U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PATRICIA A. MITCHELL and U.S. POSTAL SERVICE,
POST OFFICE, Denver, CO

Docket Nos. 99-859 and 00-2501; Submitted on the Record;
Issued February 9, 2001

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request for a prerecoupment hearing on the grounds that her request was not made within 30 days of the date of the preliminary determination of an overpayment; (2) whether the Office properly determined that an overpayment of $768.38 was created; (3) whether the Office properly denied waiver of the overpayment; and (4) whether appellant has greater than a seven percent loss of the use of her left leg, for which she received a schedule award.

The Office accepted appellant's claim for a left knee strain and approved a subsequent surgery on September 10, 1997. She accepted a limited-duty job offer as a modified manual distribution clerk and began her modified duties on December 8, 1997. Appellant returned to her reassignment duties on January 14, 1998.

Appellant submitted a leave-buy-back request to the employing establishment for the period September 9 through October 10, 1997. By letter dated December 1, 1997, the employing establishment contacted the Office requesting a listing of the dates compensation was paid during the period September 27 through October 24, 1997.

In a June 25, 1998 memorandum, the Office noted that the official payroll records from the employing establishment indicated that appellant had 98 hours of lost time charged to leave-without-pay (LWOP) during the period September 27 through October 24, 1997. The balance of appellant's lost time during that period was charged to paid leave. Accordingly, the Office recommended an appropriate overpayment action be instituted. The Office advised appellant by letter dated July 13, 1998, that a preliminary determination had been made that an overpayment of compensation in the amount of $768.38 for the period from September 27 through October 24, 1997 had occurred. The Office further determined that appellant was not at fault in creating the overpayment. The Office noted that the request for a hearing must be made within 30 days and must be accompanied by attached forms, which included an overpayment

questionnaire and a statement of election between a prerecoupment hearing, a telephone conference or a determination of waiver based on the financial information submitted by appellant.

In a letter of July 24, 1998, appellant requested a waiver of the overpayment. The word "hearing" along with the signature of "Pam" and the date August 14, 1998 was handwritten on the letter. A telefax of the letter was sent August 14, 1998 to the Branch of Hearings and Review. No forms or financial information was submitted.

By decision dated November 2, 1998, the Office denied appellant's request for a hearing on the grounds that her request was not submitted within 30 days of the date of the preliminary determination of the overpayment. The Office noted that appellant could submit any additional evidence on the overpayment to the Office for further consideration.

Appellant submitted the overpayment recovery questionnaire on August 14, 1998, which the Office received on August 25, 1998.

In a decision dated November 16, 1998, the Office determined that an overpayment of $768.38 had been created and that appellant was not entitled to waiver of recovery of the overpayment.

In a decision dated December 9, 1998, the Office determined that the position of modified mail processor in which appellant had been working since December 8, 1997 fairly and reasonably represented her wage-earning capacity and terminated her compensation as her actual wages met or exceeded the wages of the job held when injured and thus no loss of wages occurred.

By decision dated December 16, 1998, the Office awarded appellant a schedule award for a seven percent permanent impairment to her left leg.

The Board finds that the Office properly denied appellant's request for a prerecoupment hearing on the grounds that her request was not made within 30 days of the date of the preliminary determination of an overpayment.

The Office's procedures on the recovery of overpayments are found in the Code of Federal Regulations at 20 C.F.R. § 10.321. The regulations provide that before collecting an overpayment, the Office must provide the claimant with written notice of the fact and amount of overpayment, the finding of fault and the right to a prerecoupment hearing or the right to submit additional evidence to the Office.[1] The regulations provide further that a claimant is entitled to submit additional evidence or a request for a prerecoupment hearing within 30 days of the written notice of the overpayment and that "[f]ailure to exercise the right to a prerecoupment hearing within 30 days of the notice of overpayment shall constitute a waiver of that right."[2]

[1] 20 C.F.R. § 10.321(d).

[2] 20 C.F.R. § 10.321(5)(e). The regulations direct the Office to issue a final decision based on the available evidence, and to initiate recovery action, where additional written evidence is not submitted or a hearing requested.

In the present case, appellant was notified of the overpayment by written notice dated July 13, 1998. She requested a prerecoupment hearing by faxisimile on August 14, 1998, which was more than 30 days after the July 13, 1998 notice of an overpayment. Because appellant's request for a prerecoupment hearing was untimely, she has waived her right to a prerecoupment hearing. The Board notes that the Office properly informed appellant that she may address her concerns for waiver by submitting any additional information to the Office. Accordingly, the Office properly denied appellant's request for a prerecoupment hearing.

The Board has reviewed the record and finds that an overpayment of $768.38 was created.

In this case, the record indicates and appellant does not contest, that during the period of September 27 through October 24, 1997, she was paid for 168 hours of work, totaling $1,982.92. However, the actual amount of compensation for that time period should have been $1,214.54 as appellant had 97.78 hours of lost time charged to LWOP. Accordingly, this resulted in an overpayment of $768.38.

The Board further finds that the Office properly denied waiver of the overpayment.

Section 8129(b) of the Federal Employees' Compensation Act[3] provides: "Adjustment 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."[4] Since the Office found appellant to be without fault in the creation of the overpayment, the Office may only recover the overpayment if recovery 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, respectively, in sections 10.322 and 10.323 of Title 20 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

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20 C.F.R. § 10.322(5)(h).

[3] 5 U.S.C. §§ 8101-8193.

[4] 5 U.S.C. § 8129(b).

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).[5] Section 10.323 provides 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 20 C.F.R. § 10.322; or the individual, in reliance on the payment which created the overpayment, relinquished a valuable right or changed his position for the worse.

In the present case, appellant submitted financial information regarding her monthly expenses and income, as well as other assets and liabilities, on August 25, 1998. Based on the financial information provided, appellant has not established that recovery of the overpayment would defeat the purpose of the Act. Although appellant reported assets below the resource base provided in section 10.322(a), appellant has not provided evidence that recovery would cause hardship by depriving the overpaid individual of income and resources needed for ordinary and necessary living expenses or that she relinquished a valuable right or changed her position for the worse in reliance on the overpayment. Accordingly, the Board finds that appellant has not established that recovery of the overpayment would be against equity and good conscience.

As noted above, appellant is not entitled to waiver of the overpayment unless she can show that recovery would defeat the purpose of the Act or be against equity and good conscience. Based on the evidence of record, appellant has not established entitlement to waiver of the $768.38 overpayment in this case.

The Board finds that appellant is not entitled to more than a seven percent loss of the use of her left leg, for which she received a schedule award.

The schedule award provision of the Act[6] provides for compensation to employees sustaining permanent impairment from loss or loss of use of specified members of the body. The Act's compensation schedule specifies 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 does not, however, specify the manner by which the percentage loss of a member, function, or organ shall be determined. The method used in making such a determination is a matter that rests in the sound discretion of the Office.[7] For consistent results and to ensure equal justice under the law to 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.[8]

In a July 20, 1998 medical report, Dr. Donald S. Harder, a Board-certified orthopedic surgeon and appellant's treating physician, reevaluated appellant under the fourth edition of the

[5] To establish that recovery would defeat the purpose of the Act, appellant must show that he needs substantially all his income to meet ordinary and necessary living expenses, and that his assets do not exceed the established resource base; *see Robert E. Wenholz*, 38 ECAB 311 (1986).

[6] 5 U.S.C. § 8107 *et seq.*

[7] *Arthur E. Anderson*, 43 ECAB 691, 697 (1992); *Danniel C. Goings*, 37 ECAB 781, 783 (1986).

[8] *Arthur E. Anderson*, *supra* note 7 at 697; *Henry L. King*, 25 ECAB 39, 44 (1973).

American Medical Association, *Guides to the Evaluation Permanent Impairment*.[9] He noted that according to the fourth edition, the patient receives no impairment for loss of flexion in the knee. He stated that appellant has 118 degrees of flexion and according to Table 41, page 3/78, there is no impairment allocated for flexion of 110 degrees or greater. He noted that appellant had a partial medial meniscectomy; however, the operative report stated that 80 percent of the meniscus was removed. He therefore accorded a 2 percent impairment of the lower extremity due to more than a partial meniscectomy, but less than a total meniscectomy under Table 64, page 3/85. Under Table 62, page 3/83 he accorded a 5 percent impairment of the lower extremity due to arthritis and chondromalacia. This equated to a combined impairment of 7 percent. Dr. Harder further noted that the A.M.A., *Guides* did not adequately measure appellant's pain and weakness as a result of her knee injury and provided an additional 15 percent impairment rating based on the Federal (FECA) Procedure Manual on page 2.208. Accordingly, Dr. Harder opined that appellant had a 21 percent impairment rating.

The Office submitted the entire record to the an Office medical adviser for an evaluation. In his December 2, 1998 report, the Office medical adviser utilized the A.M.A., *Guides* (4th ed. 1994) and on the basis of Dr. Harder's July 20, 1998 report, stated that appellant had a 2 percent rating for partial meniscectomy based on Table 64, page 3/85 and a 5 percent rating for her history of direct trauma, complaints of patellofemoral pain and crepitation on physical examination without joint space narrowing as demonstrated on roentgenograms based on Table 61, page 3/83 footnote "t." The Office medical adviser further indicated that Dr. Harder's logic for additional impairment for pain was not in conformance with the A.M.A., *Guides* which specifically include pain in the impairment values as set forth on page 2/9 under the heading "pain."

It is well settled that when a physician's report gives an estimate of a permanent impairment and indicates that the estimate is not based on the A.M.A., *Guides*, the Office may follow the advice of its medical adviser or consultant where he or she has properly utilized the A.M.A., *Guides*.[10] Board cases are clear that if a physician does not utilize the A.M.A., *Guides*, his opinion is of diminished probative value in establishing the degree of any permanent impairment.[11] For this reason, the Board finds that Dr. Harder's additional 15 percent impairment rating for pain and weakness is of diminished probative value and the Office properly followed the advise of its medical adviser in finding that appellant sustained a 7 percent loss of use of her left leg as the estimate was properly based on the application of the A.M.A., *Guides*.

The decisions of the Office of Workers' Compensation Programs dated December 16 and 9, November 16 and 2, 1998 are affirmed.

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[9] In a May 19, 1998 letter, the Office advised Dr. Harder that it appeared he utilized the third edition of the A.M.A., *Guides* in his report of May 14, 1998 and requested that he translate his findings to an impairment rating based on the newer fourth edition in order to process a schedule award for appellant.

[10] *Paul R. Evans*, 44 ECAB 646, 651 (1993); *see Ronald J. Pavlik*, 33 ECAB 1596 (1982).

[11] *Paul R. Evans*, *supra* note 10 at 651; *Thomas P. Gauthier*, 34 ECAB 1060, 1063-64 (1983).

Dated, Washington, DC
February 9, 2001

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member