

FACTUAL HISTORY

On February 27, 2003 appellant, then a 39-year-old aircraft mechanic, sustained injury to his right leg, left arm and right hand when he fell off a left wing tip while in the performance of duty. He stopped work on the date of injury. The Office accepted appellant's claim for right tibia fracture, left elbow fracture, bilateral infectious otitis and bilateral nonhealing surgical wound and acute serous otitis media. Appellant returned to full-time light-duty work on April 14, 2003. On November 20, 2003 Dr. Tom H. Shurley, a Board-certified orthopedic surgeon, released him to return to his regular work duties on a full-time basis.

On March 4, 2004 appellant filed a claim (Form CA-7) for a schedule award. By decision dated April 28, 2004, the Office granted him schedule awards for 16 percent impairment of the left upper extremity and 24 percent impairment of the right lower extremity. The period of the awards was for 119.04 weeks of compensation to run from December 10, 2003 to March 22, 2006.

By letter dated May 5, 2004, the Office offered appellant a lump-sum payment for his remaining schedule award in the amount of \$58,784.19 as of May 16, 2004.¹ It advised him:

“Any lump-sum payment will represent full and final compensation payment for the period of the award even if you suffer a recurrence of total disability. If you elects [sic] to receive your schedule award in this form, please sign the attached agreement and return it to this Office as soon as possible.”

On May 7, 2004 appellant signed the agreement accepting the lump-sum settlement of his schedule award. The agreement stated:

“I understand and agree that payment of such lump sum will represent full and final settlement of my schedule award for the period noted above [December 10, 2003 to March 22, 2006] in connection with my injury of February 27, 2003 and that no further monetary compensation benefits will be extended to me for the duration of the schedule award.”

On June 14, 2004 appellant submitted a CA-7 form for leave buyback for the period April 22 to December 19, 2003.

By letter dated June 17, 2004, the Office advised appellant that his lump-sum payment in the amount of \$58,784.19 for the balance of his schedule award had been processed. It reminded him that he had agreed that any lump-sum payment would represent full and final compensation payment for the period of the schedule award even if he suffered a recurrence of total disability. A computer printout indicated that the Office issued appellant a check dated June 17, 2004 in the amount of \$58,784.19 for a lump-sum payment of his schedule award for the period February 27, 2003 to June 14, 2004.

¹ The record reveals that on April 30, 2004 the Office issued a check to appellant in the amount of \$11,444.74 in payment of his schedule award for the period December 10, 2003 to April 17, 2004. On May 15, 2004 the Office issued appellant a check in the amount of \$2,490.00 for the period April 18 through May 15, 2004.

In a June 21, 2004 letter, the Office advised appellant that it was unable to process his claim for leave buyback beginning December 10, 2003 because he received a lump-sum payment for his schedule award. The Office stated that compensation for a schedule award and disability could not be paid concurrently for the same conditions.

On March 9, 2005 appellant filed a CA-7 form for wage-loss compensation for total disability beginning March 17, 2005. He stopped work on March 17, 2005 due to complications following the removal of hardware in his right tibia on February 24, 2005. On April 22, 2005 the Office commenced payment of compensation for temporary total disability beginning March 17, 2005. By letter dated May 24, 2005, the Office advised appellant that he had been placed on the periodic rolls and he would receive compensation effective May 5, 2005.

On August 19, 2005 Dr. Wayne A. Johnson, a Board-certified orthopedic surgeon, released appellant to return to light-duty work.

On August 26, 2006 the Office issued a preliminary determination that appellant received an overpayment in the amount of \$13,155.46 during the period March 17 to September 3, 2005 because he received a lump-sum payment for a schedule award and compensation for temporary total disability concurrently. The Office found that appellant was at fault in the creation of the overpayment because, although it did not delete compensation payments in a timely manner and erroneously issued compensation payments, he knew or should have known that he was not entitled to receive dual compensation based on its May 5, 2004 letter and his May 7, 2004 agreement to accept the lump-sum payment. Appellant was advised that he could request a telephone conference, a final decision based on the written evidence only or a prerecoupment hearing within 30 days if he disagreed that the overpayment occurred, with the amount of the overpayment or if he believed that recovery of the overpayment should be waived. The Office requested that he complete an accompanying overpayment recovery questionnaire (Form OWCP-20) and submit financial documents in support thereof within 30 days.

On September 23, 2005 appellant requested a prerecoupment hearing. In an OWCP-20 form completed by appellant on the same date, he reported no monthly income, monthly expenses in the amount of \$1,875.66 and assets in the amount of \$5,747.00.

At an October 17, 2006 hearing, appellant testified that he was not challenging the fact and amount of the overpayment, but contended that he was not at fault in the creation of the overpayment. He testified that he did not know how he should have known that he accepted an incorrect payment when employees in the employing establishment's personnel office did not know and he could not obtain the correct information. Appellant stated that, when he stopped work, he specifically asked them whether going on the periodic rolls for total disability was the same as receiving a schedule award. He was informed that the payments were separate. The hearing representative advised appellant that he had signed an agreement for a lump-sum payment of his schedule award which provided that he was not entitled to any further monetary compensation benefits during the duration of the schedule award. Appellant testified that he believed that this statement meant that he was not entitled to any further compensation from a schedule award. He inquired about using advanced sick leave, annual leave or anything to avoid dealing with the Office. Appellant stated that he was advised by personnel to file a claim for compensation rather than request advanced sick leave.

Following the hearing, appellant submitted an OWCP-20 form dated November 2, 2006. He reported his monthly income and expenses. Appellant's income was \$2,184.00 and his expenses totaled \$2,120.28. He reported assets in the amount of \$7,100.00.

By decision dated December 22, 2006, the hearing representative found that appellant was at fault in the creation of the overpayment in the amount of \$13,155.46 for the period March 17 to September 3, 2005. She found that the Office's May 5, and June 17, 2004 letters and appellant's May 7, 2004 agreement to accept a lump-sum payment for his schedule award established that he knew or should have known that his acceptance of such payment precluded him from receiving further compensation benefits. The hearing representative also found that there was no evidence of record to substantiate appellant's contention that he relied on misinformation from the employing establishment. She noted the Office's negligence in issuing the compensation in question but she concluded that appellant knew that he was not entitled to this compensation. The hearing representative directed recovery of 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), 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.² Section 8116(a) of the Federal Employees' Compensation 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 Government,

² 20 C.F.R. § 10.422(b).

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 28, 2004 the Office granted appellant a schedule award for 16 percent impairment of the left upper extremity and 24 percent impairment of the right lower extremity. He received 119.04 weeks of compensation, to run from December 10, 2003 to March 22, 2006. On June 17, 2004 the Office issued a payment of \$58,784.19 for the period February 27, 2003 to June 14, 2004 as a lump-sum payment for the schedule award. In a letter dated May 5, 2004, the Office explicitly informed appellant that because he was receiving a lump-sum payment, he would not be entitled to further compensation.

The Office, however, paid compensation for wage-loss disability beginning March 17, 2005. As appellant had received \$58,784.19 in compensation in a lump-sum schedule award and subsequently received temporary total disability compensation payments, the Board finds that an overpayment in compensation was created. Office computer printouts of record establish that appellant received temporary total disability compensation payments in the amount of \$13,155.46 from March 17 to September 3, 2005. The Board finds that the record establishes that appellant received an overpayment in the amount of \$13,155.46.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Act⁴ 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 recovery would defeat the purpose of [the Act] or would be against equity and good conscience.⁵ Thus, the Office may not waive the overpayment of compensation unless appellant was without fault.⁶ Adjustment or recovery must, therefore, be made when an incorrect payment has been made to an individual who is with fault.⁷

On the issue of fault, section 10.433 of the Office’s regulations, provides that an individual will be found at fault if he or she has done any of the following:

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

⁴ 5 U.S.C. § 8129(b).

⁵ *Michael H. Wacks*, 45 ECAB 791, 795 (1994).

⁶ *Norman F. Bligh*, 41 ECAB 230 (1989).

⁷ *Diana L. Booth*, 52 ECAB 370, 373 (2001); *William G. Norton, Jr.*, 45 ECAB 630, 639 (1994).

(3) accepted a payment which he or she knew or should have known was incorrect.⁸

With respect to whether an individual is without fault, section 10.433(b) of the Office's regulations provides in relevant part:

“Whether or not [the Office] determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid.”⁹

ANALYSIS -- ISSUE 2

The Office applied the third standard in determining that appellant was at fault in creating the overpayment. In order for the Office to establish that appellant was at fault in creating the overpayment of compensation, it must establish that, at the time appellant received the compensation checks in question, he knew or should have known that the payments were incorrect.¹⁰ 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.¹¹

The Office's May 5 and June 17 and 21, 2004 correspondence clearly advised appellant that the lump-sum payment pursuant to the 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. As noted, the Office issued a check dated June 17, 2004 to appellant for a lump-sum payment in the amount of \$58,784.19. In accepting the lump-sum payment, appellant signed a statement on May 7, 2004 that he understood and agreed that the lump-sum payment represented full and final settlement of his schedule award for the period December 10, 2003 to March 22, 2006 and that he was not entitled to any further compensation for the duration of his schedule award. The record establishes that appellant received compensation for temporary total disability commencing March 17, 2005 and continued to receive compensation after being placed on the periodic rolls effective May 5, 2005. When appellant received wage-loss compensation payments after receiving the lump-sum payment of \$58,784.19, he should have known that they were incorrect.

Appellant contended that he was not responsible for the creation of the overpayment because he believed the Office's May 7, 2004 letter meant that he was not entitled to further schedule award compensation. However, his argument is not persuasive. The Board finds that the Office's May 5 and June 17 and 21, 2004 letters put appellant on notice that the \$58,784.19

⁸ 20 C.F.R. § 10.433(a).

⁹ *Id.* at § 10.433(b).

¹⁰ *Diana L. Booth*, *supra* note 7.

¹¹ *William E. McCarty*, 54 ECAB 525 (2003); *Lorenzo Rodriguez*, 51 ECAB 295 (2000).

lump-sum payment of his schedule award represented the settlement of his claim and that he had no reasonable expectation of receiving additional compensation for temporary total disability until the period of the schedule award expired. The fact that appellant subsequently claimed and accepted periodic payments for wage loss after he had received a lump-sum settlement under the schedule award, establishes that he is at fault in the creation of the overpayment under the third criterion noted above. He accepted payments he knew or should have known to be incorrect. As the evidence establishes that appellant is at fault in the creation of the overpayment in compensation that occurred in this case, the Board finds that he is not entitled to waiver of recovery of the overpayment.¹²

Appellant further contended that he was incorrectly advised by the employing establishment to file a claim for compensation rather than request advanced sick leave when he stopped work. The Office's regulations provide that an individual may not be at fault if he or she "relied on misinformation given in writing by the Office (or by another Government agency which he or she had reason to believe was connected with the administration of benefits) as to the interpretation of a pertinent provision of the Act or its regulations."¹³ There is no evidence that appellant relied on misinformation given in writing by the employing establishment. The Board finds that he was at fault in creating the overpayment of \$13,155.46 and it is not subject to waiver.¹⁴

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$13,155.46 during the period March 17 to September 3, 2005 due to the concurrent receipt of a lump-sum schedule award payment and compensation for temporary total disability. The Board further finds that appellant was at fault in the creation of the overpayment and, therefore, is ineligible for waiver of the overpayment.¹⁵

¹² *Sinclair L. Taylor*, 52 ECAB 227 (2001).

¹³ 20 C.F.R. § 10.435(b).

¹⁴ *Sinclair L. Taylor*, *supra* note 12.

¹⁵ With respect to the recovery of the overpayment, the Board notes that its jurisdiction is limited to review of those cases where the Office seeks recovery from continuing compensation benefits under the Act. *Terry A. Keister*, 56 ECAB ___ (Docket No. 04-1136, issued May 23, 2005); *see also Albert Pineiro*, 51 ECAB 310 (2000). As appellant was no longer receiving compensation benefits at the time of the Office's December 22, 2006 decision, the Board lacks jurisdiction to review the recovery of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the December 22, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 13, 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