

February 1, 2020; and (2) whether OWCP properly determined that appellant was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment.

FACTUAL HISTORY

On January 9, 2018 appellant, then a 34-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that on December 28, 2017 she suffered a right shoulder sprain when lifting packages while in the performance of duty. On March 2, 2018 OWCP accepted the claim for right shoulder sprain. It subsequently expanded acceptance of the claim to include thoracic spine sprain, right shoulder pain, cervical spine sprain, muscle spasm, weakness, and right shoulder rotator cuff tear or rupture. OWCP paid appellant wage-loss compensation on the supplemental rolls from February 24, 2018 through September 14, 2019 and on the periodic rolls commencing September 15, 2019.

In a letter dated December 6, 2018, OWCP outlined appellant's entitlement to compensation benefits. It notified her of her continuing compensation payments and her responsibility to return to work if she was no longer totally disabled in connection with the accepted injury. An attached EN1049 form further provided:

“[T]o minimize the possibility of an overpayment of compensation, NOTIFY THIS OFFICE IMMEDIATELY WHEN YOU GO BACK TO WORK. If you receive your compensation payments *via* paper check, the payment shows the period for which payment is made. If you have worked for any portion of this period, return the payment to this office, even if you have already advised OWCP that you are working. For payments sent by electronic funds transfer (EFT), a notification of the date and amount of payment appears on the statement from your financial institution. You are expected to monitor your EFT deposits carefully, at least every 2 weeks. If you have worked for any portion of the period for which a deposit was made, advise OWCP immediately so that the overpayment can be collected.” (Emphasis in the original.)

An October 30, 2019 telephone call memorandum (Form CA-110) indicated that OWCP received a voicemail message from appellant that it was unable to access.

In a Form CA-110 dated January 28, 2020, appellant notified OWCP that she had returned to work, during the second week of November 2019, but she was unsure of the exact date. She asserted that she had previously informed OWCP that she would be returning to work in an earlier voicemail message. Appellant stated that the employing establishment had not provided a written job offer.

In a compensation termination sheet dated January 30, 2020, OWCP noted that appellant had returned to work on November 6, 2019 and received an overpayment of \$6,557.28 for the period November 6, 2019 through February 1, 2020. For the period November 6 through 9, 2019, it calculated a net overpayment of \$298.28 by taking the gross compensation paid, \$334.14, and subtracting \$28.90 for health benefits (HB), \$2.14 for basic life insurance (BLI), and \$4.82 for miscellaneous deductions. For the period November 10 through December 7, 2019, OWCP calculated an overpayment of \$2,087.96 by taking the gross compensation paid, \$2,339.00, and

subtracting \$202.30 for HB, \$15.00 for BLI, and \$33.74 for miscellaneous deductions. For the period December 8, 2019 through January 4, 2020, it calculated an overpayment of \$2,087.96 by taking the gross compensation paid, \$2,339.00, and subtracting \$202.30 for HB, \$15.00 for BLI, and \$33.74 for miscellaneous deductions. For the period January 5 through February 1, 2020, OWCP calculated an overpayment of \$2,083.08 by taking the gross compensation paid, \$2,339.00, and subtracting \$206.34 for HB, \$15.00 for BLI, and \$34.58 for miscellaneous deductions.

On February 5, 2020 OWCP received notice from the employing establishment that appellant had returned to work on November 6, 2019.

In a February 19, 2020 preliminary determination, OWCP informed appellant that she received an overpayment of compensation in the amount of \$6,557.28 for the period November 6, 2019 through February 1, 2020, because she had returned to full-time, limited-duty work on November 6, 2019, but continued to receive wage-loss compensation through February 1, 2020. It also determined that she was at fault in the creation of the overpayment because she accepted a payment that she knew or reasonably should have known, was incorrect. OWCP advised appellant that she could submit evidence challenging the fact or amount of the overpayment, or the finding of fault, and request waiver of recovery of the overpayment. Additionally, it informed her that, within 30 days of the date of the letter, she could request a telephone conference, a final decision based on the written evidence, or a prerecouplement hearing. OWCP requested that appellant complete an enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documentation. No response was received.

By decision dated March 25, 2020, OWCP finalized the overpayment of compensation in the amount of \$6,557.28 for the period November 6, 2019 through February 1, 2020. It determined that appellant was at fault in the creation of the overpayment because she accepted compensation payments which she knew or should have known were incorrect.

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.³ 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.⁴

Section 8116(a) of FECA provides that, while an employee is receiving compensation, the employee may not receive salary, pay, or remuneration of any type from the United States, except

³ 5 U.S.C. § 8102(a).

⁴ *Id.* at § 8129(a).

in limited specified instances.⁵ OWCP's procedures provide that an overpayment of 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 of compensation in the amount of \$6,557.28 for the period November 6, 2019 through February 1, 2020 because she continued to receive disability compensation following her return to work.

The evidence of record established that appellant returned to full-time work on November 6, 2019. However, appellant continued to receive wage-loss compensation for total disability through February 1, 2020. As noted above, she was not entitled to receive compensation for total disability after her return to work.⁷ Therefore, an overpayment of compensation was created in this case.

In its overpayment determination, OWCP calculated the amount of the overpayment by taking the amount of total disability compensation received for the period November 6, 2019 through February 1, 2020, \$6,557.28, and subtracting for HB, BLI, and miscellaneous deductions. Appellant has not disputed the fact or amount of the overpayment. Thus, the Board finds that she received an overpayment of compensation in the amount of \$6,557.28 during the above-noted period.⁸

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) provides 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 A claimant who is at fault in the creation of the overpayment is not entitled to waiver.¹⁰

On the issue of fault, 20 C.F.R. § 10.433(a) provides that an individual is at 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

⁵ *Id.* at § 8116(a).

⁶ *L.T.*, Docket No. 19-1389 (issued March 27, 2020); *B.H.*, Docket No. 09-0292 (issued September 1, 2009); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Determinations in an Overpayment*, Chapter 6.300.4(g) (September 2018).

⁷ *Supra* notes 5 and 6.

⁸ *K.P.*, Docket No. 19-1151 (issued March 18, 2020).

⁹ 5 U.S.C. § 8129(b).

¹⁰ *M.C.*, Docket No. 19-1263 (issued March 5, 2020); *Gregg B. Manston*, 45 ECAB 344, 354 (1994).

only, accepted a payment which the individual knew or should have been expected to know was incorrect.¹¹

The Board has held that an employee who receives wage-loss compensation payments from OWCP in the form of a direct deposit may not be at fault the first time incorrect funds are deposited into his or her account, as the acceptance of the resulting overpayment lacks the requisite knowledge.¹² 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.¹³ Previous cases have held that receiving one erroneous direct deposit payment does not necessarily create the requisite knowledge to find that a claimant was at fault in the creation of the overpayment.¹⁴

With respect to whether an individual is without fault, section 10.433(b) of OWCP's regulations provide 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 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.¹⁵

ANALYSIS -- ISSUE 2

The Board finds that appellant was without fault in the creation of the overpayment for the period November 6 through 9, 2019, and that she was at fault in the creation of the overpayment for the period November 10, 2019 through February 1, 2020.

OWCP paid appellant compensation by direct deposit every 28 days. Appellant returned to work on November 6, 2019. The first direct deposit she received after her return to work was made on November 9, 2019. There is no documentation or other evidence to demonstrate that appellant had clear knowledge at the time the bank received the November 9, 2019 direct deposit that the payment was incorrect.¹⁶ The Board thus finds that she was without fault in accepting the initial direct deposit covering the period of the overpayment from November 6 through 9, 2019.

¹¹ 20 C.F.R. § 10.433(a).

¹² *C.H.*, Docket No. 19-1470 (issued January 24, 2020); *Tammy Craven*, 57 ECAB 689 (2006).

¹³ *Id.*

¹⁴ *K.K.*, Docket No. 19-0978 (issued October 21, 2019); *D.B.*, Docket No. 16-0258 (issued February 1, 2016); *W.P.*, 59 ECAB 514 (2008).

¹⁵ 20 C.F.R. § 10.433(b); *see also L.T.*, *supra* note 6.

¹⁶ *See K.K.*, *supra* note 14; *K.E.*, Docket No. 19-0978 (issued October 25, 2018).

The Board further finds that appellant was at fault in the creation of the overpayment for the remaining direct deposit payments for the period November 10, 2019 through February 1, 2020.¹⁷

In a December 6, 2018 letter, OWCP notified appellant that to avoid an overpayment of compensation, she was to immediately notify it of her return to work. Appellant was required to reimburse OWCP for compensation paid during a period in which she worked. 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.¹⁸ 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. By the time of the second 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 November 6, 2019.¹⁹ After her receipt of the first direct deposit following her return to work, she was on notice that OWCP began to make payments to her in error and knew or should have known that she was not entitled to the benefits of the subsequent direct deposits.

The Board therefore finds that this case is not in posture for decision regarding the issue of waiver of recovery of the overpayment for the period November 6 through 9, 2019. The Board will set aside the March 25, 2020 decision regarding the issue of fault for that period and remand the case to OWCP to determine whether appellant is entitled to waiver of recovery of the overpayment covering the period November 6 through 9, 2019.²⁰

The Board further finds that appellant was at fault in the creation of the overpayment resulting for the remaining direct deposit payments for the period November 10, 2019 through February 1, 2020.²¹

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$6,557.28 for the period November 6, 2019 through February 1, 2020 because she continued to receive disability compensation following her return to work. The Board further finds that she was without fault in the creation of the overpayment for the period November 6 through 9, 2019, and that she was at fault in the creation of the overpayment for the period November 10, 2019 through February 1, 2020. The case will be remanded to OWCP to consider waiver of recovery of the overpayment for the period November 6 through 9, 2019.

¹⁷ See *K.P.*, *supra* note 8; *D.W.*, Docket No. 15-0229 (issued April 17, 2014).

¹⁸ *L.T.*, *supra* note 6; *P.B.*, Docket No. 19-0329 (issued December 31, 2019); *C.G.*, Docket No. 15-0701 (issued December 9, 2015).

¹⁹ *Id.*

²⁰ *L.T.*, *supra* note 6; *K.K.*, *supra* note 14.

²¹ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the March 25, 2020 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part, and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: December 1, 2020
Washington, DC

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

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

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board