

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JEANNE G. MACKEY and DEPARTMENT OF AGRICULTURE,
Minneapolis, MN

*Docket No. 98-464; Submitted on the Record;
Issued September 10, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
WILLIE T.C. THOMAS

The issues are: (1) whether appellant established that she has greater than a nine percent permanent impairment of the right lower extremity, for which she received a schedule award; (2) whether the Office of Workers' Compensation Programs properly determined that appellant received an overpayment in the amount of \$2,098.02 for the period March 3 through April 30, 1996; (3) whether the Office properly determined that appellant was not entitled to a waiver of recovery of the overpayment; and (4) whether the Office properly recovered the overpayment from appellant's continuing compensation.

On May 22, 1995 appellant, then a 33-year-old food inspector, sustained an injury to her right ankle when she fell from a hydraulic stand while in the performance of duty. She ceased working that day and was later treated in the emergency room at Cox-Monett Hospital for a right ankle sprain and a soft tissue injury of the right knee. Appellant returned to work on June 28, 1995, however, she experienced increased pain and swelling in her ankle and, therefore, she did not return to work the following day. On August 28, 1995 the Office accepted appellant's claim for a right ankle sprain. Upon further evaluation, it was determined that appellant sustained ligament damage as a result of the May 22, 1995 employment incident. Accordingly, the Office subsequently authorized surgery to repair appellant's personal tendon, which appellant underwent on December 1, 1995. Appellant received continuation of pay and appropriate wage-loss compensation as a result of her injury and subsequent surgery. She returned to work on March 17, 1996 on an intermittent basis and subsequently resumed her full-time duties on April 14, 1996.

On September 26, 1996 the Office informed appellant that it had made a preliminary determination that an overpayment in the amount of \$2,098.02 had occurred. The Office explained that appellant had erroneously received a duplicate wage-loss payment for the period March 3 through 16, 1996. Additionally, appellant was advised that she received an overpayment of disability benefits for the period March 17 through April 30, 1996, due to the fact that she resumed work prior to April 30, 1996. The Office found that appellant was without

fault in the creation of the overpayment and advised appellant of her rights in the event that she disagreed with the preliminary determination. Finally, the Office indicated that if appellant did not respond within 30 days, a final decision would be issued based on the information currently on file.

Appellant did not respond to the Office's September 26, 1996 preliminary determination within the allotted time and accordingly, the Office finalized its prior determination regarding overpayment on January 17, 1997. Although appellant was found to be without fault in the creation of the overpayment, the Office did not grant a waiver of recovery of overpayment inasmuch as appellant had not requested such a waiver.

On March 10, 1997 the Office referred appellant for examination with Dr. J. Newt Wakeman, Jr., a Board-certified orthopedic surgeon, for purposes of determining her entitlement to a schedule award under the Federal Employees' Compensation Act. In a report dated March 27, 1997, Dr. Wakeman noted that appellant had 50 degrees of plantar flexion with extension to 5 degrees, as well as 10 degrees of inversion and 15 degrees of eversion. Dr. Wakeman explained that appellant's loss of extension and inversion represented an impairment of 7 percent and 3 percent, respectively and a combined 10 percent impairment of the lower limb in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993).

The Office medical adviser reviewed Dr. Wakeman's March 27, 1997 report, initially on April 21, 1997 and again on August 9, 1997. While the Office medical adviser concurred with Dr. Wakeman's finding of a seven percent impairment due to loss of flexion, he noted that the three percent hindfoot impairment reported by Dr. Wakeman actually represented an impairment of the foot rather than the lower extremity. The Office medical adviser explained that the measurements for eversion and inversion reported by Dr. Wakeman represented a 2 percent impairment of the lower extremity and that the combined impairments represented a 9 percent impairment of the lower extremity in contrast to the 10 percent combined rating reported by Dr. Wakeman. Finally, the Office medical adviser determined that March 27, 1997 was the date of maximum medical improvement.

By decision dated August 18, 1997, the Office granted appellant a schedule award for a nine percent permanent impairment of her right leg. The award covered a period of 25.92 weeks from March 27 through September 24, 1997. Additionally, the Office noted that appellant's schedule award was reduced by the amount of her outstanding overpayment. Appellant filed a timely appeal on November 21, 1997.

The Board finds that appellant did not meet her burden of proof to establish that she has more than a nine percent permanent impairment of her right lower extremity.

Section 8107 of the Act¹ sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body. The Act, however, does not specify the manner by which the percentage loss of a member, function or

¹ 5 U.S.C. § 8107.

organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The Office has adopted the A.M.A., *Guides* (4th ed. 1993) as an appropriate standard for evaluating schedule losses and the Board has concurred in such adoption.²

In the instant case, both the Office medical adviser and Dr. Wakeman correctly determined that appellant's measured 5 degrees of extension represented a 7 percent impairment of the lower extremity in accordance with Table 42 (Ankle Motion Impairments), at page 78 of the A.M.A., *Guides* (4th ed. 1993). Additionally, appellant's measured 10 degrees of inversion corresponds to a 2 percent impairment of the lower extremity in accordance with Table 43 (Hindfoot Impairments), at page 78 the A.M.A., *Guides*. As the Office medical adviser correctly noted, Dr. Wakeman's calculation of a 3 percent impairment under Table 43 represented an impairment to the foot and not the lower extremity. As such, Dr. Wakeman's calculation of a 10 percent combined impairment of the lower extremity was incorrect.

In accordance with the Combined Values Chart at page 322 of the A.M.A., *Guides*, the Office medical adviser properly concluded that appellant's 7 percent impairment due to loss of ankle motion when combined with her 2 percent hindfoot impairment represented an overall impairment of 9 percent of the right lower extremity. The Office medical adviser's calculation of the percentage of impairment of appellant's right lower extremity conforms to the A.M.A., *Guides* (4th ed. 1993) and, therefore, constitutes the weight of the medical evidence.³ Accordingly, appellant has failed to provide any probative medical evidence that she has greater than a nine percent impairment.

The Board further finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$2,098.02 for the period March 3 through April 30, 1996. The record shows that appellant erroneously received a duplicate wage-loss payment for the period March 3 through 16, 1996. Moreover appellant received compensation for total disability during the period March 17 through April 30, 1996, notwithstanding the fact that she worked intermittently for 29 hours after March 17, 1997 and resumed work full time on April 14, 1997.

Additionally, the Board finds that appellant is not entitled to a waiver of recovery of overpayment and that the Office properly recovered the overpayment from appellant's continuing compensation.

Section 8129 of the Act⁴ provides that an overpayment 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." In the instant case, while appellant was found to be without fault in the creation of the overpayment, the Office did not grant a waiver of recovery of overpayment because appellant

² *James J. Hjort*, 45 ECAB 595 (1994).

³ *See Bobby L. Jackson*, 40 ECAB 593, 601 (1989).

⁴ 5 U.S.C. § 8129(a), (b).

neither requested such a waiver nor submitted any financial information that would support a waiver of recovery of overpayment. The Board has held that where appellant has failed to submit the necessary information to support a waiver of recovery of overpayment, the Office's denial of waiver is appropriate.⁵ Additionally, where appellant fails to submit an overpayment recovery questionnaire, the Office may recover the overpayment from appellant's continuing compensation.⁶ Inasmuch as appellant did not request a waiver of recovery of overpayment or submit any evidence that would otherwise justify such a waiver, the Office properly recovered appellant's outstanding overpayment from her August 18, 1997 schedule award.

The decisions of the Office of Workers' Compensation Programs dated August 18 and January 17, 1997 are, hereby, affirmed.

Dated, Washington, D.C.
September 10, 1999

Michael J. Walsh
Chairman

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

⁵ *William D. Emory*, 47 ECAB 365, 373 (1996).

⁶ *Nina D. Newborn*, 47 ECAB 132, 140 n.13 (1995).