

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SHEILA LINCOLN and DEPARTMENT OF LABOR,
JOB CORPS CENTER, Clearfield, Utah

*Docket No. 97-768; Submitted on the Record;
Issued February 4, 1999*

DECISION and ORDER

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

The issues are: (1) whether appellant has more than a 12 percent permanent impairment of the left upper extremity, for which she received a schedule award; and (2) whether appellant is with fault in the matter of the overpayment that occurred in her case, thereby precluding waiver of recovery.

On January 14, 1991 appellant, then a welder, sustained an injury while in the performance of her duty when she slipped on ice, fell and broke her left arm. She underwent several surgeries. The Office of Workers' Compensation Programs accepted her claim for fracture of the midshaft radius and ulna. The Office placed appellant on the periodic rolls effective February 10, 1991. On March 1, 1991 the Office notified appellant as follows:

"In order to avoid an overpayment of compensation, NOTIFY THIS OFFICE IMMEDIATELY WHEN YOU RETURN TO WORK. Each payment made through the Office's automated system will include the period for which payment is made. If you have worked for any portion of this period, you must return the check to this Office. Otherwise, an overpayment of compensation may result." (Original emphasis.)

Appellant filed a claim for a schedule award.

Dr. Jeffrey A. Bogosian, a Board-certified orthopedic surgeon and Office referral physician, reported on December 23, 1994 that medical records and x-rays confirmed that appellant had an employment-related cubital tunnel syndrome of the left elbow. On April 26, 1995 he reported that appellant's condition was permanent and stationary. Responding to a request for specific clinical findings necessary to evaluate appellant's claim for a schedule award, Dr. Bogosian reported that appellant had diminished sensation of the left ulnar nerve distribution and a positive Tinel's sign at the distal forearm over the ulnar nerve. He also

reported grip weakness of the left hand “with 80 percent of normal.” Dr. Bogosian indicated that all other findings were within normal limits.

An Office medical consultant compared Dr. Bogosian’s clinical findings to the criteria in the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (fourth edition). He noted that a 20 percent loss of grip strength represented a 10 percent impairment of the upper extremity according to Table 34, page 65. He also noted that the level of sensory impairment was Grade 2 or 25 percent, under Table 11, page 48. As the maximum impairment value of the ulnar nerve is 7 percent for sensory deficit, under Table 15, page 54, the medical consultant calculated that the sensory impairment of the upper extremity was 25 percent times 7 percent, or 2 percent. Taking the two impairments together, the medical consultant determined that appellant had a 12 percent impairment of the left upper extremity.

On October 30, 1996 the Office issued a schedule award for a 12 percent permanent impairment of the left upper extremity. The period of the award ran from the date of maximum medical improvement, December 18, 1995 to September 5, 1996.

A few months earlier, on July 17, 1996 the Office issued a preliminary determination that appellant was with fault in the matter of an overpayment that occurred in her case when, while in receipt of compensation for temporary total disability, appellant returned to full time employment on March 10, 1994. The Office found that appellant accepted a payment she knew or should have been expected to know was incorrect: As she had returned to working full time and had earnings, the Office found, appellant should have reasonably been aware she was not entitled to compensation benefits on the basis of total disability.

On October 29, 1996, having received no response from appellant, the Office issued a decision finalizing its preliminary determination. The Office found that appellant should have reasonably been aware that she was not entitled to benefits on the basis of total disability when she had returned to work full time and had earnings. To recover the overpayment, the Office offset the amount of the overpayment by the amount of the schedule award, leaving \$405.43 to be recovered. The Office requested that appellant forward a check in this amount.

The Board finds that the medical evidence fails to support that appellant has more than a 12 percent permanent impairment of the left upper extremity.

Section 8107 of the Federal Employees’ Compensation Act¹ and section 10.304 of the implementing federal regulations² authorize the payment of schedule awards for the loss or permanent impairment of specified members, functions or organs of the body. Neither the Act nor the regulations, however, specify how the percentage of impairment shall be determined. For consistent results and to ensure equal justice for all claimants, the Office has adopted the

¹ 5 U.S.C. § 8107.

² 20 C.F.R. § 10.304.

A.M.A., *Guides* as the standard for determining the percentage of impairment and the Board has concurred in such adoption.³

Table 34, page 65, of the fourth edition of the A.M.A., *Guides* supports that a 20 percent loss of strength represents a 10 percent impairment of the upper extremity. Table 11, page 48, provides a grading scheme and procedure for determining impairment of the upper extremity due to pain or sensory deficit. The Office medical consultant considered Dr. Bogosian's clinical findings and graded appellant's pain or sensory deficit as Grade 2, or decreased sensibility, with or without abnormal sensation or pain, which is forgotten during activity. This appears to be reasonably supported by the medical evidence.⁴ The medical consultant gave the greatest percentage sensory deficit permitted by such a grade, or 25 percent. Then, following the procedure set forth in Table 11, he found that the maximum sensory impairment value of the implicated nerve, according to Table 15, page 54, was 7 percent. Multiplying the severity of the sensory deficit, 25 percent, by the maximum impairment value of the nerve, 7 percent, the medical consultant calculated that appellant had a 2 percent impairment of the left upper extremity due to pain or sensory deficit. Using the Combined Values Chart at page 322, the 10 percent impairment for loss of strength and the 2 percent impairment for pain or sensory deficit combine for a total impairment of 12 percent, for which the Office awarded compensation.

The Board finds that the Office properly followed standardized procedures in determining appellant's entitlement to schedule compensation. For this reason, the Board will affirm the Office's October 30, 1996 decision.

The Board also finds that the Office properly determined that appellant was with fault in the matter of the overpayment that occurred in her case, thereby precluding waiver of recovery.

Section 8129 of the Act⁵ provides that an overpayment of compensation shall be recovered by the Office unless "incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience." Thus, before the Office may recover an overpayment of compensation, it must determine whether the individual is without fault.

Section 10.320 of the implementing federal regulations⁶ provides the following:

"In determining whether an individual is with fault, the Office will consider all pertinent circumstances including age, intelligence, education and physical and

³ See, e.g., *Leisa D. Vassar*, 40 ECAB 1287 (1989). FECA Bulletin No. 94-4 (issued November 1, 1993) states that any recalculations or previous awards that result from hearings, reconsideration or appeals should be based on the fourth edition of the A.M.A., *Guides* effective November 1, 1993.

⁴ Grade 3 is decreased sensibility, with or without abnormal sensation or pain, which interferes with activity. Dr. Bogosian gave no indication that appellant's sensory deficit interfered with activity.

⁵ 5 U.S.C. § 8129(b).

⁶ 20 C.F.R. § 10.320(b).

mental condition. An individual is with fault in the creation of an overpayment who:

- (1) Made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or
- (2) Failed to furnish information which the individual knew or should have known to be material; or
- (3) With respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect.”

The Office found that appellant was with fault under the third criterion. The Office explained to appellant the conditions under which she would receive compensation for temporary total disability, and it was reasonable under the facts of this case for the Office to find that appellant should have been expected to know that she was not entitled to compensation for total disability while she was employed full time with earnings. Because appellant was with fault in the matter of the overpayment that occurred in her case, the Office may not waive recovery of the overpayment. In this case, the Office recovered most of the overpayment using the amount of the schedule award to which appellant was entitled as an offset.

The Board’s jurisdiction to review the collection of an overpayment is limited to cases of adjustment, wherein the Office decreases later payments to which the individual is entitled.⁷ When the Office finalized its overpayment decision on October 29, 1996, appellant was no longer entitled to monetary compensation for wage loss. Further, the period of the schedule award to which she was entitled ended on September 5, 1996. In short, appellant was not entitled to later payments of compensation. The Board therefore has no jurisdiction to review the Office’s collection of the overpayment.

⁷ See 5 U.S.C. § 8129; *Levon H. Knight*, 40 ECAB 658 (1989).

The October 30 and October 29, 1996 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, D.C.
February 4, 1999

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member