

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of FRANKLIN D. JOHNSON and U.S. POSTAL SERVICE,
POST OFFICE, Denver, CO

*Docket No. 98-1073; Submitted on the Record;
Issued December 28, 2000*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant has a 14 percent permanent impairment of his left arm after previously awarding him a schedule award for a 47 percent permanent impairment of his left arm; (2) whether appellant received a \$50,938.92 overpayment of compensation; and (3) whether the Office abused its discretion by refusing to waive recovery of the overpayment.

This is the second appeal in the present case. In the prior appeal, the Board issued a decision¹ on May 7, 1996 in which it set aside the August 2, 1993, March 3 and April 7, 1994 decisions of the Office on the grounds that the case was not in posture for decision regarding the extent of the permanent impairment of appellant's left arm. The Board found that additional medical opinion was required from Dr. Roswell B. Dorsett, a Board-certified neurologist, or another attending physician regarding the nature and extent of appellant's left arm impairment. The Board indicated that a more detailed description of appellant's condition was necessary in order for a claims examiner or others reviewing the record to clearly visualize the impairment with its resulting restrictions and limitations. The Board indicated that, after any further development deemed necessary, the Office should refer the case to an Office medical adviser for calculation of appellant's permanent impairment. The Board remanded the case to the Office for further development of the medical evidence to be followed by the issuance of an appropriate decision.² The facts and circumstances of the case up to that point are set forth in the Board's prior decision and are incorporated herein by reference.

¹ Docket No. 94-1552.

² The Office accepted that appellant sustained a neuropathy in the form of a pinched neck nerve due to the duties of his mailhandler job. Appellant stopped work on June 9, 1990 and received compensation for periods of disability. In December 1991, appellant underwent foraminotomies at C4-5 and C5-6, which were authorized by the Office. On August 2, 1993 appellant received a schedule award for a 47 percent permanent impairment of his left arm. The award ran for 146.65 weeks from May 24, 1993 to March 15, 1996. The Office based its schedule award

After the remand to the Office, it was determined that Dr. Dorsett had retired and that appellant did not have any attending physician with respect to his arm problem. The Office then referred appellant for further evaluation to J. Scott Bainbridge, a physician Board-certified, in physical medicine and rehabilitation. By decision dated January 28, 1997, the Office determined that appellant was only entitled to a schedule award for a 14 percent permanent impairment of his left arm. The award ran from May 24, 1993 to March 25, 1994. The Office based its determination on the opinion of Dr. Bainbridge and the December 10, 1996 and January 14, 1997 reports of the Office medical adviser. The effect of the Office's January 28, 1997 decision was to rescind a portion of the August 2, 1993 schedule award, which appellant had received for a 47 percent permanent impairment of his left arm.

In a preliminary determination dated February 20, 1997, the Office determined that appellant received a \$50,938.92 overpayment of compensation because he received a schedule award for a 47 percent permanent impairment of his left arm but was only entitled to receive a schedule award for a 14 percent permanent impairment of his left arm. The Office determined that appellant was not at fault in the creation of the overpayment and requested that he submit financial information in support of any claim for overpayment waiver. By decision dated November 21, 1997 and finalized November 26, 1997, an Office hearing representative affirmed the Office's January 28, 1997 decision regarding the extent of appellant's permanent impairment and finalized the preliminary overpayment determination regarding the fact and amount of the overpayment and appellant's lack of fault in its creation. The Office hearing representative further determined that appellant was not eligible for waiver of the overpayment and that the overpayment should be recovered through payments of \$250.00 per month.

The Board finds that the Office properly determined that appellant has a 14 percent permanent impairment of his left arm after previously awarding him a schedule award for a 47 percent permanent impairment of his left arm.

The Board has upheld the Office's authority to reopen a claim at any time on its own motion under section 8128(a) of the Federal Employees' Compensation Act and, where supported by the evidence, set aside or modify a prior decision and issue a new decision.³ The Board has noted, however, that the power to annul an award is not an arbitrary one and that an award for compensation can only be set aside in the manner provided by the compensation statute.⁴ It is well established that once the Office accepts a claim, it has the burden of justifying termination or modification of compensation.⁵ This holds true where, as here, the Office later decides that it has erroneously accepted a claim for compensation. To justify rescission of

on the June 10, 1993 report of the Office medical adviser.

³ *Eli Jacobs*, 32 ECAB 1147, 1151 (1981).

⁴ *Shelby J. Rycroft*, 44 ECAB 795, 802-03 (1993). *Compare Lorna R. Strong*, 45 ECAB 470, 479-80 (1994).

⁵ *See Frank J. Meta, Jr.*, 41 ECAB 115, 124 (1989); *Harold S. McGough*, 36 ECAB 332, 336 (1984).

acceptance, the Office must establish that its prior acceptance was erroneous, based on new or different evidence or through new legal argument and/or rationale.⁶

Section 8107 of the Act provides 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 a schedule award for the permanent impairment of the scheduled member or function.⁷ Neither the Act 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, the Office has adopted the American Medical Association (A.M.A.) *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993) as a standard for evaluating schedule losses and the Board has concurred in such adoption.⁸

The Board finds that the Office provided sufficient new evidence and argument to justify its partial rescission of appellant's entitlement to schedule award compensation. The Office explained that the weight of the medical evidence rested with previously unconsidered evidence, the opinion of Dr. J. Scott Bainbridge, a physician Board-certified in physical medicine and rehabilitation who served as an Office referral physician, and the December 10, 1996 and January 14, 1997 reports of the Office medical adviser, which showed that appellant had a 14 percent permanent impairment of his left arm rather than a 47 percent permanent impairment. Therefore, the Office provided sufficient justification for its determination that a portion of appellant's schedule award entitlement should be rescinded.

In his report dated September 26, 1996, Dr. Bainbridge properly determined that appellant has a 14 percent permanent impairment of his left arm. He stated that appellant has a 2 percent impairment based on multiplying the 5 percent maximum value for sensory loss associated with the C5 nerve distribution times 40 percent, the level of appellant's Grade 3 sensory loss. Dr. Bainbridge noted that appellant has a 4 percent impairment based on multiplying the 30 percent maximum value for motor loss associated with the C5 nerve distribution times 13 percent, the level of his Grade 4 motor loss.⁹ He stated that appellant has a 3 percent impairment based on multiplying the 8 percent maximum value for sensory loss associated with the C6 nerve distribution times 40 percent, the level of appellant's Grade 3 sensory loss. Dr. Bainbridge indicated that appellant has a 5 percent impairment based on multiplying the 35 percent maximum value for motor loss associated with the C6 nerve distribution times 13 percent, the level of his Grade 4 motor loss.¹⁰ Using the Combined Values

⁶ *Laura H. Hoexter*, 44 ECAB 987, 994 (1993); *Alphonso Walker*, 42 ECAB 129, 132-33 (1990); *petition for recon. denied*, 42 ECAB 659 (1991); *Beth A. Quimby*, 41 ECAB 683, 688 (1990); *Roseanna Brennan*, 41 ECAB 92, 95 (1989); *Daniel E. Phillips*, 40 ECAB 1111, 1118 (1989), *petition for recon. denied*, 41 ECAB 201 (1990).

⁷ 5 U.S.C. § 8107(a).

⁸ *James Kennedy, Jr.*, 40 ECAB 620, 626 (1989); *Charles Dionne*, 38 ECAB 306, 308 (1986).

⁹ See A.M.A., *Guides* 42-43, Tables 10-12 (3^d ed., rev. 1990). Dr. Bainbridge properly applied the standards of the revised third edition of the A.M.A., *Guides* as this edition was in effect when appellant's initial schedule award was granted; see FECA Bulletin No. 91-27 (issued September 18, 1991); FECA Bulletin No. 94-4 (issued November 1, 1993); *Roy L. Brandt*, 41 ECAB 569, 578-80 (1990).

¹⁰ See A.M.A., *Guides* 42-43, Tables 10-12.

Chart, he then combined these impairment values to determine that appellant has a total left arm impairment of 14 percent.

In a report dated January 8, 1997, Dr. Bainbridge further explained his opinion regarding the extent of appellant's left arm impairment. With respect to the involvement of the C5-6 nerve distributions, Dr. Bainbridge stated:

“It made sense to me that he had persistent pain in C5-6 distributions and that these were the most likely levels involved, supported by the fact that these were the operating levels. [Appellant] described some pain into the index and middle fingers on the left which would be an argument for C7 involvement, but I did not feel that this was as likely (I felt that these sensory symptoms were explained by C6) because of the imaging studies. My calculation of impairment was thus based on sensory and motor loss in the C5[-]6 distributions and not in C6[-]7 distributions as had been done by [appellant's attending physicians].”

Dr. Bainbridge further explained that he assigned a Grade 3 for sensory loss and a Grade 2 for motor loss based on his evaluation of appellant and indicated that these figures were consistent with the initial assessment of Dr. Dorsett, an attending Board-certified neurologist.¹¹ Dr. Bainbridge indicated that appellant's limited shoulder motion did not warrant a separate impairment rating in that this restriction was covered by the impairment ratings for sensory and motor loss.¹²

In reports dated December 10, 1996 and January 14, 1997, the Office medical adviser indicated that he had reviewed the reports of Dr. Bainbridge and checked his calculations for permanent impairment of appellant's arm. The Office medical adviser also properly determined that appellant had a 14 percent permanent impairment of his left arm under the standards of the A.M.A., *Guides*. As the opinion of Dr. Bainbridge and the December 10, 1996 and January 14, 1997 reports of the Office medical adviser provided the only evaluations which conformed with the A.M.A., *Guides*, they constitute the weight of the medical evidence and provide an

¹¹ In a report dated September 16, 1992, Dr. Dorsett indicated that appellant had reached maximum medical improvement and assigned a Grade 3 for sensory loss and a Grade 2 for motor loss associated with the C6 and C7 nerve distributions. In a report dated May 24, 1993, Dr. Dorsett assigned a Grade 4 for sensory loss and a Grade 3 for motor loss associated with the C6 and C7 nerve distributions. He did not explain why he changed the grades for sensory and motor loss.

¹² Dr. Bainbridge properly did not assign any impairment rating for loss of motion as such a rating would have duplicated impairment ratings for sensory and motor loss; *see* A.M.A., *Guides* 41. Appellant did not exhibit atrophy of his left arm, which would entitle him to an impairment rating.

appropriate basis for the Office's partial rescission of appellant's entitlement to schedule award compensation.¹³

The Board further finds that appellant received a \$50,938.92 overpayment of compensation.

As described above, the Office properly rescinded a portion of appellant's entitlement to schedule award compensation. Appellant received compensation for a 47 percent permanent impairment of his left arm despite the fact that he was only entitled to receive compensation for a 14 percent permanent impairment of his left arm. The record contains evidence which shows that, as a result, appellant received \$50,938.92 in schedule award compensation to which he was not entitled. Therefore, the Office properly determined that appellant received a \$50,938.92 overpayment.

The Board further finds that the Office did not abuse its discretion by refusing to waive recovery of the overpayment.

The waiver or refusal to waive an overpayment of compensation by the Office is a matter that rests within the Office's discretion pursuant to statutory guidelines.¹⁴ These statutory guidelines are found in section 8129(b) of the Act which states: "Adjustment or recovery [of an overpayment] 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."¹⁵ Since the Office found appellant to be without fault in the matter of the overpayment, then, in accordance with section 8129(b), the Office may only recover the overpayment if it determined that recovery of the overpayment would neither defeat the purpose of the Act nor be against equity and good conscience.¹⁶

The guidelines for determining whether recovery of an overpayment would defeat the purpose of the Act or would be against equity and good conscience are set forth in sections

¹³ See *Bobby L. Jackson*, 40 ECAB 593, 601 (1989). In granting appellant's initial schedule award for left arm impairment, the Office relied upon a June 10, 1993 report of an Office medical adviser. In this report, the Office medical adviser determined that appellant had a 47 percent permanent impairment of his left arm, but it does not appear that this calculation was reached in accordance with the relevant standards of the A.M.A., *Guides*. In making his calculation, the Office medical adviser indicated that the C6 and C7 nerve distributions were involved and that appellant had a Grade 4 rating for both sensory and motor loss. In connection with its rescission determination, the Office properly noted that the Office medical adviser did not adequately explain the basis for these findings and a review of the medical evidence does not provide support for such findings. The record does not contain an opinion of Dr. Dorsett or any other attending physician, which would be in conflict with the opinion of Dr. Bainbridge and the December 10, 1996 and January 14, 1997 reports of the Office medical adviser.

¹⁴ See *Robert Atchison*, 41 ECAB 83, 87 (1989).

¹⁵ 5 U.S.C. § 8129(b).

¹⁶ Appellant argued that the overpayment should be waived because he was not found to be at fault in its creation but he would only be entitled to such waiver if it were shown, under the standards described below, that recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience.

10.322 and 10.323, respectively, of the Code of Federal Regulations. Section 10.322(a) provides, generally, that recovery of an overpayment would defeat the purpose of the Act if recovery would cause hardship by depriving the overpaid individual of income and resources needed for ordinary and necessary living expenses and, also, if the individual's assets, those which are not exempt from recovery, do not exceed a resource base of \$3,000.00 (or \$5,000.00 if the individual has a spouse or one dependent, plus \$600.00 for each additional dependent).¹⁷ Section 10.323 provides, generally, that recovery of an overpayment would be against equity and good conscience if: (1) the overpaid individual would experience severe financial hardship in attempting to repay the debt, with "severe financial hardship" determined by using the same criteria set forth in section 10.322; or (2) the individual, in reliance on the payment which created the overpayment, relinquished a valuable right or changed his position for the worse.¹⁸

Appellant has not established that recovery of the overpayment would defeat the purpose of the Act because he has not shown both that he needs substantially all of his current income to meet ordinary and necessary living expenses and that his assets do not exceed the allowable resource base. The record reflects that appellant has \$1,683.00 in monthly income comprised of military and civil service retirement payments, Department of Veterans Affairs disability payments and salary from private employment at an airline.¹⁹ The record further reflects that appellant has \$1,355.00 of monthly expenses comprised of mortgage payments, utilities, automobile expenses, insurance, food and incidental expenses, credit card payments and alimony payments.²⁰ Therefore, appellant's monthly income exceeds his monthly ordinary and necessary expenses by approximately \$328.00. As appellant's current income exceeds his current ordinary and necessary living expenses by more than \$50.00 appellant has not shown that he needs substantially all of his current income to meet current ordinary and necessary living expenses.²¹ Because appellant has not met the first prong of the two-prong test of whether recovery of the overpayment would defeat the purpose of the Act, it is not necessary for the Office to consider the second prong of the test, *i.e.*, whether appellant's assets do not exceed the allowable resource base.²²

¹⁷ 20 C.F.R. § 10.322(a). Section 10.322 defines the terms "income," "expenses" and "assets." 20 C.F.R. § 10.322(b), (c) and (d). For waiver under the "defeat the purpose of the Act" standard, a claimant must show both that he needs substantially all of his current income to meet ordinary and necessary living expenses and that his assets do not exceed the applicable resource base; *see George E. Dabdoub*, 39 ECAB 929, 935-36 (1988); *Robert E. Wenholz*, 38 ECAB 311, 314 (1986). An individual is deemed to need substantially all of his current income to meet ordinary and necessary living expenses if his monthly income does not exceed monthly expenses by more than \$50.00; *see* Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6a(1) (September 1994); *Connie L. Potratz-Hasson*, 42 ECAB 359, 363 (1991); 20 C.F.R. § 10.323.

¹⁸ 20 C.F.R. § 10.323.

¹⁹ Financial figures have been rounded to the nearest dollar.

²⁰ The Office hearing representative properly disallowed certain claimed expenses for attorney fees and back alimony payments because they were not adequately documented. He inadvertently indicated that appellant's expenses totaled \$1,255.00 rather than \$1,355.00.

²¹ *See supra* note 19 and accompanying text.

²² It should be noted that appellant listed assets of more than \$19,000.00, a figure well above the allowable

Appellant also has not established that recovery of the overpayment would be against equity and good conscience because he has not shown, for the reasons noted above, that he would experience severe financial hardship in attempting to repay the debt²³ or that he relinquished a valuable right or changed his position for the worse in reliance on the payment which created the overpayment.²⁴

Because appellant has failed to establish that recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience, he has failed to show that the Office abused its discretion by refusing to waive the overpayment.²⁵

The decision of the Office of Workers' Compensation Programs dated and finalized November 26, 1997 is hereby affirmed.

Dated, Washington, DC
December 28, 2000

David S. Gerson
Member

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

resource base.

²³ Whether a claimant experiences severe financial hardship in attempting to repay an overpayment is determined by using the same criteria set forth in 20 C.F.R. § 10.322; *see supra* note 20 and accompanying text.

²⁴ *See William J. Murphy*, 41 ECAB 569, 571-72 (1989).

²⁵ As recovery from continuing compensation benefits under the Act is not involved in this case, the Board has no jurisdiction over the amount the Office determined that appellant should repay each month. *Levon H. Knight*, 40 ECAB 658, 665 (1989).