

**United States Department of Labor
Employees' Compensation Appeals Board**

DALE MACKELPRANG, Appellant

and

**U.S. POSTAL SERVICE, GENERAL MAIL
FACILITY, Phoenix, AZ, Employer**

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**Docket No. 03-1614
Issued December 16, 2003**

Appearances:

*Barbara Mackelprang, for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

Appellant filed an application for review with the Board on June 12, 2003. According to 20 C.F.R. § 501.3(d)(2), the jurisdiction of the Board is limited to final decisions of the Office of Workers' Compensation Programs issued within one year of the filing of the appeal. The record contains two decisions of the Office dated June 4, 2003 finding an overpayment of compensation and denying wage loss for the period February 25 to March 8, 2001. The Board has jurisdiction on the merits of these issues.

ISSUES

The issues are: (1) whether the Office properly determined that an overpayment of \$8,049.00 was created; (2) whether the Office properly determined that appellant was at fault in creating the overpayment; and (3) whether appellant is entitled to compensation for wage loss from February 25 to March 8, 2001.

FACTUAL HISTORY

Appellant has filed several claims for injuries. The Office accepted that he sustained a left shoulder subscapular muscle strain on March 17, 1989. After stopping work in September 1990, appellant filed a claim for an emotional condition on November 20, 1990. The claim was

accepted for adjustment disorder with depressed and anxious features. On November 25, 1991 appellant filed a claim for a hernia and the Office accepted a ventral hernia. In addition, the Office accepted that appellant sustained left shoulder strains on November 11, 1997 and June 1, 1999.

On March 20, 2001 the Office issued a schedule award for a 14 percent impairment to the left arm. The award ran for 43.68 weeks, from February 23 to December 25, 2001. In a decision dated March 21, 2001, the Office denied appellant's claim for wage-loss compensation from February 25 to March 8, 2001, on the grounds that he had received compensation for a schedule award during this period.

On June 11, 2001 appellant signed a lump-sum settlement of his schedule award. The settlement stated that appellant agreed to accept a payment of \$17,723.35 for the commuted value of further installments of the schedule award from June 17 to December 25, 2001. The agreement stated that appellant understood that the lump-sum payment represented full and final payment of his schedule award for the period noted above and no further monetary compensation benefits would be extended for the duration of the schedule award.

A compensation payment history prepared by the Office indicates that appellant received continuing compensation payments for the period commencing February 23, 2001. A compensation payment dated June 22, 2001 was issued in the amount of \$17,723.35. The compensation period was reported as covering February 23 to June 12, 2001. On July 14, 2001 a payment of \$2,683.00 was issued for the period June 17 to July 14, 2001; a payment of \$2,683.00 was issued on August 11, 2001 for the period July 15 to August 11, 2001, and a payment of \$2,683.00 was issued on September 8, 2001 for the period August 12 to September 8, 2001.

By decision dated December 18, 2001, the Office found that an overpayment of \$8,049.00 was created because appellant received individual compensation payments during a period covered by his lump-sum schedule award. Appellant filed an appeal with the Board that was docketed as No. 02-804. The Office decisions noted by appellant were dated March 20 and 21, April 11, July 2, October 4 and December 18, 2001. In May 2002, the Board received a second application for review, which was docketed as No. 02-1530. Appellant indicated that he was requesting review of an April 9, 2002 decision.¹

In a decision dated June 14, 2002, the Office determined that appellant was not entitled to compensation for wage loss for March 20 and 21, 2002. By decision dated June 20, 2002, the Office determined that appellant did not have a sleep disorder causally related to his federal employment.

With respect to the appeals docketed as No. 02-804 and 02-1530, the Board issued orders dated February 11, 2003 remanding the case to the Office. The Board indicated that the case record had not been received and the case was remanded for proper assemblage of the case

¹ This decision denied compensation for wage loss from December 30, 2001 to February 6, 2002.

record. The Office was directed to issue appropriate decisions to protect appellant's appeal rights.

In a decision dated June 4, 2003, the Office determined that an overpayment of \$8,049.00 had been created. The Office found that appellant received three wage-loss payments of \$2,683.00 covering a period included in his lump-sum settlement of the schedule award. The Office also determined that appellant was at fault in that he accepted payments that he should have known were incorrect. Accordingly, appellant was not entitled to waiver of the overpayment.

In a separate decision of June 4, 2003, the Office denied appellant's claim for wage-loss compensation for the period February 25 to March 8, 2001. The Office found that appellant had received compensation for his schedule award during this period and, therefore, he was not entitled to compensation for wage loss.

LEGAL PRECEDENT -- Issue 1

Section 8116 of the Federal Employees' Compensation Act provides that, while an employee is receiving compensation 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.²

ANALYSIS -- Issue 1

In the present case, appellant received a schedule award for a 14 percent permanent impairment to the left arm. The period of the award was 43.68 weeks commencing February 23, 2001. Appellant began receiving compensation payments under the schedule award by periodic payment. On June 22, 2001 the Office issued a payment of \$17,723.35 under a lump-sum settlement, representing the commuted value of further installments of the schedule award from June 17 to December 25, 2001. The Office, however, issued three additional payments of \$2,683.00 on July 14, August, 11 and September 8, 2001, covering the period June 17 to September 8, 2001. Since this period was included in the lump-sum payment issued on June 22, 2001, an overpayment of compensation in the amount of \$8,049.00 was created. Fact of overpayment is established in that appellant received compensation for the period June 17 to September 8, 2001 under the schedule award and dual payments for that period issued by the Office, totaling \$8,049.00.

LEGAL PRECEDENT -- Issue 2

Section 8129(b) of the Act³ 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

² 5 U.S.C. § 8116(a).

³ 5 U.S.C. §§ 8101 *et seq.*

and good conscience.”⁴ Waiver of an overpayment is not permitted unless the claimant is “without fault” in creating the overpayment.⁵

On the issue of fault, 20 C.F.R. § 10.433 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) accepted a payment which he or she knew or should have known was incorrect.”

ANALYSIS -- Issue 2

The lump-sum settlement agreement signed by appellant on June 11, 2001 provided that appellant agreed to accept a sum of \$17,723.35 for the commuted value of further installments of compensation payable from June 17 to December 25, 2001. Although the Office may have incorrectly recorded the period covered by the \$17,723.35 payment when it was issued, appellant should have known that the lump-sum payment was intended to cover the period commencing June 17, 2001. The lump-sum settlement is explicit and unambiguous as to the period covered; it also clearly stated that the lump-sum payment represented the full and final settlement of the schedule award.

Moreover, appellant had already received compensation payments covering a period through June 16, 2001, and by the terms of the settlement agreement he was not entitled to additional payments after the lump-sum payment. When appellant continued to receive installment compensation payments dated July 14, August, 11 and September 8, 2001, covering a period June 17 to September 8, 2001, he knew or should have known they were incorrect. Pursuant to 20 C.F.R. § 10.433(3) appellant is at fault in creating the overpayment and is not entitled to waiver.⁶

LEGAL PRECEDENT -- Issue 3

It is well established that a claimant is not entitled to dual workers’ compensation benefits for the same injury.⁷ A claimant may not receive compensation for temporary total disability or compensation based on loss of wage-earning capacity and a schedule award covering the same period of time.⁸

⁴ 5 U.S.C. § 8129(b).

⁵ *Norman F. Bligh*, 41 ECAB 230 (1989).

⁶ If an overpayment results from the negligence of the Office this does not excuse the employee from accepting a payment that he knew or should have known to be incorrect. *See Diana L. Booth*, 52 ECAB 370 (2001).

⁷ *Eugenia L. Smith*, 41 ECAB 409, 412 (1990).

⁸ *Id.*; *see Robert T. Leonard*, 34 ECAB 1687, 1690 (1983).

ANALYSIS -- Issue 3

In this case, appellant filed a claim for compensation (Form CA-7) for the period February 25 to March 8, 2001. Appellant contends that the period claimed was not within the period covered by the lump-sum schedule award payment. The record establishes the period of the schedule award was February 23 to December 25, 2001 and appellant received compensation payments pursuant to the schedule award prior to the lump-sum settlement. The period of the schedule award began on February 23, 2001. The Office issued a compensation payment dated March 24, 2001 covering the period February 25 to March 24, 2001. Since appellant cannot receive both a schedule award payment and compensation for wage loss covering the same period, appellant is not entitled to any additional compensation for the period February 23 to March 8, 2001. The Office properly denied the claim for wage-loss compensation during this period.

CONCLUSION

The Board finds that the Office properly determined that an overpayment of \$8,049.00 was created as appellant received compensation payments after obtaining a lump-sum settlement of his schedule award. Since appellant knew or should have known that he was not entitled to additional compensation payments for a period covered by his lump-sum settlement, he is at fault in creating the overpayment and is not entitled to waiver. The Board further finds that the Office properly denied compensation for wage loss from February 25 to March 8, 2001, since appellant had received compensation pursuant to the schedule award during this period and may not receive dual benefits.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated June 4, 2003 are affirmed.⁹

Issued: December 16, 2003
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

⁹ The record contains Office decisions dated June 14, 2002 (wage loss as of March 20, 2002) and June 20, 2002 (sleep disorder) that are within one year of the filing of this appeal. The record transmitted to the Board indicates that on July 2, 2002 the Branch of Hearings and Review received appellant's request for an oral hearing before an Office hearing representative with respect to these decisions. On appeal, appellant reiterated that a request for a hearing had been submitted with respect to these decisions. Accordingly, on return of the case record the Branch of Hearings and Review should issue appropriate decisions.