United States Department of Labor
Employees' Compensation Appeals Board

R.W., Appellant	)	
and	)	**Docket No. 08-2098**
	)	**Issued: July 24, 2009**
U.S. POSTAL SERVICE, POST OFFICE, Clearfield, UT, Employer	)	

Appearances:
David J. Holdsworth, Esq., for the appellant
No appearance, for the Director

Oral Argument June 17, 2009

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 24, 2008 appellant, through his representative, filed a timely appeal from the May 29, 2008 merit decision of the Office of Workers' Compensation Programs, which found him at fault in the creation of an overpayment. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the case.

ISSUE

The issue is whether appellant was at fault in creating an $83,562.36 overpayment. Appellant argues he had no reason to believe he was being overpaid.

FACTUAL HISTORY

On October 22, 2004 appellant, then a 56-year-old letter carrier, filed an occupational disease claim alleging that both his knees had deteriorated in the performance of duty to the point that he needed bilateral knee replacement surgery. The Office accepted his claim for aggravation of degenerative joint disease, bilateral knees, and authorized the surgery. Appellant underwent a right total knee arthroplasty on December 22, 2004 and a left total knee arthroplasty on

February 17, 2005. He underwent a left total knee arthroplasty revision and liner exchange on December 22, 2005.

Appellant requested a schedule award and submitted the March 30, 2006 report of Dr. Nathan Momberger, his orthopedic surgeon, who found that appellant had reached maximum medical improvement and had a good result from both knee replacements. Dr. Momberger determined that appellant had a 37 percent permanent impairment of each lower extremity.

On September 29, 2006 appellant telephoned the Office to discuss his schedule award. The Office recorded the following:

> "Explained that the DMA [district medical adviser] noted his prior SAs [schedule awards] for his knees, and they must be researched. He has already received two SAs, one for the right knee in approx[imately] 1987, and one for the left knee in approximately 1999. This means the DMA will have to review the case again to assess a combined rating."

On December 5, 2006 the Office issued a schedule award finding that appellant had a 37 percent permanent impairment of each lower extremity. The period of the award ran 213.12 weeks from March 3, 2006 to April 29, 2010. The Office informed appellant that he would receive $21,211.12 for the period March 30 to November 25 2006 and then continuing payment of $2,466.00 each four weeks. The decision noted that after expiration of the award he would be entitled to compensation based on his disability for employment. On January 26, 2007 appellant received a lump-sum payment totaling $119,128.15.

On July 25, 2007 the Office made a preliminary determination that appellant was at fault in creating an $83,563.23 overpayment. It noted that appellant had received previous schedule awards for his lower extremities, and the current total impairment was paid without adjusting for those awards.[1] The Office found that appellant was at fault in creating this overpayment because he knowingly accepted compensation to which he was not entitled.

During a telephonic hearing on March 11, 2008, appellant contested the fact and amount of the $83,563.23 overpayment. He stated that he had no idea how the Office calculated the award or what he would be receiving. Appellant stated that he had no reason to believe he was being overpaid.

In a decision dated May 29, 2008, the Office hearing representative modified the amount of the overpayment to $83,562.36 and found that appellant was at fault in creating the overpayment. She noted that appellant, and his representative, were aware of the 37 percent ratings given by Dr. Momberger. The Office hearing representative noted the September 29, 2006 telephone call, in which the Office advised appellant that, since he had previously received

[1] Appellant received a schedule award for a 20 percent impairment of his right lower extremity in 1992, an increase of 8 percent for his right lower extremity in 1993, and an award of 10 percent for his left lower extremity in 1999. The Office determined the amount of the overpayment by subtracting compensation for the additional 9 percent appellant should have received for his right lower extremity and the additional 27 percent he should have received for his left lower extremity from the compensation paid for a 37 percent impairment of each.

two schedule awards, the district medical adviser would have to review the medical evidence again and calculate a combined rating. "This should have put the claimant on notice that he was not entitled to the full rating and he should have been aware he may not have been entitled to the full payment amount." The hearing representative added: "I find he should have known he was not entitled to schedule award benefits for 37 percent of each lower extremity since he knew he had received awards in the past and had been told the DMA would have to come up with a combined rating."

LEGAL PRECEDENT

When an overpayment of compensation has been made because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled. But adjustment or recovery by the United States may not be made when incorrect payment had been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of the Federal Employees' Compensation Act or would be against equity and good conscience.[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 received 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).[3]

Whether or not the Office determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances. 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.[4]

ANALYSIS

Appellant does not contest the fact or amount of the overpayment. Because he had already received awards for a 28 percent impairment of his right lower extremity and a 10 percent impairment of his left, Dr. Momberger's 37 percent bilateral rating meant that appellant was entitled to an additional 9 percent on the right and an additional 27 percent on the left. But the Office did not account for the previous awards and instead paid appellant for the full 37 percent bilaterally, creating the overpayment. It calculated the amount of the overpayment by

[2] 5 U.S.C. § 8129.

[3] 20 C.F.R. § 10.433(a).

[4] *Id*. at § 10.433(b).

simply subtracting the compensation appellant should have received for additional impairments from the compensation actually paid. The Board will affirm the Office's May 29, 2008 decision on the issues of fact and amount of overpayment.

The disputed issue is the Office's finding that appellant was at fault in creating this overpayment because he accepted a payment which he knew or should have known to be incorrect. The Office based this finding on the fact that he knew he had received awards in the past and was told the Office medical adviser would have to come up with a combined rating.

But these two facts do not support the Office's finding of fault. They do not show that appellant knew or should have known the amount of compensation paid was incorrect. The schedule award described the degree and nature of his permanent impairment as 37 percent right lower extremity and 37 percent left lower extremity. That was exactly what his orthopedic surgeon had reported and what the Office had accepted.

Appellant understood he was not entitled to full compensation for a 37 percent bilateral impairment. What he did not know, and could not be expected to know, was whether the number of weeks of compensation awarded, 213.12, represented full compensation or some adjusted figure. The schedule award did not explain, and the Office did not advise that the Act provides 288 weeks' compensation for a 100 percent impairment or total loss of the lower extremity, and that partial impairments are compensated proportionately.[5] With that information, a reasonable person under the circumstances could have presumed that a 37 percent impairment of one lower extremity is 37 percent of 288 weeks, or 106.56 weeks' compensation, and 37 percent impairment to both extremities is equal to 213.12 weeks, which is what the Office awarded. Under such circumstances, a claimant may have known that the schedule award issued did not account for past awards and was incorrect. The Office did not explain how it converted the percentage of impairment Dr. Momberger reported into the weeks of compensation awarded. The fact that appellant knew about the previous awards and knew the Office would have to take them into account did not reasonably put him on notice that the amount of compensation awarded on December 5, 2006 was incorrect. Moreover, the decision is confusing in stating an ending date of April 29, 2010 and in providing that appellant would be entitled to continuing compensation.

The Board finds that appellant was not at fault in creating the overpayment. This means he is eligible for consideration of waiver of the recovery of the overpayment. The Board will set aside the Office's fault finding and remand the case for further development of the evidence and an appropriate final decision on the issue of waiver.

CONCLUSION

The Board finds that appellant was not at fault in creating the overpayment. Further development and a final decision are therefore warranted on the issue of waiver.

[5] 5 U.S.C. § 1807(c)(2), (c)(19).

ORDER

IT IS HEREBY ORDERED THAT the May 29, 2008 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part. The case is remanded for further action consistent with this decision.

Issued: July 24, 2009
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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