

FACTUAL HISTORY

On July 29, 2002 appellant, then a 40-year-old city letter carrier, filed an occupational disease claim alleging that he sustained bilateral knee injuries as a result of employment activities.² OWCP accepted his claim for bilateral medial meniscal tears and aggravation of traumatic arthropathy. Appellant returned to full-time, unrestricted duty on March 4, 2006, at which point OWCP terminated him from the compensation rolls.

On July 18, 2006 OWCP issued schedule awards for a 50 percent permanent impairment of appellant's left leg and a 50 percent impairment of the right leg. The period of the awards ran from May 1, 2006 to November 6, 2011.

In a letter dated August 10, 2006, appellant requested a lump sum in lieu of periodic schedule award payments. By letter dated September 22, 2006, OWCP acknowledged his request and asked him to complete an enclosed form authorizing the one-time, lump-sum payment of \$152,037.62 in full satisfaction of his schedule award. On September 26, 2006 appellant signed the release form accepting a lump-sum payment in lieu of future periodic payments during the period of the award.

The record reflects that appellant received the lump-sum award in the amount of \$152,037.62, but he also continued to receive periodic compensation payments under the award through October 23, 2010. A December 2, 2010 payment worksheet reflects payments to appellant from May 1, 2006 to October 23, 2010 in the amount of \$140,814.99.

On December 3, 2010 OWCP issued a preliminary determination that appellant had received an overpayment in the amount of \$140,814.99. It found him at fault in creating the overpayment on the grounds that he knew or should have reasonably known the payments were incorrect.

On an overpayment recovery questionnaire, appellant requested a telephone conference. The form reflected that he had monthly income in the amount of \$4,736.00 and monthly expenses in the amount of \$5,899.00. The record does not contain any supporting documentation.

In a January 6, 2011 decision, OWCP found that appellant was at fault in creating an overpayment in the amount of \$140,814.99 because he accepted payments that he knew or reasonably should have known were incorrect.

Appellant appealed the January 6, 2011 decision to the Board. In an order dated September 28, 2011, the Board found the case was not in posture for a decision due to OWCP's failure to provide appellant with a telephonic hearing. The case was remanded to OWCP for the requested hearing and a *de novo* decision.

² This case was previously before the Board. In an order dated September 29, 2011, the Board set aside OWCP's January 6, 2011 overpayment decision on procedural grounds and remanded the case for further development. Docket No. 11-650 (issued September 28, 2011).

During a November 3, 2011 telephone conference, appellant reiterated his contention that he was not at fault because OWCP had erred in the creation of the overpayment. He stated that repayment would create a financial hardship. OWCP's hearing representative reviewed appellant's overpayment recovery questionnaire, which listed monthly income in the amount of \$4,736.00 and monthly expenses in the amount of \$5,899.00. The hearing representative advised appellant that he would not be able to establish hardship without documentation supporting his income and expenses. The record was kept open for 20 days in order to provide appellant with the opportunity to submit additional information. No additional evidence was received.

In a December 6, 2011 decision, OWCP's hearing representative found that appellant was at fault in creating an overpayment in the amount of \$140,814.99 because he had accepted payments that he knew or reasonably should have known were incorrect. The hearing representative directed appellant to repay the overpayment by submitting a monthly check in the amount of \$1,000.00.

LEGAL PRECEDENT -- ISSUE 1

FECA authorizes the payment of a schedule award for the loss or loss of use of a specified member, organ or function of the body. Compensation for the total loss of a lower extremity, as with amputation at the hip, is 288 weeks of compensation. Partial losses are compensated proportionately.³

ANALYSIS -- ISSUE 1

The fact and amount of overpayment are not in dispute. Appellant's September 22, 2006 schedule award was paid in a lump-sum payment in the amount of \$152,037.62. He acknowledged that he was not to receive any additional compensation during the period of the schedule award, May 1, 2006 through November 6, 2011. Appellant continued, however, to receive periodic payments through October 23, 2010 in the amount of \$140,814.99. As he was not entitled to such payments, an overpayment arose. The Board has reviewed the compensation payment history and finds that appellant received \$140,814.99 in compensation from May 1, 2006 through October 23, 2010. The Board will therefore affirm OWCP's December 6, 2011 decision on the issues of fact and amount of overpayment.

LEGAL PRECEDENT -- ISSUE 2

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. According to section 8129(b) of FECA, the only exception to this general rule is that 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 FECA or would be against equity and good conscience.⁴

³ 5 U.S.C. § 8107.

⁴ *Id.* at § 8129(b).

OWCP 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 payment he or she receives from OWCP 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.⁵

Whether or not 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 is being overpaid.⁶

The fact that OWCP may have erred in making the overpayment does not by itself relieve the individual who received the overpayment from liability for repayment if the individual also was at fault in accepting the overpayment.⁷

ANALYSIS -- ISSUE 2

The provisions of appellant's July 18, 2006 schedule award defined the period of the award as May 1, 2006 to November 6, 2011. Further, he sought payment of a lump sum which was approved by OWCP. The terms of the lump sum was in full satisfaction of the award and precluded appellant's receipt of any further monetary compensation benefits during the period of the award. He agreed to these terms. Having been placed on notice, appellant knew or should have known that he was not entitled to additional compensation payments after he received the lump sum. Notwithstanding, accepted receipt of compensation payments for more than five years. Under the circumstances of this case, the Board finds that appellant was at fault in creating the overpayment because he accepted payments that he should have known to be incorrect and is, therefore, not entitled to consideration of waiver.

Appellant contends that he was not at fault because OWCP's error created the overpayment. OWCP's negligence, however, does not relieve him of fault in accepting the incorrect payments.⁸ Appellant also stated that he is financially unstable. As the Board has determined that he was at fault in the creation of the overpayment, waiver cannot be considered.

The Board finds that appellant was at fault in creating the overpayment, as he knew or should have known that the payments he accepted after receiving the lump-sum schedule award

⁵ 20 C.F.R. § 10.433(a).

⁶ *Id.* at § 10.433(b).

⁷ *Id.* at § 10.435(a).

⁸ *Id.*

were incorrect. As he was with fault in this matter, appellant is not entitled to consideration of waiver. The Board will affirm OWCP's December 6, 2011 decision on the issue of fault.

CONCLUSION

The Board finds that appellant was at fault in creating an overpayment of \$140,814.99 and is thus not eligible for consideration of waiver.⁹

⁹ The Board does not have jurisdiction over recovery of the overpayment as OWCP has not issued a final decision directing recovery from continuing compensation benefits. *See* 20 C.F.R. § 501.2(c); *see D.R.*, 59 ECAB 148 (2007).

ORDER

IT IS HEREBY ORDERED THAT the December 6, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 14, 2013
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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