

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

B.J., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Santa Ana, CA, Employer**

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**Docket No. 12-150
Issued: May 22, 2012**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 15, 2011 appellant filed a timely appeal from a September 12, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) finding an overpayment of compensation.¹ Pursuant to the Federal Employees' Compensation Act² (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 OWCP properly determined that appellant received an overpayment in the amount of \$667.45 for the period January 21 to February 12, 2011 because she received compensation for total disability when she had earnings from employment; and (2) whether she was at fault in the creation of the overpayment and not entitled to waiver of the overpayment.

¹ In a decision dated August 23, 2011, an OWCP hearing representative reversed a May 13, 2011 decision denying her claim for disability compensation for the period March 4 to 13, 2011. Since this decision is not adverse to appellant's claim, that issue is not on appeal.

² 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

OWCP accepted that on June 1, 2010 appellant, then a 42-year-old mail carrier, sustained a lumbosacral sprain when she was attacked by a dog and fell down on the sidewalk. In its July 22, 2010 letter accepting the claim, it advised her that she was expected to return to work as soon as she was able and to notify OWCP once she returned to work. OWCP further informed appellant that she was only entitled to compensation if she was unable to work due to her accepted condition and that she should immediately return any compensation checks received which included payment for a period after which she returned to work.

In a June 3, 2010 report, Dr. Rajeswari K. Bodapati, a Board-certified family practitioner, provided an accurate history of injury and conducted an examination. He diagnosed neck strain, left elbow abrasion, elbow contusion, right ankle sprain, lumbosacral sprain and right lumbosacral radiculitis. Dr. Bodapati stated that appellant was temporarily totally disabled today and authorized her to return to modified duty.

The employing establishment was not able to provide a job position that accommodated her work restrictions. OWCP paid wage-loss compensation for disability.

On February 23, 2011 OWCP received notice that appellant had returned to limited-duty work on January 21, 2011.

On February 5, 2011 appellant requested compensation for leave without pay (LWOP) from January 15 to February 4, 2011 and submitted a time-analysis form.³

OWCP paid appellant net compensation of \$1,594.09 for the period January 21 to February 4, 2011. A computer printout noted that she was on LWOP status for 54.34 hours for the period January 21 to February 4, 2011.

In a letter dated March 3, 2011, OWCP advised the employing establishment that appellant was overpaid the amount of \$523.89 for the period January 21 to February 4, 2011 after she returned to limited-duty work on January 21, 2011. It requested her leave status for February 5 to 12, 2011 to determine any additional overpayments.

On March 7, 2011 appellant requested compensation for LWOP for the period February 5 through March 4, 2011. In an attached time analysis form, she noted that she used LWOP for 3.89 hours on February 5, 2011; 2.99 hours on February 8, 2011; 5 hours on February 9, 2011; and 8 hours on February 10, 11 and 12, 2011, for a total of 35.88 hours.

Overpayment worksheets dated April 27, 2011 indicated that appellant received compensation payments for 23 days of time lost which totaled \$2,444.28 for the period January 21 to February 12, 2011, but she was only entitled to compensation for 90.22 hours of time lost, in the amount of \$1,776.83.

³ Appellant requested 86.34 hours of LWOP from January 15 to February 4, 2011 and indicated that she worked 33.66 hours.

On May 27, 2011 OWCP issued a preliminary decision that appellant received an overpayment of compensation in the amount of \$667.45 because she received compensation for total disability from January 21 to February 12, 2011 after she returned to work part time. It determined that she used 54.34 hours of LWOP from January 21 to February 4, 2011 and 35.88 hours of LWOP from February 5 to 12, 2011, for a total of 90.22 hours. OWCP calculated the overpayment by subtracting the compensation to which she was entitled from January 21 to February 12, 2011, \$1,776.83, from the amount that she received \$2,444.28, to find an overpayment of \$667.45. It further advised appellant of its finding that she was at fault in the creation of the overpayment because she knew or should have known that she was not entitled to full wage-loss compensation after her return to part-time work. OWCP informed her that she had 30 days to request a telephone conference, a final decision based on the written evidence or a precoupment hearing on the issues of fault and a possible waiver. Appellant did not respond to the preliminary finding of overpayment.⁴ On September 12, 2011 OWCP finalized its preliminary decision regarding the overpayment of \$667.45.

LEGAL PRECEDENT -- ISSUE 1

Section 8102 of FECA provides that the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.⁵ A claimant is not entitled to receive total disability compensation and actual earnings for the same period. OWCP procedures provide that an overpayment in compensation is created when a claimant returns to work but continues to receive wage-loss compensation.⁶

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment in the amount of \$667.45. OWCP accepted her claim for lumbosacral sprain and paid her compensation for total disability. On January 21, 2011 appellant returned to limited-duty work at the employing establishment. From January 21 to February 12, 2011 she used 90.22 hours of LWOP. OWCP paid compensation for total disability through February 12, 2011. It is well established that an employee is not entitled to compensation for total disability for the same time period that she received actual earnings.⁷ Because appellant received compensation for total disability after she returned to limited-duty work and received actual earnings, she received an overpayment of compensation.

OWCP calculated the overpayment by subtracting the compensation to which she was entitled from January 21 to February 12, 2011, \$1776.83, from the amount that she received \$2,444.28, to find an overpayment of \$667.45. The Board will affirm the September 12, 2011 decision on the fact and amount of overpayment.

⁴ Appellant submitted additional claims for compensation and medical evidence in support of such claims.

⁵ 5 U.S.C. § 8102.

⁶ *Danny E. Haley*, 56 ECAB 393 (2005); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(a) (May 2004).

⁷ *Daniel Reynard*, 51 ECAB 466 (2000); *Tami L. Wright*, 51 ECAB 463, 465 (2000); 20 C.F.R. § 10.403(c).

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of FECA provides that an overpayment must be recovered 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.⁸ No waiver of payment is possible if appellant is not without fault in helping to create the overpayment.⁹

In determining whether an individual is not without fault or alternatively, with fault, section 10.433(a) of OWCP's regulations provide in relevant part:

“An individual is with fault in the creation of an overpayment who--

- (1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or
- (2) Failed to provide information which he or she knew or should have known to be material; or
- (3) Accepted a payment which he or she knew or should have known to be incorrect.”¹⁰

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 she is being overpaid.¹¹

ANALYSIS -- ISSUE 2

OWCP determined that appellant was at fault in the creation of the overpayment because she accepted a payment that she knew or reasonably should have known was incorrect. The Board has previously found that each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives are proper.¹² A recipient must show good faith and exercise a high degree of care in reporting events that may affect entitlement to or the amount of benefits.¹³ The record establishes that appellant returned to limited-duty work on January 21, 2011. In its July 22, 2010 letter accepting the claim, OWCP advised her that she was expected to return to work as soon as she was able and to notify OWCP once she returned to work. It further informed her that she was only entitled to compensation if

⁸ *Id.* at § 8129(b).

⁹ *Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

¹⁰ 20 C.F.R. § 10.433(a).

¹¹ *Id.*

¹² *Danny E. Haley*, *supra* note 6.

¹³ *Sinclair L. Taylor*, 52 ECAB 227 (2001).

she was unable to work due to her accepted condition and that she should immediately return any compensation checks received which included payment for a period during which she returned to work. Despite this notice, however, appellant did not notify OWCP when she received compensation for total disability after she returned to limited-duty work. On appeal, appellant alleges that she accepted all compensation checks because she has expenses that need to be paid and that OWCP was at fault due to the negligence of the caseworker in failing to compensate in a timely manner. The Board has found, however, that the fact that OWCP may have been negligent in issuing the payments does not mitigate fault.¹⁴

As appellant was at fault in the creation of the overpayment, she was not eligible for waiver of recovery of the overpayment.

CONCLUSION

The Board finds that appellant received an overpayment in the amount of \$667.45 for the period January 21 to February 12, 2011. The Board further finds that she was at fault in creating the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the September 12, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 22, 2012
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

¹⁴ *D.R.*, 59 ECAB 148 (2007); *William E. McCarty*, 54 ECAB 525 (2003).