

FACTUAL HISTORY

On April 7, 1997 appellant, a 37-year-old contract specialist, filed a traumatic injury claim alleging that she injured her back on March 20, 1997 while helping to move her computer, monitor and printer. The Office accepted the claim for back and cervical strains and authorized C5-6 discectomy surgery, which occurred on November 2, 2000. On May 21, 2001 the Office accepted right ulnar neuropathy and authorized cervical surgery, which occurred on June 25, 2001. She was placed on the automatic rolls for temporary total disability by letter dated July 28, 1997. Appellant returned to work for the employer on July 17, 2000. On August 10, 2000 she filed a claim for a recurrence of disability beginning July 18, 2000. Appellant returned to work on July 25, 2000 for two days a week working four hours per day. By letter dated June 18, 2001, she was placed on the automatic rolls for temporary total disability. Appellant returned to modified duty on August 19, 2002 working four hours per day which was increased to six hours per day on September 30, 2002.

On September 2, 2002 appellant signed up for direct deposit of her compensation checks into her bank account.

On November 21, 2002 appellant filed a claim for a schedule award.

On January 29, 2003 the Office granted appellant a schedule award for a 25 percent impairment of the right upper extremity. The period of the award was from December 29, 2002 to June 26, 2004, a total of 78 weeks of compensation. Appellant requested a lump-sum payment which was subsequently made by the Office.¹

On March 11, 2003 the Office granted appellant a schedule award for a 42 percent impairment of the right upper extremity and a 23 percent impairment of the left upper extremity. The period of the award was from December 29, 2002 to November 17, 2006, a total of 202.80 weeks of compensation. Appellant requested a lump-sum payment which was subsequently made by the Office.²

A November 15, 2003 computer printout indicated that appellant was paid \$19,825.00 for the period April 20 to September 6, 2003. Her pay rate was noted as \$1,290.56.

On May 7, 2004 the Office issued a preliminary notice of overpayment in the amount of \$19,825.00, for the period April 20 through September 6, 2003, because she received concurrent compensation under the schedule award lump sum and for wage loss. The Office made a preliminary determination that appellant was at fault in the creation of the overpayment, finding that she knew or should have know that she could not receive wage-loss compensation payments after receipt of the lump-sum payment. The Office advised appellant of her right to a prerecoupment hearing if she contested fact or amount of overpayment, to contest the fault determination or to support a request for waiver.

¹ Appellant received a commutated payment of \$20,799.03 for the period of the schedule award.

² Appellant received a commutated payment of \$173,277.62 for the period of the schedule award.

On June 16, 2004 the Office received appellant's May 17, 2004 request for a prerecoupment hearing which was held on March 9, 2005. She contended that she was not at fault in the creation of the overpayment as she had no control over the deposits to her bank account. Appellant requested waiver of recovery of the overpayment, claiming that it would constitute a severe financial hardship that would deprive her and her dependents of the ability to meet ordinary and necessary living expenses. She completed the Office's financial information form. She listed monthly income as \$6,063.15. Appellant listed her monthly expenses as \$2,007.91 for rent or mortgage, \$600.00 for food, \$200.00 for clothing, \$660.00 for utilities, \$200.00 for dental work, \$100.00 for legal fees, \$100.00 for yard care, \$300.00 for Harris Hospital, \$160.00 for gasoline and \$360.00 for car loan. Appellant's creditors included a monthly payment of \$500.00 to Ford Motors and \$10,269.00 owed to the Internal Revenue Service. She listed her total monthly expenses as \$5,588.00. Appellant listed assets as \$150.00 cash, \$800.00 checking account balance, \$2,000.00 savings account balance for a total of \$2,950.00. Her monthly income was \$1,605.00 Social Security benefits,³ \$1,496.00 Civil Service disability retirement and \$4,458.00 husband's earnings for a total monthly income of \$6,063.15.

In a decision dated May 10, 2005, the Office hearing representative finalized the overpayment of \$19,825.00. The hearing representative found that appellant received an overpayment because she received wage-loss compensation for a period also covered by her schedule award for the same part of the body, her right and left upper extremities. The hearing representative found that appellant was improperly paid a schedule award and wage-loss compensation for the period April 20 to September 6, 2003 for her back and upper extremity injuries. He noted that Office records reflected that appellant was paid \$19,825.00 in wage loss for the period April 20 to September 6, 2003. The Office hearing representative determined that she was not entitled to waiver as appellant was at fault in the creation of the overpayment since she accepted payment she knew or should have known to be incorrect and directed recovery of the overpayment at a rate of \$500.00 per month.

LEGAL PRECEDENT -- ISSUE 1

Section 8116(a) of the Federal Employees' Compensation Act provides that an employee who receives continuing compensation or 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, may not receive salary, pay or remuneration of any type from the United States.⁴ It is a well-established principle that a claimant is not entitled to dual workers' compensation benefits for the same injury.⁵ With respect to benefits under the Act, the Board has held that "an employee cannot concurrently receive compensation under a schedule award and compensation for disability for work."⁶

³ This amount included \$535.00 for her daughter Leslie A. Fast.

⁴ 5 U.S.C. § 8116(a); *see also* 20 C.F.R. § 10.400(b) and *Dale Mackelprang*, 55 ECAB ____ (Docket No. 03-1614, issued December 2003).

⁵ *James A. Earle*, 51 ECAB 567, 568 (2000); *Benjamin Swain*, 39 ECAB 448, 454 (1988).

⁶ *Id.*; *see also Andrew B. Poe*, 27 ECAB 510, 512 (1976).

ANALYSIS -- ISSUE 1

The Board finds that the Office properly determined that appellant received an overpayment of compensation for the period April 20 to September 6, 2003. Under Federal (FECA) Procedure Manual, Part 2 -- Claims, *Waiver of Recovery*, Chapter 2.808.5(a)(3) (March 1995), a schedule award for one injury may be paid concurrently with wage loss for another injury only if the injuries are not to the same part of the body. The record reflects that appellant received a lump-sum payment under the March 11, 2003 schedule award for impairment to her left and right upper extremities arising from the 1997 employment injury. The period of the award was from December 29, 2002 to November 17, 2006, a total of 202.80 weeks of compensation. Appellant requested a lump-sum payment which was subsequently made by the Office. She accepted the lump-sum payment. Therefore, the wage-loss compensation paid for the period April 20 to September 6, 2003 based on her 1997 employment injury, created an overpayment of compensation. The Board finds that the fact of overpayment is established in this case.

LEGAL PRECEDENT -- ISSUE 2

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 with respect to 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).⁷

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.⁸

ANALYSIS -- ISSUE 2

The Office found that appellant was at fault in the creation of the overpayment based on the third criterion above, that she accepted payments which she knew or should have known to be incorrect. In order for the Office to establish that she was at fault in creating the overpayment, the Office must show that, at the time appellant received the compensation payments in question, she knew or should have known that they were incorrect.⁹ The Board

⁷ 20 C.F.R. § 10.433(a).

⁸ 20 C.F.R. § 10.433(b).

⁹ *Lorenca Rodriguez*, 51 ECAB 295 (2000); *Robin O. Porter*, 40 ECAB 421 (1989).

finds that the Office provided no factual basis to support its finding of fault. Neither the May 7, 2004 preliminary determination nor the May 10, 2005 final decision identified facts or included rationale to support the fault finding. The Office simply concluded that appellant was at fault because she knew or should have known that the payments she received were incorrect.

The record establishes that appellant received compensation payments for the period April 20 to September 6, 2003 from the Office. These payments were deposited directly into appellant's bank account. The Board has distinguished such a situation from one in which a claimant receives a check in the mail covering a specific period, knows or should know that she is not entitled to such compensation but decides nonetheless to cash or deposit the check.¹⁰ The Board has found that a direct deposit is not sufficient to establish acceptance by a claimant who has had no opportunity to make a decision on the check before it was deposited to her account. The record does not contain the date the Office made the compensation payments, but there is a November 15, 2003 computer printout which indicates that appellant received compensation for the period in question. The Office did not advise her that an incorrect amount had been released to her checking account until the May 7, 2004 preliminary notice of overpayment. Appellant was not on notice of the incorrect payment and had no reason to suspect at the time such checks were deposited during the period April 20 to September 6, 2003 that they were incorrect payments. Because the funds were deposited directly into her bank account, she was not in a position to immediately decline acceptance of the amounts paid by the Office. Under the circumstances of this case, the Board finds that appellant was not at fault in the creation of the overpayment.¹¹ Accordingly, the Office's May 10, 2005 decision finding of fault will be reversed and the case remanded to determine whether she is eligible for waiver of the overpayment.¹²

CONCLUSION

The Board finds that appellant received an overpayment in the amount of \$19,825.00, for the period April 20 through September 6, 2003. The Board finds that appellant was without fault in the creation of the overpayment.

¹⁰ *William F. Salmonson*, 54 ECAB 152 (2002); *Leotis Hall*, Docket No. 02-2140 (issued February 5, 2004).

¹¹ *Id.*

¹² The Office's decision to recover the overpayment, pursuant to 20 C.F.R. § 10.441(a), by deducting \$500.00 every 28 days from appellant's continuing compensation is rendered moot pending resolution of the issue of waiver of recovery.

ORDER

IT IS HEREBY ORDERED THAT the May 20, 2005 decision of the Office of Workers' Compensation Programs is affirmed in part and reversed in part and the case is remanded for further action consistent with this decision.

Issued: February 14, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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