U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DAVID A. NIGG and U.S. POSTAL SERVICE,
GENERAL MAIL FACILITY, San Bernardino, CA

Docket No. 00-2369; Submitted on the Record;
Issued July 2, 2001

DECISION and ORDER

Before MICHAEL E. GROOM, A. PETER KANJORSKI,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether appellant has established that he has more than a three percent permanent impairment of the right upper extremity, for which he received a schedule award; (2) whether the Office of Workers' Compensation Programs properly determined that appellant received an overpayment in the amount of $1,528.60 for September 20 through October 9, 1999; and (3) whether the Office properly determined that appellant was at fault in the creation of the overpayment and therefore, was not subject to waiver of recovery.

On May 3, 1998 appellant, a 43-year-old automation clerk, injured his right shoulder casing mail. The Office accepted his claim for right shoulder sprain by letter dated July 10, 1998. The letter advised appellant that, with regard to long-term disability "Compensation benefits … are payable only for the period(s) documented by the physician during which the injury related … condition causes disability for work or need for medical care. In cases of long-term disability, compensation is paid on the periodic rolls each 28 days until you can return to suitable employment with your agency or undergo vocational rehabilitation." The Office paid appellant appropriate compensation for total disability and placed him on the periodic rolls.

On May 13, 1999 the Office authorized arthroscopic surgery to repair a torn labrum in appellant's right shoulder, with right shoulder debridement, on June 21, 1999.

On September 20, 1999 appellant returned to full-time work in a modified, light-duty position with the employing establishment.

By letter dated October 22, 1999, the Office made a preliminary determination that an overpayment of compensation was created in the amount of $1,528.60, covering September 20 through October 9, 1999. The Office found that appellant was at fault in creating the overpayment because he should have known that he was not entitled to receive compensation benefits after he returned to work.

The Office informed appellant that if he disagreed with the preliminary determination he could submit evidence or argument to the Office or request a prerecoupment hearing with the Branch of Hearings and Review.

Appellant completed a Form OWCP-20 on November 2, 1999 and contended he was not at fault at creating the overpayment because the Office was aware of his return to work on September 20, 1999 and failed to inform him that he was not entitled to the compensation check he subsequently received. He also indicated that he needed the check because he had to pay his rent and needed the money immediately.

On January 3, 2000 appellant filed a claim for a schedule award based on partial loss of use of his right upper extremity.

By letter dated February 3, 2000, the Office referred appellant for a second opinion impairment evaluation with Dr. Thomas R. Dorsey, a Board-certified orthopedic surgeon, to evaluate the extent of his permanent partial impairment based on loss of use of his right upper extremity due to the May 3, 1998 employment injury.

In a report dated February 29, 2000, Dr. Dorsey found that appellant had right shoulder impingement syndrome with arthroscopic decompression and debridement stemming from his June 21, 1999 arthroscopy. He set forth findings on physical examination.

In a memorandum dated April 24, 2000, an Office medical adviser, based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (fourth edition), found that appellant had a three percent permanent impairment of his right upper extremity. Relying on Dr. Dorsey's findings and conclusions, the Office medical adviser stated that, pursuant to Table 11 at page 48 of the A.M.A., *Guides*, the level of impairment at Grade 3, based on sensory deficit, was 60 percent. Relying on Table 15 at page 54, the Office medical adviser found that maximum impairment based on the axillary nerve was 5 percent. The Office medical adviser then calculated that 60 percent of a 5 percent sensory loss of the axillary nerve totaled a 3 percent total impairment for the right upper extremity.

By decision dated April 28, 2000, the Office found that appellant was at fault in creating the overpayment of compensation from September 20 through October 9, 1999, in the amount of $1,528.60.

On May 3, 2000 the Office granted appellant a schedule award for a 3 percent permanent impairment of the right upper extremity from February 29 to May 5, 2000, for a total of 9.36 weeks of compensation.

The Board finds that appellant has no more than a three percent permanent impairment of the right upper extremity, for which he received a schedule award.

The schedule award provision of the Federal Employees' Compensation Act[1] and its implementing regulations[2] 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 loss of use.[3] However, neither the Act nor its regulations specify the manner in which the percentage of loss of use of a member is to be determined. For consistent results and to insure equal justice under the law to all claimants, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants seeking schedule awards. The A.M.A., *Guides* have been adopted by the Office for evaluating schedule losses, and the Board has concurred in such adoption.[4]

In this case, the Office determined that appellant had a three percent permanent impairment of his right upper extremity relying on the findings of the Office medical adviser, who determined the impairment rating based on Dr. Dorsey's findings of right shoulder impingement syndrome and residuals from appellant's June 21, 1999 surgery. The Office medical adviser then applied these findings to the applicable tables of the A.M.A., *Guides* and arrived at the total percentage of impairment in appellant's right upper extremity.

The Board finds that the Office medical adviser correctly applied the A.M.A., *Guides* in determining that appellant has no more than a three percent permanent impairment for loss of use of his right upper extremity. The Office medical adviser applied the A.M.A., *Guides* to note a maximum of five percent based on the axillary neroes. He then graded the extent of impairment to the nerve at 60 percent, to find a total of 3 percent impairment. Appellant has failed to provide probative medical evidence that he has more than the three percent impairment awarded.

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of $1,528.60 for September 20 through October 9, 1999.

The record shows that the Office incorrectly issued a check for temporary total disability covering September 20 through October 9, 1999. During that time appellant had returned to work and was therefore no longer totally disabled. Therefore, an overpayment occurred in the amount of $1,528.60.

The Board further finds that appellant was not without fault in the creation of the overpayment.

Section 8129 of the Act[5] provides that an overpayment must be recovered unless "incorrect payment has been made to an individual who is without fault and when adjustment or

[1] 5 U.S.C. §§ 8101-8193*; see* 5 U.S.C. § 8107(c).

[2] 20 C.F.R. § 10.304.

[3] 5 U.S.C. § 8107(c)(19).

[4] *Thomas D. Gunthier*, 34 ECAB 1060 (1983).

[5] 5 U.S.C. § 8129(a)-(b).

recovery would defeat the purpose of the Act or would be against equity and good conscience." No waiver of an overpayment is possible if the claimant is not "without fault" in helping to create the overpayment.[6]

In determining whether an individual is with fault, section 10.433(a) of the Office's regulations provides in relevant part:

> "A recipient who has done any of the following will be found to be at fault with respect to the creation of an overpayment:
>
> (1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or
>
> (2) Failed to provide information which he or she knew or should have known to be material; or
>
> (3) Accepted a payment which he or she knew or should have known to be incorrect. (This provision applies only to the overpaid individual.)"[7]

In this case, the Office applied the third standard in determining that appellant was at fault in creating the overpayment.

Even if the overpayment resulted from negligence on the part of the Office, this does not excuse the employee from accepting payment which he knew or should have been expected to know that he was not entitled.[8] Appellant was informed by the Office in its July 10, 1998 letter that he was only entitled to compensation benefits for the period in which his condition caused disability for work and that he would only be paid until the time he was able to return to suitable employment. Because appellant returned to full-time employment on September 20, 1999 and, therefore was no longer totally disabled, he knew or should have known that he was no longer entitled to receive compensation for total disability. Upon his receipt of the disability check from the Office following his return to work which covered September 18 through October 9, 1999 appellant had a duty to inquire as to whether acceptance of this payment was appropriate or return the check issued for total disability. Instead, appellant cashed this check and used the money to pay his bills, as he acknowledged.

For these reasons, the Board finds that, under the circumstances of this case, the Office properly found that appellant knew or should have known that the check issued by the Office subsequent to appellant's return to work on September 20, 1999 was in error. As appellant was not without fault under the third standard outlined above, recovery of the overpayment of compensation in the amount of $1,528.60 may not be waived.

---

[6] *Bonnye Mathews*, 45 ECAB 657 (1994).

[7] 20 C.F.R. § 10.433(a).

[8] *See Russell E. Wageneck*, 46 ECAB 653 (1995).

The April 28 and May 3, 2000 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
July 2, 2001

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

Priscilla Anne Schwab
Alternate Member