

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

_____)
R.P., Appellant)

and)

U.S. POSTAL SERVICE, CHICAGO)
INTERNATIONAL SERVICE CENTER,)
CHICAGO INTERNATIONAL MILITARY)
SERVICE CENTER, Chicago, IL, Employer)
_____)

Docket No. 24-0222
Issued: May 2, 2024

Appearances:
*Alan J. Shapiro, Esq., for the appellant*¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On January 2, 2024 appellant, through counsel, filed a timely appeal from a December 22, 2023² merit decision of the Office of Workers' Compensation Programs. Pursuant to the Federal

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 The Board notes that the record also contains a December 14, 2023 merit decision, which denied appellant's claim for compensation (Form-CA-7) for intermittent disability from work during the period February 23 and September 11, 2023. Counsel, however, did not appeal from that decision. The December 14, 2023 decision is, therefore, not properly before the Board and will not be addressed in this decision. *See* 20 C.F.R. § 501.3.

Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.⁴

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$8,756.34 for the period February 9 through April 22, 2023, because she continued to receive wage-loss compensation for total disability following her return to full-time work; and (2) whether OWCP properly found that appellant was at fault in the creation of the overpayment thereby precluding waiver of recovery of the overpayment.

FACTUAL HISTORY

On September 1, 2020 appellant, then a 58-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on March 18, 2020 she contracted COVID-19 when working in an environment without masks or social distancing while in the performance of duty. She stopped work on March 19, 2020. On March 10, 2021 OWCP accepted the claim for COVID-19. It subsequently expanded the acceptance of the claim to include post-COVID-19 condition; generalized anxiety disorder; and major depressive disorder, single episode. OWCP paid appellant wage-loss compensation on the supplemental rolls from April 29 through September 11, 2021, and on the periodic rolls, effective September 12, 2021.

In a letter dated September 13, 2021, OWCP outlined appellant's entitlement to wage-loss compensation benefits and advised that, if she returned to work, she should notify OWCP at once. It informed her that wage-loss compensation for total disability was available only if she was unable to perform the duties of her regular position and that she should notify OWCP if she returned to work or obtained new employment. OWCP explained that, if appellant worked during a period in which she received compensation, she must notify OWCP. An attached EN-1049 instructed that, if appellant worked during any portion of the covered period, and compensation payments were received by paper check or electronic funds transfer (EFT), she was to return the payment to OWCP even if she had already advised OWCP that she was working.

The employing establishment offered appellant a full-time assignment as a modified mail handler on January 28, 2023 which appellant accepted on February 9, 2023. Appellant returned to work on February 9, 2023. However, OWCP continued to pay her wage-loss compensation on the periodic rolls through April 22, 2023.

An April 27, 2023 report of work status (Form CA-3) indicated that appellant had returned to full-time regular-duty work as of February 9, 2023.

³ 5 U.S.C. § 8101 *et seq.*

⁴ The Board notes that, following the December 22, 2023 decision, appellant submitted additional evidence to OWCP. 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.*

In a preliminary overpayment determination dated May 9, 2023, OWCP advised appellant of its finding that she had received an overpayment of compensation in the amount of \$8,756.34 for the period February 9 through April 22, 2023, because she received compensation for total disability after she returned to full-time work on February 9, 2023. It determined that she received \$3,177.09 in compensation for the period January 29 through February 25, 2023; \$3,400.30 in compensation for the period February 26 through March 25, 2023; and \$3,427.09 in compensation for the period March 26 through April 22, 2023.⁵ OWCP then deducted \$1,248.14, the amount that appellant was due for the period January 29 through February 8, 2023, which it calculated by dividing \$3,177.09 by 28 days and then multiplying by 11, the number of days that she was entitled to be paid for the period January 29 through February 8, 2023. This resulted in a total overpayment of \$8,756.34. OWCP made the preliminary finding that she was at fault in the creation of the overpayment, as she accepted payments she knew or should have known to be incorrect. It noted that appellant received paper compensation checks with the printed period of payment and the amount paid and found that she reasonably should have known that the payment was incorrect because the dates overlapped with a period when she worked; therefore, she accepted payment she knew or reasonable should have known was incorrect. OWCP requested that appellant submit a completed overpayment recovery questionnaire (Form OWCP-20) to determine a reasonable repayment method and advised her that she could request waiver of recovery of the overpayment. It further requested that she provide supporting financial documentation, including copies of income tax returns, bank account statement, bills, canceled checks, payslips, and any other records that support income and expenses. Additionally, OWCP provided an overpayment action request form and notified appellant that, within 30 days of the date of the letter, she could request a final decision based on the written evidence, or a preresoupment hearing. It afforded her 30 days to submit additional evidence/argument and to request a hearing.

On June 2, 2023 appellant requested a decision based on the written evidence and requested waiver of recovery of the overpayment. She contended that both she and her supervisor had informed OWCP that she returned to work in February 2023. Appellant indicated that OWCP could have averted the overpayment prior to disbursement of the funds, but failed to do so. She indicated that she believed that she was being fairly compensated for her work injury and spent the funds on expenses. Appellant submitted a completed Form OWCP-20 dated May 19, 2023, along with supporting financial documentation.

By decision dated December 22, 2023, OWCP finalized the preliminary overpayment determination, finding that appellant received an overpayment of compensation in the amount of \$8,756.34 for the period February 9 through April 22, 2023 because she continued to receive wage-loss compensation following her return to full-time regular work. It determined that she was

⁵ The ACPS worksheet dated April 27, 2023 indicated that appellant was issued three paper checks. It noted that on February 25, 2023 she was issued a paper check for \$3,177.09 for the period January 29 through February 25, 2023; on March 25, 2023 she was issued a paper check for \$3,400.30 for the period February 26 through March 25, 2023; and on April 22, 2023 she was issued a paper check for \$3,427.09 for the period March 26 through April 22, 2023.

at fault in the creation of the overpayment as she accepted compensation payments, which she knew or should have known were incorrect.⁶

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of FECA⁷ 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 duty.⁸ 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.⁹

A claimant is not entitled to receive temporary total disability and actual earnings for the same period.¹⁰ OWCP regulations provide 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.¹¹

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$8,756.34 for the period February 9 through April 22, 2023, for which she was without fault, because she continued to receive wage-loss compensation for total disability following her return to full-time work.

OWCP paid appellant wage-loss compensation for total disability on the periodic rolls. Appellant returned to work, full time, on February 9, 2023, but continued to receive wage-loss compensation for total disability through April 22, 2023. A claimant is not entitled to receive temporary total disability benefits and actual earnings for the same time period.¹² Accordingly, the Board finds that appellant received an overpayment of compensation.¹³

The record reflects that OWCP calculated that, from January 29 through April 22, 2023, appellant received \$10,004.48 in total net compensation, but was only entitled to \$1,248.14 during this period. It explained that she was paid \$3,177.09 for the period January 29 through

⁶ OWCP noted in the "calculation" section of the decision that appellant was paid by paper check. However, in the "basis for decision" section of the decision it noted that she received compensation payments deposited by EFT.

⁷ 5 U.S.C. §§ 8101-8193.

⁸ *Id.* at § 8102(a).

⁹ *Id.* at § 8129(a).

¹⁰ *See M.S.*, Docket No. 16-0289 (issued April 21, 2016); *D.B.*, Docket No. 15-0258 (issued February 1, 2016).

¹¹ *See C.V.*, Docket No. 16-0986 (issued September 1, 2016); 20 C.F.R. § 10.500.

¹² *See supra* note 10.

¹³ *J.M.*, Docket No. 17-1574 (issued February 8, 2018).

February 25, 2023; \$3,400.30 for the period February 26 through March 25, 2023; and \$3,427.09 for the period March 26 through April 22, 2023, for total payments of \$10,004.48. Appellant was entitled to \$1,248.14 for the period January 29 through February 8, 2023. The Board has reviewed OWCP's calculations and finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$8,756.34 for the period February 9 through April 22, 2023.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA 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 FECA or would be against equity and good conscience.¹⁴ A claimant who is at fault in the creation of the overpayment is not entitled to waiver.¹⁵

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.¹⁶

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.¹⁷

Even if an overpayment resulted from negligence by OWCP, this does not excuse the employee from accepting payment, which the employee knew or should have been expected to know she was not entitled.¹⁸

ANALYSIS -- ISSUE 2

The Board finds that this case is not in posture for decision.

¹⁴ 5 U.S.C. § 8129(b).

¹⁵ See *C.C.*, Docket No. 19-1268 (issued April 2, 2021); *J.S.*, Docket No. 19-1363 (issued April 10, 2020); *B.R.*, Docket No. 18-0339 (issued January 24, 2019); *K.E.*, Docket No. 18-0687 (issued October 25, 2018); *Gregg B. Manston*, 45 ECAB 344, 354 (1994); *Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

¹⁶ 20 C.F.R. § 10.433(a).

¹⁷ *Id.* at § 10.433(b); see also *C.C.*, *supra* note 15; *M.P.*, Docket No. 20-1035 (issued December 1, 2020).

¹⁸ *Diana L. Booth*, 52 ECAB 370 (2001).

In order for it to establish that appellant was at fault in the creation of the overpayment of compensation, OWCP must establish that, at the time she received the compensation check in question, she knew or should have known that the payment was incorrect.¹⁹

The Board has explained that, when a claimant returns to work and subsequently receives a compensation check in the mail covering a period of employment, if he or she knows or should have known that they were not entitled to such compensation, but decides nonetheless to cash or deposit the check, the cashing or depositing of the check establishes fault.²⁰

The Board finds that, as the checks in question do not appear in the record, it is unable to verify that the checks identified the period for which compensation was paid and, therefore, that appellant should have known that the checks were compensation payments for the period following which she had returned to work.

Accordingly, the Board finds that the case must be remanded to OWCP. OWCP shall scan copies of the checks issued to appellant for the period January 29 through February 25, 2023; February 26 through March 25, 2023; and March 26 through April 22, 2023 into the case record. It shall thereafter determine whether she knew or should have known that she received an overpayment of compensation. OWCP shall then issue a new preliminary overpayment determination regarding the issue of fault, with an overpayment action request form, a Form OWCP-20 instructions for appellant to provide supporting financial documentation. Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$8,756.34 for the period February 9 through April 22, 2023 because she continued to receive wage-loss compensation for total disability following her return to full-time work. The Board further finds, however, that this case is not in posture for decision with regard to whether she was at fault in the creation of the overpayment.

¹⁹ *J.H.*, Docket No. 17-0592 (issued May 1, 2018); *Linda E. Padilla*, 45 ECAB 768, 772 (1994).

²⁰ *See J.H., id.*; *William F. Salmonson*, 54 ECAB 152 (2002).

ORDER

IT IS HEREBY ORDERED THAT the December 22, 2023 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: May 2, 2024
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board