

right ankle, right knee, lumbar spine, and neck, a contusion of the right hip, an aggravation of preexisting osteoarthritis of the right knee, and displacement of an intervertebral lumbar disc without myelopathy.

On February 7, 2011 appellant underwent a right total knee arthroplasty.² He stopped work on February 7, 2011 and returned to work on March 10, 2011. OWCP paid appellant compensation for temporary total disability.

By decision dated December 7, 2012, OWCP granted appellant a schedule award for a 21 percent permanent impairment of the right leg. The award ran for 60.38 weeks from September 14, 2012 to November 11, 2013.³

By letter dated December 11, 2012, OWCP advised appellant that his schedule award would run through November 11, 2013, but that he could request to receive the remainder of his schedule award as a lump sum if he was either working or receiving benefits from the Office of Personnel Management (OPM).

On December 23, 2012 appellant notified OWCP that he wanted to receive the remainder of his schedule award in a lump sum. On January 4, 2013 OWCP terminated his schedule award compensation payments as he had elected a lump sum.

By letter dated January 27, 2013, appellant requested that OWCP continue paying him monthly schedule award compensation. On February 6, 2013 OWCP informed him that it was attempting to reinstate monthly payments. In a February 8, 2013 internal memorandum, it noted that it had paid appellant \$7,424.21 before stopping his schedule award compensation and that he was entitled to compensation for an additional 302.36 days. OWCP indicated that its system did not allow a schedule award to be reinstated once terminated and advised that it had placed appellant on the periodic rolls effective February 10, 2013. It determined that it would issue compensation for the period January 13 to February 9, 2013 on February 10, 2013 and noted that it would need to manually terminate the schedule award prior to November 6, 2013.

On January 13, 2014 appellant left a message for OWCP to telephone him about his compensation. In a memorandum documenting a January 13, 2014 telephone call, OWCP advised him “of payment status and that he should have received payment dated January 11, [2014] per [compensation] history.”

On May 29, 2013 appellant accepted a job offer from the employing establishment.

The record indicates that appellant was paid schedule award compensation through the periodic rolls until March 9, 2014.

² By decision dated December 6, 2010, OWCP denied appellant’s claim for compensation for time lost from work due to a medical appointment on September 13, 2010. In a decision dated April 21, 2011, it denied his claim for four hours of time lost for a medical appointment on October 18, 2011.

³ OWCP did not provide a copy of the December 7, 2012 decision to appellant’s authorized representative. On December 10, 2012 counsel inquired when OWCP was going to issue a schedule award decision. On January 22, 2013 OWCP provided him with a copy of the December 7, 2012 schedule award decision.

On March 25, 2014 OWCP identified an overpayment of compensation because appellant's schedule award payments had not been manually terminated on November 6, 2013, but instead continued through March 8, 2014. It noted that he was working full time while receiving his schedule award payments.

On April 10, 2014 OWCP advised appellant of its preliminary determination that he received an overpayment of compensation in the amount of \$7,347.32 because he received schedule award compensation from November 11, 2013 through March 8, 2014 to which he was not entitled. It calculated the overpayment by determining the amount he received from November 17, 2013 to March 8, 2014 to find an overpayment of \$7,347.32. OWCP further advised appellant of its preliminary determination that he was at fault in the creation of the overpayment. It requested that he complete the enclosed overpayment recovery questionnaire and submit supporting financial documents. Additionally, OWCP notified appellant that, within 30 days of the date of the letter, he could request a telephone conference, a final decision based on the written evidence, or a prerecoupment hearing.

On April 15, 2014 appellant requested a prerecoupment hearing and telephone conference. In an overpayment recovery questionnaire, he challenged the existence and amount of the overpayment and the finding that he was at fault. Appellant maintained that he telephoned OWCP in January 2014 to inquire about the payments and OWCP told him that changing his lump-sum request to a request to receive monthly payments altered the date the schedule award expired. OWCP advised him that when he received less than the regular payment that would be the final check.

During the telephone prerecoupment hearing, held on November 10, 2014, appellant and counsel stipulated as to fact and amount of the overpayment. Counsel noted that appellant was not informed that his schedule award payments were being changed to payments on the periodic rolls. He also asserted that OWCP did not advise him of the change.

On December 8, 2014 appellant submitted financial information.

By decision dated January 20, 2015, an OWCP hearing representative determined that appellant was at fault in the creation of an overpayment of compensation in the amount of \$7,347.32 from November 11, 2013 to March 8, 2014. She found that the December 7, 2012 decision put him on notice of the ending date of his schedule award compensation and that he consequently knew or should have known that he was not entitled to compensation after that date. The hearing representative instructed appellant to repay the overpayment in full.

LEGAL PRECEDENT

Under OWCP regulations, waiver of the recovery of an overpayment may be considered only if the individual to whom it was made was not at fault in accepting or creating the overpayment.⁴ The fact that the overpayment was the result of error by OWCP or another government agency does not by itself relieve the individual who received the overpayment of

⁴ 20 C.F.R. § 10.433(a).

liability for repayment if the individual also was at fault for receiving the overpayment.⁵ Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she received from OWCP are proper. The recipient must show good faith and exercise a high degree of care in reporting events that 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; (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 (this provision applies only to the overpaid individual).⁶

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 is being overpaid.⁷

ANALYSIS

Appellant, through counsel, stipulated that he received an overpayment of compensation in the amount of \$7,347.32 for the period November 11, 2013 to March 8, 2014, but challenged the finding that he was at fault in creating the overpayment. OWCP determined that he was at fault because he accepted compensation benefits that he knew or should have known to be incorrect. It found that the December 7, 2012 schedule award decision clearly identified the expiration date of the schedule award as November 11, 2013. The Board finds, however, that OWCP did not support its finding of fault because of its interruption of his schedule award payments after he requested a lump-sum payment. This complicated the payment process.

Appellant requested a lump-sum payment in lieu of monthly compensation for his schedule award. On January 4, 2013 OWCP stopped paying him compensation for his schedule award based on his request for a lump sum. Appellant subsequently advised OWCP that he did not want a lump-sum payment for the remainder of his schedule award. OWCP notified him on February 6, 2013 that it was attempting to reinstate his schedule award payments. It again began paying appellant monthly schedule award compensation on February 10, 2013. The February 10, 2013 payment covered the period January 13 to February 9, 2013. OWCP paid appellant schedule award compensation using the periodic rolls as the computer system did not allow it to reinstate the schedule award payments. It did not, however, stop payments on November 11, 2013 but instead continued to pay him compensation for the schedule award until March 8, 2014.

In response to OWCP's preliminary determination that he was at fault in creating an overpayment of compensation, appellant asserted that in January 2014 he telephoned OWCP to ask about the continuing payments. He maintained that OWCP advised him that changing the

⁵ *Id.* at § 10.435(a).

⁶ *Id.* at § 10.433(a); *see Kenneth E. Rush*, 51 ECAB 116 (1999).

⁷ *Id.* at § 10.433(b); *see also L.J.*, 59 ECAB 264 (2007).

lump-sum request back to a request for monthly payments altered the termination date of the schedule award payments. Appellant related that OWCP informed him that he would recognize the final installment because the benefit amount would be less than the usual amount of prior payments.

The record indicates that on January 13, 2014 appellant left a message requesting to speak with OWCP about his compensation. In a memorandum of a telephone call dated January 13, 2014, an OWCP claims examiner advised appellant that based on the compensation history he should have received the payment dated January 11, 2014. The January 13, 2014 report of telephone call, while not definitively establishing that OWCP told him that the ending date of his schedule award had changed, lends support to his allegation.

Additionally, OWCP informed appellant on February 6, 2013 that it had not yet reinstated his schedule award payments, given the confusion, it was reasonable for him to believe that the correct date of his last schedule award payment had been altered by the interruption. Consequently, it has not shown that he knew or should have known at the time he received the schedule award payments subsequent to November 11, 2013 that they were inaccurate. OWCP thus erred in finding that appellant was at fault in creating the overpayment.

The Board will set aside OWCP's January 20, 2015 decision on the issue of fault. On remand, OWCP must determine whether appellant is eligible for waiver of recovery of the overpayment. The Board will remand the case for further development of the evidence regarding his current financial circumstances and for an appropriate final decision on the issue of waiver.

CONCLUSION

The Board finds that OWCP has not established that appellant was at fault in creating the overpayment of compensation in the amount of \$7,347.32 for the period November 11, 2013 to March 8, 2014. The case is remanded for further development on the issue of waiver of recovery of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the January 20, 2015 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: July 13, 2015
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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