

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MIGUEL A. MUNIZ and U.S. POSTAL SERVICE,
POST OFFICE, Camden, NJ

*Docket No. 02-58; Submitted on the Record;
Issued December 9, 2002*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's request to participate in the selection of an impartial medical specialist; (2) whether the Office properly rescinded appellant's schedule award; (3) whether the Office properly determined that appellant received an overpayment of compensation in the amount of \$8,756.26, the amount of his schedule award; and (4) whether the Office properly denied waiver of the overpayment.

This case has previously been before the Board. In a November 24, 1999 decision, the Board affirmed an Office termination of appellant's entitlement to compensation benefits. The case was remanded to the Office for further development regarding appellant's entitlement to a schedule award. The Office was instructed to submit a May 27, 1998 report from appellant's treating osteopathic physician, Dr. David Weiss, to an Office medical adviser for an opinion as to whether appellant sustained a permanent impairment based on his accepted left knee condition.¹ The law and facts as set forth in the Board's November 24, 1999 decision and order are incorporated herein by reference.

In a January 3, 2000 report, an Office medical adviser agreed with Dr. Weiss' assessment that appellant sustained a 27 percent impairment of the left lower extremity. By decision dated January 4, 2000, the Office granted appellant a schedule award for a 27 percent impairment of the left lower extremity, for a total of 77.76 weeks of compensation, to run from May 27, 1998 to November 22, 1999.

On January 13, 2000 appellant, through counsel, requested a hearing. In a decision dated March 30, 2000, an Office hearing representative found that the case was not in posture for a hearing because a conflict in medical evidence existed between the opinions of Dr. Weiss and Dr. Alexander Sapega, a Board-certified orthopedic surgeon, who provided a second opinion

¹ Docket No. 99-663 (issued November 24, 1999).

evaluation for the Office, regarding whether appellant had a permanent impairment of the left lower extremity causally related to the October 21, 1991 employment injury.²

By letter dated April 28, 2000, appellant's counsel requested to participate in the selection of the impartial medical specialist, in an "attempt to assure that the claimant receives an impartial evaluation concerning this schedule award claim." On September 6, 2000 the Office referred appellant, along with a statement of accepted facts, a set of questions and the medical record, to Dr. Aaron A. Sporn, a Board-certified orthopedic surgeon, for an impartial medical evaluation. In a report dated September 20, 2000, Dr. Sporn advised that he had extensively reviewed the medical record and conducted a thorough physical examination. He concluded that, based on a January 5, 1994 magnetic resonance imaging (MRI) scan and a January 17, 1995 operative report, appellant had no objective evidence of pathology in the left knee causally related to the October 21, 1991 employment injury. Dr. Sporn opined that appellant's subjective symptoms were not substantiated by objective findings and concluded that appellant had no impairment of the left lower extremity.

By decision dated October 2, 2000 and finalized October 3, 2000, the Office rescinded the schedule award, finding the weight of the medical evidence, represented by Dr. Sporn's impartial medical examination, established that appellant had no work-related left knee impairment that would entitle him to a schedule award. By decision dated October 3, 2000, the Office denied appellant's request to participate in the selection of the impartial medical specialist. The Office noted that there was no absolute right to participate and deemed the reason given by appellant's representative invalid.

In a letter dated October 3, 2000, the Office informed appellant that it had made a preliminary determination that he had received an overpayment of compensation in the amount of \$8,756.26, based on the January 4, 2000 schedule award. The Office further found that appellant was without fault in the creation of the overpayment and requested that he indicate on an attached Office form whether he wished to contest the existence or amount of the overpayment or the fault determination.³ The Office also requested that he complete an attached overpayment recovery questionnaire (Form OWCP-20) and submit financial documents in support thereof. The Office indicated that the financial information would be used to determine whether he was entitled to waiver should he be found to be without fault and informed him that failure to submit the requested financial information within 30 days would result in a denial of waiver of the overpayment.

On October 11, 2000 appellant, through counsel, requested a preresoupment hearing that was held on March 1, 2001. Appellant contended that the schedule award had not been made in

² In a November 13, 1996 report, Dr. Sapega reported findings following physical examination and a review of x-rays. He noted normal left knee alignment and no specific evidence of internal derangement or cartilage tear. Dr. Sapega concluded that appellant had completely healed regarding any left knee injury without residual but that he voluntarily exaggerated his left knee pain and disability.

³ The form provides a claimant with three choices: (1) A request of waiver and a telephone conference; (2) a request of waiver with the Office making the decision on the written record; and (3) a request of waiver with a hearing before the Branch of Hearings and Review. With each of these choices, a claimant is to provide supporting financial documents.

error and, therefore, an overpayment in compensation had not been created. The hearing representative instructed appellant to submit financial information,⁴ and the record was kept open for 30 days. By letter dated March 14, 2001, he submitted an overpayment questionnaire. In a letter dated June 4, 2001, the hearing representative informed appellant that additional financial information was needed regarding his assets, income and expenses.⁵ Receiving nothing further from appellant, in a decision dated July 10, 2001, the hearing representative found that the Office properly rescinded the schedule award, based on the opinion of Dr. Sporn, the impartial medical specialist and that an overpayment of compensation in the amount of \$8,756.26 had been created. The hearing representative found that, while appellant was not at fault in the creation of the overpayment, because he had not submitted sufficient financial information, he was not entitled to waiver and was to repay the overpayment in full.

The Board finds that the Office did not abuse its discretion in denying appellant's request to participate in the selection of the impartial medical specialist.

A physician selected by the Office to serve as an impartial medical specialist should be one wholly free to make a completely independent evaluation and judgment. To achieve this, the Office has developed specific procedures for selecting impartial medical specialists designed to provide adequate safeguards against any possible appearance that the selected physician's opinion was biased or prejudiced. Office procedures provide that, unlike selection of second opinion examining physicians, selection of referee physicians is made by a strict rotational system using appropriate medical directories. The services of all available and qualified Board-certified specialists will be used as far as possible to eliminate any inference of bias or partiality. This is accomplished by selecting specialists in alphabetical order as listed in the roster chosen under the specialty and/or subspecialty heading in the appropriate geographic area and repeating the process when the list is exhausted.⁶

Under Office procedures, a claimant who asks to participate in the selection of an impartial medical specialist or objects to the selected physician must provide a valid reason. The procedural opportunity of a claimant to participate in the selection of an impartial medical specialist is not an unqualified right. The Office has imposed the requirement that the employee provide a valid reason for any participation request or for any objection proffered against a designated impartial medical specialist. Office procedures provide that a claimant who asks to participate in selecting the referee physician or who objects to the selected physician should be

⁴ This was to include detailed information regarding expenses, information regarding his wife's income, bank statements and a recent tax return.

⁵ The hearing representative reiterated that appellant submit copies of bank account statements, tax returns, documentation of bills and cancelled checks, etc.

⁶ *Charles M. David*, 48 ECAB 543 (1997).

requested to provide his or her reason for doing so, and the claims examiner is responsible for evaluating the explanation offered.⁷

In the instant case, appellant's representative merely requested to participate in the selection of the referee examiner, in an "attempt to assure that the claimant receives an impartial evaluation concerning this schedule award claim." The Board finds that he did not provide a valid reason for participating in the selection and did not raise a specific objection to the selected physician. Thus, the Office properly denied his request to participate in the selection of an impartial medical specialist.⁸

The Board further finds that the Office properly rescinded the January 4, 2000 schedule award.

Once the Office accepts a claim and pays compensation benefits, it has the burden of justifying the termination or modification of compensation. This holds true where the Office later decides that it erroneously accepted a claim. To support rescission of acceptance, the Office must establish that its prior acceptance was erroneous. Section 10.610 of the implementing regulations of the Office state:

"The [Federal Employees' Compensation Act] specifies that an award for or against payment of compensation may be reviewed at any time on the Director's own motion. Such review may be made without regard to whether there is new evidence or information. If the Director determines that a review of the award is warranted (including, but not limited to circumstances indicating a mistake of fact or law or changed conditions), the Director (at any time and on the basis of existing evidence) may modify, rescind, decrease or increase compensation previously awarded, or award compensation previously denied. A review on the Director's own motion is not subject to a request or petition and none shall be entertained."⁹

Under section 8107 of the Act¹⁰ and section 10.404 of the implementing federal regulations,¹¹ schedule awards are payable for permanent impairment of specified body members, functions or organs. However, the Act does not specify the manner in which the percentage of impairment shall be 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

⁷ *Richard Coonradt*, 50 ECAB 360 (1999). Examples of circumstances under which the claimant may participate in the selection include (but are not limited to) documented bias by the selected physician, documented unprofessional conduct by the selected physician, or a female claimant who requests a female physician when a gynecological examination is required. Federal (FECA) Procedural Manual, Part 3 -- Medical, *Referee Examinations*, Chapter 3.500.4(b)(4) (March 1994).

⁸ See *David Alan Patrick*, 46 ECAB 1020 (1995).

⁹ 20 C.F.R. § 10.610 (1999).

¹⁰ 5 U.S.C. § 8107.

¹¹ 20 C.F.R. § 10.404 (1999).

tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the Office,¹² through its implementing federal regulations, as an appropriate standard for evaluating schedule losses.¹³

In the instant case, the impartial medical specialist, Dr. Sporn, a Board-certified orthopedic surgeon, provided a comprehensive report dated September 20, 2000 in which he found that appellant had no impairment causally related to the October 21, 1991 employment injury. Based on his examination and physical findings, the Office properly rescinded appellant's schedule award. As the physician reported no permanent impairment there was no basis on which to further apply the A.M.A., *Guides*.

The Board further finds that, as appellant was not entitled to a schedule award, for which he received payment of \$8,756.26, an overpayment of compensation was created.

The Board further finds that, while appellant was not at fault in the creation of the overpayment, he is not entitled to waiver.

Section 8129(a) of the Act¹⁴ provides that, where an overpayment of compensation has been made "because of an error of fact or law" adjustments shall be made by decreasing later payments to which an individual is entitled.¹⁵ The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): "Adjustments or recovery by the United States may not be made when incorrect payments 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."¹⁶ Thus, a finding that appellant was without fault is not sufficient, in and of itself, for the Office to waive the overpayment.¹⁷ The Office must 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," pursuant to the guidelines provided in sections 10.434-437 of the implementing federal regulations.¹⁸

Section 10.436 of relevant Office regulations states:

"Recovery of an overpayment will defeat the purpose of the [Act] if such recovery would cause hardship to a currently or formerly entitled beneficiary because: (a) The beneficiary from whom [the Office] seeks recovery needs substantially all of his or her current income (including compensation benefits) to

¹² A.M.A., *Guides* (5th ed. 2001); *Joseph Lawrence, Jr.*, 53 ECAB ____ (Docket No. 01-1361, issued February 4, 2002).

¹³ See 20 C.F.R. § 10.404.

¹⁴ 5 U.S.C. §§ 8101-8193.

¹⁵ 5 U.S.C. § 8129(a).

¹⁶ 5 U.S.C. § 8129(b).

¹⁷ *James Lloyd Otte*, 48 ECAB 334, 338 (1997); see *William J. Murphy*, 40 ECAB 569, 571 (1989).

¹⁸ 20 C.F.R. §§ 10.434-437 (1999).

meet current ordinary and necessary living expenses; and (b) The beneficiary's assets do not exceed a specified amount as determined by [the Office] from data furnished by the Bureau of Labor Statistics. A higher amount is specified for a beneficiary with one or more dependents."¹⁹

The Board finds that here appellant did not make a good-faith effort to fully complete an overpayment recovery questionnaire.²⁰ While the record indicates that appellant submitted an incomplete overpayment questionnaire, both at the hearing and in a letter dated June 4, 2001, the hearing representative informed appellant of the specific financial information needed to determine whether or not appellant was entitled to waiver of the overpayment of compensation. Appellant did not comply. Without an accurate and complete breakdown of appellant's monthly income, monthly expenses and assets, supported by financial documentation, the Office was not able to calculate whether appellant's assets exceeded the specified resource base. The Office therefore properly found that appellant was not entitled to waiver on the grounds that recovery would defeat the purpose of the Act.²¹

Recovery of an overpayment is considered to be against equity and good conscience if an individual who was never entitled to benefits would experience severe financial hardship in attempting to repay the debt,²² or if the individual, in reliance on the overpaid compensation, relinquished a valuable right or changed his or her position for the worse.²³

Appellant, however, has submitted no evidence to establish that he relinquished a valuable right or changed his position for the worse in reliance on the overpaid compensation. The Office, therefore, properly found that recovery of the overpayment would not be against equity or good conscience.

Lastly, the Board notes that its jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation benefits under the Act. Where, as here, a claimant is no longer receiving wage-loss compensation benefits, the Board does not have

¹⁹ 20 C.F.R. § 10.436 (1999). Office procedures provide 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 under the criteria set out in this section. Recovery will defeat the purpose of the Act if both: (a) The individual from whom recovery is sought needs substantially all of his or her current income (including monthly benefits) to meet current ordinary and necessary living expenses, and (b) The individual's assets do not exceed the resource base of \$3,000.00 for an 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 claimant's assets not exempted from recoupment. The first \$3,000.00 or more, depending on the number of the individual's dependents, is also exempted from recoupment as a necessary emergency resource. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a) (September 1994).

²⁰ See *Gail M. Roe*, 47 ECAB 268 (1995).

²¹ *Id.*

²² 20 C.F.R. § 10.437(a) (1999).

²³ 20 C.F.R. § 10.437(b) (1999).

jurisdiction with respect to the Office's recovery of the overpayment under the Debt Collection Act.²⁴

The decision of the Office of Workers' Compensation Programs dated July 10, 2001 is hereby affirmed.

Dated, Washington, DC
December 9, 2002

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

²⁴ *Robert S. Luciano*, 47 ECAB 793 (1996).