U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOSE O. ARRIAGA and DEPARTMENT OF THE NAVY, NAVAL WEAPONS STATION, Concord, CA

Docket No. 98-2244; Submitted on the Record;
Issued June 5, 2000

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON, BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received a $7,831.81 overpayment of compensation from January 9 to May 30, 1997; and (2) whether the Office properly found that appellant was at fault in creating the overpayment of compensation.

On January 9, 1987 appellant, then a 36-year-old supply clerk, filed a claim for traumatic injury alleging that on January 7, 1987 he injured his left ankle while in the performance of duty.

On February 3, 1987 the Office accepted appellant's claim for a left ankle fracture and subsequent surgical repair. In a March 4, 1987 report, the employing establishment notified the Office and appellant that his 27 days of continuation of pay from January 8 to February 16, 1987 was based on his wage of $9.00 an hour.

On March 17, 1987 the Office advised appellant of his right to file a claim for a schedule award in the event he finds that he has a disability as a result of his January 7, 1987 work-related left ankle fracture.

On October 9, 1996 the Office received appellant's February 26, 1996 claim for a schedule award. The employing establishment noted that appellant was paid $17.48 an hour at the time of the injury.[1]

On October 8, 1997 the Office issued a schedule award of 7 percent for a permanent impairment of the left ankle. The Office stated that appellant would be paid one check in the total of $15,509.20 for 20.16 weeks of compensation based on 75 percent of his weekly pay of $727.60 which resulted in $545.70 a week. The award was to run from January 9 to May 30, 1987.

[1] On October 1, 1996 the employing establishment forwarded appellant's schedule award claim.

On May 8, 1998 the Office notified appellant that it had made a preliminary determination that it had overpaid him $7,831.81 as a result of an incorrect pay rate. The Office stated that it had based appellant's award on a pay rate of $727.60 per week rather than $360.00 per week. Appellant was provided 30 days from the date of the notice to submit evidence or arguments if he disagreed with the Office's preliminary determination. The record contains a worksheet calculating the amount of the overpayment by subtracting what appellant should have been paid from January 9 to May 30, 1997 from the amount actually paid during that period.

On May 21, 1998 appellant stated that the overpayment was due him because for many years he had been treated by a chiropractor and acupuncturist based on a neck injury. He also stated that he believed he was not at fault in the creation of the overpayment because he was not advised until several years after his work-related injury that he could file a claim for a schedule award and that when he received the award he was unaware of what his pay rate was at the time of the injury. Appellant further noted that he had used the funds to establish a savings plan to pay for his daughter's college education.

By letter decision dated June 16, 1998, the Office determined that the preliminary determination that appellant was at fault in the creation of the overpayment in the amount of $7,813.81 was correct and that he would be required to repay the Office the amount of the overpayment within 30 days from the date of the letter.

The Board finds that the Office properly found that an overpayment in the amount of $7,831.81 occurred.

The basic compensation rate for temporary total disability is 66 2/3 percent of the established pay rate for compensation purposes.[2] The compensation rate is increased to 75 percent when there are more one or more dependents.[3]

The record indicates that on October 8, 1997 the Office notified appellant that he would be paid a check for his schedule award in the amount of $15,509.20 for 20.16 weeks of compensation based on a his weekly pay of $727.60. The period of award ran from January 9 to May 30, 1997 and was paid at 75 percent of his weekly wage or $545.70 a week. The record then notes that the Office advised appellant that he had been overpaid by $7,813.70 because the Office had relied on an incorrect wage rate and that a preliminary determination had been made that he was found to be not without fault in the creation of the overpayment. The Office advised appellant that he could submit evidence or argument to challenge the Office's preliminary determination. In his response to the Office's notice, appellant did not dispute its determination that the correct weekly pay rate at the time of the injury was $360.00. Accordingly, appellant should have been paid compensation based on the compensation rate of 75 percent of $360.00 rather than 75 percent of $727.60. The difference between what he was paid for 20.16 weeks at 75 percent of $727.60 a week and what he should have been paid, 75 percent of 360.00,

[2] 20 C.F.R. § 10.302.

[3] *Id.*

represents an overpayment of compensation. The Office has correctly calculated this amount to be $7,831.81.[4]

The Board further finds that appellant was not without fault in the creation of the overpayment.

Section 8129(b) of the Federal Employees' Compensation Act[5] provides "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."[6] Accordingly, no waiver of an overpayment is possible if the claimant is with fault in helping create the overpayment.

In determining whether an individual is with fault, section 10.320(b) of the Office's regulations provide 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 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.'"[7]

In the present case, the Office applied the third standard in determining that appellant was at fault in creating the overpayment.

With respect to whether an individual is without fault, section 10.320(c) of the Office's regulations provides in relevant part:

> "Whether an individual is 'without fault' depends on all the circumstances surrounding the overpayment in the particular case. The Office will consider the individual's understanding of any reporting requirements, the agreement to report events affecting payments, knowledge of the occurrence of events that should have been reported, efforts to comply with the reporting requirements, opportunities to comply with the reporting requirements, understanding of the

[4] The Office included the consumer price index (CPI) increase in its calculations.

[5] 5 U.S.C. §§ 8101-8193.

[6] 5 U.S.C. § 8129(b).

[7] 20 C.F.R. § 10.320(b).

obligation to return payments which were not due, and ability to comply with any reporting requirements...."[8]

In the instant case, the Office advised appellant on October 8, 1997 that it calculated his schedule award on a weekly pay rate of $727.60. This was more than double his actual weekly rate of pay of $360.00 at the time of the injury. Although appellant argued that he was unaware of what his rate of pay was at the time of the injury, the record contains a March 4, 1987 report from the employing establishment to appellant wherein its states that his 27 days of continuation of pay was based on his $9.00 hourly rate of pay. He also stated that he was not advised of his right to file a claim for a schedule award until several years after his initial claim. However, the record contains a March 17, 1987 letter to appellant advising him of his right to file a schedule award claim if he believed that he was disabled as a result of his January 7, 1987 work-related injury. He was therefore on notice as early as of February 1987 that his rate of pay at the time of the injury was $9.00 an hour and as early as March 17, 1997, a little over two months from the date of his initial claim, that he may be entitled to file a claim for a schedule award. Appellant therefore had reason to know that he was entitled to file a claim for a schedule award shortly after his initial claim was filed and that it would be based on his pay rate at the time of the injury which was $9.00 an hour. He therefore had reason to know that his award in the amount of $15,509.20 was based on a weekly pay rate far in excess of his pay rate at the time of the injury. Further, appellant's belief that he was due the additional money so he could pay for medical expenses for an unrelated medical condition and for educational expenses are not sufficient reasons to waive a determination of fault. He accepted a one time schedule award payment based on an incorrect rate of pay which he should have known was incorrect and therefore he is at fault in under section 10.320(b) of the Office's regulations.

[8] 20 C.F.R. § 10.320(c).

The decision of the Office of Workers' Compensation Programs dated June 16, 1998 is affirmed.[9]

Dated, Washington, D.C.
June 5, 2000

George E. Rivers
Member

David S. Gerson
Member

Bradley T. Knott
Alternate Member

[9] The Board notes that subsequent to the Office's June 16, 1998 decision, appellant submitted additional evidence. The Board has no jurisdiction to review this evidence for the first time on appeal. 20 C.F.R. § 501.2(c); *James C. Campbell*, 5 ECAB 35 (1952).