

² In an October 10, 2012 letter to the Clerk of the Board, appellant indicated that he was no longer represented by counsel and stated that counsel was “not available to represent me at the hearing and I will make arrangements to appear before the Board.” Under Board procedure, “A request for oral argument must be submitted in writing to the Clerk. The application must specify the issue(s) to be argued and provide a statement supporting the need for oral argument. The request must be made no later than 60 days after the filing of the appeal.” 20 C.F.R. § 501.5(b). Appellant did not file a timely request for oral argument. The Board, in its discretion, will deny the request and consider this matter on the record.

ISSUES

The issues are: (1) whether appellant received a \$25,697.97 overpayment of compensation; (2) whether appellant was at fault in the creation of the overpayment, thereby precluding waiver of recovery; and (3) whether OWCP properly required repayment of the overpayment by deducting \$1,000.00 from appellant's compensation payments every 28 days.

FACTUAL HISTORY

OWCP accepted that on March 7, 2006 appellant, then a 50-year-old lead transportation security officer, sustained a left knee strain and left medial meniscus tear due to turning around after screening a passenger. On May 5, 2006 he underwent a left medial meniscectomy and, on October 9, 2006, he had a left partial medial meniscectomy for a re-tear of the medial meniscus. On June 18, 2007 appellant underwent a left total knee replacement. The surgical procedures were authorized by OWCP.

Appellant returned to full duty as of April 1, 2008. On August 22, 2008 he filed a claim for a schedule award due to his work injuries. In a December 17, 2008 award of compensation, OWCP granted appellant a schedule award for a 50 percent permanent impairment of his left leg. The award ran for 144 weeks from July 11, 2008 to April 14, 2011.

In a December 30, 2008 letter, appellant requested that the remainder of his schedule award be paid in one lump sum. In a February 5, 2009 letter, OWCP advised him that any lump-sum payment would represent full and final compensation payment for the period of the award even if he sustained a recurrence of disability.

After appellant's request for a lump-sum schedule award payment was denied, an OWCP hearing representative issued an October 19, 2009 decision allowing for payment of the remainder of his schedule award in a lump sum.

On October 22, 2009 appellant signed an agreement to accept a lump-sum payment of his schedule award. With this statement, he agreed that payment of such lump sum would represent full and final settlement of his schedule award for the period November 22, 2009 to April 14, 2011 and that no further monetary compensation benefits would be extended for the duration of the schedule award. OWCP subsequently issued a lump-sum payment to appellant in the amount of \$41,694.42, which covered the period November 22, 2009 to April 14, 2011.³

OWCP accepted that on March 24, 2010 appellant sustained left knee, left hip and right hand contusions when he tripped and fell to the floor at work.⁴ Appellant stopped work on March 24, 2010. In an April 2, 2010 report, Dr. Timothy H. Izant, an attending Board-certified orthopedic surgeon, advised that appellant was totally disabled due to his March 24, 2010 left

³ Appellant received periodic scheduled payments from July 11, 2008 to November 21, 2009.

⁴ OWCP also accepted that appellant sustained a mechanical complication of an internal orthopedic device in connection with his authorized surgery. Appellant's March 24, 2010 injury was developed under a different case file than his March 7, 2006 injury.

knee injury. In connection with his March 24, 2010 work injury, appellant claimed and began to receive wage-loss compensation starting June 4, 2010.

In a letter dated April 22, 2011, the employing establishment notified OWCP that appellant had submitted CA-7 forms and was paid compensation for wage loss starting June 4, 2010 under the case file for his March 24, 2010 injury, which involved the same part of his body (the left leg) as his March 7, 2006 injury. A review was requested to determine if appellant was overpaid as he had received the schedule award lump sum through April 14, 2011. In a May 5, 2011 letter, an OWCP District Director determined that appellant received an impermissible dual payment of schedule award and wage-loss compensation. He indicated that OWCP would issue a decision on the matter.

In a May 5, 2011 decision, OWCP issued a letter decision denying appellant's entitlement to schedule award benefits for the period June 4, 2010 to April 14, 2011 for the reason that he was not entitled to dual workers' compensation benefits for temporary total disability and a schedule award for the same period. On September 13, 2011 an OWCP hearing representative reversed the May 5, 2011 decision and directed OWCP to address the issue of the overpayment under the case file for appellant's March 24, 2010 injury.

In a February 17, 2012 letter, OWCP advised appellant of its preliminary determination that he received a \$25,697.97 overpayment of compensation. It explained that he was overpaid \$25,697.97 because he received a lump-sum schedule award for the period November 22, 2009 to April 14, 2011 under the case file for his March 7, 2006 injury while he received wage-loss compensation for the period June 4, 2010 to April 14, 2011 under the case file for his March 24, 2010 injury.⁵ OWCP noted that appellant's March 7, 2006 and March 24, 2010 injuries had been accepted for the same part of the body, *i.e.*, the left leg. Therefore, he was prohibited from receiving schedule award and wage-loss compensation at the same time. It made a preliminary determination that he was at fault in the creation of the overpayment because he accepted payments that he knew or reasonably should have known were incorrect. OWCP stated that appellant was at fault in creating the overpayment because he signed an October 22, 2009 statement that he understood and agreed that no further monetary compensation benefits would be extended to him for the duration of the schedule award (July 11, 2008 to April 14, 2011). However, appellant claimed and received compensation for wage-loss compensation for the period June 4, 2010 to April 14, 2011. OWCP provided him an opportunity to challenge the overpayment and directed him to complete a financial information questionnaire (Form OWCP-20), which it indicated was attached to the letter.⁶

The record includes documents showing that appellant received compensation for wage-loss compensation for the period June 4, 2010 to April 14, 2011 in the amount of \$25,697.97. The payment history showed that he received \$25,265.20 for the period June 4, 2010 to April 9,

⁵ OWCP actually stated that appellant received lump-sum schedule award compensation for the period July 11, 2008 to April 14, 2011. However, appellant actually received periodic payments of schedule award compensation for the period July 11, 2008 to November 21, 2009.

⁶ The record also contains a February 17, 2012 decision, in which OWCP determined that appellant had not been entitled to receive wage-loss compensation for the period June 4, 2010 to April 14, 2011, because he had received schedule award compensation for the same period.

2011 and \$432.77 for the period April 10 to 14, 2011. OWCP attached a copy of the October 22, 2009 statement regarding appellant's lump-sum payment for his schedule award.

On March 2, 2012 OWCP reissued its preliminary overpayment letter because it had neglected to attach a Form OWCP-20 with its February 27, 2012 letter. It provided appellant 30 days to complete and submit the OWCP-20 form.

In an April 2, 2012 decision, OWCP finalized the determination that appellant received a \$25,697.97 overpayment of compensation. It found that he was at fault in the creation of the overpayment, thereby precluding waiver of recovery. OWCP noted that appellant did not provide any financial information and directed recovery of the overpayment by deducting \$1,000.00 from his compensation payments every 28 days.⁷

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty.⁸ Section 8129(a) of FECA provides, in pertinent part, "When an overpayment has been made to an individual under this subchapter because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled."⁹

Section 8116(a) of FECA 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 specified instances.¹⁰

Under OWCP's procedure, a schedule award for one injury may be paid concurrently with compensation for wage loss paid for another injury, as long as the two injuries do not involve the same part of the body and/or extremity.¹¹

ANALYSIS -- ISSUE 1

The record establishes that appellant received a \$25,697.97 overpayment in the form of an impermissible dual payment of compensation for the period June 4, 2010 to April 14, 2011. On March 7, 2006 appellant sustained a work-related left knee strain and left medial meniscus

⁷ OWCP indicated that, through this recovery method, the overpayment would be absorbed on about May 3, 2012.

⁸ 5 U.S.C. § 8102(a).

⁹ *Id.* at § 8129(a).

¹⁰ *Id.* at § 8116(a).

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a(4) (January 2010). *See also* L.S., Docket No. 08-270 (issued July 2, 2009).

tear. In connection with this injury, he received a schedule award on December 17, 2008 for a 50 percent permanent impairment of his left leg. The award ran for 144 weeks from July 11, 2008 to April 14, 2011.

At appellant's request, OWCP issued a lump-sum payment in the amount of \$41,694.42 which covered the period November 22, 2009 to April 14, 2011.¹² Subsequently, on March 24, 2010 appellant sustained left knee, left hip and right hand contusions and he claimed and received wage-loss compensation in connection with this injury for the period June 4, 2010 to April 14, 2011. The Board notes that the March 7, 2006 and March 24, 2010 injuries involve the same part of his body, *i.e.*, his left leg. Therefore, appellant may not receive schedule award compensation and wage-loss compensation for the same period.¹³ The payment records reflect that appellant received his lump-sum schedule award for the period June 4, 2010 to April 14, 2011, and also received wage-loss compensation payments equaling \$25,697.97. For these reasons, OWCP properly determined that appellant received a \$25,697.97 overpayment of compensation.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of FECA 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.¹⁴ 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 this subchapter or would be against equity and good conscience."¹⁵ No waiver of payment is possible if appellant is not "without fault" in helping to create the overpayment.¹⁶

In determining whether an individual is not "without fault" or alternatively, "with fault," section 10.433(a) of Title 20 of the Code of Federal Regulations provides in relevant part:

"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

¹² Appellant received periodic payments of schedule award compensation for the period July 11, 2008 to November 21, 2009.

¹³ *See supra* note 10.

¹⁴ 5 U.S.C. § 8129(a).

¹⁵ *Id.* at § 8129(b).

¹⁶ *Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

(3) Accepted a payment which he or she knew or should have known to be incorrect....”¹⁷

Section 10.433(c) of OWCP’s regulations provide:

“Whether or not OWCP 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.”¹⁸

ANALYSIS -- ISSUE 2

OWCP found appellant at fault in the creation of the \$25,697.97 overpayment under the third standard described above, *i.e.*, he accepted payments which he knew or should have known to be incorrect. The Board finds that OWCP properly determined that he was at fault in the creation of the overpayment.

Appellant requested a lump-sum payment of his schedule award. On October 22, 2009 he signed an agreement to accept the lump-sum settlement of the schedule award for his left leg impairment. He agreed that payment of the lump sum would represent full and final settlement of his schedule award for the period November 22, 2009 to April 14, 2011 and that no further monetary compensation benefits would be extended for the duration of the schedule award. Therefore, appellant knew or should have known that he could not receive any other compensation benefits for the period represented by schedule award lump sum. The record reflects that he received schedule award compensation for his left leg impairment and wage-loss benefits (for an injury that also involved his left leg) for the period June 4, 2010 to April 14, 2011. This constitutes a prohibited full payment. Appellant knew or should have known that he was accepting incorrect payments for the period June 4, 2010 to April 14, 2011. Even though OWCP may have been negligent in issuing his compensation for wage loss for a period that he received schedule award compensation, this does not excuse his acceptance of payments which he knew or should have been expected to know should have been returned to OWCP.¹⁹ For these reasons, it properly found that appellant was at fault in the creation of the \$25,697.97 overpayment. Because appellant was at fault in the creation of the overpayment, OWCP properly determined that he was not entitled to waiver of recovery of the overpayment.²⁰

LEGAL PRECEDENT -- ISSUE 3

Section 10.441 of Title 20 of the Code of Federal Regulations provides that if an overpayment of compensation has been made to one entitled to future payments, proper

¹⁷ 20 C.F.R. § 10.433(a).

¹⁸ *Id.* at § 10.433(c).

¹⁹ *Supra* note 17.

²⁰ *See supra* notes 15 and 16.

adjustment shall be made by decreasing subsequent payments of compensation, “taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize any hardship.”²¹ When an individual fails to provide requested information on income, expenses and assets, OWCP should follow minimum collection guidelines, which state in general that government claims should be collected in full and that, if an installment plan is accepted, the installments should be large enough to collect the debt promptly.²²

ANALYSIS -- ISSUE 3

The record supports that, in requiring repayment of the \$25,697.97 overpayment by deducting \$1,000.00 from appellant’s compensation payments every 28 days, OWCP took into consideration the factors set forth in section 10.441. It found that this method of recovery would minimize any resulting hardship on appellant. Appellant failed to provide any information on his income, expenses or assets. In compliance with its implementing regulations, OWCP required the deduction of installment payments that were large enough to collect the full debt in a prompt manner. Therefore, OWCP properly required repayment of the overpayment by deducting \$1,000.00 from appellant’s compensation payments every 28 days.

CONCLUSION

The Board finds that appellant received a \$25,697.97 overpayment of compensation and that he was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment. The Board further finds that OWCP properly required repayment of the overpayment by deducting \$1,000.00 from his compensation payments every 28 days.

²¹ 20 C.F.R. § 10.441.

²² *Gail M. Roe*, 47 ECAB 268 (1995). See 20 C.F.R. § 10.438(b). Failure to submit requested financial information within 30 days shall result in a denial of waiver.

ORDER

IT IS HEREBY ORDERED THAT the April 2, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 21, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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