

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

S.M., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
New Orleans, LA, Employer**

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**Docket No. 16-1127
Issued: December 12, 2016**

Appearances:

*J. Courtney Wilson, Esq., for the appellant¹
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On May 5, 2016 appellant, through counsel, filed a timely appeal from November 24, 2015 and December 16, 2015 merit decisions of the Office of Workers' Compensation Programs (OWCP). 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 appellant received an overpayment of compensation in the amount of \$2,985.20 for the period July 26 to August 22, 2015 as she received duplicate compensation payments and not entitled to waiver of recovery; (2) whether OWCP properly

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

found appellant at fault in creation of the overpayment; and (3) whether OWCP properly denied appellant's request for a precoupment hearing as untimely.

FACTUAL HISTORY

OWCP accepted that on April 6, 2015 appellant, then a 59-year-old mail handler, sustained a right leg sprain and right knee contusion when the door of a postal container struck her knee. She stopped work on April 7, 2015. Appellant's physicians held appellant off work through August 6, 2015 and continuing. Appellant was released to modified-duty work as of October 5, 2015.

Appellant received continuation of pay and was then placed on the supplemental rolls from June 18 to 27, 2015 and on the periodic rolls beginning June 28, 2015. On April 24, 2015 she elected to receive compensation by direct electronic deposit. In a July 15, 2015 letter, OWCP explained to appellant that on July 25, 2015 she would be issued a one-time compensation payment of \$2,985.20 for the period June 28 to July 25, 2015.

An August 31, 2015 memorandum reflects that appellant telephoned OWCP to advise that she had not received the paper compensation checks dated July 25 and August 22, 2015.

In a September 4, 2015 letter, OWCP notified appellant that it had initiated tracer and stop payment actions for the check dated July 25, 2015 and the check dated August 22, 2015. It advised her to notify OWCP immediately if she received or found the checks.

In a September 15, 2015 memorandum, OWCP noted that an August 22, 2015 compensation paper check was "sent to the incorrect address," and that no electronic deposits had yet occurred in appellant's case. It advised her that the August 22, 2015 payment would be reissued as an electronic funds transfer (EFT) and deposited directly into her bank account. On September 18, 2015 OWCP issued an EFT payment for the period July 26 to August 22, 2015 in the amount of \$2,985.20.

In an October 7, 2015 memorandum, OWCP noted that, on an unspecified date, appellant cashed the check dated August 22, 2015, covering the period July 26 to August 22, 2015. It explained that an overpayment was created because she endorsed and cashed the check covering the period July 26 to August 22, 2015, although she had also received an EFT on September 15, 2015 for the same period. OWCP noted that appellant had been instructed to notify OWCP immediately if she received the check and not to cash it.

In an October 19, 2015 worksheet, OWCP noted that appellant received a \$2,985.20 overpayment of compensation as she received both a paper check and an EFT payment for the period July 26 to August 22, 2015. It explained that she cashed the check dated August 22, 2015, covering the period July 26 to August 22, 2015, after she also received an EFT on September 18, 2015 for same period.

By notice dated October 21, 2015, OWCP advised appellant that it made a preliminary finding that she had received a \$2,985.20 overpayment of compensation as she received both an EFT and a paper check for the period July 26 to August 22, 2015. It made the preliminary finding that she was at fault in creating the overpayment as she accepted a duplicate payment that she knew or reasonably should have known was incorrect. OWCP afforded appellant 30 days to

submit information regarding her income, assets, and expenses, request a precoupment hearing; or request a conference. It enclosed an overpayment recovery questionnaire (Form OWCP-20).

Appellant telephoned OWCP on October 28, 2015. A memorandum noted that OWCP advised her that “[appellant] received paper check and direct deposit check for the same period.” OWCP advised appellant that “[appellant] should have return[ed] the paper check.” Appellant contended that she was told on an unspecified date that it was “okay to cash check.”

A compensation payment history printout dated November 10, 2015 listed duplicate payments for the period July 26 to August 22, 2015, a paper check on August 22, 2015 in the amount of \$2,985.20, and an EFT on September 18, 2015 in the amount of \$2,985.20. OWCP also issued an EFT on September 19, 2015 for the period August 23 to September 19, 2015, in the amount of \$2,985.20.

By decision dated November 24, 2015, OWCP finalized the preliminary overpayment finding of a \$2,985.20 overpayment for the period July 26 to August 22, 2015. It found that appellant received duplicate payments of \$2,985.20, as OWCP issued both a paper check and EFT payment for the same period. OWCP found her at fault in creating the overpayment as she accepted a duplicate payment that she knew, or reasonably should have known, was incorrect. It further found that as appellant was at fault in creating the overpayment, it was not subject to waiver of recovery. OWCP directed recovery of the overpayment by a single payment of \$2,985.00.

In an overpayment recovery questionnaire dated and postmarked on November 21, 2015, appellant requested a precoupment hearing. She acknowledged receiving duplicate payments “in the correct amounts,” but contended that she was entitled to both the paper check and the EFT payment as she did not receive compensation payments in August or September 2015. Appellant therefore considered the duplicate July 26 to August 22, 2015 payments as a substitute for the allegedly missing payment. She completed the overpayment recovery questionnaire and submitted pay stubs.³

By decision dated December 16, 2015, OWCP denied appellant’s request for a precoupment hearing, finding that a “final decision concerning an overpayment [was] not subject to the hearing provision of 5 U.S.C. § 8124(b).”

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 or her duty.⁴ When an overpayment has been made to an individual because of an error of fact or law,

³ Appellant noted that she supported her minor granddaughter. She listed \$2,985.20 in monthly income from compensation payments, and \$330.00 in cash and savings. Appellant enumerated \$2,832.00 in monthly expenses: \$990.00 in rent or mortgage; \$480.00 for food; \$50.00 for clothing; \$220.00 for utilities; \$350.00 for miscellaneous expenses; \$50.00 in student loan payments; \$361.00 for automobile insurance; and \$331.00 for an automobile loan repayment.

⁴ 5 U.S.C. § 8102(a).

adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which the individual is entitled.⁵

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$2,985.20 for the period July 26 to August 22, 2015.

On August 22, 2015 OWCP issued appellant a check in the amount of \$2,985.20, covering the period from July 26 to August 22, 2015. As appellant advised OWCP on August 31, 2015 that she did not receive the check, OWCP issued a stop payment on September 3, 2015. OWCP instructed her by September 4, 2015 letter to contact OWCP immediately if she received the check. On September 15, 2015 it issued appellant an EFT payment for \$2,985.20, covering the same period. However, on or before October 7, 2015 appellant received and cashed the check dated August 22, 2015. Thus, the record establishes that she was paid twice for the period July 26 to August 22, 2015, creating an overpayment of \$2,985.20.

The Board notes that appellant acknowledged receiving duplicate payments in the November 21, 2015 overpayment recovery questionnaire. As well, on appeal, counsel admits that appellant received a duplicate payment for the period July 26 to August 22, 2015.⁶ He contends, however, that the duplicate payment should be considered an “offset” against a missing payment for the period June 28 to July 25, 2015. The issue on appeal is whether an overpayment of compensation was created for the period July 26 to August 22, 2015. The record establishes such duplicate payments which both appellant and counsel acknowledge.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of FECA provides that, when an overpayment of compensation has been made because of an error of fact or law, adjustment shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is when an 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.⁷

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 --

Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or

⁵ *Id.* at § 8129(a).

⁶ The Board notes that this argument is irrelevant, as it concerns a period that is not at issue on the present appeal.

⁷ *C.V.*, Docket No. 13-2108 (issued June 17, 2014); *W.M.*, Docket No. 11-2000 (issued May 21, 2012).

Failed to provide information which he or she knew or should have known to be material; or

Accepted a payment which he or she knew or should have known to be incorrect.”⁸

The regulations further provide that each recipient of compensation benefits is responsible to ensure that payments he or she receives from OWCP are proper.⁹ Whether or not OWCP determines that an individual was at fault with respect to the creation of the overpayment depends on the circumstances surrounding the overpayment.¹⁰

ANALYSIS -- ISSUE 2

OWCP determined that appellant was at fault in the creation of the overpayment under the third standard, because she cashed a check after receiving an electronic payment for the same period. It initially issued a paper check on August 22, 2015 in the amount of \$2,985.20, covering the period July 26 to August 22, 2015. On August 31, 2015 appellant advised OWCP that she did not receive the check. OWCP stopped payment on the check, and in a September 4, 2015 letter instructed her to report immediately if she received it. Appellant was thus on notice that she was not to cash the check.

On September 15, 2015 OWCP issued an EFT for \$2,985.20 for the period July 26 to August 22, 2015 to substitute for the lost check, which it had instructed appellant not to negotiate. However, between September 18 and October 7, 2015, appellant cashed the check. The record contains an image of the face of the check and her signature endorsing the check on the reverse. Appellant thus knew or should have known at the time she cashed this check that she was not entitled to receive a paper check for the same period for which she had already received the EFT payment.

Additionally, both appellant and counsel acknowledged that she knew that she received duplicate payments. Appellant noted in the November 21, 2015 overpayment recovery questionnaire that she knew she received both an EFT deposit and paper check for the period July 26 to August 22, 2015.

Therefore, OWCP has shown that appellant knew or should have known at the time she deposited the August 22, 2015 check that she was not entitled to this compensation payment. It has presented evidence to establish that she accepted a payment at the time of deposit, which she

⁸ 5 U.S.C. § 8129(b).

⁹ 20 C.F.R. § 10.433(a).

¹⁰ *Id.*

knew or should have known to be incorrect.¹¹ Thus, the Board finds that appellant was at fault in creating the overpayment.¹²

LEGAL PRECEDENT -- ISSUE 3

In response to a preliminary notice of overpayment, an individual may present evidence to OWCP in writing or at a prerecoupment hearing. The evidence must be presented or the hearing requested within 30 days of the date of the written notice of overpayment. Failure to request the hearing within this 30-day time period shall constitute a waiver of that right.¹³

The only review of a final decision concerning an overpayment is an appeal to the Board. The provisions of 5 U.S.C. §§ 8124(b) and 8128(a) regarding hearings and reconsideration do not apply to a final overpayment decision.¹⁴

ANALYSIS -- ISSUE 3

The overpayment action request form that accompanied the October 21, 2015 preliminary determination was specific as to the 30-day time limitation and the method for requesting a prerecoupment hearing, including the particular address where the signed, written request was to be mailed. Appellant submitted an overpayment recovery questionnaire dated and postmarked November 21, 2015.¹⁵ OWCP's implementing regulations specify that evidence and argument regarding a prerecoupment hearing must be presented to OWCP within 30 days of the written notice of overpayment.¹⁶

OWCP's procedures for requesting a prerecoupment hearing specify that "[a]dditional evidence and arguments must be submitted by the claimant within 30 days of the date of the letter."¹⁷ As the questionnaire was not received by OWCP within 30 days of October 21, 2015, OWCP's December 16, 2015 decision denying appellant's request for a prerecoupment hearing was proper under the law and facts of this case.

¹¹ V.A., Docket No. 12-637 (issued August 27, 2012).

¹² With respect to the recovery of the overpayment, the Board's jurisdiction is limited to those cases where OWCP seeks recovery from continuing compensation benefits. *D.R.*, 59 ECAB 148 (2007); *Miguel A. Muniz*, 54 ECAB 217 (2002). Therefore, the Board does not have jurisdiction over the recovery issue in this case.

¹³ 20 C.F.R. § 10.432. *See also D.P.*, Docket No. 13-630 (issued August 2, 2013); *M.B.*, Docket No. 12-19 (issued October 5, 2012).

¹⁴ 20 C.F.R. § 10.440(b).

¹⁵ The 30th day following October 21, 2015 was Friday November 20, 2015.

¹⁶ 20 C.F.R. § 10.432.

¹⁷ Federal (FECA) Procedure Manual, Chapter 6.200.4.a(2), *Debt Management*, Initial Overpayment Actions, Preliminary and Final Decisions (June 2009).

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$2,985.20 for the period July 26 to August 22, 2015 as she received duplicate compensation payments. The Board further finds that OWCP properly found her at fault in creation of the overpayment. The Board further finds that OWCP properly denied appellant's request for a prerecoupment hearing as untimely.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated December 16 and November 24, 2015 are affirmed.

Issued: December 12, 2016
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board