

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

R.M., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Midflorida, FL, Employer**

)
)
)
)
)
)
)
)
)
)

**Docket No. 06-949
Issued: September 18, 2007**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 9, 2006 appellant filed a timely appeal of the December 20, 2005 decision of the Office of Workers' Compensation Programs which found that he received an overpayment of compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether the Office properly determined that appellant received an overpayment in the amount of \$160,992.94, September 4, 1993 to November 22, 2003 due to his receipt of dual benefits paid under statutes administered by the Office and the Department of Veterans Affairs; and (2) whether the Office properly denied waiver of the overpayment.

FACTUAL HISTORY

On May 3, 1993 appellant, then a 50-year-old clerk, sustained injury to his left knee while throwing parcels. The Office accepted that he sustained a left knee strain, aggravation of osteoarthritis of the left knee and a consequential aggravation of osteoarthritis of the right knee.

The Office authorized a total left knee replacement which was performed on July 19, 1993. Appellant returned to a light-duty position.

By letter dated September 1, 1993, the Office notified appellant that he was currently receiving continuation of pay from the employing establishment which would expire on September 1, 1993. Appellant was granted leave without pay for the period September 4 to 18, 1993. On May 16, 1994 the Office approved his application to buy back leave for the period September 4 to 18, 1993.

In a decision dated December 6, 1994, the Office granted appellant a schedule award for 18 percent permanent impairment of the left leg. The period of the award was May 31, 1994 to May 28, 1995.

In a letter dated January 30, 1995, the Office responded to appellant's request for treatment for a back condition that he asserted was causally related to his May 3, 1993 injury. It requested that he submit copies of all medical records from the Department of Veterans Affairs (VA) medical center in support of this claim. The Office also requested that appellant submit information regarding any disability rating for his left knee as determined by the VA. In a letter dated February 27, 1995, appellant noted that the VA disability percentage increased on July 1, 1993 to 100 percent and ended in August 1994. He advised that he was currently waiting for another reevaluation from the VA.

In a January 31, 1995 letter, the Office sent appellant an EN1032 form to report income from other sources and to list dependents. It informed him that he was to report all income from employment or receipt of benefits from federally funded or federally assisted programs including the VA benefits. On February 22, 1995 appellant completed the EN1032 and noted under Part D(3), VA Benefits, that he received benefits from the VA in file number C23787052, for arthritis in the legs. He noted that his award increased on August 1, 1993 and was readjusted in October 1994.

In a statement of accepted facts dated June 10, 1996, the Office noted that appellant's condition was accepted for a left knee strain and aggravation of osteoarthritis of the left knee. The Office noted that appellant received VA benefits for a left knee condition which developed during military service.

On August 1, 1996 appellant filed a traumatic injury claim alleging that on the same date he fell injuring both knees and his lower back, file number 06-0659211. The Office accepted this claim for lumbar sprain and multiple contusions and paid appropriate compensation.

Appellant submitted a Form EN1032 on February 6, 1997 and noted under Part D(3), VA Benefits, that he received benefits from the VA in file number C23787052 for arthritis in the legs/back. He noted that his award increased in 1995 or 1996. Appellant listed that he had received a schedule award from the Office for his left leg and received benefits from 1994 to 1996.

By decision dated September 24, 1997, the Office found that appellant had been employed as a full-time modified clerk effective July 2, 1997, a period over 60 days and that his actual earnings of \$648.92 per week was equivalent to the pay rate for the position he held at the

time of his injury; thus, no loss of wages occurred. The Office concluded that his actual earnings fairly and reasonably represented his wage-earning capacity. This decision was reissued on January 12, 1998 with a revised salary for the modified clerk position of \$664.44 per week.

In a letter dated January 12, 1998, the Office notified the VA Regional Office that appellant was receiving disability compensation under the Federal Employees' Compensation Act and requested the VA furnish information regarding any disability benefits received based on his military service.

In a decision dated January 13, 1998, the Office granted appellant a schedule award for 50 percent loss of the left leg. The period of the award was from September 1, 1997 to June 8, 1999.

Appellant submitted several EN1032 forms dated February 1, 1999, January 29, 2002 and February 8, 2003. He noted under Part D(3), VA Benefits, that he received benefits from the VA in file number C23787052 for his legs and back. Appellant noted that his award was increased in July 1998.

In letters dated February 24 and March 25, 2003, the Office again notified the VA that it accepted appellant's claim for a left knee sprain, aggravation of degenerative disc disease and traumatic arthropathy of the right and left knees due to a work-related injury on May 3, 1993. The Office requested that the VA provide information regarding disability benefits paid to appellant.

In a letter dated March 18, 2003, the VA advised that effective September 1, 1994 appellant's veterans residual, status post left total knee replacement was increased to 60 percent and he was granted 20 percent for lumbosacral strain and spasm. The VA further noted that on December 3, 1997 appellant was granted individual unemployability and was paid at a 100 percent rate for service-connected disabilities.

In a letter dated April 18, 2003, the Office noted receipt of a Form EN1032 submitted by appellant which indicated that he was receiving VA benefits. The Office advised appellant that additional information was requested from the VA to determine if he was receiving dual benefits from the Office and the VA for the same conditions.

On June 3, 2003 the VA noted that appellant was granted a 10 percent disability rating for a left knee injury effective March 2, 1970. On August 31, 1993 appellant was granted an increase to 100 percent disability for the total left knee replacement. On September 1, 1994 the rating was reduced to 10 percent. The VA further noted that, in a rating dated February 27, 1995, appellant's residuals of the status postoperative total left knee replacement was increased to 60 percent effective September 1, 1994. Effective June 22, 1994 appellant was granted a service-connected disability rating for lumbosacral strain and spasm at 20 percent. The VA noted that effective December 3, 1995 appellant was paid at a 100 percent rate for service-connected disabilities.

In letters dated February 18 and April 1, 2004, the Office notified appellant that he was receiving dual benefits. It noted that the VA confirmed that appellant received a VA rating for his left knee prior to his work injury of May 3, 1993 and this rating was increased in

August 31, 1993. The Office advised appellant that the Act prohibited payment of dual benefits and that he was required to make an election between benefits under the Act or those being paid by the VA.

On April 28, 2004 appellant informed the Office that he was receiving VA benefits as early as 1995 and it failed to advise him of the regulations governing dual benefits or request an election of benefits. He contended that he was not responsible for the Office's oversight.

On May 13, 2004 the Office requested that appellant elect between benefits under the Act and VA benefits. In an election of benefits form received on May 13, 2004 appellant elected VA benefits effective November 1997. On May 19 and June 11, 2004 he again asserted that he was not at fault in this matter.

In a fiscal payment worksheet dated September 15, 2004, the Office noted that appellant was paid wage-loss compensation for the period September 4, 1993 to November 8, 1996 in the amount of \$10,734.56 and he was paid a schedule award for the period May 31, 1994 to November 22, 2003 in the amount of \$150,258.38. The Office determined that for the period September 4, 1993 to November 22, 2003 appellant had been paid benefits in the amount of \$160,992.94. The Office attached a breakdown for applicable pay rates and gross compensation for the period September 4, 1993 to November 22, 2003.

In a September 30, 2004 letter, the Office advised appellant that it had preliminarily determined that he received a \$160,992.94, overpayment of compensation from September 4, 1993 to November 22, 2003 for which he was not at fault. It found that he had received an overpayment of \$160,992.94, in wage-loss compensation and leave buy back for his left knee condition for the period September 4, 1993 to November 8, 1996 and was paid a schedule award for the period May 31, 1994 to November 22, 2003 and also received an increase in VA benefits for the same injury for the period beginning on August 31, 1993. The Office advised that the overpayment occurred because appellant received compensation benefits from both the Office and the VA during the same period for the same conditions. It advised him that he had the right to submit, within 30 days, evidence or arguments regarding the overpayment and his eligibility for waiver of the overpayment and provided appellant with an overpayment questionnaire to submit. The Office also informed appellant that he had a right to a precoupment hearing before an Office hearing representative. It instructed him to complete an enclosed overpayment recovery form and submit supporting financial documentation.

On October 24, 2004 appellant requested a precoupment hearing. He noted that since 1993 he reported his VA benefits to the Office but that he was never informed of the regulations prohibiting dual benefits. Appellant asserted that he had increasing medical expenses and did not have the financial means to pay back the overpayment. He requested a waiver of the overpayment to avoid manifest injustice. Appellant submitted an overpayment recovery form with supporting financial documents.

A precoupment hearing was held on October 28, 2005. Appellant submitted updated financial information, noting monthly expenses of \$4,119.05 and monthly income of \$4,424.00. He noted a savings account balance of \$9,489.00 and indicated that he owned a pontoon boat worth between \$2,000.00 to \$4,000.00.

The employing establishment submitted an investigative memorandum dated December 12, 2005 from the U.S. Postal Inspection Service. It referenced a letter from the VA to the Office dated June 3, 2003, which noted that since December 3, 1995 appellant was paid a 100 percent disability rating for his service-connected disabilities. Also referenced were VA documents which revealed that since 1998 appellant received benefits of \$2,429.00 per month.

By decision dated December 20, 2005, the Office found that appellant received a \$160,992.94 overpayment of compensation from September 4, 1993 to November 22, 2003, for which he was not at fault. Appellant received an overpayment of \$160,992.94, in wage-loss compensation and leave buy back for his left knee condition for the period September 4, 1993 to November 8, 1996 and was paid a schedule award for the period May 31, 1994 to November 22, 2003 and also received an increase in VA benefits for the same injury for the period beginning on August 31, 1993. It advised that the overpayment occurred because appellant received compensation benefits from both the Office and the VA during the same period for the same injury. The hearing representative denied waiver of the overpayment finding that recovery of the overpayment would not defeat the purpose of the Act,¹ nor would it be against equity and good conscience. The hearing representative directed repayment of the overpayment at the rate of \$800.00 per month.

LEGAL PRECEDENT -- ISSUE 1

Section 8116(a) of the Act² states:

“(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, retirement pay, retainer pay or equivalent pay for service in the Armed Forces or other uniformed services...

However, eligibility for or receipt of benefits under subchapter III of chapter 83 of this title or another retirement system for employees of the Government, does not

¹ 5 U.S.C. §§ 8101-8193.

² 5 U.S.C. § 8116(a).

impair the right of the employee to compensation for scheduled disabilities specified by section 8107(c) of this title.”³

Section 8116(b) provides that in such cases an employee shall elect which benefits he shall receive. Thus, the Act prevents payment of dual benefits in cases where the Office has found that the disability was sustained in civilian federal employment and the VA has held that the same disability was caused by military service.⁴

ANALYSIS -- ISSUE 1

On October 22, 1993 the Office accepted appellant’s claim for left knee strain and aggravation of osteoarthritis of the left knee and subsequently accepted the July 10, 1993 total left knee replacement. The Office awarded compensation for wage-loss compensation and leave buy back for appellant’s left knee condition for the period September 4, 1993 to November 8, 1996 and was paid a schedule award for his left knee the period May 31, 1994 to November 22, 2003. On August 1, 1996 appellant filed a traumatic injury claim alleging that on the same date he fell injuring both knees and his lower back in file number 06-0659211. The Office accepted this claim for lumbar sprain and multiple contusions and paid appropriate compensation.

The record indicates that the VA granted appellant a 10 percent disability rating for a left knee injury effective March 2, 1970. The VA noted that on August 31, 1993 after appellant’s May 3, 1993 work injury he was granted an increase to 100 percent disability for the total left knee replacement. On September 1, 1994 the rating was reduced to 10 percent. However, the VA further noted in a rating dated February 27, 1995, that appellant’s rating for residuals of the status postoperative total left knee replacement was increased to 60 percent effective September 1, 1994. It noted that, effective December 3, 1995, he was paid at a 100 percent rate for service-connected disabilities.

The Office properly determined that appellant received dual benefits from the Office and the VA for the same injury during September 4, 1993 to November 22, 2003. As noted, the evidence shows that appellant received increased VA benefits for his left knee condition for the same time that the Office paid benefits for his accepted work-related left knee condition. As he received compensation from both the Office and the VA for the same injury to the left knee during the same period, the Board finds that an overpayment was created.

However, the Board is unable to determine how the amount of the \$160,992.94 overpayment was calculated. The Office provided a fiscal payment worksheet dated September 15, 2004 which noted that appellant was paid wage-loss compensation for the accepted conditions of left knee strain and aggravation of osteoarthritis of the left knee for the period September 4, 1993 to November 8, 1996, in the amount of \$10,734.56 and was paid a schedule award for the left leg for the period May 31, 1994 to November 22, 2003 in the amount of \$150,258.38, for a total payment of benefits in the amount of \$160,992.94. However, the

³ *Id.*

⁴ *Sinclair L. Taylor*, 52 ECAB 227 (2001); *Allen W. Hermes*, 43 ECAB 435 (1992).

Office failed to explain how it determined that the overpayment amount was \$160,992.94. It failed to set forth a detailed calculation of the overpayment. The fiscal payment worksheet noted that appellant was paid a schedule award for the period May 31, 1994 to November 22, 2003, approximately a nine year period, in the amount of \$150,258.38. However, the record does not support that appellant was paid a schedule award in the amount of \$150,258.38, for the period May 31, 1994 to November 22, 2003. The Office provided no further explanation detailing the overpayment calculation. The record reveals that on December 6, 1994 the Office granted appellant a schedule award for 18 percent permanent impairment of the left leg for the period May 31, 1994 to May 28, 1995. On January 13, 1998 the Office granted appellant a schedule award for 50 percent loss of the left leg, less of the 18 percent loss of use of the left leg previously awarded, for the period September 1, 1997 to June 8, 1999. There is no evidence in the record that appellant was issued any further schedule award.⁵ The Board further notes that, although the fiscal payment worksheet provides a breakdown for changing pay rates and gross compensation for September 4, 1993 to November 22, 2003, the record does not contain an overpayment worksheet or other record detailing the overpayment calculation with regard to the monetary compensation received to account for the total determined by the Office.

The amount of the overpayment has not been established. The case will be returned to the Office for a new determination of the amount of the overpayment of compensation, including preparation of a detailed memorandum explaining the Office's method of calculation, the calculation itself and any other relevant information. Following this and other development as the Office deems appropriate, the Office shall conduct appropriate disposition of the issues.

As the Board has set aside the Office's finding on the amount of the overpayment, it is premature to address waiver of the overpayment.

CONCLUSION

The Board finds that appellant received an overpayment of compensation from September 4, 1993 to November 22, 2003. The Board finds that the Office incorrectly calculated the amount of the overpayment and that it is premature to consider appellant's eligibility for waiver of the overpayment.

⁵ The Board notes that an 18 percent impairment would calculate into 51.84 weeks of compensation or approximately 1 year (18 multiplied by 288 weeks equals 51.84 weeks) and a 50 percent impairment would calculate into 144 weeks of compensation or 2.76 years; however, neither calculation would correspond to the 9-year schedule award referenced by the Office in the fiscal payment worksheet. See 5 U.S.C. § 8107(c)(2) (provides for a maximum of 288 weeks' compensation for permanent loss of use of the leg).

ORDER

IT IS HEREBY ORDERED THAT the December 20, 2005 decision of the Office of Workers' Compensation Programs is affirmed as to the fact of overpayment and set aside with respect to the amount of the overpayment and remanded for further action consistent with this decision of the Board.

Issued: September 18, 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