

FACTUAL HISTORY

On October 20, 2006 appellant, then a 53-year-old letter carrier, filed an occupational disease claim which the Office accepted for left carpal tunnel syndrome and left thumb trigger finger. In a July 13, 2007 letter, the Office accepted appellant's claim for right carpal tunnel syndrome.

On July 26, 2007 appellant filed a claim for a schedule award. In an April 4, 2007 medical report, Dr. Warburton opined that appellant reached maximum medical improvement on February 20, 2007. He determined that appellant sustained a five percent impairment of the left upper extremity and a four percent impairment of the right upper extremity based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (5th ed. 2001).

On August 8, 2007 an Office medical adviser reviewed appellant's case record. The medical adviser agreed with Dr. Warburton's April 4, 2007 findings and determined that appellant sustained a five percent impairment of the left upper extremity and a four percent impairment of the right upper extremity based on the A.M.A., *Guides*.

By decision dated October 16, 2007, the Office granted appellant a schedule award for a five percent impairment of the left arm and a four percent impairment of the right arm for the period February 20 to October 27, 2007. It informed him that, during the stated period, he would receive \$21,889.81. This was based on multiplying appellant's weekly pay rate of \$922.12 as of November 26, 2006 by the 75 percent compensation rate, resulting in a payment of \$2,766.36 every four weeks. The Office stated that payment of the schedule award would end on October 27, 2007. It advised appellant that, after the ending date of the award, his entitlement to compensation would be based solely on any disability for work resulting from his accepted injury.

Compensation payment logs demonstrated that appellant received electronic funds transfers in the amount of \$21,889.81 for the period February 20 to September 29, 2007 and \$2,766.36 on October 27, 2007 for the period beginning on September 30, 2007. Thereafter, he received electronic funds transfers every four weeks of \$2,766.36 from October 28, 2007 to March 15, 2008, \$2,948.00 from March 16 to April 12, 2008 and \$2,885.00 from April 13 to August 2, 2008.

On August 1, 2008 the Office made a preliminary determination that appellant received an overpayment of compensation in the amount of \$28,320.40 for the period October 28, 2007 to August 2, 2008 because he erroneously continued to receive schedule award payments after the expiration of the schedule award on October 27, 2007. It determined that he was at fault in the creation of the overpayment because he had been advised in the October 16, 2007 decision that the schedule award would expire on October 27, 2007. The Office determined that during the stated periods appellant received \$28,320.40 based on the calculations in its overpayment worksheet. Appellant was advised that he could request a telephone conference, a final decision based on the written evidence only or a hearing within 30 days if he disagreed that the overpayment occurred, with the amount of the overpayment or if he believed that recovery of the overpayment should be waived. The Office requested that he complete an accompanying

overpayment recovery questionnaire (Form OWCP-20) and submit financial documents in support thereof within 30 days.

In an August 25, 2008 letter, appellant contended that he was not at fault in creation of the overpayment. He explained that he was confused by the October 16, 2007 decision which advised him that he would receive \$2,766.36 every four weeks which he began to receive on October 26, 2007 after receiving a larger sum. Appellant stated that an Office representative advised him that he would receive a \$21,000.00 payment and payments every four weeks thereafter until the expiration of the schedule award. The Office representative advised him that she did not know how many payments he would receive but that they would be directly deposited into his bank account until the award was complete. Appellant noted that his coworkers had received a large sum schedule award and subsequent payment every four weeks until the expiration of the award. He related that he received a benefits statement for each direct deposit of compensation and believed everything was fine. Appellant contended that repayment of the overpayment would cause severe financial hardship. In an August 26, 2008 OWCP-20 form, appellant stated that he did not have any of the incorrectly paid checks or payments in his possession. He reported monthly income of \$7,583.000 which represented \$7,568.00 in earnings and \$15.00 for other income. Appellant also reported monthly expenses of \$7,195.00. Appellant had \$100.00 cash on hand, \$1,076.00 in a checking account, \$8,152.00 in a savings account and \$2,500.00 in stocks and bonds, totaling \$11,828.00. He submitted supporting financial documents.

By decision dated September 5, 2008, the Office finalized the preliminary determination of overpayment and fault. It directed recovery of the overpayment at a rate of \$400.00 per month.

In an October 13, 2008 letter, appellant, through counsel, requested reconsideration of the Office's October 16, 2007 schedule award decision.

By decision dated October 28, 2008, the Office denied appellant's request for reconsideration on the grounds that it neither raised substantive legal questions nor included new and relevant evidence and, thus, was insufficient to warrant a merit review of its October 16, 2007 decision.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of the Federal Employees' Compensation Act¹ 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.² The Office's procedure manual identifies

¹ 5 U.S.C. §§ 8101-8193.

² *Id.* at § 8102(a).

various situations when overpayments of compensation may occur, including when a schedule award expires but compensation continued to be paid.³

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained bilateral carpal tunnel syndrome and left thumb trigger finger. It granted him a schedule award on October 16, 2007. The Office explained that appellant would be paid \$21,889.81 for the period February 20 to October 27, 2007. This was based on multiplying appellant's weekly pay rate of \$922.12 by the 75 percent compensation rate, resulting in a payment of \$2,766.36 every four weeks.

On August 1, 2008 the Office calculated that appellant had received a total of \$28,320.40 from October 28, 2007 to August 2, 2008 as he received compensation after his schedule award ended on October 27, 2007. The Board notes that the period of the overpayment was October 28, 2007 to August 2, 2008 and the overpayment amount is \$28,320.40 as determined by the Office in its overpayment worksheet and supporting documentation. There is no contrary evidence regarding the fact and the amount of the overpayment. The Board, therefore, finds that an overpayment occurred in the amount of \$28,320.40 for the period October 28, 2007 to August 2, 2008 as appellant received schedule award payments for that period after the expiration of his award.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Act⁴ provides that an overpayment of compensation shall be recovered by the Office unless 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.⁵ Thus, the Office may not waive the overpayment of compensation unless appellant was without fault.⁶ Adjustment or recovery must, therefore, be made when an incorrect payment has been made to an individual who is with fault.⁷

On the issue of fault, section 10.433 of the Office's regulations, 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 Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2 (May 2004).

⁴ 5 U.S.C. § 8129(b).

⁵ *Michael H. Wacks*, 45 ECAB 791, 795 (1994).

⁶ *Norman F. Bligh*, 41 ECAB 230 (1989).

⁷ *Diana L. Booth*, 52 ECAB 370, 373 (2001); *William G. Norton, Jr.*, 45 ECAB 630, 639 (1994).

“(3) accepted a payment which he or she knew or should have known was incorrect.”⁸

With respect to whether an individual is without fault, section 10.433(b) of the Office’s regulations provide in relevant part:

“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.”⁹

ANALYSIS -- ISSUE 2

The Office found that appellant was at fault in creating the overpayment because he knew or should have known he was not entitled to schedule award compensation after the expiration of the award on October 27, 2007. In order for the Office to establish that he was at fault in creating the overpayment of compensation, the Office must establish that, at the time appellant received the compensation check in question, he knew or should have known that the payment was incorrect.¹⁰

The Board finds that appellant was at fault in creation of the overpayment from October 28, 2007 to August 2, 2008. The October 16, 2007 schedule award decision clearly set forth the period of the overpayment and the amount of the payments to be issued, noting that the schedule award ended on October 27, 2007. Appellant’s August 25, 2008 letter stated that, he received a benefits statement for each compensation payment he received by direct deposit which led him to believe that he was receiving the correct amount of compensation. He, however, acknowledged that a schedule award has an expiration date as he stated that his coworkers had received a large sum schedule award and subsequent payment every four weeks until the expiration of the award. The Board notes that appellant received his schedule award compensation in the same manner. Appellant received a direct deposit of \$21,889.89 for the period February 20 to September 29, 2007 and on October 27, 2007 he received a direct deposit of \$2,766.36 for the period beginning on September 30, 2007. The Board also notes that the period between the issuance of the schedule award and expiration of the award was only 12 days while appellant continued to receive compensation for over 10 months. For these reasons, the Board finds that the Office correctly found appellant at fault in creation of the overpayment from October 28, 2007 to August 2, 2008. Appellant knew or should have reasonably known that the payments he received following the expiration of the schedule award were incorrect.

On appeal, appellant contended that the Office failed to properly explain the conditions under which he would receive schedule award payments. He also contended that he was advised

⁸ 20 C.F.R. § 10.433(a).

⁹ *Id.* at § 10.433(b); *Diana L. Booth, supra* note 7.

¹⁰ *Diana L. Booth, supra* note 7.

by an Office representative in October 2007 that he would receive a \$21,000.00 payment and payments every four weeks thereafter until the expiration of the schedule award. Appellant stated that the Office representative stated that she did not know how many payments he would receive but that they would be directly deposited into his bank account until the award was complete. The Office regulations provide that an individual may not be at fault if he or she relied on misinformation given in writing by the Office (or by another government agency which he or she had reason to believe was connected with the administration of benefits) as to the interpretation of a pertinent provision of the Act or its regulations.¹¹ There is no evidence that appellant relied on misinformation given in writing by the Office. He accepted payments that he knew or should have known to be incorrect. As the evidence establishes that appellant is at fault in the creation of the overpayment in compensation that occurred in this case, the Board finds that he is not entitled to waiver of recovery of the overpayment.¹² The fact that the Office may have erred in issuing the payments does not mitigate this finding.¹³

With respect to the recovery of the overpayment in compensation, the Board's jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation benefits under the Act.¹⁴ As appellant is no longer receiving schedule award compensation, the Board does not have jurisdiction with respect to recovery of the overpayment under the Debt Collection Act.¹⁵

LEGAL PRECEDENT -- ISSUE 3

To require the Office to reopen a case for merit review under section 8128 of the Federal Employees' Compensation Act,¹⁶ the Office's regulation provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.¹⁷ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.¹⁸ When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review of the merits.

¹¹ 20 C.F.R. § 10.435(b).

¹² *D.R.*, 59 ECAB ____ (Docket No. 07-823, issued November 1, 2007).

¹³ *See* 20 C.F.R. § 10.435(a); *D.R.*, *supra* note 14; *William E. McCarty*, 54 ECAB 525 (2003).

¹⁴ 20 C.F.R. § 10.441(a); *Terry A. Keister*, 56 ECAB 559 (2005); *see also Cheryl Thomas*, 55 ECAB 610 (2004).

¹⁵ *Cheryl Thomas*, *supra* note 14.

¹⁶ 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, [t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application. 5 U.S.C. § 8128(a).

¹⁷ 20 C.F.R. § 10.606(b)(1)-(2).

¹⁸ *Id.* at § 10.607(a).

ANALYSIS -- ISSUE 3

By letter dated October 13, 2008, appellant disagreed with the Office's October 16, 2007 schedule award decision. The relevant issue in the case, whether he has more than a five percent impairment of the left arm and a four percent impairment of the right arm, is medical in nature.

Appellant did not submit any relevant or pertinent new evidence not previously considered by the Office in support of his request for reconsideration. Further, he did not show that the Office erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by the Office. Appellant merely requested reconsideration of the Office's October 16, 2007 decision. As appellant did not meet any of the necessary regulatory requirements, the Board finds that he is not entitled to a merit review.¹⁹

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$28,320.40 for the period October 28, 2007 to August 2, 2008. The Board also finds that the Office properly found that appellant was at fault in creating the overpayment and, therefore, ineligible for waiver of the recovery of the overpayment. The Board further finds that the Office properly denied appellant's request for a merit review of his claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the October 28 and September 5, 2008 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 4, 2009
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹⁹ See 20 C.F.R. § 10.608(b); *Richard Yadron*, 57 ECAB 207 (2005).