U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SUSAN M. BANKS and U.S. POSTAL SERVICE,
POST OFFICE, Toledo, Ohio

Docket No. 97-1497; Submitted on the Record;
Issued May 6, 1999

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's entitlement to compensation for wage loss and medical benefits on December 30, 1996, finding that her work-related injury had resolved without residuals; (2) whether the Office properly determined that appellant received an overpayment of compensation in the amount of $ 226.03; (3) whether appellant was entitled to waiver of recovery of the overpayment; and (4) whether the Office properly required repayment by salary deduction in accordance with 29 C.F.R. § 74 *et seq.*

On January 8, 1995 appellant, then a 37-year-old clerk, slipped on ice in an employing establishment parking lot and fell, injuring her left knee. The Office accepted appellant's claim for contusion of the left knee and later approved arthroscopic surgery on March 17, 1995 for the left knee.[1] On May 8, 1995 a lateral meniscus tear was also accepted. Appellant returned to a light-duty, sedentary job for four hours per day on May 15, 1995, increased to six hours per day on June 6, 1995 and increased to eight hours per day on June 26, 1995.

On June 14, 1995 the Office referred appellant to Dr. Robert L. Kalb, a Board-certified orthopedic surgeon, for further case development.

By report dated June 28, 1995, Dr. Kalb stated that appellant's March 17, 1995 arthroscopic surgery was for debridement of a degenerative lateral meniscus discoid tear. He opined that appellant's knee condition was job related, and that her improvement would be slow unless she was able to substantially reduce her weight.

On December 27, 1995 the Office determined that appellant has no loss of wage-earning capacity. However, appellant continued to have left knee problems.

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[1] During this surgery Dr. Habusta found a discoid meniscus of the left knee which he partially resected in order to create a normal C-shaped meniscus in the lateral compartment.

On March 25, 1996 appellant's treating physician, Dr. Steven Habusta, an osteopathic orthopedic surgeon, requested authorization for further left knee arthroscopic surgery scheduled for March 28, 1996, on the basis that he felt appellant had loose cartilage causing her pain, locking up and collapsing. Postoperative diagnoses included left knee synovitis with small degenerative posterior horn tear of the lateral meniscus and Grade III chondromalacia of the lateral femoral condyle and tibial plateau.

Appellant thereafter filed a claim for recurrence of disability commencing March 28, 1996. On April 17, 1996 Dr. Habusta opined that the tear of the lateral cartilage or meniscus, for which appellant underwent arthroscopic surgery, was causally related to her January 8, 1995 employment injury. He opined that appellant was disabled from work from the date of surgery until May 27, 1996 and estimated that appellant could return to work on May 27, 1996.

By letter dated June 3, 1996, the Office advised appellant that her March 28, 1996 recurrence and the arthroscopic surgery of the left knee had been accepted as being causally related to her January 6, 1995 injury. By letter dated June 4, 1996, the Office advised appellant that the accepted conditions were "left knee meniscus tear" and "arthroscopy left knee," and it explained that compensation would be paid from the period March 28 to May 28, 1996. Appellant returned to light duty on May 28, 1996. Appellant's work restrictions from Dr. Habusta were noted by appellant's nurse case manager to include no stair climbing or squatting, a 25-pound weight lifting restriction, the ability to sit or stand to tolerance and no sitting on any type of peg stool, sitting in a regular chair only.

On September 13, 1996 the Office received an attending physician's report from Dr. Habusta indicating that appellant had physical work limitations of no standing, no lifting more than 25 pounds and no pushing. He saw appellant again on September 16, 1996 and noted that she continued to have a lot of pain and discomfort in her left knee.

The Office arranged a second opinion medical examination with Dr. Sukhjit S. Purewal, a Board-certified orthopedic surgeon, on September 27, 1996, and provided a statement of accepted facts and relevant medical records for his review. He noted that appellant still had achiness in her left knee in the anterolateral and anteromedial aspects of the joint, which was worse when standing or walking for extended periods and noted that sometimes appellant's left knee tended to buckle. Upon examination Dr. Purewal found bilateral developmental lateral tilting of the patella with associated lateral impingement syndrome and a slightly increased valgus alignment of the left knee when compared to the right. He noted full range of motion of both knees and that both knees presented with mild tenderness at the medial and lateral patellar facets, with additional pain at the lateral joint line in the left knee. Dr. Purewal noted that McMurry's test was positive, producing pain at the anterolateral aspect of the joint, but no definite clicking. Contemporaneous x-rays demonstrated minimal narrowing of the medial joint space bilaterally with slightly increased valgus alignment of the left knee. He opined that this type of meniscus is usually predisposed to tears and also symptoms such as appellant was having and opined that it was quite possible that the January 8, 1995 injury resulted in a tear of the left knee discoid meniscus. Dr. Purewal opined that appellant's present symptoms were due primarily to the chondromalacia of the knee, which he identified as an early stage of degenerative change, worsened by appellant's obesity and the valgus alignment and patellar

malalignment. He opined that presently there was no evidence of any residuals or bruising from the arthroscopic procedures performed on appellant's left knee and he opined that her underlying degenerative changes, in all probability, were the cause of the symptomatology for which she underwent the second surgery. Dr. Purewal also opined, however, that the small tear found in the second surgery "was probably a remnant from the previous reshaping surgery of the meniscus" but it could also have resulted from grinding of the meniscus between the femur and the tibia. He stated that appellant's arthroscopic findings were not at all unusual in knees developing degenerative changes and he reiterated that her right knee evidence similar degenerative changes of chondromalacia at the patellofemoral joint. Dr. Purewal opined, regarding the accepted conditions of contusion of the left knee and left knee meniscus tear which required arthroscopic surgery, that appellant had a two percent permanent impairment "of the whole person because of the condition of her left knee." He noted that this figure did not include any impairment due to degenerative changes.

Following a request for clarification, Dr. Purewal opined, by report dated October 11, 1996, that appellant's original diagnosis should have been "internal derangement of the left knee with discoid meniscus" and he reiterated that that type of meniscus was more prone to damage than normally shaped menisci. Dr. Purewal indicated that, without the benefit of arthroscopic pictures, he could not determine whether a discoid meniscal tear existed and noted that the operative notes were silent on that issue and he opined that appellant's current symptoms were due to the chondromalacia and degenerative changes in her knees and there is no evidence of any residual tear of the meniscus of the left knee. He opined that appellant had a two percent permanent impairment based on the condition of her knee secondary to the left knee contusion and the left meniscus tear which required arthroscopic surgery and not due to the gradually developing degenerative changes.

Also by report dated October 11, 1996, Dr. Habusta noted that appellant had ongoing pain and problems and still had difficulty going up and down stairs and squatting. He noted work restrictions of no stair climbing or squatting, 25-pounds maximum weight restriction and the ability to sit or stand to tolerance and indicated that they still applied. Dr. Habusta opined that appellant had reached maximum medical improvement as of September 16, 1996 and that she had a 6.5 percent permanent impairment.

By preliminary determination dated October 15, 1996, the Office found that appellant had received an overpayment of compensation the amount of $226.03 for 16 hours on May 25 and 28, 1996 because she received compensation at the same time the employing establishment was paying her holiday pay for May 25, 1996 and regular pay on May 28, 1996. The Office found that appellant was without fault in the creation of the overpayment and it advised her of the requirements for requesting waiver of recovery of the overpayment. By decision dated November 18, 1996, the Office finalized its preliminary determination. The Office noted that appellant had not requested waiver or provided any information to support waiver and it denied waiver of recovery of the overpayment; the Office demanded repayment of the full amount. On December 30, 1996 the Office advised appellant that, under 29 C.F.R. § 74 *et seq.* and the Debt Collection Act of 1982 it was considering installment deductions from appellant's pay to satisfy the outstanding debt. It requested further information to determine the amount of the deduction.

By decision dated December 30, 1996, the Office terminated appellant's entitlement to compensation for wage loss and medical benefits, determining that the weight of the medical evidence established that she had recovered from her work-related injury and that work-related injury residuals had resolved. The Office noted that the opinions of Drs. Habusta and Purewal were essentially the same, the only difference being the assignment of residua necessitating work restrictions. The Office found that that issue was moot as no residua of the work-related condition or the approved procedures existed. It further determined that the January 8, 1995 injury aggravated appellant's underlying left discoid meniscus, that the March 17, 1995 surgery resolved this by reshaping, that no tear existed, that appellant's March 28, 1996 surgery was necessitated by nonwork-related factors and that no residuals of either procedure remained.

The Board finds that the decision terminating appellant's entitlement to compensation benefits and further medical care will be reversed.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[2] After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.[3] The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for wage loss.[4] To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition that requires further medical treatment.[5] The Office did not meet its burden of proof to terminate medical benefits in this case.

Dr. Purewal, the second opinion specialist, opined that appellant's present symptoms were due primarily to her underlying chondromalacia of the left knee, that there was no evidence of any residuals or bruising from the arthrocopic procedures and that there is no evidence of any residual tear of the meniscus of the left knee. He also, however, opined that appellant still had pain in her left knee, more than in the right, that sometimes her left knee seemed to buckle and that McMurry's test was positive in the left knee, without explaining why, if these symptoms were due to the underlying chondromalacia, such symptoms did not appear in the right knee also. Further, Dr. Purewal determined that appellant had a two percent permanent impairment due to the accepted conditions of contusion of the left knee and left knee meniscuas tear which required arthroscopic surgery and not due to degenerative changes. He, however, did not explain why, if appellant had no residuals from the operative procedures and/or accepted conditions, she had a residual permanent impairment of two percent due solely to the injuries and the surgeries. Dr. Purewal also did not provide detail as to what factors comprised this impairment, such as

[2] *Harold S. McGough*, 36 ECAB 332 (1984).

[3] *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

[4] *Marlene G. Owens*, 39 ECAB 1320 (1988).

[5] *See Calvin S. Mays*, 39 ECAB 993 (1988); *Patricia Brazzell*, 38 ECAB 299 (1986); *Amy R. Rogers*, 32 ECAB 1429 (1981).

pain, crepitus, weakness, or atrophy.[6] As his reports contain conflicting statements which require further clarification, they are insufficiently rationalized to constitute the weight of the medical evidence on the issue of injury residuals and do not conclusively establish that appellant has no further residuals of her left knee contusion, left meniscal tear, or arthroscopic surgeries.

Additionally, the Board notes that Dr. Habusta's reports from September and October 1996 identify ongoing left knee pain and problems as injury residuals and report functional difficulty going up and down stairs and squatting and they recommend work limitation restrictions for appellant's partially permanently impaired state, which he opined was a 6.5 percent permanent impairment.

As Dr. Purewal's reports need further clarification as to whether or not appellant has any injury residuals and/or permanent impairment due to her initial injuries or due to her two accepted surgeries, and as Dr. Habusta's reports are in conflict with Dr. Purewal's reports on the issue of injury residuals, as pointed out by the Office in its memorandum to the Director accompanying its December 30, 1996 decision, a conflict in medical opinion evidence exists which requires resolution and the Office did not meets its burden of proof to terminate appellant's entitlement to medical treatment.

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of $226.03.

The record supports that appellant received compensation for the period March 28 through May 28, 1996 and also supports that the employing establishment paid appellant holiday pay for May 25, 1996 and wages for May 28, 1996. As a claimant cannot receive both pay from the employing establishment and compensation for loss of wages for the same period, there was an overpayment of compensation for the days May 25 and 28, 1996 which the record demonstrates amounted to $226.03. Accordingly, the facts and amount of overpayment are affirmed.

Further, the Board finds that appellant was not entitled to waiver.

Section 8129 of the Federal Employees' Compensation Act[7] provides that an overpayment of compensation must be recovered 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 [emphasis supplied]." Thus, a finding that appellant was without fault does not automatically result in waiver of the overpayment. The

[6] The Board additionally notes that Dr. Purewal made conflicting statements in his reports, claiming that appellant's underlying degenerative changes were the cause of the symptomatology for which she underwent the second surgery, yet also stating that the small tear found during the second surgery was probably a remnant from the previous surgery and that appellant had a two percent impairment in part due to the left meniscus tear which required arthroscopic surgery. The Board finds that these conflicting statements about what the second surgery was for, require further clarification and that the Office could not, therefore, determine from such conflicting statements that no tear existed.

[7] 5 U.S.C. § 8129.

Office must then exercise its discretion to determine whether recovery of the overpayment would defeat the purpose of the Act or would be against equity and good conscience.[8]

Section 10.322(a) of the implementing regulations[9] provides that recovery of an overpayment will defeat the purpose of the Act if recovery would cause hardship by depriving a presently or formerly entitled beneficiary of income and resources needed for ordinary and necessary living expenses. Recovery will defeat the purpose of the Act to the extent that: (1) the individual from whom recovery is sought needs substantially all of his current income, including compensation benefits, to meet current ordinary and necessary living expenses; and (2) the individual's assets do not exceed a resource base of $3,000.00 for and individual or $5,000.00 for an individual with a spouse or one dependent plus $600.00 for each additional dependent. This base includes all of the individual's assets not exempt from recoupment.[10]

In its October 15, 1996 notice of preliminary determination of overpayment, the Office advised appellant of the information that she needed to submit if she wanted to request a waiver of recovery of the overpayment. Thereafter, appellant did not make such a request for waiver of recovery of the overpayment and did not submit any of the requested information. As a result, the Office did not have the necessary financial information to determine whether recovery of the overpayment would defeat the purpose of the Act.

With respect to whether recovery would be against equity and good conscience, section 10.323(b) of the implementing regulations provides that "[r]ecovery of an overpayment is considered to be inequitable and against good conscience when an individual, in reliance on such payments or notice that such payments would be made, relinquished a valuable right or changed [her] position for the worse." Appellant has not alleged and the evidence does not demonstrate, that she relinquished a valuable right or changed her position for the worse in reliance on the erroneously paid two days of compensation which formed the basis for the overpayment.

As appellant has not shown that recovery would "defeat the purpose of the Act" or would "be against equity and good conscience" the Board finds that the Office properly denied waiver of recovery of the overpayment.

The waiver or refusal to waive an overpayment of compensation by the Office is a matter which rests within its discretion to be exercised pursuant to the statutory guidelines. Thus, the only question before the Board is whether the refusal under the circumstances here represents an abuse of discretion.[11] As appellant has not shown that recovery would defeat the purpose of the Act or would be against equity and good conscience, the Board finds that the Office did not abuse its discretion and properly denied waiver of recovery of the overpayment.

[8] *See James M. Albers, Jr.*, 36 ECAB 340 (1984).

[9] 20 C.F.R. § 10.322(a).

[10] *Robert F. Kenney*, 42 ECAB 297 (1991).

[11] *Ronald E. Smith*, 36 ECAB 652 (1985).

The Board does not have jurisdiction over the manner of recovery of overpayments from recipients no longer receiving compensation payments.[12]

Accordingly, the decision of the Office of Workers' Compensation Programs dated November 18, 1996 is hereby affirmed, but the decision dated December 30, 1996 is hereby reversed.

Dated, Washington, D.C.
May 6, 1999

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

[12] *See Robert S. Luciano*, 47 ECAB 793 (1996); *Lewis George*, 45 ECAB 144 (1993).