

**United States Department of Labor
Employees' Compensation Appeals Board**

J.A., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Palatine, IL, Employer**

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**Docket No. 13-478
Issued: June 4, 2013**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On December 26, 2012 appellant filed a timely appeal from November 21 and December 14, 2012 decisions of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received an overpayment in the amount of \$47,250.56 for the period January 16, 2011 to April 7, 2012; and (2) if so, whether appellant is without fault in the creation of the overpayment.

FACTUAL HISTORY

On September 11, 2007 appellant, then a 57-year-old mail handler, filed a traumatic injury claim for a right knee injury sustained in the performance of duty on September 10, 2007.

¹ 5 U.S.C. § 8101 *et seq.*

OWCP accepted his claim for right medial meniscus tear, right lower leg joint pain and right leg osteoarthritis.

On February 23, 2009 appellant was granted a schedule award for 37 percent permanent impairment of the right leg. He was advised that the award would run from December 29, 2008 to January 13, 2011. In a March 5, 2009 letter, OWCP advised appellant that his schedule award benefits were to end on January 13, 2011. Appellant was also advised of his right to obtain a lump-sum schedule award payment.

The record reflects that on January 13, 2011 the schedule award payments failed to automatically cease as scheduled. A telephone call memorandum substantiates that OWCP notified appellant on January 12, 2011 that his schedule award had not automatically stopped as of January 13, 2011 and he would be receiving benefits through January 15, 2011. Appellant was advised that he was not entitled to any schedule award benefits after January 13, 2011 and that he would receive an overpayment of compensation for January 14 and 15, 2011. OWCP informed him that he could send a check for the overpaid amount of \$207.21. Appellant repaid OWCP by personal check the \$207.21 as directed. OWCP again failed to cease the schedule award payments and he received ongoing payments.

By letter dated October 7, 2011, OWCP advised appellant that a periodic medical report was necessary to receive continued compensation benefits. Appellant was advised that his physician should address questions regarding his diagnoses and disability in a narrative report.

In April 2012 OWCP determined that appellant continued to receive payments for schedule award benefits after he wrote to advise OWCP that his youngest child had turned 18.

On April 18, 2012 OWCP issued a preliminary notice of overpayment. It found that an overpayment was created in the amount of \$47,250.56 for the period January 16, 2011 to April 7, 2012, because appellant received schedule award benefits to which he was not entitled. During this period, appellant received two payments in the amount of \$2,901.00, one payment in the amount of \$2,971.00, eleven payments in the amount of \$2,950.00, one payment in the amount of \$2,983.57 and one payment in the amount of \$3,044.00. He was found to be with fault in the creation of the overpayment, as accepted compensation benefits which he knew or should have known to be incorrect.

Appellant disagreed with the decision and requested a prerecoupment hearing. On August 30, 2012 he testified that he had received a notice that he had been overpaid \$207.51 during January 2011. Appellant repaid the amount in full, but received additional checks from OWCP. He stated that he contacted the district OWCP, which assured him that the matter would be dealt with; but he continued to receive additional payments and he again contacted OWCP. Appellant received an October 4, 2011 letter instructing him to go to his doctor to keep his schedule award going until April 30, 2014. He stated that he understood the calculation of the amount and the reason for the overpayment.

Appellant submitted an OWCP-20 overpayment questionnaire form. It listed his assets, which included \$30,000.00 in bonds in his son's name for his college education, \$40,900.00 in a

checking account and \$96,000.00 in a savings account. Appellant also noted that he retained \$36,131.57 of the incorrect schedule award payments.

In a November 21, 2012 decision, OWCP found that appellant received an overpayment in the amount of \$47,250.56, for which he was with fault. In a December 14, 2012 decision, it affirmed the fault determination.

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 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.

According to 5 U.S.C. § 8106(a), a claimant is entitled to basic compensation at the rate of 66 2/3 percent of pay for the number of weeks established under 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

Appellant's February 23, 2009 schedule award ran from December 29, 2008 to January 13, 2011. He acknowledged that he was not entitled to receive any additional compensation after January 13, 2011. As to the overpayment appellant received for January 14 and 15, 2011, he returned this amount to OWCP. He continued, however, to receive periodic payments through April 7, 2012 in the amount of \$47,250.56. As appellant was not entitled to such payments, an overpayment arose. OWCP provided its calculations and accompanying documentation and there is no contrary evidence. The Board has reviewed the compensation payment history and finds that appellant received \$47,250.56 in compensation from January 16, 2011 through April 7, 2012. The Board will affirm OWCP's November 21 and December 14, 2012 decisions 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

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).

adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.³

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 payments 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.⁴

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.⁵

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.⁶

ANALYSIS -- ISSUE 2

The provisions of appellant's February 23, 2009 schedule award defined the period of the award as December 29, 2008 to January 13, 2011. He was advised on several occasions of the ending date of the schedule award on January 13, 2011. Appellant was again advised when the schedule award expired by letter dated March 5, 2009. In addition, he was advised by telephone that he was no longer entitled to schedule award benefits in January 2011 and repaid an initial overpayment for two days. Having been placed on notice, appellant knew or should have known that he was not entitled to additional compensation payments and that such payments were incorrect. The accepted receipt of compensation payments was from January 16, 2011 until April 7, 2012.

The Board finds that appellant was at fault in creating the overpayment because he accepted payments that he knew or should have known to be incorrect. Appellant is 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

³ 5 U.S.C. § 8129(b).

⁴ 20 C.F.R. § 10.433(a).

⁵ *Id.* at § 10.433(b).

⁶ *Id.* at § 10.435(a).

incorrect payments.⁷ Appellant contends that because OWCP sought further medical evidence from his physician in October 2011, he believed his schedule award had been extended. While OWCP did request a narrative report from appellant's physician in October 2011 regarding his disability status, there is no evidence of record that it notified him of any ongoing entitlement to schedule award compensation or that it found that he was entitled to receipt of wage-loss disability benefits upon the termination of the schedule award on January 13, 2011.

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 January 14, 2011 were incorrect. As appellant was with fault in this matter, he is not entitled to consideration of waiver. The Board will affirm OWCP's November 21, 2012 decision on the issue of fault.

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment in the amount of \$47,250.56 for the period January 16, 2011 to April 7, 2012 and that he is with fault in the creation of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the December 14 and November 21, 2012 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: June 4, 2013
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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

⁷ *Id.*