



## **FACTUAL HISTORY**

On April 1, 2004 appellant, then a 39-year-old rural carrier associate, sustained injuries to her right wrist and left knee when she slipped and fell while delivering mail.<sup>1</sup> She underwent numerous surgical procedures on her right wrist and left knee and was totally disabled for intermittent periods. On February 1, 2008 appellant filed a schedule award claim and in a February 8, 2008 decision, was granted a schedule award for a 45 percent impairment of the right upper extremity and a 10 percent impairment of the left lower extremity. The schedule award was for a total of 169.2 weeks, to run from December 28, 2007 to March 26, 2011.

Appellant, through her attorney, advised the Office that she wanted her schedule award paid in a lump sum. A periodic schedule award payment of \$2,039.26 was made on February 6, 2008 for the period December 28, 2007 through January 19, 2008 and payments of \$2,549.07 each were made on February 16 and March 16, 2008 for the periods January 20 through February 16, 2008 and February 17 through March 15, 2008 respectively. In a February 20, 2008 letter, the Office informed appellant that a lump sum in her case would total \$94,766.49 as of March 16, 2008. Appellant was informed that this lump sum would represent “full and final compensation payment for the period of the award even if you suffer a recurrence of total disability.” On February 23, 2008 she signed an agreement to proceed with the lump-sum settlement of her schedule award. The agreement stated that appellant agreed to accept the sum of \$94,766.49 in payment of compensation for the commuted value of further installments of compensation for the remainder of the schedule award payable from March 16, 2008 to March 26, 2011 and “that I understand and agree that payment of such lump sum will represent full and final settlement of my schedule award for the period noted above in connection with my injury of April 1, 2004 and that no further monetary compensation benefits will be extended to me for the duration of the schedule award.” On March 21, 2008 the Office issued a payment of \$94,766.49 as a lump-sum payment for appellant’s schedule award. Appellant retired on disability effective June 4, 2008. The record shows that the Office made an additional 19 periodic schedule award payments of \$2,549.07 each, covering the period March 16, 2008 to August 29, 2009, for a total of \$48,432.33.

By letter dated September 14, 2009, the Office issued a preliminary determination that appellant had received an overpayment in compensation in the amount of \$48,432.33. It noted that she continued to receive periodic schedule award compensation benefits for the period March 16, 2006 to August 29, 2009, after she received a lump-sum payment for the period March 16, 2006 to March 25, 2011. The Office found appellant to be at fault in the creation of the overpayment because she accepted payments that she knew or should have known were incorrect.

On September 28, 2009 appellant requested a telephone conference and submitted an overpayment questionnaire. By decision dated October 16, 2009, the Office finalized the overpayment and in an October 23, 2009 letter, vacated the decision, noting that she had

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<sup>1</sup> The accepted conditions are contusion of left knee, contusion of right wrist, left knee sprain of cruciate ligament, old disruption of left anterior cruciate ligament, villonodular synovitis of the left lower leg and secondary malignant neoplasm of the bone and bone marrow, right. The record does not contain a diagnosis of secondary malignant neoplasm of the bone and bone marrow.

requested a telephone conference. A telephone conference was held on October 29, 2009. Appellant stated that she thought that, because she had a new functional capacity evaluation, she was entitled to an additional schedule award after the lump sum was paid and that she had telephoned to ask if she was entitled to the money. Her finances were discussed in reference to recovery of the overpayment.

By decision dated November 19, 2009, the Office finalized the determination that an overpayment in compensation in the amount of \$48,432.33 had been created and that appellant was at fault because she knowingly accepted compensation to which she was not entitled. A repayment schedule of \$300.00 a month was established.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 10.422(b) of the Office's regulations provide that the Office, in its exercise of discretion afforded under section 8135(a) of the Federal Employees' Compensation Act,<sup>2</sup> may make a lump-sum payment to an employee entitled to a schedule award under section 8107 when such a payment is in the employee's best interest.<sup>3</sup> Section 8116(a) of the Act provides:

“(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 pay, retirement pay, retainer pay, or equivalent pay for service in the Armed Forces or other uniformed services, subject to the reduction of such pay in accordance with section 5532(b) of [T]itle 5, United States Code.

“However, eligibility for or receipt of benefits under subchapter III of [C]hapter 83 of this title or another retirement system for employees of the Government, does not impair the right of the employee to compensation for scheduled disabilities specified by section 8107(c) of this title.”<sup>4</sup>

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<sup>2</sup> 5 U.S.C. § 8135(a).

<sup>3</sup> *Id.* at § 8107; 20 C.F.R. § 10.422(b).

<sup>4</sup> *Id.* at § 8116(a); *see Jorge O. Diaz*, 51 ECAB 124 (1999).

### **ANALYSIS -- ISSUE 1**

On February 8, 2008 the Office granted appellant a schedule award for a 45 percent permanent impairment of her right upper extremity and a 10 percent permanent impairment of her left lower extremity, for a total of 169.2 weeks of compensation, to run from December 28, 2007 to March 26, 2011. Appellant received schedule award compensation of \$2,039.26 on February 6, 2008 for the period December 28, 2007 through January 19, 2008 and payments of \$2,549.07 each on February 16 and March 16, 2008 for the periods January 20 through February 16, 2008 and February 17 through March 15, 2008 respectively. She requested that her schedule award be paid in a lump sum and by letter dated February 20, 2008, the Office informed her that a lump sum in her case would total \$94,766.49 as of March 16, 2008 and that this lump sum would represent “full and final compensation payment for the period of the award even if you suffer a recurrence of total disability.” On March 21, 2008 the Office issued a payment of \$94,766.49 as a lump-sum payment for her schedule award. Its computer print-outs show that it made 19 additional periodic schedule award payments of \$2,549.07 each, covering the period March 16, 2008 to August 29, 2009, for a total of \$48,432.33. As appellant had received \$94,766.49 as a lump-sum payment for “full and final compensation for the period of the [schedule] award” for the April 1, 2004 employment injury and subsequently received 19 additional periodic payments totaling \$48,432.33 to which she was not entitled, the Board findings that an overpayment in compensation in the amount of \$48,432.33 was created.<sup>5</sup>

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8129 of the Act provides that an overpayment in 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.”<sup>6</sup>

Section 10.433(a) of the Office’s regulations provide that 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 in 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

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<sup>5</sup> *E.V.*, 59 ECAB 258 (2007).

<sup>6</sup> *Id.* at § 8129; *see Linda E. Padilla*, 45 ECAB 768 (1994).

knew or should have known to be incorrect. (This provision applies only to the overpaid individual).”<sup>7</sup>

### **ANALYSIS -- ISSUE 2**

In this case, the Office applied the third standard in determining that appellant was at fault in the creation of the overpayment in compensation in the amount of \$48,432.33. In order for it to establish that appellant was at fault in creating the overpayment, it must establish that at the time she received the compensation in question, she knew or should have know that the payments were incorrect.<sup>8</sup>

Even though the Office may have been negligent in making incorrect payments following the lump-sum schedule award, this does not excuse appellant from accepting payments she knew or should have known to be incorrect.<sup>9</sup> Its February 20, 2008 letter, clearly advised her that the lump-sum payment pursuant to her schedule award would represent the only compensation she would receive for the period covered by the award, even if she sustained a recurrence of total disability. The Office issued appellant a lump-sum payment on March 21, 2008 in the amount of \$94,766.49. In accepting the lump-sum payment, appellant signed a statement on February 23, 2008 acknowledging that she understood and agreed that this lump-sum payment represented full and final settlement of her schedule award for the period March 16, 2008 to March 26, 2011 and that she was not entitled to any further compensation for the duration of the schedule award. The record establishes that she continued to receive periodic schedule award payments for the period March 16, 2008 to August 29, 2009. The first payment of \$2,549.09 was dated April 12, 2008. When appellant received this payment, after receiving the lump-sum payment of \$94,766.49 on March 21, 2008 and after she was clearly informed that she was not entitled to additional compensation, she should have known that this and the subsequent 18 additional payments were incorrect.

On appeal, appellant contends that she was not responsible for the creation of the overpayment because she believed the continued payments were for an increased schedule award. This argument is not persuasive. The Board finds that the February 20, 2008 Office letter put her on notice that the \$94,766.49 lump-sum payment of her schedule award represented the settlement of her claim and that she had no reasonable expectation of receiving additional schedule award compensation until the period the schedule award expired on March 26, 2011. The fact that appellant subsequently accepted periodic schedule award payments after she had received the lump-sum settlement for her schedule award establishes that she was at fault in the creation of the overpayment in compensation under the third criterion noted above. Based on the evidence of record, she accepted payments she knew or should have known to be incorrect. As the evidence establishes that appellant was at fault in the creation of the overpayment in

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<sup>7</sup> 20 C.F.R. § 10.433 (1999); *see Sinclair L. Taylor*, 52 ECAB 227 (2001); *see also id.* at § 10.430.

<sup>8</sup> *See Diana L. Booth*, 52 ECAB 370 (2001).

<sup>9</sup> *William E. McCarty*, 54 ECAB 525 (2003).

compensation in the amount of \$48,432.33 that occurred in this case, she was not entitled to waiver of the overpayment.<sup>10</sup>

With respect to 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.<sup>11</sup> As appellant is no longer receiving wage-loss compensation, the Board does not have jurisdiction with respect to the recovery of the overpayment under the Debt Collection Act.<sup>12</sup>

### **CONCLUSION**

The Board finds that the Office properly determined that appellant was at fault in the creation of an overpayment in compensation in the amount of \$48,432.33.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the November 19, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 2, 2010  
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

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<sup>10</sup> *E.V.*, *supra* note 5.

<sup>11</sup> *Cheryl Thomas*, 55 ECAB 610 (2004).

<sup>12</sup> *Id.* The Board notes that appellant submitted additional evidence with her appeal to the Board. The Board cannot consider this evidence, however, as its review of the case is limited to the evidence that was before the Office at the time it rendered its final decision. 20 C.F.R. § 501.2; *see Sandra D. Pruitt*, 57 ECAB 126 (2005).