

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of THOMAS P. MURRAY and U.S. POSTAL SERVICE,
POST OFFICE, Oakdale, NY

*Docket No. 99-993; Submitted on the Record;
Issued August 21, 2000*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether appellant received an overpayment of compensation in the amount of \$19,704.38 and, if so, whether he was without fault in the creation of this overpayment.

The Office of Workers' Compensation Programs accepted that appellant sustained a fracture of the left ankle when he slipped on ice on March 4, 1994. He received continuation of pay from March 5 to April 15, 1994 and used sick or annual leave from April 16, 1994 until his return to work on August 31, 1994. Appellant used sick leave during a recurrence of disability from February 3 to 24, 1995 for surgery to remove hardware from his ankle.

Appellant filed a claim against the owner of the property on which he fell on March 4, 1994 and received a settlement in the gross amount of \$100,000.00. On March 15, 1995 his attorney sent the Office a check in the amount of \$5,223.59, the amount shown on a statement of recovery to represent the disbursements by the Office for medical expenses, \$7,835.00, less the government's allowance for the attorney's fee. By letter dated July 25, 1995, the Office advised appellant that its records showed that he had obtained a recovery from the third party responsible for his injury and that \$45,862.49 was "the amount of the remainder that must be offset by additional medical expenses or disability benefits before any further payments can be made on account of this injury.... Any additional compensation due in your case will be credited against the remainder of the recovery upon submission of appropriate claim forms." In an information sheet accompanying this letter, the Office stated that the remainder shown in its letter represented:

"The recovery which remains after the payment of the required refund. This remainder, which you keep, is the amount against which we will credit any future payments of compensation or medical expenses on account of the same injury. If you have not previously received benefits for disability or for a permanent impairment involving total or partial loss or loss of use of a member, function or organ of the body as specified in the Federal Employees' Compensation Act and

its regulations ... you should file a claim on [F]orm CA-7 so benefits due can be credited.”

Appellant filed a claim for a schedule award due to his March 4, 1994 employment injury on June 22, 1995. The Office determined that he had a 14 percent permanent loss of use of his left leg due to his March 4, 1994 injury and on May 9, 1997 issued him a check in the amount of \$19,704.38 in full payment of this schedule award.

On September 10, 1998 the Office issued a preliminary determination that appellant had received an overpayment in the amount of \$19,704.38 that arose because the amount of the schedule award should have been credited against the remainder from the third-party recovery instead of being paid to appellant. The Office also preliminarily found that appellant was not without fault in the creation of the overpayment on the basis that he “knew or should have known, that the third-party aspect of his case was significant. He was also put on notice that a third-party settlement would impact him and was informed that no compensation was again payable until after the remainder from his third-party settlement had been exhausted by crediting.” In response to this preliminary determination, appellant stated that he did not understand why the schedule award took away monies from his third-party lawsuit, and that he was told that it was separate and that he would receive some money. Appellant also stated:

“I was told that I was qualified for a schedule award that was separate from the monies I had received from the third party.... I was given forms and information on how to acquire it by the compensation people. I received a check and honestly thought it was my award. Otherwise why was a check issued?”

By decision dated December 3, 1998, the Office found that appellant had received an overpayment in the amount of \$19,704.38 that arose because appellant accepted the amount of the schedule award which should have been credited against the remainder from the third-party recovery, but instead was paid to appellant. The Office also found that appellant was at fault in the creation of the overpayment for the reason that he knew that any compensation awards would have to offset the declared surplus of \$45,862.49.

The Board finds that appellant received an overpayment of compensation in the amount of \$19,704.38.

Section 8132 of the Act provides that an employee who sustains an injury for which compensation is payable under circumstances creating a legal liability in a party other than the United States has the obligation to reimburse “to the United States that amount of compensation paid ... and credit any surplus on future payments of compensation payable to him for the same injury.”¹ The purpose underlying this obligation is to prevent a double recovery by the employee.² Under this section of the Act, a claimant is obligated to reimburse the United States out of any third-party recovery for any disbursements made by the Office, and where there is a recovery surplus, as there was in appellant’s case, all compensation benefits otherwise payable

¹ 5 U.S.C. § 8132.

² *Charles E. Davis*, 39 ECAB 322 (1987).

must be offset against that surplus until it is exhausted. This includes benefits that would be payable pursuant to a schedule award.³

In the present case, appellant had, at the time the schedule award was paid to him on May 9, 1997, a surplus from his third-party recovery in the amount of \$45,862.49. The amount of the schedule award, \$19,704.38, should have been credited against this surplus. Instead it was paid to appellant and the result is an overpayment of compensation in the amount of \$19,704.38.

The Board further finds that appellant was with fault in the matter of this overpayment of compensation.

Section 8129(a) of the 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.”⁴

No waiver of an overpayment is possible if the claimant is not “without fault” in helping to create the overpayment.

In determining whether an individual is not “without fault” or alternatively, “with fault,” section 10.320 of Title 20 of the Code of Federal Regulations states in pertinent part:

“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.”⁵

The Office properly found that appellant was at fault in the matter of the overpayment of compensation on the third ground stated above: acceptance of a payment which he knew or should have been expected to know was incorrect. The Office’s July 25, 1995 letter regarding

³ *Richard J. Maher*, 42 ECAB 902 (1991).

⁴ 5 U.S.C. § 8129.

⁵ 20 C.F.R. § 10.320(b).

appellant's third-party recovery clearly advised him that he had a remainder of \$45,862.49, that this amount "must be offset by additional medical expenses or disability benefits before any further payments can be made on account of the injury," and that "[a]ny additional compensation due in your case will be credited against the remainder of the recovery." In addition, an information sheet accompanying this letter specifically advised appellant that payments under a schedule award would be credited against the remainder. Given this notification by the Office, appellant knew or should have been expected to know, that the check in the amount of \$19,704.38 issued on May 9, 1997 was incorrect.⁶

The decision of the Office of Workers' Compensation Programs dated December 3, 1998 is affirmed.

Dated, Washington, D.C.
August 21, 2000

David S. Gerson
Member

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

⁶ While the Office may have been negligent in issuing appellant's schedule award payment, this does not excuse appellant's acceptance of such payment which he knew or should have known was incorrect. See *Larry D. Strickland*, 48 ECAB 669 (1997); *Russell E. Wageneck*, 46 ECAB 653 (1995).