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M.R., Appellant)	
)	
and)	Docket No. 24-0200
)	Issued: March 28, 2024
U.S. POSTAL SERVICE, BALTIMORE)	
PROCESSING & DISTRIBUTION CENTER,)	
Baltimore, MD, Employer)	
)	

Case Submitted on the Record

Before:
 JANICE B. ASKIN, Judge
 VALERIE D. EVANS-HARRELL, Alternate Judge
 JAMES D. MCGINLEY, Alternate Judge

On December 21, 2023 appellant filed a timely appeal from a September 5, 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.

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$8,604.19 during the period April 22 through June 17, 2023, because she continued to receive wage-loss compensation for total disability after she returned to full-time work; and (2) whether OWCP properly determined that she was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On May 15, 2017 appellant, then a 36-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that on that date she injured her right shoulder and neck when removing skids from a dumper while in the performance of duty. OWCP accepted the claim for neck muscle, fascia and tendon strain; and muscle spasm. It subsequently expanded the acceptance of the claim to include cervical radiculopathy and right shoulder impingement syndrome. OWCP paid appellant wage-loss compensation on the supplemental rolls commencing October 15, 2017, and on the periodic rolls commencing February 4, 2018.

On February 9, 2018 OWCP advised appellant that she was expected to return to work as soon as she was able to do so, and that 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 modified assignment as a full-time mail handler with restrictions on April 5, 2023, which she accepted on April 18, 2023. Appellant returned to work on April 22, 2023.

In an automated compensation payment system (ACPS) worksheet dated June 22, 2023, OWCP calculated that appellant's overpayment amount for the period April 22 through June 17, 2023 was \$8,604.19. It noted that she was paid \$150.95 for April 22, 2023, and \$4,226.52 for each subsequent 28-calendar-day period through June 17, 2023.

In a June 26, 2023 preliminary overpayment determination, OWCP notified appellant that she had received an overpayment of compensation in the amount of \$8,604.19, for the period April 22 through June 17, 2023, because she returned to work full time on April 22, 2023, but continued to receive wage-loss compensation through June 17, 2023. It determined that she received \$4,226.62 in compensation for the periods March 26 through June 17, 2023. OWCP noted that appellant was paid \$4,226.62 for 28 days of compensation for the period March 26 through April 22, 2023 when she was only entitled to 27 days of compensation. It calculated that appellant was not entitled to \$150.95 for the one day of nonentitlement on April 22, 2023, which it calculated by dividing \$4,226.62 by 28 days. The daily rate for April 22, 2023 equated to \$150.95, which OWCP combined with \$8,453.24 for the period April 23 through June 17, 2023, resulting in a total overpayment of \$8,604.19. OWCP further advised appellant of its preliminary overpayment determination that she was at fault in the creation of the overpayment, because she had received a compensation payment deposited by EFT, and ample time had elapsed since the EFT deposit for her to receive and review a statement from her financial institution showing the details of an improper payment. It requested that she complete an overpayment action request form and 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

prerecoupment hearing. It mailed the preliminary overpayment determination to her last known address of record and afforded her 30 days to respond. No response was received.

By decision dated September 5, 2023, OWCP finalized its preliminary overpayment determination that appellant had received an overpayment of compensation in the amount of \$8,604.19 for the period April 22 through June 17, 2023, 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 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

² 5 U.S.C. § 8102(a).

³ *Id.* at § 8129(a).

⁴ *Id.* at § 8116(a).

⁵ 20 C.F.R. § 10.500(a).

⁶ *See T.L.*, Docket No. 23-0424 (issued December 28, 2023); *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 *T.L.*, *id.*; *S.S.*, *id.*; *L.T.*, *id.*; *C.H.*, *id.*; Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Identifying and Calculating an Overpayment*, Chapter 6.200.1a (September 2020).

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$8,604.19 during the period April 22 through June 17, 2023, because she continued to receive wage-loss compensation for total disability after she returned to full-time work.

Appellant resumed full-time modified-duty employment on April 22, 2023. OWCP, however, continued to pay her wage-loss compensation for total disability following her return to work through June 17, 2023. 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 April 22 through June 17, 2023 as \$8,604.19. It explained how it calculated the amount of the overpayment, based on her receipt of compensation in the amount of \$4,226.62 every 28 days for the period March 26 through June 17, 2023. The Board has reviewed OWCP's calculations and finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$8,604.19 for the period April 22 through June 17, 2023.

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 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

⁸ *Supra* note 6.

⁹ 5 U.S.C. § 8129(b).

¹⁰ *T.L.*, *supra* note 6; *S.S.*, *supra* note 6; *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).

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 or second 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 OWCP improperly determined that appellant was at fault in the creation of the overpayment for the period April 22 through May 20, 2023.

Appellant returned to work on April 22, 2023, but continued to receive compensation *via* EFT every 28 days. The first EFT deposit following her return to work was made by OWCP on April 22, 2023 and covered the period March 26 through April 22, 2023. The second EFT deposit following appellant's return to work was made by OWCP on May 20, 2023, and covered the period April 23 through May 20, 2023.

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.¹⁵

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 April 22 and May 20, 2023 that the payments were received and were incorrect.¹⁶ The Board thus finds that she was without fault in accepting the two direct deposits covering the period of the overpayment from April 22 through May 20, 2023.¹⁷

As the case is not in posture for decision regarding the issue of waiver of recovery of the overpayment for the period April 22 through May 20, 2023, the case must be remanded for OWCP

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

¹³ *L.W.*, Docket No. 22-1155 (issued January 19, 2023); *M.T.*, Docket No. 20-1353 (issued May 9, 2022); *C.H.*, *supra* note 6. *See Tammy Craven*, 57 ECAB 689 (2006); *see also A.B.*, Docket No. 18-0922 (issued January 3, 2019).

¹⁴ *Id.*

¹⁵ *See G.H.*, Docket No. 22-0890 (issued January 9, 2023); *C.C.*, Docket No. 18-1268 (issued April 2, 2021); *M.J.*, Docket No. 19-1665 (issued July 29, 2020); *Tammy Craven*, *supra* note 13.

¹⁶ *See G.H.*, *id.*; *M.T.*, *supra* note 13; *B.W.*, *supra* note 10; *K.E.*, Docket No. 19-0978 (issued October 25, 2018).

¹⁷ *See G.H.*, *id.*; *L.G.*, Docket No. 20-1342 (issued September 3, 2021).

to determine whether appellant is entitled to waiver of recovery of the overpayment covering that period.¹⁸ Following any further development deemed necessary, it shall issue a *de novo* decision regarding waiver.

The Board further finds, however, that appellant was at fault in the creation of the overpayment for the subsequent compensation payment covering the period May 21 through June 17, 2023.¹⁹

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.²⁰ 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.²¹ 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 April 22, 2023.²² 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 May 21 through June 17, 2023.

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$8,604.19 during the period April 22 through June 17, 2023. The Board further finds that she was without fault in the creation of the overpayment for the period April 22 through May 20, 2023, and that she was at fault in the creation of the overpayment for the period May 21 through June 17, 2023. The case will be remanded to OWCP to consider waiver of recovery of the overpayment for the period April 22 through May 20, 2023

¹⁸ *G.H., id.*; *D.R.*, Docket No. 21-0234 (issued November 17, 2022); *C.C.*, Docket No. 19-1268 (issued April 2, 2021).

¹⁹ *S.R.*, Docket No. 23-1050 (issued October 16, 2023); *K.P.*, Docket No. 19-1151 (issued March 8, 2020); *D.W.*, Docket No. 15-0229 (issued April 17, 2014).

²⁰ *S.R., id.*; *B.W., supra* note 10; *P.B.*, Docket No. 19-0329 (issued December 31, 2019); *C.G.*, Docket No. 15-0701 (issued December 9, 2015).

²¹ *Id.*

²² *Id.*

ORDER

IT IS HEREBY ORDERED THAT the September 5, 2023 decision of the Office of Workers' Compensation Programs is reversed in part, affirmed in part, and set aside in part; the case is remanded for further proceedings consistent with this decision of the Board.

Issued: March 28, 2024
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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