

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILL HARRIS, JR. and DEPARTMENT OF THE ARMY, CORPS OF ENGINEERS, WATERWAYS EXPERIMENT STATION, Vicksburg, MS

*Docket No. 00-2792; Submitted on the Record;
Issued June 7, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether appellant had more than a five percent impairment to his right leg for which he received a schedule award; (2) whether the Office of Workers' Compensation Programs properly determined that appellant received an overpayment of \$3,466.33; and (3) whether the Office properly determined that appellant was at fault in creating the overpayment and, therefore, was not entitled to waiver of recovery.

On August 3, 1982 appellant, then a 42-year-old drill-rig operator, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1), alleging that on June 8, 1981 he injured his legs and back while unloading a supply truck. It was accepted that appellant sustained a herniated nucleus pulposus at L5-S1 and compensation was paid.

After the Office began to pay appellant compensation, it periodically requested that he complete a Form CA-1032, which required him to respond to questions regarding, *inter alia*, whether appellant had any other sources of income, including other employment. For example, some of these forms were completed by appellant on April 9, 1991, April 30, 1992 and March 8, 1993. Immediately prior to the signature of appellant, the form indicated:

"I understand that I must immediately report to the Office any improvement in my medical condition, any employment and change in the status of claimed dependents, any third-party settlement and any change in income from federally assisted disability or benefit programs."

On March 7, 1994 appellant submitted a Form CA-1032 to the Office wherein he indicated that he worked from August to October 1993 at the Warren County jail as a relief janitor and was paid \$135.00 weekly. He answered questions propounded by the Office with regard to this employment on May 9, 1994. A statement submitted by the Social Security Administration indicated that appellant received \$4,405.94 for his employment with Warren County in 1993.

Meanwhile, by letter dated June 11, 1993, the Office requested that Dr. Jose L. Ferrer, appellant's treating Board-certified orthopedic surgeon, provide his impairment rating for appellant's lower extremities due to the job-related spinal pathology by applying the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). In a medical report dated June 23, 1999, he noted that appellant reached maximum medical improvement on March 1, 1999. He then evaluated appellant's degree of impairment under the A.M.A., *Guides*, as follows:

"To start with, he has an L4 radiculopathy because of decreased sensation in the L4 distribution and this accounts for 5 percent impairment of the lower extremity using Table #83, page 130. His second problem is decreased range of motion of the lumbar spine, especially with lateral bending, which gives him a 2 percent impairment of the body as a whole, according to Table #82, page 130. His third problem is that he has a severe lumbar spine impairment due to an intervertebral disc disorder that was operated on four times. This gives him [an] impairment rating of 15 percent, according to Table #75, page 113.

"This is a total of 5 percent impairment of the lower extremity and a total of 20 percent impairment of the body as a whole if it is done by adding all these individual impairment ratings. If we use the Combined Values Chart on page 322, then we would have to give him whole body impairment rating of 18 percent.

"Another way of giving him a percentage of impairment is to use the descriptions on page 102, which categorized the patients by diagnosis. [Appellant] will fall on DRE lumbosacral category #5, which gives him a 25 percent impairment of the body as a whole."

On August 25, 1999 the Office medical adviser reviewed appellant's case and determined that he had a one percent permanent impairment of the right lower extremity.

By letter dated October 7, 1999, the Office referred appellant to Dr. A. Roy Tyrer, a Board-certified neurosurgeon. In a report dated November 11, 1999, he noted that appellant had "post operative status multiple (4) lumbar spine operations, remote, with residual chronic back and right leg symptoms, including right fifth toe numbness." He estimated that appellant has a permanent physical impairment estimated to be 14 percent considering the body as a whole based on the A.M.A., *Guides*. In response to questions from the Office, in a November 22, 1999 report, Dr. Tyrer stated:

"It is my opinion that [appellant] sustained minor permanent impairment of his right leg relating to this lifting injury sustained in 1981, resulting in several lower lumbar spine operations. The evidence for this is persisting chronic right leg pain with associated numbness in the right fifth toe. The nerve root affected is the right S1 nerve root. The degree of permanent impairment to the right leg due to the sensory deficit and pain is 5 percent based on Table 83 [of the] A.M.A., *Guides* (4th ed.). I do not identify any definite loss of strength in the right leg or foot."

Dr. Tyrer expressed his objections to the Office's policy of not recognizing whole person impairment and indicated that his prior assessment of 14 percent permanent physical impairment considering the body as a whole is the proper impairment rating.

On November 30, 1999 the Office medical adviser stated that Dr. Tyrer needed to give impairment related to spinal nerve impairment and not the spine. In response to further questions, on December 28, 1999 Dr. Tyrer reiterated his opinion that appellant has a five percent impairment of the right leg due to sensory deficit and pain involving S1 nerve root based on Table 83, page 3/130 of the A.M.A., *Guides*.

On February 1, 2000 the Office medical adviser reviewed Dr. Tyrer's report and indicated that appellant had sensory deficit in the right lower extremity due to involvement of the S1 nerve root and that this would indicate permanent impairment in the right lower extremity of five percent based on Table 83 page 3/130.

On February 7, 2000 the Office made an award under the schedule based on a five percent loss of use of the right lower extremity. On February 14, 2000 appellant requested an oral hearing.

In a decision dated February 25, 2000, the Office made a preliminary determination that appellant was overpaid in the amount of \$3,466.43. The Office based this on the fact that he earned a salary in the amount of \$4,405.94 during the period August 1 through October 31, 1993 and received total disability compensation for the same period. The Office found that appellant knew or should have known of this overpayment, but did not notify the Office until March 7, 1994. On March 1, 2000 appellant requested a hearing on the overpayment issue.

At the hearing held on July 25, 2000, appellant noted his objections to the schedule award as he testified that he has had back surgery four times and that a neighbor who had a similar injury received a higher schedule award. He also noted that he did not dispute the fact that he earned \$4,405.94 for his work for the Warren County Sheriff Department, but that he disputed the fact that he did not properly notify the Office.

On March 1, 2000 appellant responded to questions regarding the overpayment and submitted a list of his monthly expenses.

In a decision dated September 1, 2000, the hearing representative affirmed the award of five percent permanent impairment of appellant's right leg. In a separate decision, also dated September 1, 2000, the hearing representative found appellant "at fault" in the creation of the overpayment and ordered the case be returned to the Office for recovery of the overpayment by deducting \$100.00 per month from appellant's continuing benefits.

The Board finds that appellant did not meet his burden of proof to establish that he has more than a five percent permanent impairment of his right leg for which he received a schedule award.

An employee seeking compensation under the Federal Employees' Compensation Act¹ has the burden of establishing the essential elements of his claim by the weight of the reliable, probative and substantial evidence,² including that he sustained an injury in the performance of duty as alleged and that his disability, if any, was causally related to the employment injury.³

The schedule award provision of the Act⁴ and its implementing regulation⁵ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members or functions of the body. However, the Act does not specify the manner in which the percentage of loss shall be determined. 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. The A.M.A., *Guides*, has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.

In the instant case, appellant's treating physician, Dr. Ferrer found that appellant sustained a five percent impairment to the right leg based on Table 83 of the A.M.A., *Guides*. Dr. Ferrer also noted that appellant had an impairment rating of 18 percent for the whole body. Included in his calculation of whole body impairment were appellant's decreased range of motion of the lumbar spine and his lumbar spine impairment due to an intervertebral disc disorder that was operated on four times. However, the Act does not authorize the payment of a schedule award for the permanent impairment of "the whole person."⁶ Furthermore, no schedule award is payable for a member, function or organ of the body not specified in the Act or the regulations.⁷ Because neither the Act nor the regulations provide for the payment of a schedule award for the permanent loss of use of the neck or back, the claimant is not entitled to such award.⁸ It is only when impairment extends into a function of the body specifically listed under the Act or the implementing regulations that eligibility for a schedule award arises.⁹ Therefore, none of Dr. Ferrer's whole person ratings, whether for the neck, back or extremities, may be used to determine appellant's entitlement to schedule compensation. Only Dr. Ferrer's rating of five percent impairment to the lower extremity is applicable to this case. Dr. Tyrer also found a five

¹ 5 U.S.C. §§ 8101-8193.

² *Donna L. Miller*, 40 ECAB 492, 494 (1989); *Nathaniel Milton*, 37 ECAB 712, 722 (1986).

³ *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.404 (1999).

⁶ *Ernest P. Govednick*, 27 ECAB 77 (1975).

⁷ *William Edwin Muir*, 27 ECAB 579 (1976); *see also Thomas E. Montgomery*, 28 ECAB 294 (1977).

⁸ The Act itself specifically excludes the back from the definition of "organ." 5 U.S.C. § 8101(19).

⁹ *See Terry E. Mills*, 47 ECAB 309 (1996).

percent impairment to the right leg due to sensory deficit and pain based on Table 83 of the A.M.A., *Guides*.¹⁰ He specifically noted that he did not identify any definite loss of strength in the right leg or foot. This finding was also upheld by the Office medical examiner. As the physicians are in agreement that the extent of the impairment to appellant's right lower extremity is five percent, the schedule award determination is affirmed.

The Board further finds that the Office properly determined that appellant was at fault in creating the overpayment and, therefore, not entitled to waiver of recovery.

Section 8129(b) of Act 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."¹¹ No waiver of an overpayment is possible if the claim is at fault in creating the overpayment.¹²

On the issue of fault, 20 C.F.R. § 10.433(1) provides in pertinent part:

"A recipient who has done any of the following will be found to be at fault with respect to creating 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."

The Office found that appellant had accepted a payment which he knew or should have known to be incorrect. This Board agrees, appellant should have known that he was not entitled to receive full compensation payments during the period of time that he was working.¹³ Appellant was familiar with Form 1032, having completed numerous copies of this form in previous years. This form clearly advised appellant that he had a burden to report any employment to the Office "immediately." Nevertheless, appellant began work at the Sheriff's department in August 1993 and stopped work in October 1993, but did not report this income until he filed his Form 1032 on March 7, 1994, approximately six months after said employment. By not timely notifying the Office of his employment status despite his legal obligation to do so,

¹⁰ Dr. Tyrer also indicated that appellant had a 14 percent permanent physical impairment considering the body as a whole and expressed his objections to the Office policy of not recognizing whole person impairment. Nevertheless, the Office's policy of not accepting whole person impairment ratings is well established in Board precedent. *See, e.g., Gordon G. McNeil*, 42 ECAB 140 (1990); *Rozella L. Skinner*, 37 ECAB 398 (1986).

¹¹ 5 U.S.C. § 8129(b).

¹² *Gregg B. Manston*, 45 ECAB 344 (1994).

¹³ The Board notes that this is not the first time appellant has dealt with an overpayment situation.

appellant was at fault in creating the overpayment. As appellant had been properly advised of his responsibility to report his income, he should have been aware of the fact that he could not work and receive benefits for temporary total disability. Accordingly, the probative evidence indicates that appellant knew that the compensation payment during his period of employment in 1993 was incorrect and, therefore, he is at fault in creating the resulting overpayment. Since he is at fault, he is not entitled to waiver of recovery of the overpayment.

The decisions of the Office of Workers' Compensation Programs dated September 1 and February 7, 2000 are hereby affirmed.

Dated, Washington, DC
June 7, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member