

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HAROLD PATTERSON and U.S. POSTAL SERVICE,
POST OFFICE, East Point, GA

*Docket No. 99-477; Submitted on the Record;
Issued May 17, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
DAVID S. GERSON

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received an overpayment in the amount of \$303.82 for the period December 3 through 6, 1997 inasmuch as appellant received duplicate compensation checks for this period; (2) whether the Office properly found that appellant was with fault in the creation of the overpayment in the amount of \$303.82; and (3) whether appellant is entitled to more than a 15 percent permanent impairment of the right arm, for which he has already received a schedule award.

On August 5, 1996 appellant, then a 62-year-old window distribution clerk, filed a traumatic injury claim (Form CA-1) alleging that on that date, he injured his right shoulder when he pulled a large heavy parcel from an "APC" container. He stopped work.

The Office accepted appellant's claim for a right shoulder strain and a right rotator cuff tear.¹

Appellant returned to work in a modified distribution window clerk position on January 27, 1997.

By letter dated December 19, 1997, the Office accepted that appellant sustained a recurrence of disability beginning December 3, 1997 since his shoulder surgery had been approved.²

In an undated letter, the Office advised appellant that he was receiving a check dated December 26, 1997 in the amount of \$303.82 for the period December 3 through 6, 1997. In a

¹ Appellant underwent surgery on his right shoulder on December 19, 1996.

² Appellant underwent shoulder surgery on December 5, 1997. He returned to light-duty work on March 5, 1998.

January 14, 1998 letter, he stated at that time he had not received a compensation check and that he had not received a check since that time. Appellant requested that the Office trace the whereabouts of this check.

In a May 15, 1998 telephone conversation, appellant advised the Office that he had received a March check, but that he had not received a check for the period December 3 through December 6, 1997.

By letter dated May 19, 1998, the Office advised Dr. Raju Vanapalli, an orthopedic surgeon and appellant's treating physician, that appellant would contact him for an appointment to determine the extent of permanent impairment of his right shoulder with surgery. The Office also advised Dr. Vanapalli to utilize the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* in making his determination.

In an undated letter, the Office advised appellant that tracer action had been initiated to locate the missing check. The Office also advised him that a stoppage of payment had been requested if the check was outstanding. The Office then advised appellant that if he received the check(s), he should immediately provide notification over his signature. The Office further advised him that he must hold the check for 10 days before cashing it so that the stop payment could be withdrawn. In an internal memorandum dated February 23, 1998, the Office requested that a trace be placed on the check for the period December 3 through 6, 1997 because appellant called and stated he had not received this check.

Dr. Vanapalli submitted a June 24, 1998 medical report revealing that appellant had a 15 percent permanent impairment of the right shoulder based on the fourth edition of the A.M.A., *Guides*.

On June 30, 1998 appellant filed a claim for a schedule award (Form CA-7).

An internal Office memorandum dated July 8, 1998 indicated that a compensation check issued December 26, 1997 was still outstanding. The memorandum also indicated that a replacement check in the amount of \$303.82 was issued on June 5, 1998.

In a July 21, 1998 letter, the Office made a preliminary determination that an overpayment in compensation had occurred in the amount of \$303.82 during the period December 3 through 6, 1997 because appellant received two checks for this period. The Office noted that a replacement check was issued on June 5, 1998. The Office advised appellant that its records indicated both checks were still outstanding. The Office then advised appellant that he was at fault in the creation of the overpayment because he was not entitled to receive two compensation checks for the same period. In addition, the Office advised appellant that he could request a telephone conference, a final decision based on the written evidence only or a hearing within 30 days of the date of this letter if he disagreed that the overpayment occurred, if he disagreed with the amount of the overpayment, if he believed that the overpayment occurred through no fault of his own and if he believed that recovery of the overpayment should be waived. The Office requested that appellant complete an accompanying overpayment recovery questionnaire (Form OWCP-20) and submit financial documents in support thereof.

On August 6, 1998 an Office medical adviser reviewed Dr. Vanapalli's June 24, 1998 medical report and agreed with Dr. Vanapalli's finding that appellant had a 15 percent permanent impairment of the right upper extremity.

By decision dated October 13, 1998, the Office finalized its preliminary overpayment decision and finding of fault. By decision of the same date, the Office granted appellant a schedule award for a 15 percent permanent impairment of the right arm for the period June 24, 1998 through May 17, 1999.³

The Board finds that the Office has not established that an overpayment occurred in the amount of \$303.82 for the period December 3 through December 6, 1997.

Section 8129(a) of the Federal Employees Compensation Act provides that where an overpayment of compensation has been made "because of an error of fact or law," adjustment shall be made by decreasing later payments to which an individual is entitled.⁴ The only exception to this requirement is a situation which meets the test set forth as follows in section 8129(b): "[a]djustment or recovery 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 the Act or would be against equity and good conscience."⁵

In the instant case, the record indicates that the Office issued two compensation checks dated December 26, 1997 and June 5, 1998 and each in the amount of \$303.82 to appellant. Appellant, however, contended that he received one check only for the period in question, the check dated June 5, 1998 and in a January 14, 1998 letter requested that the Office place a tracer on the December 26, 1997 compensation check. Although the record indicates that the Office requested a tracer on the check in question, it does not contain the results of this action. Thus, the record does not establish that an overpayment occurred.

The Board further finds that appellant is not entitled to more than a 15 percent permanent impairment of the right arm, for which he has already received a schedule award.

The schedule award provision of the Act⁶ and its implementing regulation,⁷ 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.⁸ However, neither the Act nor the regulations specify the manner in which the percentage of impairment shall be

³ In an October 20, 1998 letter, the Office advised appellant that the overpayment in the amount of \$303.82 had been deducted from his schedule award payment.

⁴ 5 U.S.C. § 8129.

⁵ 5 U.S.C. § 8129(b).

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

⁷ 20 C.F.R. § 10.304.

⁸ 5 U.S.C. § 8107(c)(19).

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 A.M.A., *Guides* have been adopted by the Office and the Board has concurred in such adoption, as an appropriate standard for evaluating schedule losses.⁹

In this case, Dr. Vanapalli's June 24, 1998 medical report revealed that appellant could work eight hours per day with the restriction of not lifting more than five pounds of weights in an overhead position. Regarding his range of movements findings, Dr. Vanapalli indicated that abduction was 90 degrees, adduction was 45 degrees, forward flexion was 60 degrees, extension was 40 degrees, internal rotation was 60 degrees and external rotation was 60 degrees. He opined that, the combined limitation of motion and impairment of the right shoulder secondary to that impairment of motion was 15 percent of the right upper extremity. An accompanying work capacity evaluation musculoskeletal conditions (Form OWCP-5c) of the same date indicated that appellant could work eight hours per day with physical restrictions. The Office medical adviser, using Dr. Vanapalli's findings determined that appellant had a 15 percent permanent impairment of the right upper extremity based on Figures 38 through 45, pages 43 through 45 of the fourth edition of the A.M.A., *Guides*. The Board concludes that Dr. Vanapalli and the Office medical adviser properly applied the fourth edition of the A.M.A., *Guides* in determining that appellant has no more than a 15 percent permanent impairment of the right arm, for which he has received a schedule award and that appellant has failed to provide probative, supportable medical evidence that he has more than the 15 percent impairment already awarded.¹⁰

⁹ 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).

¹⁰ *Hermese H. Baldrige*, Docket No. 94-2276 (issued July 28, 1995)

The October 13, 1998 overpayment decision of the Office of Workers' Compensation Programs is hereby reversed. The Office's October 13, 1998 decision finding that appellant was not entitled to more than a 15 percent permanent impairment of the right arm, for which he has already received a schedule award is hereby affirmed.

Dated, Washington, D.C.
May 17, 2000

Michael J. Walsh
Chairman

George E. Rivers
Member

David S. Gerson
Member