

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PATRICIA SCHROEDER and U.S. POSTAL SERVICE,
MAIN POST OFFICE, Cleveland, Ohio

*Docket No. 96-1508; Submitted on the Record;
Issued April 21, 1998*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether appellant is entitled to a schedule award for a permanent partial impairment of the left leg; (2) whether appellant has established that she has more than a 20 percent permanent impairment of the right leg, for which she has received a schedule award; (3) whether the Office of Workers' Compensation Programs properly found that there was an overpayment in the amount of \$3,680.64 as appellant received a schedule award for the right lower extremity based on an incorrect calculation by an Office medical adviser; and (4) whether the Office abused its discretion in denying waiver of recovery of the overpayment.

The Board has duly reviewed the evidence of record in this appeal and finds that appellant is not entitled to a schedule award for a permanent partial impairment of the left leg.

The schedule award provision of the Federal Employees' Compensation Act¹ and its implementing regulation,² set forth the number of weeks of compensation to be paid for permanent loss, or loss of use, of the members of the body listed in the schedule. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage of loss of use.³ However, neither the Act nor the regulations 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 American Medical Association, *Guides to the Evaluation of Permanent Impairment* have been

¹ 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C. § 8107(c).

² 20 C.F.R. § 10.304.

³ 5 U.S.C. § 8107(c)(19).

adopted by the Office and the Board has concurred in such adoption, as an appropriate standard for evaluating schedule losses.⁴

In this case, appellant, then a clerk, filed a traumatic injury claim (Form CA-1) assigned number A9-198839 on September 24, 1977 alleging that on that date she injured both knees and chin when she slipped and fell on a wet floor in the cafeteria.⁵ Appellant stopped work on September 24, 1977 and returned to work on January 17, 1978.

On July 31, 1978 appellant filed a claim (Form CA-2a) alleging that on June 7, 1978 she sustained a recurrence of disability. Appellant stopped work on June 17, 1978.

The Office accepted appellant's claim for strained ligaments of both knees, internal derangement of the right knee and torn medial meniscus. The Office also accepted arthrotomy and medial meniscectomy of the right knee performed on September 11, 1978.

On October 8, 1991 appellant requested a schedule award for the right leg. By letter dated February 20, 1992, the Office advised appellant to complete the front side of an enclosed Form CA-7. In a March 17, 1992 response, appellant filed the Form CA-7 for a schedule award.

On March 31, 1992 the Office granted appellant a schedule award for a 20 percent permanent impairment of the right lower extremity for the period November 1, 1979 through December 8, 1980.

On November 12, 1993 and May 16, 1994 appellant requested a schedule award for the left leg accompanied by an October 9, 1993 medical report of Dr. David Weiss, a Board-certified orthopedic surgeon and appellant's treating physician, revealing that appellant had a 17 percent permanent impairment of the left leg.

An Office medical adviser reviewed Dr. Weiss' report and submitted an August 4, 1994 report indicating that appellant had a 23 percent permanent impairment of the right knee.

On August 30, 1994 the Office granted appellant a schedule award for an additional three percent permanent impairment of the right lower extremity for the period October 9 through December 8, 1993.

On September 8, 1994 appellant, through her counsel, requested an oral hearing before an Office representative. By decision dated December 16, 1994, the hearing representative vacated the Office's August 30, 1994 schedule award on the basis that the Office medical adviser erroneously calculated an additional impairment of the right leg rather than an impairment of the left leg. On remand, the hearing representative instructed the Office to determine whether appellant had sustained permanent partial impairment of the left leg causally related to the September 24, 1977 employment injury.

⁴ See *James J. Hjort*, 45 ECAB 595 (1994); *Luis Chapa, Jr.*, 41 ECAB 159 (1989); *Leisa D. Vassar*, 40 ECAB 1287 (1989); *Francis John Kilcoyne*, 38 ECAB 168 (1986).

⁵ Previously, appellant filed a claim assigned number A2-601132 for which she received compensation benefits.

By letter dated January 5, 1995, the Office advised appellant that it considered her claim to be a recurrence of disability. The Office further advised appellant that medical reports from 1977 and 1978 mentioned the left and right knee employment injuries, but that subsequent reports, with the exception of the September 19, 1991 medical report of Dr. Ronald Goldberg, an orthopedic surgeon,⁶ failed to specifically address the left knee employment injury. The Office then advised appellant to submit factual and bridging medical evidence concerning treatment of the left knee. In response, appellant submitted a January 19, 1995 narrative statement.

By letter dated February 27, 1995, the Office advised appellant to submit medical evidence regarding treatment of the left knee between 1977 and the present. In a March 20, 1995 response, appellant requested an additional 30-day extension to locate a physician to provide the requested medical evidence.

By decision dated March 24, 1995, the Office found the evidence of record insufficient to establish that the claimed recurrence of disability or permanent impairment of the left leg was causally related to the September 24, 1977 employment injury.

By letter dated March 24, 1995, the Office advised appellant that it had made a preliminary determination that an overpayment had occurred in the amount of \$3,680.64 due to an administrative error in the payment of an additional three percent schedule award for the loss of the use of the right leg when she was claiming an award for the left leg. The Office further advised appellant that she was not at fault in the creation of the overpayment. The Office also advised appellant that she had the right to submit any additional evidence or arguments if she disagreed that the overpayment occurred, if she disagreed with the amount of the overpayment and if she believed that recovery of the overpayment should be waived.

In letters dated March 27 and May 4, 1995, appellant, through her counsel, requested an oral hearing before an Office representative. Subsequent to the hearing held on October 25, 1995, appellant submitted financial evidence.

By decision dated January 24, 1996, the hearing representative found the evidence of record insufficient to establish that appellant sustained permanent impairment of the left knee causally related to the September 24, 1977 employment injury. The hearing representative also found the evidence of record insufficient to establish that appellant was entitled to a schedule award for more than a 20 percent permanent impairment for which she had received a schedule award. The hearing representative further found that an overpayment had occurred in the amount of \$3,680.64, that appellant was not at fault in the creation of the overpayment and that appellant was not entitled to a waiver of the overpayment.

Inasmuch as appellant failed to respond to the Office's January 5, 1995 letter advising her to submit bridging medical evidence supportive of her schedule award claim for the left leg,

⁶ Regarding appellant's left knee employment injury, Dr. Goldberg's September 19, 1991 medical report revealed that appellant experienced pain in the left knee and that the range of motion for the left knee was full in extension and flexion.

the Board finds that appellant is not entitled to a schedule award for a permanent partial impairment of the left leg.

The Board further finds that appellant has failed to establish that she has more than a 20 percent permanent impairment of the right leg, for which she has received a schedule award. In this case, the medical evidence reveals an August 4, 1994 report from an Office medical adviser revealing that appellant had a 23 percent permanent impairment of the right leg based on a review of Dr. Weiss' October 9, 1993 medical report and the 4th edition of the A.M.A., *Guides*. Dr. Weiss' report revealed a history of the September 24, 1977 employment injury, appellant's medical history, a review of medical records, and his findings on physical examination. Dr. Weiss diagnosed post-traumatic osteoarthritis, post-traumatic patello-femoral arthralgia and post-traumatic internal derangement of the left knee. Dr. Weiss opined that appellant had a 17 percent permanent impairment of the left lower extremity as a result of the September 24, 1977 employment injury and the A.M.A., *Guides*. Specifically, Dr. Weiss calculated that appellant had a 5 percent impairment for osteoarthritis of the left knee and a 12 percent impairment for muscle strength weakness totaling 17 percent. The Office medical adviser indicated that flexion was to 120 degrees, specifically more than 110 degrees, which was equivalent to 0 percent pursuant to Table 41 on page 78 of the A.M.A., *Guides*, that lateral meniscectomy was 7 percent pursuant to Table 64 on page 85 of the A.M.A., *Guides*, that traumatic osteoarthritis was 5 percent pursuant to Table 64 on page 85 of the A.M.A., *Guides* and that quadriceps muscle weakness was 12 percent totaling 23 percent impairment of the lower right extremity.⁷ Thus, the Office medical adviser concluded that appellant was entitled to a schedule award for an additional three percent permanent loss of use of the right lower extremity. The Board notes that Dr. Weiss' October 9, 1993 report only discussed his findings regarding appellant's left leg. Additionally, the Board notes that there is no other medical evidence of record which addressed whether appellant has more than a 20 percent permanent impairment of the right leg. Therefore, the Board finds that appellant is not entitled to a schedule award for more than a 20 percent permanent impairment of the right leg.⁸

The Board also finds that appellant received an overpayment in the amount of \$3,680.64. The record contains evidence which shows that appellant received \$3,680.64 in compensation for the period October 9 through December 8, 1993 for an additional three percent permanent impairment of the loss of use of the right leg. The Office, however, advised appellant that due to an administrative error she was not entitled to receive compensation for this period since she had claimed an award for the left leg which was not compensable. Appellant did not allege or submit evidence to show that she did not receive a \$3,680.64 overpayment for this period and the Office properly found that she received such an overpayment.

Additionally, the Board finds that the Office did not abuse its discretion in denying waiver of recovery of the overpayment.

⁷ The Board notes that the total permanent impairment rating for appellant's right lower extremity is 24 percent rather than 23 percent as indicated by the Office medical adviser.

⁸ Subsequent to the Office's January 24, 1996 decision, appellant submitted medical evidence. However, the Board cannot consider evidence that was not before the Office at the time of its decision; *see* 20 C.F.R. § 501.2(c).

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.⁹ 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."¹⁰ 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.

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 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).¹¹ For waiver under this standard, appellant must show both that she needs substantially all of her current income to meet current ordinary and necessary living expenses and that her assets do not exceed the resource base.¹² An individual is deemed to need substantially all of her current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.¹³

In the instant case, appellant completed a Form OWCP-20, overpayment recovery questionnaire and submitted additional documents verifying the amounts shown on the questionnaire. The questionnaire revealed monthly expenses of \$6,078.45¹⁴ subtracted from

⁹ See *Robert Atchison*, 41 ECAB 83, 87 (1989).

¹⁰ 5 U.S.C. § 8129(b).

¹¹ 20 C.F.R. § 10.322(a). Section 10.322 defines the terms "income," "expenses" and "assets." See 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 she needs substantially all of her current income to meet ordinary and necessary living expenses and that her 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 her current income to meet ordinary and necessary living expenses if her 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 6.200.6(a)(1) (September 1994); *Connie L. Potratz-Hasson*, 42 ECAB 359, 363 (1991).

¹² *Forrest E. Brown, II*, 44 ECAB 278, 284 (1992); Federal (FECA) Procedure Manual, Part 9 -- Debt Management, *Initial Overpayment Actions*, Chapter 9.200.(6)(a) (September 1989).

¹³ Federal (FECA) Procedure Manual, Part 9 -- Debt Management, *Initial Overpayment Actions*, Chapter 9.200.6(a)(1) (September 1989).

¹⁴ The questionnaire revealed monthly expenses of \$4,229.00 for rent or mortgage, \$400.00 for food, \$400.00 for clothing and \$1,049.45 for utilities.

appellant's monthly income of \$8,500.85,¹⁵ this leaves appellant with an excess of \$2,422.40 per month, substantially more than \$50.00. The questionnaire also revealed that appellant had substantial assets in the amount of \$149,979.34.¹⁶ Inasmuch as appellant does not meet the conjunctive income and asset standard for waiver because her income exceeds her ordinary and necessary living expenses by more than \$50.00 per month, and appellant's assets exceed the maximum allowable, the Board finds that appellant is not entitled to waiver of recovery of the overpayment under the "defeat the purpose of the Act" standard.

Regarding the "against equity and good conscience" standard, section 10.323(b) 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.¹⁷

The evidence in this case does not establish that appellant would suffer undue hardship in repaying the overpayment in the amount of \$3,680.64. Further, the record does not establish that appellant relinquished a valuable right or changed her position for the worse in reliance on the payment of compensation. To show detrimental reliance under section 10.323(b), appellant must show that she made a decision she otherwise would not have made in reliance on the overpaid compensation and that this decision resulted in a loss.¹⁸ Appellant did not allege any substantial reliance on the overpayment of compensation in this case, nor was detrimental reliance shown. Therefore, the Board finds that the Office did not abuse its discretion in denying waiver of recovery of the overpayment.

¹⁵ The questionnaire revealed monthly income in the amount of \$2,244.28 from benefits received in claim number A2-601132, \$3,521.57 from appellant's husband's salary from the employing establishment and \$2,735.00 from rentals.

¹⁶ Specifically, the questionnaire revealed that appellant owned property valued at \$148,000.00 less a mortgage of \$103,486.00 which equaled \$44,514.00, property valued at \$80,000.00 less a mortgage of \$46,346.00 which equaled \$33,654.00 and property valued at \$100,000.00 less a mortgage of \$30,045.00 which equaled \$69,955.00. The questionnaire also indicated that appellant had \$48.00 in cash on hand, \$525.00 and \$26.44 in checking accounts, and \$1,256.90 in a savings account totaling \$1,856.34 rather than \$1,855.90 as indicated by appellant.

¹⁷ 20 C.F.R. § 10.323(b).

¹⁸ *Forrest E. Brown, II, supra* note 12 at 285-86; Federal (FECA) Procedure Manual, Part 9 -- Debt Management, *Initial Overpayments Actions*, Chapter 9.200.6(b)(3) (September 1989).

The January 24, 1996 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, D.C.
April 21, 1998

George E. Rivers
Member

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member