

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

E.V., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
El Centro, CA, Employer**

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**Docket No. 07-1733
Issued: December 11, 2007**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 15, 2007 appellant filed a timely appeal from a March 13, 2007 decision of the Office of Workers' Compensation Programs, which found that he received an overpayment of compensation in the amount of \$16,140.00. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether appellant received an overpayment in compensation in the amount of \$16,140.00; and (2) whether the Office properly determined that he was at fault in accepting the overpayment and was therefore not entitled to waiver.

FACTUAL HISTORY

On January 2, 2004 appellant, then a 54-year-old letter carrier, sustained a right forearm and wrist laceration when he was attacked by a pit bull while delivering mail. He stopped work that day and was placed on the periodic rolls. On March 25, 2004 he underwent revision and tendon repair of the right forearm. Appellant retired in November 2004 without returning to

work. On March 21, 2005 he filed a schedule award claim. In a decision dated April 26, 2005, the Office granted a schedule award for a 15 percent impairment of the right upper extremity. The award was for 46.8 weeks, to run from January 24 through December 17, 2005.

By letter dated May 2, 2005, appellant advised the Office that he wanted his schedule award paid in a lump sum. A payment of \$7,821.88 was made on April 29, 2005 for the period January 24 through April 16, 2005 and payments of \$2,690.00 each were made on May 14 and June 11, 2005 for the periods April 17 through May 14, 2005 and May 15 through June 11, 2005 respectively. By letters dated May 5 and 11, 2005, the Office informed appellant that a lump sum in his case would total \$18,069.43 as of June 12, 2005. He was informed that this lump sum would represent “full and final compensation payment for the period of the award even if you suffer a recurrence of total disability.” On June 17, 2005 the Office issued a payment of \$18,069.43 as a lump-sum payment for his schedule award. In a decision dated June 21, 2005, the Office noted that his schedule award was disbursed as a lump sum per his request and agreement. Office computer printouts contained in the record show that the Office made six additional periodic schedule award payments of \$2,690.00, covering the period June 12 through November 26, 2005, for a total of \$16,140.00.

By letter dated December 15, 2005, the Office issued a preliminary determination that appellant had received an overpayment in compensation in the amount of \$16,140.00. The Office noted that he received periodic schedule award compensation benefits for the period June 12 through November 26, 2005, after he had received a lump-sum payment for the period June 12 through December 17, 2005. The Office found appellant to be at fault in the creation of the overpayment because he accepted payments that he knew or should have known to be incorrect.

On January 12, 2006 appellant requested a prerecoupment hearing and submitted an overpayment questionnaire. At the hearing, held on December 6, 2006, he testified that he did not appeal the schedule award decision because he was under stress. Appellant stated that he thought the Office had granted him an additional award and argued that he was not at fault in the creation of the overpayment. He discussed his income and expenses, testifying that his monthly income was approximately \$3,500.00 and expenses approximately \$2,575.00.

By decision dated March 13, 2007, an Office hearing representative finalized the overpayment of compensation in the amount of \$16,140.00. Appellant was found at fault because he was aware that he was not entitled to receive additional schedule award payments after receipt of a lump-sum payment. He was advised that the overpayment would be collected at the rate of \$550.00 per month.

LEGAL PRECEDENT -- ISSUE 1

Section 10.422(b) of the Office’s regulations provides that the Office, in its exercise of discretion afforded under section 8135(a) of the Federal Employees’ Compensation Act,¹ may

¹ 5 U.S.C. § 8135(a).

make a lump-sum payment to an employee entitled to a schedule award under section 8107 when such a payment is in the employee's best interest.² Section 8116(a) of the Act provides:

“(a) While an employee is receiving compensation under this subchapter 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, he may not receive salary, pay or remuneration of any type from the United States, except --

- (1) in return for service actually performed;
- (2) pension for service in the Army, Navy or Air Force;
- (3) other benefits administered by the Department of Veterans Affairs unless such benefits are payable for the same injury or the same death; and
- (4) retired pay, retirement pay, retainer pay, or equivalent pay for service in the Armed Forces or other uniformed services, subject to the reduction of such pay in accordance with section 5532(b) of [T]itle 5, United States Code.

“However, eligibility for or receipt of benefits under subchapter III of [C]hapter 83 of this title or another retirement system for employees of the [g]overnment, does not impair the right of the employee to compensation for scheduled disabilities specified by section 8107(c) of this title.”³

ANALYSIS -- ISSUE 1

On April 26, 2005 the Office granted appellant a schedule award for a 15 percent impairment of his right upper extremity, for a total of 46.8 weeks of compensation, to run from January 24 through December 17, 2005. Appellant received schedule award compensation of \$7,821.88 for the period January 24 through April 16, 2005 and two periodic payments of \$2,690.00 each for the periods April 17 through May 14, 2005 and May 15 through June 11, 2005. On May 2, 2005 he requested that his schedule award be paid in a lump sum. By letters dated May 5 and 11, 2005, the Office informed appellant that a lump sum in his case would total \$18,069.43 as of June 12, 2005. Appellant was informed that this lump sum would represent “full and final compensation payment for the period of the award even if you suffer a recurrence of total disability.” On June 17, 2005 the Office issued a payment of \$18,069.43 as a lump-sum payment for his schedule award. Office computer printouts, however, establish that the Office erroneously issued an additional six periodic schedule award payments of \$2,690.00, covering the period June 12 through November 26, 2005, in the total amount of \$16,140.00. As appellant had received \$18,069.43 as a lump-sum payment for full and final compensation for the period of the schedule award and subsequently received six additional periodic payments

² 5 U.S.C. § 8107; 20 C.F.R. § 10.422(b).

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

totaling \$16,140.00 to which he was not entitled, the Board findings that an overpayment in compensation in the amount of \$16,140.00 was created.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of the Act provides that an overpayment in compensation shall be recovered by the Office unless “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.”⁴

Section 10.433(a) of the Office’s regulations provides:

“The Office may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from [the Office] are proper. The recipient must show good faith and exercise a high degree of care in reporting events which may affect entitlement to or the amount of benefits. A recipient who has done any of the following will be found to be at fault in creating an overpayment --

- (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 to be incorrect. (This provision applies only to the overpaid individual).”⁵

ANALYSIS -- ISSUE 2

In this case, the Office applied the third standard in determining that appellant was at fault in the creation of the overpayment in compensation in the amount of \$16,140.00. In order for the Office to establish that appellant was at fault in creating the overpayment, it must establish that at the time appellant received the compensation in question, he knew or should have known that the payments were incorrect.⁶

Even though the Office may have been negligent in making incorrect payments following the lump-sum schedule payment, this does not excuse appellant from accepting payments he knew or should have known to be incorrect.⁷ Following the April 26, 2005 schedule award,

⁴ 5 U.S.C. § 8129; see *Linda E. Padilla*, 45 ECAB 768 (1994).

⁵ 20 C.F.R. § 10.433 (1999); see *Sinclair L. Taylor*, 52 ECAB 227 (2001); see also 20 C.F.R. § 10.430.

⁶ See *Diana L. Booth*, 52 ECAB 370 (2001).

⁷ *William E. McCarty*, 54 ECAB 525 (2003).

appellant requested that the Office pay the award in a lump sum. The Office's May 5 and 11, 2005 correspondence clearly advised appellant that the lump-sum payment of his schedule award would represent the only compensation he would receive for the period covered by the award, even if he sustained a recurrence of total disability. The Office issued appellant a lump-sum payment on June 17, 2005 in the amount of \$18,069.43. In accepting the lump-sum payment, appellant signed a statement on May 16, 2005 that he understood and agreed that the lump-sum payment represented full and final settlement of his schedule award for the period June 12 through December 17, 2005 and that he was not entitled to any further compensation for the duration of his schedule award. However, the record establishes that he continued to receive periodic schedule award payments for the period June 12 through November 26, 2005 in the amount of \$2,690.00. Appellant accepted these payments after receiving the lump-sum payment of \$18,069.43. He had been clearly informed by the Office and had agreed that he was not entitled to additional compensation. The record establishes that appellant knew or should have known that these additional periodic payments were incorrect.

Appellant contended that he was not responsible for the creation of the overpayment because he believed the continued payments were for an increased schedule award. This argument is not persuasive. The Board notes that issuance of the lump-sum payment was made at his request. The May 5 and 11, 2005 Office letters put him on notice that the \$18,069.43 lump-sum payment of his schedule award represented the settlement of his claim and that he had no reasonable expectation of additional schedule award compensation until the period of the schedule award expired on December 17, 2005. Appellant subsequently accepted periodic schedule award payments after he received his lump-sum payment for his schedule award. The record establishes that he is at fault in the creation of the overpayment under the third criterion noted above as he accepted payments he knew or should have known to be incorrect. As the evidence establishes that appellant was at fault in the creation of the overpayment in compensation in the amount of \$16,140.00 that occurred in this case, he is not entitled to waiver of the overpayment.⁸

With respect to recovery of the overpayment in compensation, the Board's jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation benefits under the Act.⁹ As appellant is no longer receiving wage-loss compensation, the Board does not have jurisdiction with respect to the recovery of the overpayment under the Debt Collection Act.¹⁰

CONCLUSION

The Board finds that the Office properly determined that appellant was at fault in the creation of an overpayment in compensation in the amount of \$16,140.00.

⁸ See *Sinclair L. Taylor*, *supra* note 5.

⁹ *Cheryl Thomas*, 55 ECAB 610 (2004).

¹⁰ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 13, 2007 be affirmed.

Issued: December 11, 2007
Washington, DC

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

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board