U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of FINLEY W. LECLAIR and DEPARTMENT OF THE INTERIOR, BUREAU OF LAND MANAGEMENT, Waldport, OR

Docket No. 02-2307; Submitted on the Record;
Issued March 25, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON, MICHAEL E. GROOM

The issue is whether appellant received an overpayment of compensation in the amount of $8,715.09, and, if so, whether he was at fault in the creation of this overpayment.

On September 24, 1992 appellant, then a 37-year-old surveying aid, filed a claim for a fracture of the left leg sustained that day in a fall. The Office of Workers' Compensation Programs accepted that appellant sustained a comminuted interarticular fracture of the proximal left tibia and fibula. The employing establishment paid appellant continuation of pay from September 24 until November 7, 1992. On November 7, 1992 the employing establishment terminated appellant's temporary appointment, stating that it would have terminated at approximately the time his continuation of pay ended.

On November 8, 1992 the Office began payment of compensation for temporary total disability, using a pay rate of $156.23 per week. The employing establishment advised the Office that appellant had been hired on July 12, 1992 at a pay rate of $14,082.00 per year "in a temporary appointment, not to exceed 180 days."

By letter dated May 17, 1993, the employing establishment advised the Office that it had no light duty available for appellant. In a report dated June 14, 1993, Dr. Thomas B. Corsolini, a Board-certified physiatrist, to whom the Office referred appellant for a second opinion evaluation, concluded that appellant probably would never be able to return to his regular job due to left knee instability, a condition an Office medical adviser concluded was probably caused by his September 24, 1992 employment injury.

By letter dated February 7, 1994, the Office advised appellant of the amount of compensation he was receiving and of the weekly pay rate of $156.23 used to compute his compensation. The Office also advised appellant that "payment of compensation will be terminated without … notice whenever this Office is notified that you have earnings equal to or higher than the wages being paid for the job you held when injured." Appellant was also advised that, if he worked during any portion of a period covered by his periodic compensation check, he

must return that check to avoid an overpayment of compensation. The Office sent appellant another copy of this form letter on March 14, 1996.

On an Office Form CA-1032 he completed on August 16, 1996, appellant stated that he had worked at J.C. Penney in maintenance since April 24, 1996 at a pay rate of $5.50 per hour. On a Form CA-1032 he completed on August 18, 1997 appellant indicated that he was still working in this position, at a pay rate of $5.80 per hour. J.C. Penney confirmed that appellant had worked as a custodian for 37 to 40 hours per week beginning April 24, 1996, at an initial pay rate of $5.50 per hour, increased to $5.80 per hour on April 24, 1997.

An Office memorandum dated October 2, 1997 states:

> "The Office requested and received a like employee on this claimant. He was a GS-3 in 1993. Claimant worked four months prior to the injury. An employee in a like position would have worked 20 weeks. Earnings for a GS-3 in 1992 were $14,082.00 or $6.75 per hour as a survey aid.
>
> "As a like employee would have been less than a GS-1 so, he was paid on the 150 formula at 100 percent.
>
> "$6.75 x 2,087 divided by 52 = $270.91 per week x 20 weeks would be less than the like employee. So the 150 salary is greater."

By decision dated March 4, 1999, the Office terminated appellant's compensation on the basis that his actual earnings of $232.00 per week represented his wage-earning capacity and exceeded the wages of the job he held when injured.

By letter dated March 22, 1999, appellant stated that his wages on the date he was injured were $254.25 per week, based on actual hours worked.

On May 22, 2001 appellant filed a claim for a schedule award.

By decision dated April 22, 2002, the Office determined that appellant was entitled to a schedule award for a 12 percent permanent impairment of his left leg, with the period of the award being from April 24 to December 21, 1996. The Office found:

> "You returned to work on April 24, 1996 without any pay loss. You were erroneously compensated for total wage loss from April 24, 1996 through October 11, 1997. For the period of this schedule award, you received 34.56 weeks of compensation[1] at the rate of $168.50 per week or $5,823.36. There is no residual compensation owed to you for this award period, rather there is a net overpayment."

On April 26, 2002 the Office issued a preliminary determination that appellant received an overpayment of compensation in the amount of $8,715.09 that occurred because appellant

[1] 5 U.S.C. § 8107 provides for payment of 288 weeks of compensation for loss of a leg and for proportionate payment for permanent partial loss of use of a member.

returned to work on April 24, 1996 without pay loss but continued to receive compensation for total wage loss through October 11, 1997. Appellant received compensation in the amount of $13,078.29 during this period. The amount of the overpayment was reduced by the $4,363.20 to which appellant was entitled under the schedule award. The Office found that appellant was at fault in the matter of the overpayment for the reason that he accepted wage-loss compensation benefits which he knew or reasonably could be expected to know he was not entitled to retain.

By decision dated June 12, 2002, the Office found that appellant received an overpayment of compensation in the amount of $8,715.09 that occurred because he received compensation for total wage loss from April 24, 1996 to October 11, 1997, a period during which he worked and sustained no loss of wages. The Office found that appellant was at fault in the matter of this overpayment for the reason that he accepted payments of total wage-loss compensation to which he knew or reasonably could be expected to know he was not entitled.

The Board finds that appellant received an overpayment of compensation in the amount of $8,715.09.

As reported by appellant on CA-1032 forms and confirmed by the company for which he worked, appellant was employed full time beginning April 24, 1996. His earnings in this employment of $220.00 to $232.00 per week exceeded the rate of pay for the same period of the job he held when injured.[2] For this reason, appellant was not entitled to compensation for disability beginning April 24, 1996.[3] The Office continued to pay compensation for temporary total disability through October 11, 1997. Appellant received compensation in the amount of $13,078.29 from April 24, 1996 through October 11, 1997.

From the $13,078.29 that appellant was improperly paid, the Office subtracted $4,363.20, the amount to which appellant was entitled for the period April 24 to December 21, 1996 under a schedule award for a 12 percent permanent impairment of the left leg.[4] Generally, the Office should not select an effective date for payment of a schedule award at a date other than the date of maximum medical improvement[5] and the Office should not offset amounts owed to employees against amounts of overpayments, as this precludes the employee from obtaining waiver of the entire amount of the overpayment. However, under the circumstances of this case, where appellant was found to be at fault and no waiver is possible, appellant was not harmed by these actions by the Office.

[2] Although appellant stated, in a March 22, 1999 letter, that he earned $254.25 per week for the employing establishment, the Office properly used the formula set forth at 5 U.S.C. § 8114(d) (3) to determine his rate of pay of $156.23 per week on the date he was injured.

[3] *See Kenneth E. Rush*, 51 ECAB 116 (1999).

[4] The amount appellant would have received under the schedule award for the period April 24 to December 21, 1996 was less than the amount he would have received for temporary total disability for the same period, as the payment under the schedule award, unlike that for disability, is not subject to the minimum monthly payment provided for by 5 U.S.C. § 8112; *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Computing Compensation*, Chapter 2.901.10 (December 1995).

[5] *See Herbert Hale*, 42 ECAB 258 (1990).

The Board finds that appellant was at fault in the matter of the overpayment.

Section 8129(a) of the Federal Employees' Compensation Act provides that, where an overpayment of compensation has been made "because of an error of fact or law," adjustment shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): "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 the Act or would be against equity and good conscience."[6] No waiver of an overpayment is possible if the claimant is not "without fault" in helping to create the overpayment.

Section 10.433 of Title 20 of the Code of Federal Regulations provides:

> "A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment:
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> > (1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or
> >
> > (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 to be incorrect. (This provision applies only to the overpaid individual.)"[7]

The Office properly found that appellant accepted a payment which he knew or should have known to be incorrect. The Office informed appellant in February 7, 1994 and March 14, 1996 letters that he must return checks received after he returned to work in order to avoid an overpayment of compensation. Although appellant notified the Office that he had returned to work, the Office's error in not terminating his compensation immediately upon receiving this notice does not excuse appellant's acceptance of payments for total disability during a period when he was working full time.[8] As appellant was at fault in the matter of the overpayment, the overpayment of compensation in the amount of $8,715.09 cannot be waived.

[6] 5 U.S.C. § 8129.

[7] 20 C.F.R. § 10.433(a).

[8] *See Lynden F. Moser*, 37 ECAB 725 (1986).

The June 12, 2002 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
March 25, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member