

On April 29, 2005 appellant, then a 55-year-old mail carrier, filed an occupational disease claim alleging that he sustained wrist pain and numbness from prolonged carrying of mail and

flyers. He stopped work on August 26, 2004. The Office accepted the claim for bilateral carpal tunnel syndrome. Appellant underwent a left carpal tunnel release in June 2004 and a right carpal tunnel release in June 2005. He returned to work for four hours per day on September 9, 2005.¹

On May 9, 2006 appellant filed a claim for a schedule award. He returned to his usual employment on May 12, 2006 and voluntarily retired from the employing establishment on June 8, 2006. By decision dated September 5, 2006, the Office granted appellant a schedule award for a 20 percent permanent impairment of the right upper extremity.² The period of the award ran for 62.4 weeks from April 15, 2006 to June 25, 2007. The Office paid appellant an initial payment of \$10,851.40 covering the period April 14 through August 5, 2006. It informed him that he would subsequently receive compensation in the amount of \$2,693.61 every 28 days for the remainder of the schedule award period. The Office notified appellant that he may be entitled to receive the schedule award in a lump sum if he was either working or receiving retirement benefits.

On September 14, 2006 appellant telephoned the Office and requested the remainder of his schedule award balance in a lump sum. In a letter dated November 29, 2006, the Office notified appellant that a lump-sum payment would “represent full and final compensation for the period of the award....” It calculated that he would receive a lump-sum payment of \$17,633.18 for the period December 24, 2006 to June 25, 2007.

On December 2, 2006 appellant agreed to accept “the sum of \$17,633.18 in payment of compensation for the commuted value of further installments of compensation for the remainder of the schedule award....”³ He acknowledged that the lump sum represented full payment for the schedule award and that he would receive no further benefits “for the duration of the schedule award.”

On December 13, 2006 the Office paid appellant a lump sum of \$17,633.18 in lieu of further periodic rolls payments for the balance of the schedule award. On February 13, 2007 it noted that it did not delete appellant’s schedule award compensation from the periodic rolls even though he received the lump-sum payment.⁴

On February 6, 2008 the Office notified appellant of its preliminary determination that he received an overpayment of \$5,387.22 because he continued to receive periodic rolls payments for a schedule award from December 24, 2006 to February 17, 2007 after he received a lump-sum payment for that period. It calculated that he received periodic rolls payments of \$2,693.61

¹ On April 18, 2006 the Office accepted that appellant sustained a recurrence of disability. He returned to limited-duty employment for four hours per day on April 26, 2006.

² The Office initially issued a decision dated August 18, 2006 granting appellant a schedule award for 20 percent right upper extremity impairment. The September 5, 2006 decision superseded the August 18, 2006 decision and provided a correct period of the award.

³ The Office, in a typographical error, indicated that the period covered was December 24 to December 24, 2006.

⁴ On July 11, 2007 appellant agreed to receive a lump sum of \$41,032.72 as payment for the remainder of his schedule award for the left upper extremity award.

for the period December 24, 2006 to January 20, 2007 and \$2,693.61 for the period January 21 to February 17, 2007, which created a total overpayment of \$5,387.22. A computer printout of the Office's compensation payment history shows that appellant received a check dated January 20, 2007 for \$2,693.61 covering the period December 24, 2006 to January 20, 2007 and a check dated February 17, 2007 for \$2,693.61 covering the period January 21 to February 17, 2007. The Office advised him of its preliminary determination that he was at fault in the creation of the overpayment. It requested that appellant complete the enclosed overpayment recovery questionnaire and submit supporting financial documents. Additionally, the Office notified him that, within 30 days of the date of the letter, he could request a telephone conference, a final decision based on the written evidence or a prerecoupment hearing.

By decision dated March 12, 2008, the Office finalized its finding that appellant received an overpayment of \$5,387.22 because he received payments on the periodic rolls for a schedule award for the right upper extremity from December 24, 2006 to February 17, 2007 after receiving a lump-sum payment. It further finalized its preliminary finding that he was at fault in creating the overpayment because he accepted payments he knew or should have known were incorrect. The Office instructed him to forward a check for \$5,387.22 to repay the overpayment.

LEGAL PRECEDENT -- ISSUE 1

Section 10.422(b) of the Office's regulations provides that the Office, in its exercise of discretion afforded under 5 U.S.C. § 8135(a) of the Federal Employees' Compensation Act,⁵ may make a lump-sum payment to an employee entitled to a schedule award under 5 U.S.C. § 8107 when such a payment is in the employee's best interest.⁶ Section 8116(a) of the Act provides that, while an employee is receiving compensation or if he has been paid a lump sum in commutation of installment payments, until the expiration of the period during which the installment payments would have continued, the employee may not receive salary, pay or remuneration of any type from the United States, except in limited special instances.⁷

ANALYSIS -- ISSUE 1

On September 5, 2006 the Office granted appellant a schedule award for a 20 percent permanent impairment of the right upper extremity. The period of the award ran for 62.4 weeks from April 15, 2006 to June 25, 2007. On December 13, 2006 the Office issued appellant \$17,633.18 for the period December 24, 2006 to June 25, 2007 as a lump-sum payment of the remainder of the schedule award. An Office computer printout, however, establishes that the Office erroneously issued two periodic rolls payments of \$2,693.61 covering the period December 24, 2006 to February 12, 2007 by checks dated January 20 and February 17, 2007. As appellant had received \$17,633.18 as a lump-sum payment for full and final compensation for the period of the schedule award and subsequently received an additional two payments totaling

⁵ 5 U.S.C. §§ 8101-8193.

⁶ 20 C.F.R. § 10.422(b).

⁷ 5 U.S.C. § 8116(a); *see Jorge O. Diaz*, 51 ECAB 124 (1999).

\$5,387.22 to which he was not entitled, the Board finds that he received an overpayment of \$5,387.22.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Act⁸ 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.” Section 10.433 of the Office’s implementing regulations⁹ provides that, in determining whether a claimant is at fault, the Office will consider all pertinent circumstances. An individual is with fault in the creation of an overpayment who:

“(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.”

ANALYSIS -- ISSUE 2

The Office applied the third standard in determining that appellant was at fault in the creation of the overpayment. It must thus establish that at the time he received the compensation checks in question, he knew or should have known that the payments were incorrect.¹⁰

In a letter dated November 29, 2006, the Office clearly advised appellant that as he was receiving a lump-sum payment, he would not be entitled to any further compensation for that period. He signed an agreement on December 2, 2006 agreeing to accept \$17,633.18 as payment for the remainder of the schedule award and acknowledging that he would receive no further benefits from the Office for the duration of the schedule award. Despite the unambiguous language of the settlement agreement, appellant accepted schedule award payments by checks dated January 20 and February 17, 2007 covering the period December 24, 2006 to February 17, 2007. He knew or should have known that these compensation payments, received subsequent to his lump-sum payment of \$17,633.18, were incorrect. As the evidence establishes that appellant was at fault in the creation of the overpayment of compensation that occurred in this case, the Board finds that he is not entitled to waiver of recovery of the overpayment.¹¹

⁸ 5 U.S.C. § 8129(b).

⁹ 20 C.F.R. § 10.433.

¹⁰ See *Diana L. Booth*, 52 ECAB 370 (2001).

¹¹ *Sinclair L. Taylor*, 52 ECAB 227 (2001).

On appeal appellant highlighted the portion of the Office decision noting that it had erred in sending him further compensation for his schedule award. Even though the Office may have been negligent in making incorrect wage-loss payments following the lump-sum schedule award, this does not excuse appellant from accepting payments he knew or should have known to be incorrect.¹²

CONCLUSION

The Board finds that appellant received an overpayment of \$5,387.22 during the period December 24, 2006 to February 17, 2007 as he received both a lump-sum payment and periodic rolls payments for a schedule award. The Board further finds that he was at fault in the creation of the overpayment and thus not entitled to waiver.¹³

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 12, 2008 is affirmed.

Issued: January 8, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

¹² *William E. McCarty*, 54 ECAB 525 (2003); *Lorenzo Rodriguez*, 51 ECAB 295 (2000).

¹³ With respect to recovery of the overpayment, the Board's jurisdiction is limited to review of those cases where the Office seeks recovery from continuing compensation benefits under the Act. See *Terry A. Keister*, 56 ECAB 559 (2005); *Albert Pineiro*, 51 ECAB 310 (2000). As the Office instructed appellant to submit a check for the entire amount to repay the overpayment, the Board lacks jurisdiction to review the recovery of the overpayment.