § 10.430.

¹⁴ *Id.* at § 10.433(b); *C.L., id.*; *see also* Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Determinations in an Overpayment*, Chapter 6.300.4(d) (September 2020).

¹⁵ *See R.S.*, Docket No. 20-0177 (issued September 3, 2021); *M.J.*, Docket No. 19-1665 (issued July 29, 2020); *Tammy Craven*, 57 ECAB 689 (2006).

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.¹⁶ Previous cases have held that receiving one or two erroneous direct deposit payments does not necessarily create the requisite knowledge to find that a claimant was at fault in the creation of the overpayment.¹⁷

ANALYSIS -- ISSUE 2

The Board finds that OWCP improperly determined that appellant was at fault in the creation of the overpayment for the period May 16 through June 18, 2022.

Appellant returned to work on May 16, 2022, but continued to receive compensation *via* EFT every 28 days. The first EFT deposit following her return to work was made by OWCP on May 21, 2022 and covered the period May 16 through 21, 2022. The second EFT deposit following appellant's return to work was made by OWCP on June 18, 2022 and covered the period May 22 through June 18, 2022.

As noted above, 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 or second incorrect deposit since the acceptance of the overpayment, at the time of receipt of the direct deposit, lacks the requisite knowledge.¹⁸

Given the short period of time following appellant's return to work, there is no documentation to demonstrate that appellant had knowledge at the time her bank received direct deposits from OWCP on May 21 and June 18, 2022 that the payments were incorrect.¹⁹ The Board thus finds that she was without fault in accepting the two direct deposits covering the period of the overpayment from May 16 through June 18, 2022.²⁰

As the case is not in posture for decision regarding the issue of waiver of recovery of the overpayment for the period May 16 through June 18, 2022, the case must be remanded for OWCP to determine whether appellant is entitled to waiver of recovery of the overpayment covering that period.²¹ Following any further development deemed necessary, it shall issue a *de novo* decision regarding waiver.

¹⁶ See *L.G.*, Docket No. 20-1342 (issued September 3, 2021); *C.H.*, Docket No. 19-1470 (issued January 24, 2020); see also *Karen Dixon*, 56 ECAB 145 (2004).

¹⁷ *L.G., id.*; *V.S.*, Docket No. 13-1278 (issued October 23, 2013).

¹⁸ See *M.J.*, *supra* note 15; see also *George A. Hirsch*, 47 ECAB 520 (1996).

¹⁹ See *M.T.*, Docket No. 20-1353 (issued May 9, 2022); *B.W.*, Docket No. 19-0239 (issued September 18, 2020); *K.E.*, Docket No. 19-0978 (issued October 25, 2018).

²⁰ See *L.G.*, *supra* note 16.

²¹ *D.R.*, Docket No. 21-0234 (November 17, 2022); *C.C.*, Docket No. 19-1268 (issued April 2, 2021),.

The Board further finds, however, that appellant was at fault in the creation of the overpayment for the subsequent compensation payment covering the period June 19 through July 16, 2022.²²

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.²³ 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.²⁴ By the time of the third 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 May 16, 2022.²⁵ After her receipt of the first two 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 period June 19 through July 16, 2022.

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$3,906.29 for the period May 16 through July 16, 2022 because she continued to receive wage-loss compensation after she returned to work. The Board further finds that OWCP improperly found her at fault in the creation of the overpayment for the period May 16 through June 18, 2022, but properly found her at fault for the period June 19 through July 16, 2022. The case will be remanded to OWCP to consider waiver of recovery of the overpayment for the period May 16 through June 18, 2022. On remand, OWCP shall request updated financial information from appellant to evaluate her current financial situation. Following this and other such further development as deemed necessary, it shall issue a *de novo* decision regarding waiver.

²² *K.P.*, Docket No. 19-1151 (issued March 18, 2020); *D.W.*, Docket No. 15-0229 (issued April 17, 2014).

²³ *B.W.*, *supra* note 19; *P.B.*, Docket No. 19-0329 (issued December 31, 2019); *C.G.*, Docket No. 15-0701 (issued December 9, 2015).

²⁴ *Id.*

²⁵ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the September 13, 2022 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: October 16, 2023
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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