

FACTUAL HISTORY

OWCP accepted that on October 23, 2007 appellant, then a 40-year-old painter, sustained a sprain of the lateral collateral ligament of his left knee when he struck his knee at work. Appellant's claim was later expanded to include acceptance of internal derangement of his left knee. On February 22, 2010 he filed a CA-7 form alleging entitlement to schedule award compensation due to the accepted work conditions.

In an August 5, 2010 decision, OWCP granted appellant a schedule award for 10 percent permanent impairment of his left leg. It advised him that the award would run for 28.8 weeks from June 3 to December 21, 2010. OWCP stated, "Payment of your award ends when you have been paid for the last day shown in item 3 above." The last day shown in item three was December 21, 2010. The decision was addressed to appellant's address of record.

In a September 9, 2013 letter, OWCP advised appellant that it had made a preliminary determination of a \$90,329.86 overpayment of compensation for the period December 22, 2010 to June 29, 2013 because, due to a system failure, he continued to receive schedule award compensation for this period after December 21, 2010. It also made a preliminary determination that he was at fault in the creation of the overpayment because he accepted payments that he knew or should have known to be incorrect. Regarding its fault determination, OWCP stated:

"[It] placed the claimant on the schedule award periodic roll[s], effective August 1, 2010. By letter dated August 5, 2010[,] [OWCP] advised the claimant that compensation would be paid each four weeks, that the period of the award of compensation was from June 3 through December 21, 2010 (Item 3) and that 'Payment of your award ends when you have been paid for the last day shown in item three above.' As such the claimant was paid, accepted and has not returned compensation for which he was aware he was not entitled to from December 22, 2010 through June 29, 2013."²

Appellant requested a telephonic prerecoument hearing with an OWCP hearing representative in connection with the overpayment matter. During the prerecoument hearing held on April 21, 2014, he asserted that he never received anything stating how long or how much he was supposed to get from his August 5, 2010 schedule award. Appellant indicated that he tried to call OWCP to obtain clarification of this matter but that he could "never get a response." He testified regarding his financial circumstances, indicating that he had about \$10,000 in a retirement account.

Appellant submitted an overpayment recovery questionnaire, completed on September 28, 2013, in which he indicated that he had monthly income of \$1,028.53, monthly expenses of \$2,317.50 and no assets. He asserted that he was not at fault in the creation of overpayment and requested waiver of recovery of the overpayment.

² OWCP requested that appellant complete and return an enclosed overpayment recovery questionnaire and advised him that he could request a prerecoument hearing with an OWCP hearing representative. It attached payment records and worksheets showing that appellant received \$90,329.86 in schedule award payments for the period December 22, 2010 to June 29, 2013.

In a June 10, 2014 decision, an OWCP hearing representative finalized OWCP's preliminary determination that appellant received a \$90,329.86 overpayment of compensation which occurred for the period December 22, 2010 to June 29, 2013 because he continued to receive schedule award compensation for this period after December 21, 2010. The hearing representative found that appellant was at fault in the creation of the overpayment because he accepted payments that he knew or should have known to be incorrect. Given this fault finding, waiver of recovery of the overpayment was precluded. OWCP hearing representative found that the \$90,329.86 overpayment would be recovered through payments of \$400.00 per month.³

LEGAL PRECEDENT -- ISSUE 1

Section 8102 of FECA provides that the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.⁴

Section 8116 of FECA provides that, while an employee is receiving compensation, he or she may not receive salary, pay or remuneration of any type from the United States, except in limited circumstances.⁵ Schedule award compensation is paid for specified periods according to the extent of the permanent impairment of the scheduled member or members.⁶

ANALYSIS -- ISSUE 1

The Board finds that the evidence of record shows that appellant received a \$90,329.86 overpayment of compensation. In an August 5, 2010 decision, OWCP granted appellant a schedule award for a 10 percent permanent impairment of his left leg. The award ran for 28.8 weeks from June 3 to December 21, 2010 and it specifically indicated that there was no entitlement to schedule award compensation after December 21, 2010. The record contains payment records and worksheets showing that appellant received \$90,329.86 in schedule award payments for the period December 22, 2010 to June 29, 2013. Given that appellant was not entitled to receive compensation after December 21, 2010, the total amount of compensation received during that period is an overpayment. Therefore, he received a \$90,329.86 overpayment for the period December 22, 2010 to June 29, 2013.

³ With respect to the recovery of an overpayment, the Board's jurisdiction is limited to those cases where OWCP seeks recovery from continuing compensation benefits. *D.R.*, 59 ECAB 148 (2007); *Miguel A. Muniz*, 54 ECAB 217 (2002). As appellant was not in receipt of compensation at the time of OWCP's overpayment determination, the Board does not have jurisdiction over the method of recovery of the overpayment in this case. *See Lorenzo Rodriguez*, 51 ECAB 295 (2000); 20 C.F.R. § 10.441.

⁴ 5 U.S.C. § 8102.

⁵ *Id.* at § 8116(a).

⁶ *Id.* at § 8107.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of FECA provides that where an overpayment of compensation has been made “because of an error of fact or law,” adjustment shall be made by decreasing later payments to which an individual is entitled.⁷ The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): “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 this subchapter or would be against equity and good conscience.”⁸ No waiver of payment is possible if the claimant is not “without fault” in helping to create the overpayment.⁹

In determining whether an individual is not “without fault” or alternatively, “at fault,” section 10.433(a) of Title 20 of the Code of Federal Regulations provide in relevant part:

“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....”¹⁰

Section 10.433(b) of OWCP’s regulations provide:

“Whether or not OWCP determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. 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.”¹¹

ANALYSIS -- ISSUE 2

OWCP properly found that appellant was at fault in the creation of the \$90,329.86 overpayment of compensation under the third prong of the above-described test, *i.e.*, he accepted payments which he knew or should have known to be incorrect.

⁷ 5 U.S.C. § 8129(a).

⁸ *Id.* at § 8129(b).

⁹ *L.J.*, 59 ECAB 264 (2007).

¹⁰ 20 C.F.R. § 10.433(a).

¹¹ *Id.* at § 10.433(b).

The Board notes that OWCP clearly advised appellant that he would not be entitled to receive schedule award compensation after December 21, 2010 and that, therefore, he knew or should have known that he could not accept schedule award payments after that date. In its August 5, 2010 schedule award decision, OWCP clearly advised appellant that the award would run for 28.8 weeks from June 3 to December 21, 2010. OWCP stated, "Payment of your award ends when you have been paid for the last day shown in item 3 above." The last day shown in item three was December 21, 2010. During the precoupment hearing, appellant asserted that he did not receive OWCP's August 5, 2010 schedule award decision. Absent evidence to the contrary, a letter properly addressed and mailed in the ordinary course of business is presumed to have been received. This is known as the mailbox rule.¹² OWCP's August 5, 2010 decision was sent to appellant's address of record and is presumed to have been received by him absent any notice of nondelivery. Appellant has not submitted evidence to rebut this presumption.

Before OWCP and on appeal, appellant alleged that he attempted to contact OWCP on several occasions in order to clarify matters concerning the end of his receipt of schedule award compensation, but that he was unsuccessful in his attempts. However, appellant did not adequately describe the nature of these attempts or submit evidence to support his assertions in this regard. As previously discussed, he was clearly informed that he would not be entitled to schedule award compensation after December 21, 2010. Even though OWCP may have been negligent in continuing to issue appellant checks for schedule award compensation after December 21, 2010, this does not excuse his acceptance of such checks which he knew or should have known were incorrect.¹³ For these reasons, OWCP properly found appellant at fault in the creation of the \$90,329.86 overpayment, thereby precluding waiver of recovery of the overpayment.¹⁴

CONCLUSION

The Board finds that OWCP properly determined that appellant received a \$90,329.86 overpayment of compensation. The Board further finds that OWCP properly determined that he was at fault in creating the overpayment of compensation, thereby precluding waiver of recovery of the overpayment.

¹² See *James A. Gray*, 54 ECAB 277 (2002).

¹³ See *Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

¹⁴ See *supra* notes 8 and 9.

ORDER

IT IS HEREBY ORDERED THAT the June 10, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 16, 2014
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board