

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

D.G., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,)
WEST PALM BEACH VA MEDICAL CENTER,)
West Palm Beach, FL, Employer)

Docket No. 23-0780
Issued: October 13, 2023

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
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On May 12, 2023 appellant filed a timely appeal from a May 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.

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$3,145.78 for the period January 30 through February 25, 2023, for which she was without fault, because she continued to receive wage-loss compensation for total disability following her return to full-time work; and (2) whether OWCP properly denied waiver of recovery of the overpayment.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On January 27, 2022 appellant, then a 62-year-old nursing assistant, filed a traumatic injury claim (Form CA-1) alleging that on January 23, 2022 she sustained a right shoulder injury when assisting others cleaning a combative patient while in the performance of duty. She stopped work on January 23, 2022. OWCP accepted the claim for right shoulder joint sprain and right rotator cuff tear. It paid appellant wage-loss compensation on the supplemental rolls as of March 11, 2022 and on the periodic rolls as of December 4, 2022.

The employing establishment offered appellant a full-time modified assignment on light duty as a nursing assistant in acute care on January 20, 2023, which appellant accepted on January 23, 2023. Appellant returned to work on January 30, 2023.

In a fiscal worksheet dated March 8, 2023, OWCP calculated that it had paid appellant wage-loss compensation in the net amount of \$3,262.29 for the period January 29 through February 25, 2023.

In a preliminary overpayment determination dated March 15, 2023, OWCP advised appellant that an overpayment of compensation in the amount of \$3,145.78 had been created because she returned to work full time on January 30, 2023, but continued to receive wage-loss compensation for total disability through February 25, 2023. OWCP noted that appellant had received compensation for the 28-day period covering January 29 through February 25, 2023, but she was only entitled to compensation for one day during this period, which was January 29, 2023. Thus, she was overpaid during the 27-day period covering January 30 through February 25, 2023. The amount appellant received for the 28-day period was \$3,262.29. OWCP calculated that her daily rate of compensation for this period was \$116.51. For the period of overpayment, appellant therefore received a \$3,145.78 overpayment of compensation. It made the preliminary finding that she was without fault in the creation of the overpayment, as less than 30 days had elapsed since the electronic funds transfer (EFT) deposit was made, which did not allow her ample time to receive and review a statement from her financial institution showing the details of the improper payment. OWCP requested that appellant complete an enclosed 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 her reported income, assets, and expenses. It advised her that failure to submit the requested information within 30 days would result in the denial of waiver and no further request would be considered until the requested information was received. 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 decision based on the written record or a prerecoyment hearing.

In a completed overpayment action request form dated March 24, 2023, appellant requested that OWCP make a decision based on the written evidence regarding possible waiver of the overpayment. She requested waiver of recovery of the overpayment, explaining that during the time she received wage-loss compensation, she withdrew \$17,000.00 from the Thrift Savings Program (TSP) to pay her mortgage and bills as her compensation payments were incorrect. Appellant attached supporting documentation. In an attached Form OWCP-20, appellant advised that her total monthly income was \$4,100.00. She further advised that her monthly expenses totaled \$4,220.00. Appellant indicated that she had total assets of \$270.00.

By letter dated April 17, 2023, OWCP advised that it had received her March 24, 2023 overpayment action request form and Form OWCP-20. It noted that while it had received financial information, it lacked supporting financial documentation. OWCP afforded appellant an additional 15 days to provide financial information in support of her request for waiver.

On May 8, 2023 OWCP received appellant's April 28, 2023 reply to OWCP's April 17, 2023 letter. In an overpayment action request form, she once again requested that OWCP make a decision based upon the written evidence and requested waiver of recovery of the overpayment because she was found to be without fault in its creation. In an attached Form OWCP-20, appellant advised that her monthly income totaled \$4,350.00. She further advised that her total monthly expenses were \$5,207.26. Appellant indicated that she had assets of \$370.00 to \$420.00. She attached numerous other documents including a TSP account statement, and credit card statements noting account balances and monthly minimum due amounts. Appellant also submitted statements supporting her mortgage payments, utility, insurance, and telephone bills.

By decision dated May 11, 2023, OWCP finalized its preliminary overpayment determination that appellant had received an overpayment of compensation in the amount of \$3,145.78 for the period January 30 through February 25, 2023, because she returned to work on January 30, 2023, but continued to receive wage-loss compensation through February 25, 2023. It found that she was without fault in the creation of the overpayment, but denied waiver of recovery. It noted that she had not responded to its April 17, 2023 development letter.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of FECA² 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.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

A claimant is not entitled to receive temporary total disability and actual earnings for the same period.⁵ 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.⁶

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$3,145.78 for the period January 30 through February 25, 2023, for which she was without fault,

² 5 U.S.C. §§ 8101-8193.

³ *Id.* at § 8102(a).

⁴ *Id.* at § 8129(a).

⁵ *See M.S.*, Docket No. 16-0289 (issued April 21, 2016); *D.B.*, Docket No. 15-0258 (issued February 1, 2016).

⁶ *See C.V.*, Docket No. 16-0986 (issued September 1, 2016); 20 C.F.R. § 10.500.

because she continued to receive wage-loss compensation for total disability following her return to full-time work.

OWCP paid appellant wage-loss compensation on the supplemental and periodic rolls. The evidence reflects that appellant returned to work, full time, on January 30, 2023. However, she continued to receive wage-loss compensation through February 25, 2023. A claimant is not entitled to receive temporary total disability benefits and actual earnings for the same time period.⁷ Accordingly, the Board finds that appellant received an overpayment of compensation.⁸

The record shows that OWCP calculated that, from January 30 through February 25, 2023, appellant received \$3,145.78 in total net compensation, but was not entitled to any compensation during this time period. OWCP calculated that her daily rate of compensation for this period was \$116.51. For the 27-day period of overpayment, she therefore received a \$3,145.78 overpayment of compensation. The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$3,145.78 for the period January 30 through February 25, 2023.

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.⁹ No waiver of recovery of an overpayment is possible if the claimant is at fault in creating 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; or (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'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

⁷ *Supra* note 5.

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

⁹ 5 U.S.C. § 8129(b).

¹⁰ *See A.C.*, Docket No. 22-0118 (issued December 15, 2022); *B.R.*, Docket No. 18-0339 (issued January 24, 2019); *Gregg B. Manston*, 45 ECAB 344, 354 (1994).

¹¹ 20 C.F.R. § 10.433(a). *See A.W.*, Docket No. 20-0448 (issued March 4, 2022); *Kenneth E. Rush*, 51 ECAB 116, 118 (1999).

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

Even if an overpayment resulted from negligence by OWCP, this does not excuse the employee from accepting payment, which the employee knew or should have been expected to know she was not entitled.¹³

ANALYSIS -- ISSUE 2

The Board finds that the case is not in posture for decision regarding the issue of waiver of recovery of the overpayment.

In its March 15, 2023 preliminary overpayment determination, OWCP found that appellant was without fault in the creation of the \$3,145.78 overpayment for the period January 30 through February 25, 2023. In the final overpayment decision dated May 11, 2023 OWCP also found appellant without fault in the creation of the overpayment, rendering her eligible for waiver of recovery of the overpayment.

OWCP, in its May 11, 2023 decision, noted that appellant had not responded to its April 17, 2023 development letter. The evidence of record establishes, however, that on May 8, 2023, OWCP received appellant's April 28, 2023 reply. In an overpayment action request form, she once again requested that OWCP make a decision based upon the written evidence and requested waiver of recovery of the overpayment because she was found to be without fault in its creation. In an attached Form OWCP-20, appellant advised that her monthly income totaled \$4,350.00. She further advised that her total monthly expenses were \$5,207.26. Appellant indicated that she had assets of \$370.00 to \$420.00. She attached numerous other documents including a TSP account statement, and credit card statements noting account balances and monthly minimum due amounts. Appellant also submitted statements supporting her mortgage payments, utility, insurance, and telephone bills.

In the case of *William A. Couch*,¹⁴ the Board held that, when adjudicating a claim, OWCP is obligated to review all evidence properly submitted by a claimant and received by OWCP before the final decision is issued. As the Board's decisions are final as to the subject matter appealed,¹⁵ it is crucial that all evidence relevant to that subject matter which was properly submitted to OWCP prior to the time of issuance of its final decision be considered and addressed.¹⁶

The case must therefore be remanded so that OWCP may fully consider and address the evidence that was properly submitted by appellant prior to the issuance of this decision, regarding

¹² *Id.* at § 10.433(b).

¹³ *A.W.*, *supra* note 11; *Diana L. Booth*, 52 ECAB 370 (2001).

¹⁴ 41 ECAB 548 (1990); *F.A.*, Docket No. 20-1324 (issued March 1, 2021); *T.G.*, Docket No. 19-1930 (issued January 8, 2021).

¹⁵ *Id.* at § 501.6(c).

¹⁶ *See William A. Couch*, *supra* note 14.

the issue of waiver of recovery of the overpayment.¹⁷ Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.¹⁸

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$3,145.78 for the period January 30 through February 25, 2023, for which she was without fault, because she continued to receive wage-loss compensation for total disability following her return to full-time work. The Board further finds that the case is not in posture for decision regarding the issue of waiver of recovery of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the May 11, 2023 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 13, 2023
Washington, DC

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

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

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

¹⁷ *M.P.*, Docket No. 16-1325 (issued November 2, 2016).

¹⁸ *J.B.*, Docket No. 11-2005 (issued July 23, 2012).