

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

M.M., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Manhattan, IL, Employer**

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**Docket No. 15-265
Issued: May 27, 2015**

Appearances:

Alan J. Shapiro, Esq., for the appellant

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On November 17, 2014 appellant, through counsel, filed a timely appeal of a September 2, 2014 merit decision and an October 30, 2014 nonmerit 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 the case.²

ISSUES

The issues are: (1) whether OWCP properly denied appellant's request for a prerecoumpment hearing; (2) whether it properly determined that she received a \$2,149.14 overpayment of compensation for the period April 3 to May 4, 2013; (3) whether OWCP properly determined that appellant was at fault in creating the overpayment of compensation,

¹ 5 U.S.C. §§ 8101-8193.

² The record also contains an October 29, 2014 OWCP decision terminating medical benefits and wage-loss compensation. Appellant has not appealed this decision. The record indicates that appellant's counsel requested a hearing before OWCP with respect to this matter.

thereby precluding waiver of recovery of the overpayment; and (4) whether it properly required repayment of the overpayment by deducting \$100.00 every 28 days from her continuing compensation.

FACTUAL HISTORY

On December 5, 2011 appellant, then a 35-year-old letter carrier, injured her right arm while delivering a package on her mail route. OWCP accepted her claim for right shoulder and upper arm sprain. Appellant stopped work on December 5, 2011.

Appellant was placed on the periodic compensation rolls. By letter dated June 19, 2012, OWCP outlined her entitlement to compensation benefits and her responsibility to return to work in connection with the injury accepted by OWCP. In an attached EN1049, it provided:

“9. OVERPAYMENTS. To 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 two 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.”

Appellant received compensation *via* direct deposit payments.

On March 29, 2013 the employing establishment offered appellant a modified rural mail carrier position effective March 29, 2013. Appellant accepted the position and returned to work on April 3, 2013.

In a May 16, 2014 letter, OWCP informed appellant that it made a preliminary determination that she had received a \$2,149.14 overpayment of compensation from April 3 to May 4, 2013 because she received compensation benefits for temporary total disability for that period after she returned to work full time on April 3, 2013. It found that she was at fault in creating the overpayment because she knew or should have known that the amount was incorrect. OWCP explained that appellant was paid \$3,761.00 in compensation from March 10 to May 4, 2013; however, she was only entitled to compensation for the period March 10 to April 2, 2013 in the amount of \$1,611.86.³ This created an overpayment of \$2,149.14. Appellant was paid through direct deposit into her bank account. OWCP informed her of her review rights, including her right to request a precoupment hearing within 30 days. It also

³ The integrated Federal Employee Compensation System noted that for the period March 10 to April 6, 2013 appellant received compensation benefits of \$1,880.50 and for the period of April 7 to May 4, 2013, appellant received compensation benefits of \$1,880.50.

instructed appellant to complete an enclosed overpayment recovery form and submit supporting documentation within 30 days.

On May 19, 2014 appellant noted that she had signed an agreement to return to work on March 29, 2013 and was told that she would receive compensation from OWCP for lost hours at three-quarters of her pay if the post office was not able to provide her with her usual number of hours of work per week. She indicated that she had no way of knowing that OWCP had not received the signed agreement in a timely manner to compensate for changes in the amount she would receive. Appellant noted providing the injury compensation department copies of the CA-7 forms in June 2013 to cover pay from March 30 to April 26, 2013. She did not agree she was paid \$2,149.14 and did not know how she would pay this amount back as she had many financial obligations and was strapped for money.

In a June 5, 2013 letter, appellant indicated that she was alerted that one of her daughters spoke of committing suicide. She noted that for this reason she was unable to provide a list of her monthly bills and expenses and would need additional time to provide that information. Appellant did not submit an overpayment questionnaire or additional supporting documentation. She also did not request a prerecoupment hearing.

In a decision dated September 2, 2014, OWCP found that appellant had received a \$2,149.14 overpayment of compensation from April 3 to May 4, 2013 for which she was found at fault. It advised that the overpayment occurred because appellant had returned to work full-time, eight hours per day, on April 3, 2013 and continued to receive compensation for total disability until May 4, 2013. OWCP explained that appellant was paid \$3,761.00 in compensation from March 10 to May 4, 2013. It noted that she was entitled to compensation for the period March 10 to April 2, 2013 in the amount of \$1,611.86. This created an overpayment of \$2,149.14. OWCP was paid through direct deposit into her account.⁴ It found that appellant was at fault in creating the overpayment because she reasonably should have been aware that she was not entitled to compensation benefits for total disability while working full time. Appellant should have known she was overpaid compensation when she received direct deposits into her account after she returned to work. OWCP advised that the overpayment would be collected by withholding \$100.00 from continuing compensation payments every four weeks, beginning October 2, 2014.

On September 8, 2014 appellant, through counsel, requested an oral hearing from the September 2, 2014 decision.

By decision dated October 30, 2014, the Branch of Hearings and Review denied appellant's September 8, 2014 request for a hearing finding that, the final decision concerning an overpayment is not subject to the hearing provision of 5 U.S.C. § 8124(b).

⁴ *Id.*

LEGAL PRECEDENT -- ISSUE 1

OWCP regulations provide that a claimant may request a prerecoupment hearing with respect to an overpayment.⁵ Failure to request the prerecoupment hearing within 30 days shall constitute a waiver of the right to a hearing.⁶ The only right to a review of a final overpayment decision is with the Board.⁷ The hearing provisions of section 8124(b) of FECA do not apply to final overpayment decisions.⁸

ANALYSIS -- ISSUE 1

The May 16, 2014 preliminary determination of overpayment provided appellant with a right to request a prerecoupment hearing within 30 days. As noted above, if a claimant does not request a hearing within 30 days, it is considered a waiver of the right to a hearing.⁹ When the final overpayment decision is issued, there is no right to a hearing or a review of the written record and OWCP does not have discretion to grant such a request. The only right to appeal is with the Board.¹⁰ As appellant's written request for a hearing dated September 8, 2014 was dated more than 30 days after the May 16, 2014 preliminary determination, it was untimely and she thus waived her right to a prerecoupment hearing.¹¹ Furthermore, the Branch of Hearings and Review properly advised appellant that the decision was not subject to the hearing provision under 5 U.S.C. § 8124(b).¹²

LEGAL PRECEDENT -- ISSUE 2

A claimant is not entitled to receive temporary total disability and actual earnings for the same period. OWCP procedures provide that an overpayment in compensation is created when a claimant returns to work but continues to receive wage-loss compensation.¹³

⁵ 20 C.F.R. § 10.432.

⁶ *Id.*; see also *L.C.*, 59 ECAB 569 (2008); *Willie C. Howard*, 55 ECAB 564 (2004).

⁷ *Id.* at § 10.440(b).

⁸ *Id.*; see also *Philip G. Feland*, 48 ECAB 485 (1997).

⁹ *Id.* at § 10.432.

¹⁰ *Id.* at 10.440(b).

¹¹ *Id.* at § 10.432; see also *A.M.*, Docket No. 13-222 (issued September 25, 2013) and *E.V.*, Docket No. 10-1284 (issued February 3, 2011) (where appellants not only untimely requested a prerecoupment hearing following a preliminary overpayment determination, but also submitted said request after the preliminary determination was finalized).

¹² *Id.* at § 10.440(b); see *id.*

¹³ *Danny E. Haley*, 56 ECAB 393 (2005); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(a) (May 2004).

ANALYSIS -- ISSUE 2

The record indicates that appellant returned to a modified position on April 3, 2013. Appellant received wage-loss compensation for total disability through May 4, 2013. As noted above, she is not entitled to receive compensation for total disability after she has returned to work. Thus, an overpayment occurred.

Since the evidence indicated that appellant returned to full-time work without wage loss on April 3, 2013, she was not entitled to total disability compensation beginning that date. The record shows that OWCP calculated that, from March 10 to May 4, 2013, appellant received \$3,761.00 in total net disability compensation but he was only entitled to compensation from March 10 to April 2, 2013 in the amount of \$1,611.86. OWCP explained how the overpayment occurred and provided this to appellant with the preliminary notice of overpayment. The Board finds that OWCP properly determined that appellant had received an overpayment of compensation in the amount of \$2,149.14 for the period March 10 to May 4, 2013.

LEGAL PRECEDENT -- ISSUE 3

Section 8129(b) of FECA provides that “[a]djustment 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.”¹⁴ No waiver of an overpayment is possible if the claimant is at fault in creating the overpayment.¹⁵

On the issue of fault, 20 C.F.R. § 10.433(a) provides that an individual is with 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; or (2) failed to furnish information which the individual knew or should have known to be material; or (3) with respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know 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

¹⁴ 5 U.S.C. § 8129(b).

¹⁵ *Gregg B. Manston*, 45 ECAB 344 (1994).

¹⁶ 20 C.F.R. § 10.433(a). *See Kenneth E. Rush*, 51 ECAB 116 (1999).

¹⁷ *Id.* at § 10.433(b).

ANALYSIS -- ISSUE 3

OWCP determined that appellant was at fault in the creation of the overpayment because she accepted payments that she knew or should have known to be incorrect. The Board finds, however, that OWCP failed to establish that at the time she accepted the initial payment of compensation following her return to work on April 3, 2013, she knew or should have known the payments were incorrect.

As discussed, in cases where a claimant receives compensation through direct deposit, OWCP must establish that at the time a claimant received the direct deposit in question that he or she knew or should have known that the payment was incorrect.¹⁸ The Board has held that an employee who receives payments from OWCP in the form of a direct deposit may not be at fault for the first incorrect deposit into his or her account since the acceptance of the overpayment, at the time of receipt of the direct deposit, lacks the requisite knowledge.¹⁹ Because fault is defined by what the claimant knew or should have known at the time of acceptance, one of the consequences of electronic fund transfers is that the claimant lacks the requisite knowledge at the time of the first incorrect payment.²⁰ Whether or not OWCP determines that an individual is at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment.²¹ It is not appropriate, however, to make a finding that a claimant has accepted an overpayment *via* direct deposit until such time as a reasonable person would have been aware that this overpayment had occurred. This awareness could be established either through documentation such as a bank statement or notification from OWCP or where a reasonable period of time has passed during which a claimant could have reviewed independent confirmation of the incorrect payment.²²

Appellant received compensation by direct deposit payments every 28 days. The evidence of record does not establish that, as of the first direct deposit of compensation after she returned to work on April 3, 2013, she knew or should have known that she was accepting a direct deposit to which she was not entitled. There is no documentation or other evidence to demonstrate that appellant had clear knowledge at the time she received a direct deposit from OWCP on April 6, 2013, covering the period March 10 to April 6, 2013, that a portion of the payment was incorrect, or that a reasonable period of time passed during which she could have reviewed bank statements or been informed of the incorrect payment.²³ Therefore, appellant is not at fault in the acceptance of the direct deposit covering the period of the overpayment from March 10 to April 6, 2013.

¹⁸ See *C.K.*, Docket No. 12-746 (issued May 1, 2012).

¹⁹ See *Tammy Craven*, 57 ECAB 689 (2006).

²⁰ *Id.*

²¹ *Id.*; see also *K.D.*, Docket No. 13-451 (issued April 12, 2013).

²² *V.S.*, Docket No. 13-1278 (issued October 23, 2013).

²³ *Supra* note 2.

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.²⁴ 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, the claimant will be at fault for accepting the payments subsequently deposited.²⁵ Thus, by the time of the second payment dated May 4, 2013 (covering the period April 7 to May 4, 2013) appellant should have known that she was no longer entitled to FECA wage-loss compensation after she returned to work on April 3, 2013. She should have taken further steps to prevent issuance of another compensation payment. Accordingly, the Board will affirm the finding of fault for the remaining April 7 to May 4, 2013 period of overpayment.

The Board finds that this case is not in posture for decision regarding the issue of waiver of recovery of the overpayment for the direct deposit on April 6, 2013, covering the part of the overpayment from March 10 to April 6, 2013. The Board will set aside the September 2, 2014 decision regarding the issue of fault as to the April 6, 2013 direct deposit and will remand the case for OWCP to determine whether appellant is entitled to waiver of recovery for the direct deposit of compensation covering the period of the overpayment from March 10 to April 6, 2013.

LEGAL PRECEDENT -- ISSUE 4

The Board's jurisdiction over recovery of an overpayment is limited to reviewing those cases where OWCP seeks recovery from continuing compensation under FECA.²⁶

ANALYSIS -- ISSUE 4

In view of the Board's decision on fault, it is premature to address the issue of recovery of the overpayment from continuing compensation payments for the period April 3 to May 4, 2013.

CONCLUSION

The Board finds that appellant received an overpayment of compensation from April 3 to May 4, 2013. The Board further finds that she was without fault for that portion of the overpayment covering April 3 to 6, 2013, but that she was at fault in creating that portion of the overpayment occurring from April 7 to May 4, 2013. The case will be remanded for consideration of waiver of the recovery of the overpayment from April 3 to 6, 2013. The case is not in posture for a decision with regard to recovery of the overpayment. Furthermore, OWCP properly denied appellant's request for a hearing following a final overpayment decision.

²⁴ See *William E. McCarty*, 54 ECAB 525 (2003).

²⁵ *V.S.*, *supra* note 22; *K.D.*, *supra* note 21.

²⁶ *Lorenzo Rodriguez* 51 ECAB 295 (2000); *Albert Pineiro*, 51 ECAB 310 (2000).

ORDER

IT IS HEREBY ORDERED THAT the September 2, 2014 decision of the Office of Workers' Compensation Programs is set aside in part and affirmed in part. The October 30, 2014 decision is affirmed.

Issued: May 27, 2015
Washington, DC

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

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board