

while pushing an all-purpose container. OWCP accepted the claim for closed fracture of the right tibia and fibula. By decision dated February 25, 2009, it determined that appellant was not entitled to a schedule award for his injuries.

In a report dated March 27, 2009, Dr. Martin Fritzhand, a Board-certified urologist, provided a history and results on examination. He noted that appellant had retired from the employing establishment but was currently working. Dr. Fritzhand opined that appellant had a 30 percent permanent impairment to the right leg. By report dated July 15, 2009, an OWCP medical adviser concurred that appellant had a 30 percent right leg impairment.

By decision dated August 20, 2009, OWCP issued a schedule award for a 30 percent permanent impairment to the right leg. The decision stated the period of the award was 86.40 weeks, from December 1, 2008 to July 28, 2010. The compensation rate was reported as 75 percent of weekly pay rate. OWCP advised appellant that, after the ending date of the award, entitlement to ongoing compensation would be based solely on disability for work. It indicated that he could claim continuing compensation by submitting evidence showing the accepted injury caused disability for work. In addition, appellant was advised that if he was being paid at the augmented compensation rate (75 percent) because he had one or more dependents, he must notify OWCP in writing of any change in the status of dependents. The notice must include the effective date of the change and if there was a change in the status of a sole dependent, he should return any payments received after the change in status to OWCP.

The record contains a memorandum of telephone call (Form CA-110) dated January 14, 2010. Appellant stated that he was divorced as of November 2009. OWCP advised him that this would result in a change to the statutory compensation rate of 66 2/3 percent and he stated that he did not understand why this would occur. As of January 17, 2010, it began paying compensation pursuant to the schedule award based on a compensation rate of 66 2/3 percent. On January 19, 2010 appellant submitted a January 15, 2010 Form EN1032 regarding employment activity and dependents. He advised that he had no dependents as of November 10, 2009 and he enclosed a copy of the marriage dissolution decree. According to the evidence, appellant continued to receive compensation payments through April 9, 2011.

By letter dated September 27, 2011, OWCP advised appellant of a preliminary determination that an overpayment of compensation of \$29,882.70 was created. It found an overpayment from November 10, 2009 to January 16, 2010 based on an incorrect compensation rate and an overpayment from July 29, 2010 to April 9, 2011 as he continued to receive compensation payments after the expiration of the schedule award. OWCP calculations showed that appellant had received \$101,451.44 in compensation pursuant to the schedule award, but should have received \$71,568.74 if the proper compensation rate and ending date had been applied. It also advised him of a preliminary determination that he was not without fault in creating the overpayment.

Appellant requested a hearing before an OWCP hearing representative, which was held on February 3, 2012. He stated that he did not have a clear understanding of the ending date of the schedule award.

By decision dated April 2, 2012, the hearing representative finalized the preliminary determinations as to fact and amount of the overpayment. The hearing representative also found that appellant was at fault in creating the overpayment and waiver was denied.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provisions of FECA are found at 5 U.S.C. § 8107 and provide that, if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to compensation for the permanent impairment of the scheduled member or function.² Neither, FECA nor the regulations specify the manner in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal justice for all claimants OWCP has adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the uniform standard applicable to all claimants.³ If a claimant receives compensation payments pursuant to a schedule award in excess of the degree of permanent impairment established by the medical evidence, an overpayment of compensation may be created.⁴

According to 5.U.S.C. § 8107, a claimant is entitled to basic compensation at the rate of 66 2/3 percent of pay for the number of weeks established by the compensation schedule for the affected member or function of the body. Under 5 U.S.C. § 8110, a claimant is entitled to augmented compensation at 75 percent of the pay rate if the claimant has a dependent.

ANALYSIS -- ISSUE 1

The overpayment in this case is based on two overpayments that OWCP considered together. OWCP found an overpayment from July 29, 2010 to April 9, 2011, as appellant received compensation after the expiration of the schedule award. The schedule award in this case was for a 30 percent impairment to the right leg. According to 5 U.S.C. § 8107, complete loss of use of the leg results in 288 weeks of compensation. As the medical evidence of record establish that appellant had a 30 percent impairment, he was entitled to 86.40 weeks of compensation. The period of the award was properly found to be from December 1, 2008 to July 28, 2010, which is 86.40 weeks.

The evidence establishes that appellant was not entitled to compensation after July 28, 2010 based on permanent impairment to his right leg. In addition, there was no evidence that he was entitled to continuing compensation based on disability for work. The last medical report from an attending physician was Dr. Fritzhand's March 27, 2009 report, which provides no relevant opinion as to disability after July 28, 2010. The Board finds that the evidence supports a

² 5 U.S.C. § 8107. This section enumerates specific members or functions of the body for which a schedule award is payable and the maximum number of weeks of compensation to be paid; additional members of the body are found at 20 C.F.R. § 10.404(a).

³ A. *George Lampo*, 45 ECAB 441 (1994).

⁴ See *Richard Saldibar*, 51 ECAB 585 (2000) (the Board found that the overpayment issue was not in posture because OWCP had not properly resolved the schedule award issue).

finding that any compensation received after the expiration of the schedule award on July 28, 2010 represented an overpayment of compensation.

With respect to the compensation rate, the evidence reflects that appellant no longer had any eligible dependents as of November 10, 2009, the date of his marriage dissolution decree. In accord with 5 U.S.C. § 8107, appellant should have been paid compensation based on the statutory rate of $66 \frac{2}{3}$ of his monthly pay. Instead he continued to receive compensation at the augmented rate of 75 percent through January 16, 2010. For the period November 10, 2009 to January 16, 2010, the difference between compensation at the augmented and the basic statutory rate represents an overpayment of compensation.

With respect to the amount of the overpayment, the difference between the total amount of compensation appellant received, \$101,451.44 and the amount he should have received, \$71,568.74, was found to be the overpayment amount of \$29,882.70. OWCP provided its calculations and accompanying documentation and there is no contrary evidence. The Board does note that the fault analysis discussed below requires that the two overpayments be considered separately, as they are separate issues. Had appellant been found to be without fault with respect to one of the overpayments, OWCP would be required to provide separate calculations as to each overpayment.

LEGAL PRECEDENT -- ISSUE 2

5 U.S.C. § 8129(b) provides: “Adjustment or recovery by the United States may not be made when incorrect payment has 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.”⁵ A claimant who is at fault in creating the overpayment is not entitled to waiver.⁶ On the issue of fault, 20 C.F.R. § 10.433 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) accepted a payment which he or she knew or should have known was incorrect.”

ANALYSIS -- ISSUE 2

With respect to the overpayment created because the schedule award continued beyond July 28, 2010, the Board notes that the August 20, 2009 OWCP decision clearly stated the period of the award and the ending date. In addition, appellant was advised that the only basis for continuing compensation after July 28, 2010 was compensation based on disability for work. In this case, he did not claim compensation for wage loss on or after July 28, 2010 or submit any medical evidence regarding his current employment-related condition or disability for work.

A finding of fault may be established when a claimant accepts payments that he should have known was incorrect. Although appellant asserted that he did not have a clear

⁵ 5 U.S.C. § 8129(b).

⁶ See *Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

understanding of the ending date, the issue is whether he knew or should have known the date the schedule award expired. The Board finds that, based on the clear language of the August 20, 2009 decision and the lack of any probative evidence regarding entitlement to continuing compensation, he should have known that any compensation received after July 28, 2010 was incorrect.⁷ Each compensation check includes the period covered by the payment.⁸ Appellant accepted a compensation payment on July 31, 2010 covering compensation through that date and accepted payments every 28 days through April 9, 2011. Pursuant to 20 C.F.R. § 10.433, he was at fault with respect to receipt of compensation after July 28, 2010 and is not entitled to waiver of this overpayment.

The remaining issue is fault as to the overpayment based on an incorrect compensation rate. The August 20, 2009 decision provided clear instructions to a claimant who has a sole dependent and is receiving compensation at the augmented rate. If there is a change in status of the dependent OWCP should be notified in writing and any payment after the change in status should be returned. Appellant knew or should have known that compensation received after November 10, 2009 should be returned until OWCP had an opportunity to adjust the compensation rate. He accepted a compensation payment on November 21, 2009 for \$3,451.23, which represented the amount he had previously received based on the 75 percent compensation rate for a claimant with a dependent. Appellant should have known that this payment and subsequent payments in this amount were incorrect because he no longer had any dependents. Pursuant to 20 C.F.R. § 10.433, he was at fault with respect to compensation from November 10, 2009 to January 16, 2010 and is not entitled to waiver of the overpayment.

CONCLUSION

The Board finds that an overpayment of \$29,882.70 was created as appellant received compensation from November 10, 2009 to January 16, 2010 based on an incorrect compensation rate and from July 29, 2010 to April 9, 2011 as the schedule award had expired. The Board further finds that he was at fault in creating the overpayment and therefore was not entitled to waiver.

⁷ See *J.W.*, Docket No. 11-2116 (issued August 3, 2012) (claimant was at fault in accepting payment covering a period after the expiration of schedule award).

⁸ 20 C.F.R. § 10.430(a).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 2, 2012 is affirmed.

Issued: January 28, 2013
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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