United States Department of Labor
Employees' Compensation Appeals Board

M.J., Appellant	)	
and	)	**Docket No. 06-1972**
	)	**Issued: May 7, 2007**
U.S. POSTAL SERVICE, POST OFFICE, Jacksonville Beach, FL, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 23, 2006 appellant filed a timely appeal of decisions of the Office of Workers' Compensation Programs dated April 18 and June 20, 2006. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.

ISSUES

The issues are: (1) whether the Office used the proper pay rate in calculating appellant's compensation benefits beginning August 24, 2004; (2) whether appellant has more than a five percent impairment to each upper extremity for which she received a schedule award; (3) whether appellant received an overpayment in compensation in the amount of $3,092.30 because she was paid at the incorrect pay rate for the period August 24, 2004 through March 19, 2005; and (4) whether the Office properly denied waiver of the overpayment.

FACTUAL HISTORY

On February 12, 2004 appellant, then a part-time flexible mail processing clerk, filed a Form CA-2, occupational disease claim, alleging that factors of her federal employment caused

bilateral carpal tunnel syndrome. She became first aware of the condition and its relationship to her employment on November 29, 2003. Appellant stopped work on January 3, 2004 and returned on February 24, 2004. On February 26, 2004 the Office accepted that appellant sustained employment-related bilateral carpal tunnel syndrome. She again stopped work on August 24, 2004 when Dr. Abraham Rogozinski, a Board-certified orthopedic surgeon, performed decompression surgery on the left wrist. Dr. Rogozinski performed surgery on the right wrist on November 30, 2004. In a work capacity evaluation dated March 4, 2005, he advised that appellant could work eight hours a day with the restriction of repetitive wrist motion limited to three hours a day. In a duty status report dated March 17, 2005, Dr. Rogozinski stated that appellant could return to work on March 5, 2005 and reiterated her physical restrictions. On March 22, 2005 appellant returned to modified duty and submitted a schedule award claim on April 25, 2005.

In a May 6, 2005 report, an Office medical adviser noted his review of Dr. Rogozinski's March 4, 2005 report and found that appellant met the criteria found in scenario 2 on page 495 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*),[1] for a five percent permanent impairment to each upper extremity. On June 23, 2005 Dr. Rogozinski advised that, in accordance with the fifth edition of the A.M.A., *Guides*, appellant had a five percent impairment of each upper extremity due to residuals of her bilateral carpal tunnel syndrome.

By letter dated April 6, 2006, the employing establishment informed the Office that when appellant's disability which began on August 24, 2004, based on her minimum schedule of 30 hours per week at a pay rate of $21.11 per hour, her annual pay rate was $32,931.60 plus $633.33 in night differential, for an annual pay rate of $33,564.93. In an April 18, 2006 decision, the Office found that for the period August 24, 2004 to March 19, 2005 appellant was paid compensation at the incorrect pay rate of $40,851.00 per year when the correct rate was $33,564.93. In a second April 18, 2006 decision, the Office granted appellant a schedule award for a five percent permanent impairment of the right arm and a five percent impairment of the left arm, for 31.2 weeks, to run from April 3 to November 7, 2005, based on a weekly par rate of $645.48 at the 3/4 rate or $484.11 per week, to total $15,104.23.[2] A direct deposit in the amount of $15,104.23 was certified on April 18, 2006.

On April 20, 2006 the Office issued a preliminary finding that an overpayment in compensation in the amount of $3,092.30 had been created. The Office explained that, the overpayment resulted because, for the period August 24, 2004 to March 19, 2005, her wage-loss compensation was based on an incorrect full-time weekly pay rate of $785.60, whereas it should have been based on her part-time pay rate of $645.48 per week. The Office found appellant not at fault in the creation of the overpayment and provided an overpayment questionnaire for her to submit. By letter dated May 30, 2006, the Office requested that she provide a good day and time for a telephone conference to discuss the overpayment. Appellant was informed that if she did not respond by June 9, 2006, a final overpayment decision would be issued.

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

[2] A pay rate of $645.48 per week is equal to $33,564.93 per year.

By decision dated June 20, 2006, the Office finalized the overpayment decision. The Office found that appellant was not at fault in the creation of the overpayment but denied waiver, noting that she had not responded to the preliminary overpayment determination and requested repayment in full.

LEGAL PRECEDENT -- ISSUE 1

Section 8114(d) of the Federal Employees' Compensation Act[3] provides that average annual earnings are determined: (1) if the employee worked in the employment in which the employee was employed at the time of injury during substantially the whole year immediately preceding the injury and the employment was in a position for which an annual rate of pay -- (A) was fixed, the average annual earnings are the rate of pay; or (B) was not fixed, the average annual earnings are the product obtained by multiplying the daily wage for the particular employment or the average thereof if the daily wage has fluctuated, by 300 if the employee was employed on the basis of a 6-day workweek, 280 if employed on the basis of a 5 1/2-day week and 260 if employed on the basis of a 5-day week.[4] Office procedures state that the pay rate of part-time flexible employees whose earnings fluctuate from week to week would be computed under section 8114(d)(1)(B).[5] This section, however, is limited to employees working at least five days per week.[6]

ANALYSIS -- ISSUE 1

Appellant's pay rate for compensation purposes is the rate of pay she was receiving on the date of recurrence of disability, August 24, 2004. The record does not show that she had a fixed annual salary on August 24, 2004, but was paid at a rate of $21.11 per hour. It was, therefore, appropriate for section 8114(d)(1)(B) of the Act to be used in determining the correct annual pay rate.[7] A review of the pay rate determination establishes that section 8114(d)(1)(B) of the Act was properly applied in determining appellant's annual pay rate of $32,931.60 before premium pay of $633.33 was added, to equal an annual pay rate of $33,564.93. Appellant's hourly rate was $21.11 which, when multiplied by her part-time employment of six hours per day, equaled a rate of $126.66 per day, which when multiplied by the given factor of 260 days would equal an annual pay rate of $32,931.60. The record establishes that appellant's correct pay rate for compensation purposes for the period beginning August 24, 2004 was $32,931.60 annually or $645.48 per week.

[3] 5 U.S.C. §§ 8101-8193.

[4] *Vincent Holmes*, 53 ECAB 468 (2002).

[5] 5 U.S.C. § 8114(d).

[6] *See Janet A. Condon*, 55 ECAB 591 (2004).

[7] 5 U.S.C. § 8114(d)(1)(B).

LEGAL PRECEDENT -- ISSUE 2

Under section 8107 of the Act[8] and section 10.404 of the implementing federal regulation,[9] schedule awards are payable for permanent impairment of specified body members, functions or organs. The Act, however, does not specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice under the law for 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*[10] has been adopted by the Office and the Board has concurred in such adoption, as an appropriate standard for evaluating schedule losses.[11] Chapter 16 provides the framework for assessing upper extremity impairments.[12]

Regarding carpal tunnel syndrome, the A.M.A., *Guides* provide:

> "If, after an *optimal recovery time* following surgical decompression, an individual continues to complain of pain, paresthesias and/or difficulties in performing certain activities, three possible scenarios can be present:
>
> > 1. Positive clinical findings of median nerve dysfunction and electrical conduction delay(s): the impairment due to residual CTSE is rated according to the sensory and/or motor deficits as described earlier.
> >
> > 2. Normal sensibility and opposition strength with abnormal sensory and/or motor latencies or abnormal [electromyogram] EMG testing of the thenar muscles: a residual CTSS is still present and an impairment rating not to exceed five percent of the upper extremity may be justified.
> >
> > 3. Normal sensibility (two-point discrimination and Semmes-Weinstein monofilament testing), opposition strength and nerve conduction studies: there is no objective basis for an impairment rating."[13] (Emphasis in the original.)

ANALYSIS -- ISSUE 2

The Board finds that appellant does not have greater than a five percent right upper extremity impairment and a five percent left upper extremity impairment. In determining

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[8] *Id*. at § 8107.

[9] 20 C.F.R. § 10.404.

[10] A.M.A., *Guides*, *supra* note 1.

[11] *See Joseph Lawrence, Jr., supra* note 1; *James J. Hjort*, 45 ECAB 595 (1994); *Leisa D. Vassar*, 40 ECAB 1287 (1989); *Francis John Kilcoyne*, 38 ECAB 168 (1986).

[12] A.M.A., *Guides*, *supra* note 1 at 433-521.

[13] *Id.* at 495.

appellant's schedule award, the Office relied on the June 23, 2005 report of her attending orthopedic surgeon, Dr. Rogozinski, who provided an impairment rating for the Office and advised that, based on the residuals of her bilateral carpal tunnel syndrome and in accordance with the fifth edition of the A.M.A., *Guides*, appellant had upper extremity impairments of five percent each. In his report dated May 6, 2005, the Office medical adviser referenced the analysis found on page 495 of the A.M.A., *Guides* and agreed that appellant had five percent impairment to each upper extremity. The Board notes that there is no other medical evidence of record which provides an impairment analysis of appellant's upper extremities under the A.M.A., *Guides* or demonstrates a greater impairment rating. The Board, therefore, finds that Dr. Rogozinski's report and the Office medical adviser's analysis establishes that appellant has no greater than the five percent impairment awarded for each upper extremity.[14]

LEGAL PRECEDENT -- ISSUE 3

Section 8129(a) of the Act provides, in pertinent part:

> "When an overpayment has been made to an individual under this subchapter because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled."[15]

With respect to the recovery of the overpayment, the Board's jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation benefits under the Act.[16]

ANALYSIS -- ISSUE 3

The record in this case reflects that from August 24, 2004 to March 19, 2005 appellant received compensation at an incorrect pay rate. As reflected on Office computer print-outs and an Office worksheet, appellant received compensation totaling $16,460.82 when she should have received compensation of $13,368.52, yielding an overpayment in the amount of $3,092.30. This occurred because, as noted, the weekly pay rate used for compensation purposes was the full-time weekly pay rate of $785.60 when appellant was entitled to receive part-time compensation of $645.48 per week. The Office properly determined that an overpayment in compensation in the amount of $3,092.30 had been created, for which appellant was not at fault.

[14] Office procedures stated that claims for increased schedule awards may be based on incorrect calculation of the original award or new exposure. To the extent that a claimant is asserting that the original award was erroneous based on his or her medical condition at that time, this would be a request for reconsideration. A claim for an increased schedule award may be based on new exposure or on medical evidence indicating the progression of an employment-related condition, without new exposure to employment factors, has resulted in a greater permanent impairment than previously calculated. *Linda T. Brown*, 51 ECAB 115 (1999). The Board notes that the pay rate used for the schedule award was correct as it was based on $645.48 per week at a 3/4 compensation rate or $484.11 per week times the appropriate 31.20 weeks to equal an award of $15,103.23, to cover the period April 3 to November 7, 2005. Appellant did not receive an increase in hourly pay until March 18, 2006.

[15] 5 U.S.C. § 8129.

[16] *Desiderio Martinez*, 55 ECAB 245 (2004).

LEGAL PRECEDENT -- ISSUE 4

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.[17] 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.[18]

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.[19] 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.[20] Recovery of an overpayment is also 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.[21]

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.[22] When an individual fails to provide requested financial information, the Office should follow minimum collection guidelines designed to collect the debt promptly and in full.[23]

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[17] 20 C.F.R. § 10.433(a).

[18] *Id*. at § 10.434.

[19] *Id*. at § 10.436.

[20] *Id*. at. § 10.437(a).

[21] *Id*. at § 10.437(b).

[22] *Id*. at § 10.438(a); *Ralph P. Beachum, Sr.*, 55 ECAB 442 (2004).

[23] *Ralph P. Beachum, Sr., id.*

ANALYSIS -- ISSUE 4

The Office determined that appellant was without fault in the creation of the overpayment. Because she was not at fault, the Office may adjust later payments only if the adjustments would not defeat the purpose of the Act or be against equity and good conscience.[24] When the Office made its preliminary overpayment finding on April 20, 2006, it requested that appellant submit an overpayment recovery questionnaire together with supporting financial documents. By letter dated May 30, 2006, appellant was afforded another opportunity to discuss the overpayment. The record, however, does not establish that she responded to the Office or submitted an overpayment recovery questionnaire to either the April 20, 2006 preliminary overpayment finding or the May 30, 2006 letter.[25] Office regulations provide that failure to submit the requested information within 30 days of the request shall result in denial of waiver. The Office did not abuse its discretion in denying waiver in this case.[26]

Where a claimant is no longer receiving wage-loss compensation, the Board does not have jurisdiction with respect to recovery of the overpayment.[27]

CONCLUSION

The Board finds that the Office used a proper pay rate in calculating appellant's compensation benefits beginning August 4, 2004 and that she failed to meet her burden of proof to establish that she was entitled to a schedule award greater than the five percent for each upper extremity previously awarded. The Board also finds that an overpayment in compensation in the amount of $3,092.30 was created and that the Office did not abuse its discretion in denying waiver.

[24] 20 C.F.R. §§ 10.436, 10.437; *see Keith A. Mapes*, 56 ECAB ____ (Docket No. 03-1747, issued October 20, 2004).

[25] The Board notes that both the April 20, 2006 preliminary finding and the May 30, 2006 letter were mailed to appellant's address of record, P.O. Box 50142, Jacksonville, Beach, Florida. In the absence of evidence to the contrary, a letter properly addressed and mailed in the due course of business, such as in the course of the Office's daily activities, is presumed to have arrived at the mailing address in due course. This is known as the "mailbox rule." *Jeffrey M. Sagrecy*, 55 ECAB 724 (2004).

[26] *Supra* note 23; *see Linda Hilton*, 52 ECAB 476 (2001).

[27] *Desiderio Martinez, supra* note 16.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated June 20 and April 18, 2006 be affirmed.

Issued: May 7, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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