

**United States Department of Labor
Employees' Compensation Appeals Board**

D.C., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Ladson, SC, Employer)

Docket No. 09-608
Issued: October 20, 2009

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

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 2, 2009 appellant filed a timely appeal of the Office of Workers' Compensation Programs' merit decisions dated September 23 and November 21, 2008. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant has more than 16 percent impairment of her right lower extremity and 5 percent impairment of her left lower extremity for which she received schedule awards; and (2) whether she received an overpayment of compensation in the amount of \$1,357.56 for which she was not at fault as the Office used an incorrect pay rate; and (3) whether the overpayment is subject to waiver.

FACTUAL HISTORY

On September 12, 2006 appellant, then a 51-year-old part-time flexible window distribution clerk, filed an occupational disease claim alleging that she developed a torn

meniscus in her left and right knees due to factors of her federal employment.¹ She previously underwent arthroscopic debridement of the articular cartilage of her left patella and partial synovectomy on July 20, 1994. Appellant returned to work on August 10, 1994 as a part-time flexible employee, who averaged 24.60 hours a week. Effective September 17, 2005, her position was changed to a part-time regular position as a distribution window clerk working 25 hours a week.

By decision dated January 9, 2007, the Office denied appellant's claim for bilateral knee and right foot conditions due to her employment duties.

Appellant submitted additional evidence and requested reconsideration on March 15, 2007. On June 30, 2004 Dr. James D. Spearman, a Board-certified orthopedic surgeon, explained that she had right knee arthroscopy in 1998 and left knee surgery in 1994. He recommended repeat arthroscopic debridement bilaterally due to chondromalacia in both knees. Dr. Spearman performed right and left knee arthroscopic surgeries on August 4, 2004. Dr. Joel R. Cox, a Board-certified orthopedic surgeon, examined appellant on September 7, 2000 and diagnosed degenerative joint disease of the right great toe with hallux rigidus. Dr. J. Edward Nolan, a Board-certified orthopedic surgeon, examined appellant on February 22, 2007 and repeated her diagnoses. He opined that appellant's conditions were caused or aggravated by her employment activities. The Office accepted appellant's claim for aggravation of bilateral chondromalacia and right great toe joint with degenerative joint disease on June 13, 2007.

Appellant requested a schedule award on September 28, 2004. On October 22, 2007 the Office requested a report from Dr. Nolan regarding appellant's permanent impairment. The employing establishment completed the claim form on October 19, 2007 and provided appellant's pay rate information as \$23.70 per hour or \$30,341.97 per year based on an average of 26.03 hours per week. It noted that appellant had not worked since October 31, 2005.

The Office referred appellant for a second opinion evaluation on February 14, 2008 with Dr. Stephen C. Allen, a Board-certified orthopedic surgeon. In a report dated March 6, 2008, Dr. Allen found that appellant's knees were well aligned, stable with no effusion. He noted that patella compression resulted in pain, tenderness and crepitus, but no patella pop. Dr. Allen diagnosed chondromalacia patella in knees, pseudoarthrosis right hallux joint and metatarsalgia, myofascial pain syndrome with multiple trigger points, cervical disc degeneration and cervical and lumbar facet hypertrophy spondylolysis. He referred appellant for x-rays. Dr. Allen only partially completed the Office permanent impairment worksheets and did not provide any rating. The Office medical adviser reviewed this report on March 11, 2008 and noted that appellant had chondromalacia of both knees and that Dr. Allen had not provided an impairment rating.

The Office requested a supplemental report from Dr. Allen to address the extent of appellant's impairment of her knees and right toe. In a report dated March 6, 2008, Dr. Allen

¹ In a letter dated October 12, 2006, the Office noted that appellant was receiving compensation benefits due to a back injury under OWCP File No. xxxxxx248. It also noted that appellant had two previous claims under OWCP File No. xxxxxx843 which was approved for meniscal tear of the left knee and OWCP File No. xxxxxx464 which was filed for bilateral knee strains and denied by the Office.

indicated that appellant had 10 percent impairment of the right lower extremity due to ankylosis of the great toe.² He found that due to knee chondromalacia, femoral patella pathology and joint space greater than four millimeters, appellant had five percent impairment of each lower extremity.³ Dr. Allen concluded that appellant reached maximum medical improvement in 2005. On March 31, 2008 the Office medical adviser reviewed additional medical evidence from him and found that appellant had 12 percent impairment of her right lower extremity.⁴ He concluded that appellant had 5 percent impairment of her left lower extremity and 16 percent impairment of her right lower extremity.⁵

On April 3, 2008 the Office requested pay rate information from the employing establishment, including night differential, which it submitted on April 7, 2008. It calculated appellant's pay rate based on 26.03 hours a week earning \$27.70 per hour as a regular full-time employee with a weekly base pay rate of \$616.91.

The Office granted appellant a schedule award for 16 percent impairment of the left knee on May 5, 2008 based on a weekly pay rate of \$616.91. Appellant requested reconsideration on May 27, 2008 noting that, based on the medical evidence, she had 16 percent impairment for the right lower extremity and 5 percent impairment for the left lower extremity.

The Office noted on July 3, 2008 that appellant's pay rate for a schedule award purpose was incorrectly calculated. As a regular part-time employee guaranteed 25 hours a week with 5.5 hours of night differential and appellant's recurrent pay rate was April 18, 2005. The Office requested additional pay rate information from the employing establishment on July 7, 2008.

By decision dated July 7, 2008, the Office informed appellant that she was entitled to an additional schedule award totaling 5 percent impairment of the left lower extremity and 16 percent of the right lower extremity.

Appellant alleged on July 11, 2007 that she always worked over 25 hours a week. The employing establishment stated on August 27, 2008 that she was making \$21.76 on April 18, 2005, that she was a part-time regular employee guaranteed 25 hours a week and night differential of \$1.58 for 5.5 hours a week, totaling \$8.69. On September 19, 2008 the Office calculated appellant's weekly pay rate based on 25 hours a week at \$21.76 per hour or \$544.00 per week and night differential of 5.5 hours for a total weekly pay rate of \$552.69.

The Office determined that appellant had received compensation from March 8 to July 5, 2008 in the amount of \$8,437.52 based on the incorrect pay rate and that she should have received compensation in the amount of \$7,079.96 for this period. It calculated an overpayment in the amount of \$1,357.56.

² A.M.A., *Guides*, 542, Table 17-30.

³ *Id.* at 544, Table 17-31.

⁴ *Id.* at 545, Table 17-32.

⁵ *Id.* at 528, 604.

By decision dated September 23, 2008, the Office granted appellant a schedule award for 16 percent impairment of the right lower extremity and 5 percent impairment of the left lower extremity. It listed appellant's pay rate as \$552.69.

On October 2, 2008 the Office made a preliminary determination that appellant had received an overpayment of compensation in the amount of \$1,357.56 as her schedule award was paid at an incorrect pay rate. It found that appellant was not at fault in the creation of the overpayment. The Office requested that she complete an overpayment recovery questionnaire.

Appellant responded on October 10, 2008 and disagreed with the fact of overpayment. In a statement dated September 29, 2008, she stated that she never worked only 25 hours a week. Appellant alleged that she did not work a regular schedule and that her supervisor was responsible for providing the average weekly hours worked. She also disagreed with the amount of her schedule award noting that Dr. Dyer added 12 plus 5 and reached 16 rather than 17 percent impairment of the right lower extremity.

By decision dated November 21, 2008, the Office found that appellant received an overpayment of compensation in the amount of \$1,357.56, that she was not at fault in the creation of the overpayment and that she was not entitled to waiver. It determined to withhold \$1,357.56 from appellant's continuing schedule award payments beginning November 23, 2008 and stated that the overpayment would be absorbed by January 1, 2009.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act⁶ and its implementing regulations⁷ 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. However, the Act 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 American Medical Association, *Guides to the Evaluation of Permanent Impairment* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.⁸ Effective February 1, 2001, the Office adopted the fifth edition of the A.M.A., *Guides* as the appropriate edition for all awards issued after that date.⁹

ANALYSIS -- ISSUE 1

The Office accepted appellant's claim for aggravation of bilateral chondromalacia and right great toe joint with degenerative joint disease. Appellant requested a schedule award on

⁶ 5 U.S.C. § 8107.

⁷ 20 C.F.R. § 10.404 (1999).

⁸ *Id.*

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(a) (August 2002).

September 28, 2004. Her physician did not respond to the Office's request for a permanent impairment rating in accordance with the A.M.A., *Guides* and the Office referred appellant to Dr. Allen, a Board-certified orthopedic surgeon, for a second opinion evaluation, who concluded that she had 10 percent impairment of the right lower extremity due to ankylosis of the right great toe at the metatarsal joint and 5 percent impairment of each of her lower extremities due to chondromalacia of the patella. The Office medical adviser reviewed Dr. Allen's reports and found that appellant was entitled to 12 percent impairment of the right lower extremity due to permanent impairments of her right great toe. He then properly combined this impairment rating to reach 16 percent impairment of the right lower extremity and 5 percent impairment of the left lower extremity for which appellant has received schedule awards. There is no medical evidence in the record to support that appellant has more than 16 percent impairment of her right lower extremity and 5 percent impairment of her left lower extremity for which she has received schedule awards.

LEGAL PRECEDENT -- ISSUE 2

The Act¹⁰ provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.¹¹ When an overpayment has been made to an individual 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 the individual is entitled.¹²

Section 8105(a) of the Act provides: "If the disability is total, the United States shall pay the employee during the disability monthly monetary compensation equal to 66 2/3 percent of his monthly pay, which is known as his basic compensation for total disability."¹³ Under 5 U.S.C. § 8101(4), "monthly pay" means the monthly pay at the time of injury, or the monthly pay at the time disability begins or the monthly pay at the time compensable disability recurs, if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater.

The Office's procedure manual states that the postal service recognizes several kinds of tours of duty, depending on the kind of work performed and that an employee may work many more hours than indicated on the tour of duty. The procedure manual states: "In such cases the pattern established by the actual number of hours worked or actual amounts of money earned takes precedence over the stated schedule or tour of duty in deciding which part of 5 U.S.C. § 8114 to use in determining pay rate."¹⁴

¹⁰ 5 U.S.C. §§ 8101-8193.

¹¹ *Id.* at § 8102(a).

¹² *Id.* at § 8129(a).

¹³ *Id.* at § 8105(a). Section 8110(b) of the Act provides that total disability compensation will equal three fourths of an employee's monthly pay when the employee has one or more dependents. 5 U.S.C. § 8110(b).

¹⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.3(b) (1995).

ANALYSIS -- ISSUE 2

The Office initially granted appellant a schedule award for 16 percent impairment of the left knee on May 5, 2008 based on a weekly pay rate of \$616.91. It based this pay rate on the employing establishment's representation that appellant earned \$23.70 per hour or \$30,341.97 per year based on an average of 26.03 hours per week. Appellant requested reconsideration of the May 5, 2008 schedule award decision. The Office then determined that her pay rate should be calculated on her weekly pay rate based on 25 hours a week at \$21.76 per hour or \$544.00 per week and night differential of 5.5 hours for a total weekly pay rate of \$552.69. It determined that appellant received an overpayment in the amount of \$1,357.56 based on the difference of pay rates.

The Board finds that the Office improperly calculated appellant's pay rate in determining that she had received an overpayment of compensation. As noted, the Office's procedure manual notes that employees of the employing establishment may work many more hours than those indicated on the tour of duty. The procedure manual directs the Office to calculate the pay rate for these employees based on the actual number of hours worked or actual amount of money earned rather than the stated schedule or tour of duty. As it determined that appellant received an overpayment based solely on her schedule of duty rather than the actual number of hours worked, the Office has failed to establish the fact that she received an overpayment of compensation.¹⁵ The Board finds that the Office has not properly calculated appellant's rate of pay for purposes of her schedule award. It has not provided calculations reflecting the actual number of hours appellant worked in reaching this determination. On remand, the Office should further develop the record as to appellant's pay rate and issue an appropriate decision.

CONCLUSION

The Board finds that appellant has no more than 16 percent impairment of her right lower extremity and 5 percent impairment of her left lower extremity for which she has received schedule awards. The Board finds that the Office did not properly calculate appellant's pay rate for schedule award purposes to establish that she received an overpayment of compensation.

¹⁵ As the Office has not established fact or amount of overpayment, it is not necessary for the Board to address the issue of waiver.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 23, 2008 is affirmed in part and remanded in part. The decision dated November 21, 2008 is reversed.

Issued: October 20, 2009
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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