United States Department of Labor
Employees' Compensation Appeals Board

DANNY R. CADLE, Appellant	)	
and	)	**Docket No. 05-572**
	)	**Issued: July 22, 2005**
DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF PRISONS, BECKLEY FEDERAL CORRECTION INSTITUTION, Beaver, WV, Employer	)	

Appearances:
Danny R. Cadle, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On January 10, 2005 appellant filed a timely appeal from a decision of the Office of Workers' Compensation Programs dated July 1, 2004 which found an overpayment in compensation in the amount of $6,510.47. Appellant also filed an appeal of an August 17, 2004 decision which found that, while he was entitled to a schedule award, it was not payable due to the outstanding overpayment. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over these decisions.

ISSUES

The issues are: (1) whether the Office properly determined that appellant received an overpayment in compensation in the amount of $6,510.47 due to his receipt of dual benefits paid under statutes administered by the Federal Employees' Compensation Act[1] and the Department of Veterans Affairs; (2) whether the Office properly denied waiver of the overpayment; (3) whether appellant has met his burden of proof to establish that he has more than a three

[1] 5 U.S.C. §§ 8101-8193.

percent lower extremity impairment for which he received a schedule award. On appeal appellant argues that his expenses have increased, due to a family illness.

FACTUAL HISTORY

On October 3, 2001 appellant, then a 27-year-old correctional officer, filed a Form CA-1, traumatic injury claim, alleging that on September 13, 2001 he aggravated a preexisting lower back injury while responding to an inmate fight. He stopped work the day of the injury and the Office accepted that he aggravated a lumbar sprain. Appellant received appropriate continuation of pay and compensation and was placed on the periodic rolls. He underwent a lumbar fusion procedure at the Veterans Administration (VA) Medical Center in Richmond, Virginia on March 13, 2002. On February 24, 2003 appellant returned to work as a program support clerk at the VA Medical Center in Beckley, West Virginia. He resigned from this position, effective August 13, 2003, and was returned to the periodic rolls.

In a decision dated October 23, 2003, the VA determined that appellant was 100 percent disabled due to a chronic low back condition and awarded him disability payments beginning September 1, 2003. Following an Office request on December 1, 2003, appellant elected to receive benefits under the VA.

By letter dated December 11, 2003, appellant advised the Office that he claimed a schedule award. The Office referred appellant, together with a statement of accepted facts, a set of questions and the medical record to Dr. Conrad D. Tamea, Jr., for a second opinion evaluation regarding any permanent impairment. In a February 17, 2004 report, Dr. Tamea provided findings on physical examination including range of motion of the spine and stated that appellant had a severe chronic low back disability based upon a failed spinal fusion for spondylolysis, spinal instability with subsequent limited motion and chronic pain. He advised that maximum medical improvement had not been reached and that appellant needed a comprehensive orthopedic evaluation. Dr. Tamea opined that appellant had a 40 percent whole man impairment based on the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[2]

On March 24, 2004 the Office issued a preliminary finding that an overpayment in compensation in the amount of $6,510.47 had been created. The Office explained that the overpayment resulted because for the period September 1 to November 29, 2003 appellant had been in receipt of dual benefits from the Office and the VA. The Office found that he was not at fault in the creation of the overpayment and informed him of the actions he could take to request waiver. He was provided an overpayment questionnaire to submit. In a form response, appellant requested waiver based on the written record, and provided a completed overpayment questionnaire.

In response to an Office request for a supplementary opinion, on April 19, 2004 Dr. Tamea resubmitted the February 17, 2004 report and appended a handwritten notation stating that, based on the A.M.A., *Guides*, appellant had a 44 percent lower extremity impairment.

[2] A.M.A., *Guides* (5th ed. 2001); *Joseph Lawrence, Jr.*, 53 ECAB 331 (2002).

On June 30, 2004 a telephone conference was held between a senior claims examiner and appellant regarding whether the overpayment should be waived. Appellant indicated that he had total assets of $100.00, monthly income of $2,239.00 and monthly expenses of $2,085.50. By decision dated July 1, 2004, the Office finalized the overpayment determination and denied waiver, finding that appellant's income exceeded his expenses by $153.50.

In a report dated July 12, 2004, an Office medical adviser reviewed Dr. Tamea's reports and determined that maximum medical improvement had been reached on February 17, 2004. He found that, under Tables 15-15 and 15-18 of the A.M.A., *Guides*, appellant had a three percent permanent impairment of both lower extremities. By letter dated August 5, 2004, the Office informed appellant that he was entitled to a schedule award totaling $5,040.96, but that it would deduct the schedule award from the overpayment, resulting in an outstanding overpayment balance of $1,469.51. In a letter dated August 9, 2004, the Office amended the schedule award to show that appellant was entitled to $4,651.98, leaving an overpayment balance of $1,858.49.[3]

By decision dated August 17, 2004, the Office granted appellant a schedule award for three percent permanent impairment of both lower extremities or a total of $4,651.48. The Office noted that the amount of the award was applied to the repayment of the outstanding overpayment.

LEGAL PRECEDENT -- ISSUE 1

Section 8116 of the Act defines the limitations on the right to receive compensation benefits. This section of the Act provides in pertinent part as follows:

> "(a) While an employee is receiving compensation under this subchapter, or if he has been paid a lump sum in commutation of installment payments until the expiration of the period during which the installment payments would have continued, he may not receive salary, pay, or remuneration of any type from the United States, except --
>
> (1) in return for service actually performed;
>
> (2) pension for service in the Army, Navy or Air Force;
>
> (3) other benefits administered by the Veterans Administration unless such benefits payable for the same injury or the same death."[4]

Section 8116(b) provides that in such cases an employee shall elect which benefits he shall receive.[5] Thus, the Act prevents payment of dual benefits in cases where the Office has

[3] The Board notes that the letter contains a typographical error indicating that the overpayment is in the amount of $6,541.47 rather than the correct amount of $6,510.47. The mathematical calculation is, however, correct: $6,510.47 less $4,651.98 equals $1,858.49.

[4] 5 U.S.C. § 8116(a).

[5] 5 U.S.C. § 8116(b).

found that the disability was sustained in civilian federal employment and the VA has held that the same disability was caused by military service.[6]

ANALYSIS -- ISSUE 1

The record establishes that the Office properly calculated an overpayment in compensation in the amount of $6,510.47 in this case. On January 29, 2004 the Office completed a disability payment work sheet in which it computed that appellant was paid disability compensation of $6,510.47 for the 90 calendar days from September 1 to November 29, 2003 for his accepted condition of aggravation of lumbar sprain. The record also indicates that, in a decision dated October 23, 2003, appellant was awarded a 100 percent service-connected disability and received VA benefits for chronic low back pain with herniated nucleus pulposus. The VA benefits began on September 1, 2003. Appellant signed an election form indicating that he wished to receive VA benefits.

The record supports that appellant received benefits from the VA beginning September 1, 2003 and he was not entitled to compensation benefits under the Act for any period thereafter. The $6,510.47 he received for the period September 1 to November 29, 2003 constituted an overpayment in compensation.[7]

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.[8] If the Office finds that the recipient of an overpayment was not at fault, repayment will still be required unless (1) adjustment or recovery of the overpayment would defeat the purpose of the Act or (2) adjustment or recovery of the overpayment would be against equity and good conscience.[9]

Recovery of an overpayment will defeat the purpose of the Act if such recovery would cause hardship to a currently or formerly entitled beneficiary because: (a) the beneficiary from whom the Office seeks recovery needs substantially all of his or her current income (including compensation benefits) to meet current ordinary and necessary living expenses; and (b) the beneficiary's assets do not exceed a specified amount as determined by the Office from data furnished by the Bureau of Labor Statistics. A higher amount is specified for a beneficiary with one or more dependents.[10] Recovery of an overpayment is considered to be against equity and good conscience when any individual who received an overpayment would experience severe financial hardship in attempting to repay the debt.[11] Recovery of an overpayment is also

[6] *Sinclair L. Taylor*, 52 ECAB 227 (2001).

[7] *Id.*

[8] 20 C.F.R. § 10.433(a).

[9] 20 C.F.R. § 10.434.

[10] 20 C.F.R. § 10.436.

[11] 20 C.F.R. § 10.437(a).

considered to be against equity and good conscience when any individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.[12]

The individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by the Office. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of the Act or be against equity and good conscience. This information will also be used to determine the repayment schedule, if necessary.[13]

ANALYSIS -- ISSUE 2

As the Office found appellant without fault in the creation of the overpayment in compensation, waiver may be considered. Repayment is still required unless adjustment or recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience.[14]

Appellant furnished financial information to the Office during a telephone conference held on June 30, 2004 in which he indicated that his monthly income was $2,239.00 and his monthly expenses were $2,085.50. His income thus exceeded his expenses by $153.50.[15] Office procedures provide that an individual is deemed to need substantially all of his or her current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than $50.00, *i.e.*, the amount of monthly funds available for debt repayment is the difference between current income and adjusted living expenses plus $50.00,[16] which in this case would be $103.50. The Board therefore finds that the Office properly concluded that recovery of the overpayment would not cause financial hardship to appellant and thus defeat the purpose of the Act. Furthermore, as appellant made no argument that he gave up a valuable right or changed his position for the worse in reliance on the overpaid compensation, the Office properly determined that recovery would not be against equity and good conscience. While appellant argued on appeal that his expenses had increased due to a family illness, no such evidence was submitted in support of this contention until after the final overpayment decision which the Board may not review for the first time on appeal.[17] The Board

[12] 20 C.F.R. § 10.437(b).

[13] 20 C.F.R. § 10.438(a).

[14] 20 C.F.R. §§ 10.436, 10,437.

[15] Appellant also submitted an overpayment questionnaire in which his income was listed as the same, $2,239.00, but his expenses only totaled $1,318.00.

[16] Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a)(1), (a)(4) (May 2004).

[17] The Board cannot consider evidence submitted for the first time on appeal as its review of the case is limited to the evidence of record which was before the Office at the time it rendered its final decision. 20 C.F.R. § 501.2(c).

therefore finds that the Office properly denied waiver of the overpayment and is required by law to recover the debt by decreasing later payments to which appellant is entitled.[18]

Regarding recovery of the overpayment, the Board notes that its jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation benefits under the Federal Employees' Compensation Act. Where, as here, a claimant is no longer receiving wage-loss compensation, the Board does not have jurisdiction with respect to the recovery of the overpayment under the Debt Collection Act.[19]

LEGAL PRECEDENT -- ISSUE 3

The schedule award provision of the Federal Employees' Compensation Act and its implementing regulation[20] sets 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. The Federal Employees' Compensation Act, however, does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.[21]

It is well established that the period covered by the schedule award commences on the date that the employee reaches maximum medical improvement from the residuals of the accepted employment injury. The Board has explained, and the A.M.A., *Guides* provides, that maximum medical improvement means that the physical condition of the injured member of the body has stabilized and will not improve further.[22] It is understood that an individual's condition is dynamic, and maximum medical improvement refers to a date from which further recovery or deterioration is not anticipated, although over time there may be some expected change. Once an impairment has reached maximum medical improvement, a permanent impairment rating may be performed.[23] The determination of whether maximum medical improvement has been reached is based on the probative medical evidence of record, and is usually considered to the date of the evaluation by the physician which is accepted as definitive by the Office.[24]

---

[18] 5 U.S.C. § 8129(a).

[19] *Robert K. Swett*, 53 ECAB 615 (2002).

[20] 20 C.F.R. § 10.404.

[21] *Ronald R. Kraynak*, 53 ECAB 130 (2001).

[22] *Mark A. Holloway*, 55 ECAB ____ (Docket No. 03-2144, issued February 13, 2004); *see* A.M.A., *Guides*, *supra* note 1 at 19.

[23] *Patricia J. Penney-Guzman*, 55 ECAB ____ (Docket No. 04-1052, issued September 30, 2004).

[24] *See Mark A. Holloway*, *supra* note 22.

ANALYSIS -- ISSUE 3

In this case, the Office accepted that appellant sustained aggravation of a lumbar sprain and authorized lumbar fusion and referred appellant to Dr. Tamea to provide an impairment rating. In a report received by the Office on April 19, 2004, Dr. Tamea, revised his February 17, 2004 report and provided findings on physical examination including range of motion of the spine and stated that appellant had a severe chronic low back disability based upon a failed spinal fusion for spondylolysis, spinal instability with subsequent limited motion and chronic pain. The physician advised that maximum medical improvement had not been reached and generally referenced the fifth edition of the A.M.A., *Guides*, opining that appellant had a 44 percent lower extremity impairment.

The Board therefore finds that the probative medical evidence establishes that appellant has not reached maximum medical improvement. As stated above, the determination of whether maximum medical improvement has been reached is based on the probative medical evidence of record, and is usually considered to be the date of the evaluation by the physician which is accepted as definitive by the Office.[25] In this case, in his July 12, 2004 impairment analysis, the Office medical adviser relied on Dr. Tamea's report. The Office medical adviser, however, failed to address Dr. Tamea's opinion that maximum medical improvement had not been reached. Since Dr. Tamea stated that appellant had not reached maximum medical improvement, it was improper for the Office to render a determination regarding appellant's permanent impairment due to his employment injury. The August 17, 2004 schedule award was therefore premature and must be vacated.[26] Upon return of the case record, the Office should further review the medical evidence to determine whether appellant has reached maximum medical improvement. If so, it should proceed to determine the degree of permanent impairment caused by the September 13, 2001 employment injury.

CONCLUSION

The Board finds that the Office properly determined that appellant was not entitled to waiver of an overpayment in compensation in the amount of $6,510.47. The Board further finds that the issue of entitlement to a schedule award has not been properly resolved.

[25] *Id.*

[26] *See Richard Saldibar*, 51 ECAB 585 (2000).

ORDER

IT IS HEREBY ORDERED THAT the July 1, 2004 decision of the Office of Workers' Compensation Programs be affirmed. The decision dated August 17, 2004 is set aside and the case remanded to the Office for proceedings consistent with this opinion of the Board.

Issued: July 22, 2005
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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