

FACTUAL HISTORY

On October 3, 2001 appellant, then a 54-year-old account representative, filed an occupational disease claim for his carpal tunnel and cubital tunnel conditions in both his hands and elbows. He stated that he first realized his conditions were caused or aggravated by his employment on August 29, 2001. The Office accepted the claim for bilateral carpal tunnel syndrome and release. On August 20, 2001 appellant underwent a release of his right carpal tunnel and right cubital tunnel. He underwent a release of his left carpal tunnel and cubital tunnel on October 1, 2001. Appellant retired from the employing establishment on March 3, 2003.

On January 23, 2002 appellant filed a Form CA-7 claim for a schedule award. By decision dated January 13, 2003, the Office issued a schedule award for a 42 percent permanent impairment of the left upper extremity and a 42 percent permanent impairment of the right upper extremity based on the November 25, 2002 report of its Office medical adviser. The period of the award was from April 1, 2002 to April 9, 2007, which represented 262.08 weeks of compensation. The Office informed appellant that he would receive \$27,970.93 for the period which ran from April 1 to December 28, 2002 and a total of \$2,879.36 every four weeks thereafter until his award ended.

On January 17, 2003 the Office issued a check in the amount of \$27,970.93 for the period April 1 to December 28, 2002. On January 25, 2003 the Office issued another check in the amount of \$2,879.36 for the period December 29, 2002 to January 25, 2003.

In a letter dated January 21, 2003, the Office informed appellant that he may either elect to receive the remaining schedule award in regular payments every 28 days as stated in the award notice or may be paid the amount of the remaining award in a lump sum. Appellant was advised that the lump sum equated to \$142,986.86 as of February 23, 2003. Appellant was further advised that any lump-sum payment would represent full and final payment of compensation for the period of the award.

On January 31, 2003 appellant agreed to a lump-sum settlement which paid him \$142,986.86 in payment of compensation for a commuted value of his schedule award which was payable from April 1, 2002 to April 9, 2007. He also acknowledged that he would be entitled to no further monetary compensation for the duration of the schedule award.

In a letter dated March 3, 2003, the Office advised appellant that two checks in the amount of \$71,493.43 each were sent on February 20 and 26, 2003 for a total of \$142,986.86. Appellant was further advised that no payments for compensation for any loss of wages could be made during the period of his schedule award, which ended April 9, 2007.

The record reflects that an additional check in the amount of \$71,493.43 dated February 28, 2003 was also issued to appellant.

On April 15, 2003 the Office issued a preliminary determination of an overpayment. The Office found that appellant had received three checks in the amount of \$71,493.43 for his lump-sum schedule award but he was only entitled to a lump sum in the amount of \$142,986.86 for the

balance of his schedule award. The Office noted that, although it had erroneously issued the third check in the amount of \$71,493.43, appellant was at fault in the creation of the overpayment as the lump-sum agreement he signed on January 31, 2003 stated that the lump-sum payment was \$142,986.86 and that he understood he was not entitled to further monetary compensation during the duration of the award.

On May 8, 2003 appellant requested a telephone conference with the Office.² In a separate letter dated May 8, 2003, appellant advised that he had received a check dated February 21, 2003 in the amount of \$71,493.43. He stated that because of the Office's January 21, 2003 letter which advised that his lump-sum payment would be effective February 23, 2003, he had assumed that the check was a catch-up before the lump sum of \$142,986.86. He further advised that as the schedule award made it possible for him to retire on March 3, 2003, paying back the money would be a hardship. Appellant also enclosed a completed overpayment recovery questionnaire, Form OWCP-20.

By decision dated December 19, 2003, the Office finalized the overpayment determination in the amount of \$71,493.43, finding that appellant was at fault in the creation of the overpayment as he was only entitled to a lump-sum payment for his schedule award in the amount of \$142,986.86³ and had received additional compensation during the period of the award to which he was not entitled. The Office therefore found that the overpayment was not subject to waiver and directed appellant to either repay the full amount or contact the Office to arrange a repayment schedule.

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), 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.⁴ 5 U.S.C. § 8116(a) of the Federal Employees' Compensation Act⁵ 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 In a May 19, 2003 memorandum to the Director, the claims examiner noted that the Office had attempted, without success, to contact appellant to arrange a telephone conference on November 5, 6 and 20 and December 18, 2003.

³ The Office erroneously noted the amount to be \$142,480.29 as opposed to \$142,986.86.

⁴ 20 C.F.R. § 10.422(b).

⁵ 5 U.S.C. §§ 8101-8193.

(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 Government, does not impair the right of the employee to compensation for scheduled disabilities specified by section 8107(c) of this title.”⁶

ANALYSIS -- ISSUE 1

The Office awarded appellant 262.08 weeks of compensation, from April 1, 2002 to April 9, 2007, representing an 84 percent bilateral upper extremity impairment. Pursuant to an agreement with appellant, the Office issued a payment of \$142,986.86 as a lump-sum payment for the remainder of the schedule award payable to April 9, 2007. The Office issued payment on February 20 and 26, 2003 in the amount of \$71,493.43 each to represent the lump-sum payment. As noted above, once a lump-sum payment has been made, appellant is not entitled to any additional compensation for the period covered. However, on February 28, 2003 the Office issued a duplicate payment of \$71,493.43 intending to cover the same period. Appellant does not dispute the amount of the overpayment, the amount of his lump-sum schedule award entitlement, or that he received three checks each in the amount of \$71,493.43. As appellant had received a total of \$214,480.29 in compensation for the \$142,986.86 lump-sum payment to which he was entitled, the Board finds that the additional \$71,493.43 compensation appellant received is an overpayment of compensation.

LEGAL PRECEDENT -- ISSUE 2

When there are no further payments due and an overpayment has been made to an individual by reason of an error of fact or law such individual, as soon as the mistake is discovered or his attention is called to same, shall refund to the Office any amount so paid, or upon failure to make such refund, the Office may proceed to recover the same.⁷ Section 8129 of the Act provides that an overpayment of compensation shall be recovered by the Office unless “incorrect payment has been made to an individual who is without fault and when adjustment or

⁶ 5 U.S.C. § 8116(a).

⁷ 20 C.F.R. § 10.441(b).

recovery would defeat the purpose of the Act or would be against equity and good conscious.”⁸ Section 10.433(a) of the Office’s regulation 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; 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).”⁹

ANALYSIS -- ISSUE 2

In this case, the Office applied the third standard -- acceptance of a payment which the recipient either knew or should have known was incorrect -- in finding appellant at fault in creating the overpayment. The Board concurs in this determination.¹⁰ The January 21 and March 3, 2003 correspondence sent to appellant clearly indicated that the compensation pursuant to the schedule award would represent the only compensation he would receive for the period of the award remaining from April 1, 2002 until April 9, 2007. Appellant sought a lump-sum payment and the agreement he signed on January 31, 2003 advised him that he would be paid \$142,986.86 for the remainder of the period of his schedule award which ended April 9, 2007 and that this represented the only compensation he would receive for that period. Appellant himself acknowledged in his May 8, 2003 letter that he understood he was going to receive a calculated amount for the lump-sum payment of his schedule award in the amount of \$142,986.86.

On February 20 and 26, 2003 the Office sent appellant two checks in the amount of \$71,493.43 each. In his May 8, 2003 letter, appellant asserted that, because the Office’s January 21, 2003 letter had stated that his lump-sum payment was effective February 23, 2003, he had assumed that the check of February 20, 2003 was a catch-up before the lump sum of

⁸ 5 U.S.C. § 8129.

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

¹⁰ The Board notes that although appellant had requested a telephone conference, the Office was unsuccessful in arranging such a conference before issuing its final decision. Appellant has not disputed the fact that the Office attempted to contact him. As the Office had made reasonable attempts to contact appellant, the Board finds that the Office had made a reasonable effort to comply with appellant’s request for a telephone conference.

\$142,986.86 was paid. This is inconsistent with the circumstances of this case. When appellant received the February 20 and 26, 2003 checks followed by the Office's March 3, 2003 letter, he should have known it represented the lump-sum payment of his schedule award. The February 20, 2003 payment for \$71,493.43 represented half the amount of the lump-sum schedule award. The Office's March 3, 2003 letter had advised appellant that two checks in the amount of \$71,493.43 were sent for a total of \$142,986.86. The Board finds that, under these circumstances, appellant knew or should have known that the February 20, 2003 payment represented part of his lump-sum schedule award and thus his argument lacks merit. Appellant additionally had no reasonable expectation of receiving any additional compensation until the schedule award expired on April 9, 2007. The fact that appellant accepted the third check in the amount of \$71,493.43, after he had received his lump-sum settlement payment of \$142,986.86, in two checks each in the amount of \$71,493.43, and the Office's March 3, 2003 letter establishes that he was at fault in the creation of the overpayment under the third criterion above, as he accepted payments he knew or should have known to be incorrect. As the evidence supports the Office's finding that appellant was at fault in the creation of the overpayment that occurred in this case, section 8129 of the Act does not preclude recovery by the Office.¹¹

CONCLUSIONS

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$71,493.43 as he was only entitled to a lump sum in the amount of \$142,986.86 for the balance of his schedule award. The Board further finds that the Office properly found that appellant was at fault in the creation of the overpayment and, thus, was not entitled to waiver of recovery of the overpayment.

¹¹ Because the Office has issued no final decision on repayment of the overpayment, the Board has no jurisdiction over repayment. 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 19, 2003 is hereby affirmed.

Issued: June 22, 2004
Washington, DC

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member