

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

D.P., Appellant)	
)	
and)	Docket No. 23-0590
)	Issued: September 13, 2023
U.S. POSTAL SERVICE, CITY OF INDUSTRY)	
POST OFFICE, City of Industry, CA, Employer)	
)	

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 March 19, 2023 appellant filed a timely appeal from a February 21, 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 \$5,406.89 for the period July 5 through August 13, 2022 because she continued to receive wage-loss compensation after she returned to work; and (2) whether OWCP properly

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the February 21, 2023 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.*

determined that she was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment.

FACTUAL HISTORY

On October 15, 2019 appellant, then a 54-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on September 16, 2019 she injured her left shoulder, left arm, left wrist, both knees, both hips, and back while in the performance of duty. She explained that she slipped on detergent and extended her arm out to keep herself from falling. On the reverse side of the claim form, appellant's supervisor controverted the claim. On November 27, 2019 OWCP accepted the claim for fascia and tendon strain of the lower back, left shoulder sprain, left elbow sprain, and left wrist sprain. It paid appellant wage-loss compensation on the supplemental rolls beginning November 28, 2019 and on the periodic rolls beginning April 26, 2020.

On June 6, 2022 the employing establishment offered a rehabilitation reassignment in accordance with appellant's work restrictions, with an effective date of July 2, 2022. A work status report (Form CA-3) dated July 5, 2022 indicated that appellant accepted the job offer and returned to work as of July 5, 2022 at full duty with restrictions.

On July 16 and August 23, 2022 OWCP paid appellant wage-loss compensation in the net amounts of \$3,784.82 for the periods June 19 through July 16, 2022 and July 17 through August 13, 2022.

In a fiscal memorandum dated September 9, 2022, OWCP noted that appellant had returned to work on July 5, 2022, but had received net wage-loss compensation during the period July 5 through 16, 2022 in the amount of \$1,622.07, and net wage-loss compensation for the period July 17 through August 13, 2022 in the amount of \$3,784.82. It found that the overpayment amount totaled \$5,406.89.

On November 9, 2022 OWCP issued a preliminary overpayment determination, finding that appellant had received an overpayment of compensation in the amount of \$5,406.89 for the period July 5 through August 13, 2022, because she returned to full-time employment on July 5, 2022, but received wage-loss compensation for total disability through August 13, 2022. Using her net compensation, it found that she had received an overpayment of \$1,622.07 and \$3,784.82 for the periods July 5 through 16, 2022 and July 17 through August 13, 2022 respectively, to find a total overpayment of \$5,406.89. OWCP further notified appellant of its preliminary finding that she was at fault in the creation of the overpayment, because she accepted a payment that she knew or reasonably should have known, was incorrect. Additionally, it provided an overpayment action request form and informed her that, within 30 days, she could request a final decision based on the written evidence, or a prerecoupment hearing. 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 income and expenses.

On December 5, 2022 appellant requested a decision based on the written evidence. She submitted a completed Form OWCP-20 of even date. Appellant indicated that her monthly

income totaled \$7,819.80 and her monthly expenses totaled \$7,191.59. She also reported a total of \$8,880.09 in assets.

By decision dated February 21, 2023, OWCP finalized its preliminary overpayment determination finding that appellant had received an overpayment of compensation in the amount of \$5,406.89 for the period July 5 through August 13, 2022. It found her at fault in the creation of the overpayment because she accepted compensation payments which she knew or should have known were incorrect. OWCP required that appellant forward the full amount of \$5,406.89 within 30 days to repay the overpayment of compensation.

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 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 appellant received an overpayment of compensation in the amount of \$5,408.69 for the period July 5 through August 13, 2022, because she continued to receive wage-loss compensation after she returned to work.

Appellant resumed full-time work on July 5, 2022. OWCP, however, continued to pay her wage-loss compensation for disability through August 13, 2022, resulting in an overpayment

³ 5 U.S.C. § 8102(a).

⁴ *Id.* at § 8129(a).

⁵ *Id.* at § 8116(a).

⁶ *G.H.*, Docket No. 22-0890 (issued January 9, 2023); *L.T.*, Docket No. 19-1389 (issued March 27, 2020); *K.P.*, Docket No. 19-1151 (issued March 18, 2020); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Determinations in an Overpayment*, Chapter 6.300.4g (September 2020).

of compensation. Appellant was not entitled to receive disability benefits and actual earnings for the same period.⁷ Fact of overpayment is therefore established.

In determining the amount of the overpayment, OWCP calculated the net amount of wage-loss compensation that appellant had received from July 5 through August 13, 2022 to find an overpayment of \$5,408.69. The Board has reviewed OWCP's calculations and finds that she received an overpayment of compensation in the amount of \$5,408.69 during the above-noted period.⁸ The period and amount of overpayment is therefore established.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of FECA provides that an overpayment of compensation shall be recovered by OWCP unless "incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of FECA or be against equity and good conscience."⁹ No waiver of payment is possible if appellant is at fault in helping to create the overpayment.¹⁰

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.¹¹ 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.¹²

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, because 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

⁷ *G.H., id.; J.R.*, Docket No. 20-0025 (issued December 13, 2021); *L.T.*, Docket No. 19-1389 (issued March 27, 2020); *S.N.*, Docket No. 19-1018 (issued November 12, 2019).

⁸ *G.H., id.*

⁹ 5 U.S.C. § 8129(b).

¹⁰ *M.T.*, Docket No. 20-1353 (issued May 9, 2022); *S.S.*, Docket No. 20-0776 (issued March 15, 2021); *B.W.*, Docket No. 19-0239 (issued September 18, 2020); *C.L.*, Docket No. 19-0242 (issued August 5, 2019).

¹¹ 20 C.F.R. § 10.433(a); *G.H., supra* note 6; *see C.L.*, Docket No. 19-0242 (issued August 5, 2019); *see also* 20 C.F.R. § 10.430.

¹² *Id.* at § 10.433(b); *G.H., id.*; *see also supra* note 6 at Chapter 6.300.4d (September 2020).

¹³ *G.H., id.*; *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).

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 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.¹⁵

ANALYSIS -- ISSUE 2

The Board finds that OWCP improperly determined that appellant was at fault in the creation of the overpayment of compensation for the period July 5 through August 13, 2022.

Appellant returned to work on July 5, 2022, but continued to receive compensation *via* direct deposit through August 13, 2022. The first direct deposit following her return to work was made by OWCP on July 16, 2022 and covered the period June 19 through July 16, 2022. The second direct deposit following appellant's return to work was made by OWCP on August 13, 2022 and covered the period July 17 through August 13, 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.¹⁶

There is no documentation to demonstrate that appellant had knowledge at the time her bank received direct deposits from OWCP on July 16 and August 13, 2022 that the payments were incorrect.¹⁷ The Board thus finds that she was without fault in accepting the two direct deposits covering the period of the overpayment from July 5 through August 13, 2022.¹⁸

The Board therefore finds that the case is not in posture for decision regarding the issue of waiver of recovery of the overpayment for the period July 17 through August 13, 2022. The Board will set aside the February 21, 2023 decision regarding the issue of fault as to the July 16 and August 13, 2022 direct deposits covering the period June 19 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 5 through August 13, 2022.

¹⁴ *G.H., id.*; *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).

¹⁵ *G.H., id.*; *V.S.*, Docket No. 13-1278 (issued October 23, 2013).

¹⁶ *G.H., id.*; *see M.J.*, Docket No. 19-1665 (issued July 29, 2020); *see also George A. Hirsch*, 47 ECAB 520 (1996).

¹⁷ *G.H., id.*; *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).

¹⁸ *See L.G., supra* note 14.

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$5,406.89 for the period July 5 through August 13, 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 July 5 through August 13, 2022. The case will be remanded to OWCP to consider waiver of recovery of the overpayment for the period July 5 through August 13, 2022.

ORDER

IT IS HEREBY ORDERED THAT the February 21, 2023 overpayment 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: September 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