

FACTUAL HISTORY

On September 3, 2013 appellant, then a 49-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that she sustained knee injuries as a result of her federal employment. She indicated that she felt repetitive motion required by her employment duties, including getting in and out of her vehicle, and delivery of mail, had contributed to a bilateral knee condition. OWCP accepted appellant's claim for bilateral meniscus tears, and bilateral meniscus derangement. Appellant stopped working and began receiving wage-loss compensation as of October 13, 2013.

By letter dated December 5, 2013, OWCP advised appellant that she would be paid compensation every 28 days commencing November 17, 2013. It advised her that if she returned to work she must immediately notify OWCP. OWCP further informed appellant that she must monitor her electronic funds transfer (EFT) deposits, and if she worked for any portion of the period covered by a deposit, she must notify OWCP immediately.

In a report dated April 17, 2014, Dr. Diego Allende, an osteopathic physician, indicated that appellant could return to full-time work on April 22, 2014. He provided work restrictions that included four hours of standing or walking.

The record indicates that on May 3, 2014 appellant received a direct deposit in the amount of \$2,565.44, representing her wage-loss compensation from April 6 to May 3, 2014. She continued to receive wage-loss compensation in this amount every 28 days. In a memorandum of telephone call (CA-110) dated May 28, 2015, OWCP reported that the employing establishment indicated that appellant had returned to full-time, light-duty work on April 22, 2014.

By letter dated June 4, 2015, OWCP advised appellant of a preliminary determination that an overpayment of compensation in the amount of \$36,301.28 had been created from April 22, 2014 to May 30, 2015. It indicated that she had returned to full-time work, but continued to receive wage-loss compensation for total disability. OWCP reported in its calculation that the total amount of net compensation appellant had received from April 22, 2014 to May 30, 2015 was \$36,301.28. In addition, it made a preliminary determination that she was at fault in creating the overpayment as she had accepted payments she knew or should have known were incorrect. Appellant was provided with an overpayment recovery questionnaire (OWCP-20) and advised to respond within 30 days.

On July 8, 2015 appellant requested a precoupment hearing before an OWCP hearing representative and indicated that she felt the overpayment was not her fault. She submitted a note asserting that after her return to work her supervisor had told her the information of her return to work would be forwarded to OWCP. Appellant wrote that she believed her continuing compensation payments after her return to work were a "settlement from OWCP" because of the damage to her knees. She submitted a form OWCP-20 and other financial statements in support of her response.

A telephonic hearing was held on March 9, 2016. Appellant again indicated that she felt the compensation she received after her return to work on April 22, 2014 was a settlement from OWCP with respect to her injuries.

By decision dated May 17, 2016, the hearing representative finalized the preliminary determinations of overpayment and fault. She found an overpayment of compensation of \$36,301.28 was created, and that appellant was at fault as she accepted payments she knew or should have known were incorrect.

LEGAL PRECEDENT -- ISSUE 1

5 U.S.C. § 8116 defines the limitations on the right to receive compensation benefits. This section of FECA provides that while an employee is receiving compensation, he may not receive salary, pay, or remuneration of any type from the United States, except in limited circumstances.² 20 C.F.R. § 10.500 provides that “compensation for wage loss due to disability is available only for any periods during which an employee’s work-related medical condition prevents him or her from earning the wages earned before the work-related injury.”

ANALYSIS -- ISSUE 1

In the present case, appellant began receiving wage-loss compensation for total disability as of October 13, 2013. OWCP placed her on the periodic compensation rolls as of November 17, 2013. Appellant continued to receive compensation for total disability every 28 days, through May 30, 2015. The record indicates, however, that she had returned to full-time, light-duty work on April 22, 2014. Appellant does not contest that she returned to light-duty work on that date.

As noted above, a claimant is not entitled to receive compensation for total disability during a period that he or she had actual earnings. Therefore an overpayment of compensation was created in this case.

The amount of the overpayment was calculated to be \$36,301.28. This represented the net compensation appellant was paid from April 22, 2014 to May 30, 2015. No contrary evidence was submitted. The Board accordingly finds that OWCP properly found an overpayment of \$36,301.28 was created from April 22, 2014 to May 30, 2015.

LEGAL PRECEDENT -- ISSUE 2

5 U.S.C. 8129(b) provides: “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 FECA or would be against equity and good conscience.”³ A claimant who is at fault in creating the overpayment is not entitled to waiver.⁴

² 5 U.S.C. § 8116(a).

³ 5 U.S.C. § 8129(b).

⁴ See *Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

On the issue of fault, 20 C.F.R. § 10.433 provides that an individual will be found at fault if he or she has done any of the following: “(1) made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; (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 was incorrect.”

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 time incorrect funds are deposited into her account, as the acceptance of the resulting overpayment lacks the requisite knowledge.⁵ 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.⁶

ANALYSIS -- ISSUE 2

In the present case, OWCP found that appellant was at fault because she accepted payments she knew or should have known were incorrect. The Board notes that a complete analysis of the fault issue, when a claimant has returned to work and continues to receive compensation, must properly consider the first payment after the return to work. After her return to work on April 22, 2014, appellant received a deposit on May 3, 2014 of her regular compensation payment of \$2,565.44. The question is whether she had, at the time of the first deposit, accepted a payment she knew or should have known was incorrect. No evidence was presented by OWCP to establish that at the time appellant received the May 3, 2014 deposit she knew or should have known this payment was incorrect.

As noted above, the Board has held that the claimant may not have the requisite knowledge with respect to the first deposit payment after a return to work.⁷ The Board finds the evidence does not establish that appellant was at fault in accepting the initial payment deposited on May 3, 2014. The record contains no evidence that she knew or should have known on May 3, 2014 that this payment was incorrect. A finding that appellant was not at fault with respect to the May 3, 2014 direct deposit payment does not establish that she was entitled to waiver of recovery of that portion of the overpayment. On return of the case record, OWCP should properly consider the issue of waiver of this limited portion of the overpayment.⁸

The Board has held that for subsequent payments through a direct deposit, a claimant may be found to have accepted payments she knew or should have known to be incorrect.⁹ OWCP had advised appellant in the December 5, 2013 letter that she could not receive

⁵ *Tammy Craven*, 57 ECAB 689 (2006).

⁶ *Id.*

⁷ *See also R.O.*, Docket No. 16-0186 (issued July 21, 2016).

⁸ *See M.L.*, Docket No. 15-1683 (issued June 20, 2016).

⁹ *Id.*

compensation for total disability during a period she had returned to work. By the time OWCP issued its May 31, 2014 deposit, appellant should have been aware that a deposit of compensation representing total disability was incorrect. After her receipt of the first direct deposit following her return to work, she was on notice that OWCP was making payments to her in error.

Appellant asserted that she felt the continuing payments represented some type of settlement with OWCP regarding her injuries. There is no evidence of record to support this argument. The record does not indicate, for example, that appellant had a pending schedule award claim, or had any reasonable basis for believing that the deposited payments represented something other than continuing wage-loss compensation as forewarned in the December 5, 2013 letter from OWCP. The Board accordingly finds that OWCP properly found appellant at fault for compensation direct deposits accepted for the period May 31, 2014 to May 30, 2015. Based upon the finding of fault for this period, appellant is not entitled to waiver of recovery of this portion of the overpayment.

On appeal, appellant writes that she does not have the resources to repay the overpayment, and again asserts she felt the payments were a settlement for her knees. For the reasons discussed above, the Board finds that OWCP properly found that appellant was at fault in creating the overpayment for all deposits from May 31, 2014 to May 30, 2015. For the portion of the May 3, 2014 deposit that represents an overpayment of compensation from April 6 to May 3, 2014, the case is remanded for consideration of waiver.

CONCLUSION

The Board finds that appellant received a \$36,301.28 overpayment of compensation for the period April 22, 2014 to May 30, 2015. The Board further finds that appellant was not at fault regarding the portion of the overpayment for the period April 22 to May 3, 2014, and the case is remanded to OWCP to determine whether waiver of the recovery of the overpayment is warranted. The Board further finds that OWCP properly found that appellant was at fault for the remaining portion of the \$36,301.28 overpayment of compensation for the period May 4, 2014 to May 30, 2015 and, therefore, ineligible for waiver of the recovery.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 17, 2016 is affirmed with respect to fact and amount of a \$36,301.28 overpayment, and affirmed as to a finding of fault for compensation payments accepted from May 31, 2014 to May 30, 2015. It is set aside with respect to a finding of fault as to the May 3, 2014 compensation payment, and remanded for further action consistent with this decision of the Board.

Issued: February 22, 2017
Washington, DC

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

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

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