

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

M.T., Appellant

and

**DEPARTMENT OF THE ARMY, US ARMY
EUROPE 7th ARMY, APO, AE, Employer**

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**Docket No. 12-74
Issued: May 21, 2012**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On October 14, 2011 appellant filed a timely appeal from the June 7, 2011 overpayment decision by 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 the case.

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$6,825.72 for the period January 26 through May 8, 2010 because she received compensation for wage loss after her benefits were terminated; and (2) whether OWCP properly denied waiver of recovery of the overpayment in the amount of \$5,594.79 for the period February 14 through May 8, 2010, for which she was at fault in its creation.

On appeal, appellant notes that her current monthly income barely covers her monthly living expenses and that she no longer has any excess savings. She stated that she honestly

¹ 5 U.S.C. § 8101 *et seq.*

thought she was entitled to the compensation. Appellant noted that when her compensation was cut she experienced immense hardship and this worsened and resulted in the loss of her dwelling place and consequent homelessness, which forced her to move in with her daughter and become a burden. She requests that her debt be waived or that she be allowed to make payments in the amount of \$50.00 a month.

FACTUAL HISTORY

On January 12, 1988 appellant, then a 32-year-old food service worker, filed a traumatic injury claim alleging that she injured her left shoulder, ribs, left hip and upper leg when, while cleaning the concrete floor, she slipped and fell, landing on her left side. OWCP accepted her claim for contusion of the left shoulder and hip, left frozen shoulder and shoulder impingement syndrome, bicipital tenosynovitis and contusion of the hip and thigh. It paid wage-loss compensation and medical benefits to appellant.

On December 18, 2009 OWCP proposed terminating appellant's compensation benefits as the medical evidence established that she no longer had any disability due to the accepted work injury. It allotted her 30 days within which to submit evidence opposing the proposed termination. Appellant did not respond within the time allotted.

By decision dated January 25, 2010, OWCP terminated appellant's wage-loss benefits effective that date. This decision was sent to appellant at her address of record and was not returned by the U.S. Post Office.

By letter dated January 21, 2010 and received by OWCP on January 26, 2010, appellant contested the proposed termination of benefits.

On September 9, 2010 OWCP issued a preliminary determination that appellant was overpaid in the amount of \$6,825.72 because benefits for compensation continued from January 26 through May 8, 2010.² It made a preliminary determination that she was at fault in the creation of the overpayment because she accepted payments that she knew or reasonably should have known to be incorrect.

On October 12, 2010 appellant disagreed that the overpayment occurred and disagreed with the amount of the overpayment. She believed that the overpayment occurred through no fault of her own and requested waiver of the recovery of the overpayment. Appellant requested a precoupment hearing on the issue of fault and possible waiver of the overpayment. She believed that at the time of payment she was eligible for workers' compensation payments, that she did not have any income and was not able to repay anything and that she was told that her file had been transferred and that someone would contact her but they never did.

² Pursuant to the payment history inquiry report, appellant received: \$1,876.00 for the period covering April 11 through May 8, 2010; \$1,876.00 for the period March 14 through April 10, 2010; and \$1,814.00 for the period February 14 through March 13, 2010. A payment was also made for health benefits in the amount of \$28.79. Finally, appellant was paid \$1,814.00 for the period January 17 through February 13, 2010. As her benefits were terminated on January 25, 2010 OWCP prorated this payment and determined that she was overpaid in the amount of \$1,230.93 for this time period. The total of these overpayments (\$1,230.93 plus \$28.79 plus \$1,814.00 plus \$1,876.00 plus \$1,876.00) equals the overpayment amount of \$6,825.72.

At the prerecoupment hearing held before an OWCP hearing representative on March 18, 2011, appellant and her attorney stated that she did not receive the proposed notice of termination until January 7, 2010 that her benefits were to be terminated on January 25, 2010 and that she sent a letter to OWCP contesting the termination on January 21, 2010. She indicated that she believed she was still entitled to receive benefits while she was appealing. Appellant testified that she lives with her children and that her only income comes from social security. She submitted a statement and supporting documentation indicating that her income from social security was \$449.34 a month and that she paid \$150.00 to help cover the cost of her dwelling expense with her children. In a letter dated April 18, 2011, appellant's attorney indicated that appellant's monthly household expenses were \$150.00, her monthly car note was \$235.00 and that her monthly personal expenses were \$100.00.

By decision dated June 7, 2011, OWCP's hearing representative affirmed the finding of an overpayment in the amount of \$6,825.72. He found that appellant had established that she was without fault in the creation of the overpayment for the period January 26 through February 13, 2010 as this first payment was deposited into her bank account *via* electronic funds transfer (EFT). The hearing representative noted that, as her expenses exceeded her income, she was entitled to waiver of \$1,230.93, which represented the portion of the overpayment for which she was not at fault and eligible for waiver. With regards to the remainder of the overpayment in the amount of \$5,594.79, he found that appellant was with fault in the creation of the overpayment and therefore not entitled to waiver. The hearing representative demanded payment of the overpayment in full.

LEGAL PRECEDENT -- ISSUE 1

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 duty.³ When an overpayment has been made to an individual 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 the individual is entitled.

ANALYSIS -- ISSUE 1

Appellant's compensation benefits were terminated by OWCP as of January 25, 2010. However, she continued to receive compensation payments. The records indicate that appellant received compensation in the amount of \$6,825.72 after the termination of benefits. As she was not entitled to receive compensation from January 26 through May 8, 2010, the amount of compensation received for this time period resulted in an overpayment.

LEGAL PRECEDENT -- ISSUE 2

An individual who is found at fault in either accepting or creating an overpayment is not eligible for a waiver of recovery of overpayment.⁴ A benefits recipient will be at fault if the

³ 5 U.S.C. § 8102(a).

⁴ *Id.* at § 8129(b); 20 C.F.R. §§ 10.433(a) and 10.434.

individual: (1) made an incorrect statement as to a material fact which she knew or should have known to be incorrect; (2) failed to provide information which she knew or should have known to be material; or (3) accepted a payment which she knew or should have known to be incorrect.⁵

ANALYSIS -- ISSUE 2

OWCP found that appellant was without fault in the creation of an overpayment in the amount of \$1,230.93 covering the period January 26 through February 13, 2010. It further found that she was entitled to waiver of recovery of this overpayment. However, OWCP found that appellant was with fault in the creation of the remaining overpayment in the amount of \$5,594.79 for the period February 14 through May 8, 2010. As appellant was with fault in the creation of this overpayment, OWCP determined that it could not waive recovery of the overpayment, and demanded payment in full.

The Board finds that appellant was at fault in the creation of the overpayment because she accepted a payment which she knew or should have known to be incorrect. Appellant's compensation benefits were terminated on January 25, 2010. Yet she still continued to accept compensation payments that she should have known to be incorrect. Appellant's contention that she believed that she was entitled to these payments while she appealed the termination is without merit. The January 25, 2010 decision clearly stated that her benefits were terminated effective January 25, 2010. Appellant stated that she did not receive this decision. However, the record reflects that a copy of the January 25, 2010 decision was sent to her at her address of record. The Board has found that, in the absence of evidence to the contrary, a letter properly addressed and mailed in the due course of business, such as in the course of OWCP's daily activities, is presumed to have arrived at the mailing address in due course. This is known as the mailbox rule.⁶ As OWCP properly mailed this decision to appellant at her address of record, it is presumed to have arrived at her mailing address.

⁵ 20 C.F.R. § 10.433(a).

⁶ *Jeffrey M. Sagrecy*, 55 ECAB 724, (2004); *James A. Gray*, 54 ECAB 277 (2002).

As appellant was at fault in the creation of that portion of the overpayment in the amount of \$5,594.79, the Board finds that OWCP properly denied waiver of recovery of the overpayment.⁷

CONCLUSION

The Board finds that OWCP properly found that appellant received an overpayment of compensation in the amount of \$6,825.72 for the period January 26 through May 8, 2010 because she received compensation for wage loss after her benefits were terminated. The Board further finds that it properly denied waiver of recovery of the overpayment in the amount of \$45,594.79 for the period February 14 through May 8, 2010 as appellant was at fault in its creation.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 7, 2011 is affirmed.

Issued: May 21, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

⁷ As OWCP did not direct recovery of the overpayment from continuing compensation payments, the Board does not have jurisdiction over the recovery of the overpayment. *See Desiderio Martinez*, 55 ECAB 245 (2004) (with respect to the recovery of overpayments, the Board's jurisdiction is limited to reviewing those cases where OWCP seeks recovery from continuing compensation benefits under FECA).