

appellant contends that he initially believed that the extra payments were compensation for additional claims for which he was seeking acceptance and that he tried to notify the Office of the overpayment.¹

FACTUAL HISTORY

On February 27, 2003 appellant, then a 43-year-old mail handler, filed an occupational injury claim, Form CA-2, alleging that his employment had aggravated the diagnosed scleroderma/Raynaud's disease in his hands. On June 26, 2003 the Office accepted his claim for scleroderma/Raynaud's disease. By decision dated January 10, 2005, appellant's claim was additionally accepted for interstitial lung disease.

On January 11, 2005 appellant filed a claim for a schedule award for his hands. At his request, on May 12, 2005 the Office vacated its acceptance of the lung condition. Appellant informed the Office that he would be filing a claim on his lung condition separately and that he wanted to move forward on the schedule award for his hands.²

By decision dated June 30, 2005, the Office issued appellant a schedule award for the 55 percent impairment of each arm. He was awarded 343.2 weeks of compensation for the period March 18, 2005 to October 16, 2011. The award specified that appellant was to receive \$9,901.61 for the period March 18 to July 9, 2005 and \$2,431.97 every four weeks thereafter for the duration of the award period.

On October 27, 2005 the Office received a letter from appellant requesting that his accepted condition of scleroderma be broadened to accept its effect on other parts of his body. He stated that the autoimmune disease was affecting his internal organs, including his lungs and his esophagus. As a result of these effects, appellant had been diagnosed with heart disease, shortness of breath and acid reflux disease. He stated that a letter from his physician requesting acceptance of these conditions had been disregarded. The referenced letter from Dr. Kimberly McCrea, a Board-certified internist with a specialty in pulmonary disease, was dated June 22, 2005 and stated that appellant's scleroderma was the cause of severe secondary pulmonary hypertension and *cor pulmonale*.

Appellant enrolled in the Office's direct deposit program on December 27, 2005.

On June 9, 2006 appellant called the Office to inquire why he was receiving two checks per month. He stated that he did not want to incur an overpayment. The Office investigated and determined that on April 15, May 13 and June 10, 2006 appellant had been issued two checks, in the amounts of \$2,431.97 and \$2,517.00. It determined that he was entitled to only \$7,551.00 for this period, but had received \$14,846.91. The Office found that appellant had received an overpayment of \$7,295.91.

¹ Appellant's appeal also included statements of fact that were not previously part of the record. The Board is unable to consider these statements as they were not before the Office at the time of its final decision. 20 C.F.R. § 501.2(c).

² The Board notes that it is not clear from the record whether this claim was ever formally filed or whether the lung condition was accepted again.

On August 24, 2006 the Office informed appellant that it had made a preliminary finding that he had been overpaid by \$7,295.91. The Office found it had erroneously sent two checks each for the three periodic roll cycles from March 19 to June 10, 2006: a correctly issued check for \$2,517.00³ and an incorrectly issued check for \$2,431.97. The Office also made a finding that appellant was at fault for creating the overpayment because he had knowingly accepted compensation to which he was not entitled. It noted that though appellant had called about the issuance of two checks in the same period, he had not returned any of the checks, which caused the overpayment to occur. The Office informed appellant that he had 30 days in which to challenge these determinations or seek a waiver and provided him an overpayment recovery questionnaire, Form CA-20. Appellant did not submit any evidence or arguments related to these determinations within the allotted time.

By decision dated October 5, 2006, the Office issued a final determination of overpayment. In accordance with its preliminary findings, the Office found an overpayment of \$7,295.91 for which appellant was at fault. It informed appellant that in order to recover this overpayment, along with interest of \$102.57, the sum of \$400.00 would be withheld from each of his continuing compensation payments effective October 28, 2006 to February 17, 2008 and that \$198.48 would be withheld from his March 16, 2008 payment.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act⁴ and its implementing regulation⁵ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members or functions of the body. When an overpayment has been made because of an error of fact or law, the Office is required to adjust it in accordance with its regulations.⁶

ANALYSIS -- ISSUE 1

Appellant was awarded 343.2 weeks of compensation for the period of March 18, 2005 to October 16, 2011 for the 55 percent impairment of each of his arms. The Office informed appellant that, in addition to receiving a lump sum of \$9,901.61, covering the period March 18 to July 9, 2005, he would be placed on the periodic rolls and receive \$2,431.97 every 28 days thereafter.

The record establishes that for each of the three periodic roll cycles from March 19 to June 10, 2006 appellant received payments in the amounts of \$2,431.97 and \$2,517.00. The Office found that under his schedule award, appellant was entitled to receive only \$2,517.00 during each of these cycles and \$7,551.00 for the entire period. As appellant received \$14,846.91, the Board finds that he received an overpayment of \$7,295.91.

³ Presumably, this amount reflects an annual cost-of-living adjustment.

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.404.

⁶ 5 U.S.C. § 8129(a).

The Board concludes that the Office properly determined that appellant had been overpaid by \$7,295.91.

LEGAL PRECEDENT -- ISSUE 2

The Office may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. The fact that the overpayment was the result of error by the Office or another government agency does not by itself relieve the individual who received the overpayment for liability for repayment if the individual also was at fault for receiving the overpayment.⁷ Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives 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).⁸

Whether or not the Office 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.⁹

ANALYSIS -- ISSUE 2

The record establishes that appellant received extra payments from the Office on April 15 and May 13, 2006 in the form of direct deposits to his bank account. He called the Office to inquire about why he was receiving two checks on June 9, 2006, one day before the last double payment was made into his account on June 10, 2006. It appears from the record that none of the erroneous funds have been returned to the Office. Appellant argued that he initially thought the payments were for other benefits he had requested. He also argued that he was the one who notified the Office of the double payments.

The Board has held that an employee who receives payments from the Office in the form of direct deposit may not be at fault the first time incorrect funds are deposited into his account, as the acceptance of the resulting overpayment lacks the requisite knowledge.¹⁰ The Board has also held that in "cases involving a series of incorrect payments, where the requisite knowledge is established by a letter or telephone call from the Office or simply with the passage of time and a greater opportunity for discovery, the claimant will be at fault for accepting the payments

⁷ 20 C.F.R. § 10.435(a).

⁸ *Id.* at. § 10.433(a).

⁹ *Id.* at § 10.433(b).

¹⁰ *T.C.*, 57 ECAB ____ (Docket No. 05-249, issued July 24, 2006).

subsequently deposited.”¹¹ Previous cases have held that receiving one or two erroneous direct deposit payments does not necessarily create the requisite knowledge to find that a claimant was at fault in the creation of the overpayment.¹² However, the Board has found fault in cases where incorrect payments were made over longer periods of time or for substantially greater amounts than previously received.¹³

The Board finds that appellant was without fault for the \$2,431.97 deposited in his account on April 15, 2006. While appellant accepted the April 15, 2006 overpayment by gaining control of the funds deposited into his account pursuant to his authorization, he did not know that he would receive an incorrect payment on that day. Unlike the situation in which a claimant receives a physical check and is aware of the amount of the payment before depositing it into his account, when direct deposit is used, a claimant is not on notice of the amount of the payment until after it has been deposited.

The Board also finds, however, that appellant was not without fault for the deposits made on May 13 and June 10, 2006. Appellant had been receiving regular and uniform payments since July 2005 and, therefore, was on notice that the Office had erroneously overpaid him on April 15, 2006 when he received approximately twice as much as his schedule award dictated. The record indicates that appellant did not contact the Office with questions about the double payment until approximately two months after the first overpayment and one month after the second overpayment. By the time he contacted the Office, one day before the final overpayment, it appears to have been too late to correct the error. It is unclear from the record when appellant became aware that he had received double payments, but given the magnitude of the overpayments he should have realized the error quickly using ordinary care. Because of his delay in reporting the overpayment of April 15, 2006, appellant was at fault for creating the overpayments of May 13 and June 10, 2006.

Appellant argued that he should not be found at fault because he initially thought that the payments were made in compensation for medical conditions for which he was seeking compensation and that he, therefore, believed he was entitled to them. While he and his physician have requested acceptance of *cor pulmonale* and secondary pulmonary hypertension, the Office had not accepted these additional conditions. The Board finds that appellant’s belief was not reasonable and does not negate the Board’s finding that he should have known that he had received an incorrect payment.

CONCLUSION

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$7,295.91. The Board also finds that the Office properly determined that appellant was at fault in the creation of the overpayments of May 13 and June 10, 2006 and, therefore, is not entitled to waiver for these payments. However, the

¹¹ *Id.*

¹² *Id.* at n.6.

¹³ *Id.* at n.7.

Board finds that appellant was not at fault in the creation of the overpayment of April 15, 2006 and is eligible for consideration of waiver for this payment.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 5, 2006 is affirmed in part and reversed in part. The case is remanded to determine whether appellant is eligible for waiver of the \$2,431.97 received on April 15, 2006. The Office's decision to recover the overpayment by deducting \$400.00 every 28 days from appellant's continuing compensation is set aside pending resolution of the issue of waiver of recovery.

Issued: June 5, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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