

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

K.P., Appellant)	
)	
and)	Docket No. 19-1151
)	Issued: March 18, 2020
U.S. POSTAL SERVICE, POST OFFICE,)	
CROSSTOWN ANNEX, Roswell, GA, Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On April 25, 2019 appellant filed a timely appeal from a January 18, 2019 merit decision of 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 this case.²

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$9,278.61 because she received total disability compensation for the period July 28 through December 8, 2018 after she had returned to full-time modified work; and (2) whether

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the January 18, 2019 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

OWCP properly found appellant at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment.

FACTUAL HISTORY

On April 15, 2017 appellant, then a 43-year-old carrier technician, filed a traumatic injury claim (Form CA-7) alleging that on April 14, 2017 she sustained a left knee injury³ when she was involved in a motor vehicle accident while in the performance of duty. She stopped work on April 14, 2017, returned to work on April 15, 2017, and stopped work again on April 20, 2017. OWCP accepted the claim for left knee sprain and left knee internal derangement. It paid appellant wage-loss compensation on the supplemental rolls, as of June 4, 2017, and on the periodic rolls, as of November 12, 2017.

In a letter dated December 11, 2017, OWCP outlined appellant's entitlement to compensation benefits. An attached Form EN1049 instructed that, if she worked during any portion of the covered period, and compensation payments were received *via* either paper check or for payments sent by electronic funds transfer (EFT), she was to return the payment to OWCP even if she had already advised OWCP that she was working. OWCP noted that appellant was expected to monitor her EFT deposits carefully, at least every two weeks.

In a duty status report (Form CA-17) dated July 24, 2018, Dr. Victor Osisanyo, a Board-certified physiatrist, released appellant to full-time work with restrictions effective July 26, 2018.

In a report of work status (Form CA-3) dated December 7, 2018, the employing establishment advised OWCP that appellant had returned to limited-duty work on July 28, 2018.

By letter dated December 10, 2018, OWCP advised appellant of its preliminary determination that she had received an overpayment of compensation in the amount of \$9,278.61 because she received total disability compensation for the period July 28 through December 8, 2018 after she had returned to full-time modified work. It also made a preliminary finding that she was at fault in the creation of the overpayment because she had accepted payments that she knew, or reasonably should have known, to be incorrect. OWCP noted that appellant received a net amount of \$1,523.45 for the period July 28 through August 18, 2018; during the period August 19 through November 10, 2018, she received a net amount of \$5,816.82; and during the period November 11 through December 8, 2018, appellant received a net amount of \$1,938.34. Therefore, because appellant had returned to full-time modified-duty employment she was overpaid in the amount of \$9,278.61. OWCP advised her that she could submit evidence challenging the fact, amount, or finding of fault, and request waiver of recovery of the overpayment. It requested that she complete an enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documents. Additionally, OWCP notified appellant 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 prerecoumment hearing. Appellant did not respond.

³ Appellant noted on the Form CA-1 that the claimed injury was a right knee contusion. The medical evidence of record reveals, however, that the injury involved her left knee, not her right.

On December 19, 2018 OWCP received a Time Analysis Form (Form CA-7a) in which appellant detailed hours of leave without pay taken from August 4, 2018.⁴

By decision dated January 18, 2019, OWCP finalized the preliminary determination of a \$9,278.61 overpayment of compensation for the period July 28 through December 8, 2018.⁵ It determined that appellant was at fault in the creation of the overpayment and; therefore, she was not entitled to waiver of recovery of the overpayment. OWCP required recovery in full within 30 days.

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 his or her duty.⁶ 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.⁷

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 in limited specified instances.⁸ OWCP's procedures provide that an overpayment of compensation is created when a claimant returns to work, but continues to receive wage-loss compensation.⁹

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$9,278.61 for the period July 28 through December 8, 2018.

The evidence of record established that appellant returned to full-time modified work at the employing establishment on July 28, 2018. However, appellant continued to receive wage-

⁴ In a letter dated January 9, 2019, OWCP acknowledged receipt of appellant's claim for wage-loss compensation for the period August 4 to November 3, 2018. It informed her that the claim could not be processed as she had submitted the forms directly to OWCP and the form had not been completed by the employing establishment. It advised appellant to resubmit her claim for compensation through her employing establishment, which could then be submitted to OWCP.

⁵ OWCP identified the period of the overpayment as July 28 to August 18, 2018, but this appears to be a typographical error as OWCP's calculation of the overpayment amount includes appellant's compensation payments through December 8, 2018.

⁶ 5 U.S.C. § 8102(a).

⁷ *Id.* at § 8129(a).

⁸ *Id.* at § 8116(a).

⁹ *S.H.*, Docket No. 19-0509 (issued August 23, 2019); *K.E.*, Docket No. 18-0687 (issued October 25, 2018); *B.H.*, Docket No. 09-0292 (issued September 1, 2009); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Identifying and Calculating an Overpayment*, Chapter 6.200.1(a) (September 2018).

loss compensation for total disability through December 8, 2018. As noted above, appellant is not entitled to receive compensation for total disability after her return to work.¹⁰ Therefore, an overpayment of compensation was created in this case.

With regard to the amount of overpayment, the Board finds that OWCP properly calculated appellant's compensation paid for the period July 28 through December 8, 2018.¹¹ The record contains no evidence contradicting fact or amount of the overpayment. Thus, the Board finds that appellant received an overpayment of compensation in the amount of \$9,278.61 for the period July 28 through December 8, 2018.¹²

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."¹³ A claimant who is at fault in the creation of the overpayment is not entitled to waiver.¹⁴ On the issue of fault 20 C.F.R. § 10.433(a) 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.¹⁵

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.¹⁶

The Board has held that an employee who receives 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.¹⁷ The

¹⁰ *K.K.*, Docket No. 19-0978 (issued October 21, 2019); *E.V.*, Docket No. 17-1328 (issued December 11, 2017); Federal (FECA) Procedure Manual, *id.*

¹¹ *See supra* note 3.

¹² Appellant may still file claims for compensation (Form CA-7) through her employing establishment to claim compensation for periods of disability. *See* 20 C.F.R. § 10.102.

¹³ 5 U.S.C. § 8129(b).

¹⁴ *R.G.*, Docket No. 18-1251 (issued November 26, 2019) *C.Y.*, Docket No. 18-0263 (issued September 14, 2018).

¹⁵ 20 C.F.R. § 10.433(a).

¹⁶ *Id.* at § 10.433(b); *see also R.G.*, *supra* note 14; *D.M.*, Docket No. 17-0983 (issued August 3, 2018).

¹⁷ *C.H.*, Docket No. 19-1470 (issued January 24, 2020). *See Tammy Craven*, 57 ECAB 689 (2006); *see also A.B.*, Docket No. 18-0922 (issued January 3, 2019).

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.¹⁸

ANALYSIS -- ISSUE 2

The Board finds that appellant was not at fault with regard to OWCP's deposit for the period July 28 to August 18, 2018, and that she was at fault in the creation of the overpayment for the period August 19 through December 8, 2018.

OWCP paid appellant compensation by direct deposit every 28 days. Appellant returned to work on July 28, 2018. The first direct deposit appellant received after her return to work was made on August 18, 2018 and included compensation for the period July 22 through August 18, 2018. There is no evidence to demonstrate that appellant had clear knowledge at the time the bank received the August 18, 2018 direct deposit that the payment was incorrect.¹⁹ The Board, thus, finds that appellant was without fault in accepting the initial direct deposit which covered the period July 28 through August 18, 2018.

The Board further finds that appellant was at fault in the creation of the overpayment from the remaining direct deposit payments for the period August 19 through December 8, 2018.²⁰

In a December 11, 2017 letter, OWCP notified appellant that to avoid an overpayment of compensation, she must 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.²¹ 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 July 28, 2018.²² 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.

¹⁸ *Id.*

¹⁹ *K.K.*, *supra* note 10; *C.Y.*, *supra* note 14; *see also M.M.*, Docket No. 15-0265 (issued May 27, 2015); *Danny E. Haley*, 56 ECAB 393 (2005); Federal (FECA) Procedure Manual, *supra* note 9.

²⁰ *K.K.*, *supra* note 10; *C.Y.*, *supra* note 14; *D.W.*, Docket No. 15-0229 (issued April 17, 2014).

²¹ *K.K.*, *supra* note 10; *C.G.*, Docket No. 15-0701 (issued December 9, 2015).

²² *Id.*

The Board therefore finds that the case is not in posture for decision regarding the issue of waiver of recovery of the overpayment for the period July 28 through August 18, 2018. The case is remanded to determine whether appellant is entitled to waiver of recovery of the overpayment covering the period July 28 through August 18, 2018.²³

CONCLUSION

The Board finds that OWCP correctly determined that appellant received an overpayment of compensation in the amount of \$9,278.61 because she received total disability compensation for the period July 28 through December 8, 2018 after she had returned to full-time modified work. The Board further finds that she was without fault in the creation of the overpayment for the period July 28 through August 18, 2018, and that she was at fault in the creation of the overpayment for the period August 19 through December 8, 2018. The case will be remanded to OWCP to consider waiver of recovery of the overpayment for the period July 28 to August 18, 2018.

ORDER

IT IS HEREBY ORDERED THAT the January 18, 2019 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part and the case is remanded for further action consistent with this decision of the Board.

Issued: March 18, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

²³ *B.R.*, Docket No. 18-0339 (issued January 24, 2019).