U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DESIDERIO MARTINEZ and DEPARTMENT OF THE ARMY, DIRECTORATE OF PUBLIC WORKS, Fort Sill, OK

Docket No. 03-2100; Submitted on the Record; Issued January 9, 2004

DECISION and ORDER

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

The issues are: (1) whether appellant has more than a five percent impairment of the right upper extremity for which he received a schedule award; (2) whether the Office of Workers' Compensation Programs properly determined that there was an overpayment in this case in the amount of $21,257.44 and waiver of the overpayment was not warranted; and (3) whether the Office properly refused to reopen appellant's case for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

This case was previously before the Board.[1] In a December 5, 2002 decision, the Board remanded the case for further development regarding appellant's schedule award claim.[2] The Board's December 5, 2002 decision is herein incorporated by reference.

Following the Board's December 5, 2002 decision, the Office referred appellant to Dr. J. Shane Ross, a Board-certified physiatrist, for an examination and an evaluation of his right upper extremity permanent impairment.

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[1] *See* Docket No. 02-1567 (issued December 5, 2002).

[2] By decision dated December 20, 2001, the Office granted appellant a schedule award for 56.16 weeks (November 20, 2001 to December 18, 2002) based on an 18 percent permanent impairment of the right upper extremity. He was paid a total of $29,821.72. The Board found in its December 5, 2002 decision that the Office improperly issued the schedule award because appellant's attending physician stated in a November 20, 2001 report that appellant had not reached maximum medical improvement and wished to receive further treatment that might improve his condition. As noted by the Board in its December 5, 2002 decision, the period covered by a schedule award commences on the date that the employee reaches maximum medical improvement from the residuals of the employment injury and that maximum medical improvement means that the physical condition of the injured member of the body has stabilized and will not improve further.

In a report dated April 28, 2003, Dr. Ross provided a history of appellant's condition and findings on examination and noted that appellant had reached maximum medical improvement. He stated:

> "[Appellant] has slightly reduced forward flexion at about 165 [degrees]. Extension is about 50 [degrees]. Abduction is 140 [degrees] with impingement symptoms limiting further abduction….Adduction on the right is 30 [degrees]…. There is no gross pain or asymmetry….Internal rotation is 70 [degrees] on the right…. External rotation is 80 [degrees]]…. Motor examination reveals full strength in all upper extremity myotomes with the only asymmetry being abduction and testing of strength when his right shoulder impinges…[Appellant] has impingement features over the right acromioclavicular region. There is also some tenderness in this area, but it is otherwise negative for focal deficits. Otherwise, neurologically there are no deficits….
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> "Impairment Rating: In assessment of the permanent impairment, the only factors that require measurement and consideration are range of motion and a disorder at the acromioclavicular joint."
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> "The tables used in the above assessment include: For range of motion – [Figures] 16-40, 43, and 46. For the joint disorder – Table 16-18.
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> "Calculation of the impairment rating [is] as follows: For flexion and extension deficits there is a total of 1 percent impairment rating, for abduction and adduction deficits there is a total of a 3 percent rating deficit, and for internal rotation there is a 1 percent deficit. This confers a total of 5 percent whole person impairment for the range of motion deficit. This is combined to a 15 percent whole person deficit for the acromioplasty and the [C]ombined [V]alues [C]hart provides a total of 19 percent whole person impairment."

The Office medical adviser, Dr. Ronald H. Blum, reviewed the report of Dr. Ross and determined that appellant had a five percent impairment of the right upper extremity based on Dr. Ross's findings and the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). He found that appellant had a one percent impairment based on 165 degrees of flexion, a 2 percent impairment based on 140 degrees of abduction, a 1 percent impairment based on 30 degrees of adduction, and a 1 percent impairment based on 70 degrees of internal rotation according to Figures 16-40, 16-43, and 16-46, at pages 476-479 of the A.M.A., *Guides.* Dr. Blum stated:

> "Dr. Ross recommends another 15 percent [impairment] for acromioplasty having been performed using [Table] 16-18, [page] 499. That table refers to the value given each joint of the UE [upper extremity] and is to be related to the disorder of that joint. There is an opinion in the A.M.A., Guidelines Newsletter stating the performance of an acromioplasty does not result in impairment in addition to that resulting from loss of motion or strength (May/June 2002). It is for this reason, it

is my opinion the total impairment based on the report of Dr. Ross is five percent."

By decision dated June 9, 2003, the Office granted appellant a schedule award for a 5 percent permanent impairment of the right upper extremity for 15.6 weeks (April 28 to August 15, 2003).

On June 9, 2003 the Office advised appellant of its preliminary determination that there was an overpayment in his case in the amount of $21,257.44 because he had previously been granted a schedule award for an 18 percent impairment. As noted above, the Office subsequently determined that appellant had a five percent impairment of the right upper extremity and, therefore, appellant received an overpayment of compensation in the amount of $21,257.44 resulting from the 13 percent difference ($29,821.72 for an 18 percent impairment minus $8,564.28 for a five percent impairment). The Office also made a preliminary determination that appellant was not at fault in the creation of the overpayment. The Office advised appellant that he could request waiver of recovery of the overpayment and submit documentation of his income and expenses.

On July 7, 2003 appellant requested reconsideration of the Office's June 9, 2003 schedule award decision. He also requested waiver of recovery of the overpayment and submitted an Overpayment Recovery Questionnaire. Appellant listed $3,700.00 in monthly income and $2,270.00 in monthly expenses that included $321.00 for rent, $700.00 for food, $150.00 for clothing, $295.00 for utilities, $464.00 for other expenses, $130.00 for a credit card payment, and a $210.00 for a bank payment. He listed $4,385.00 in assets, including $185.00 cash on hand, a checking account balance of $300.00, and a savings account balance of $3,900.00.

By decision dated July 22, 2003, the Office denied appellant's request for waiver of recovery of the overpayment of compensation on the grounds that the evidence he submitted did not establish that recovery of the overpayment would defeat the purpose of the Federal Employees' Compensation Act, cause financial hardship, or be against equity and good conscience.

By decision dated July 25, 2003, the Office denied appellant's request for further merit review of his claim.

The Board finds that appellant has no more than a five percent impairment of the right upper extremity.

The schedule award provisions of the Act[3] and its implementing regulation[4] 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

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[3] 5 U.S.C. § 8107.

[4] 20 C.F.R. § 10.404.

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 his April 28, 2003 report, Dr. Ross correctly determined that appellant had a five percent impairment of the right upper extremity due to decreased range of motion according to appellant's range of motion measurements and Figures 16-40, 16-43, and 16-46 at pages 476-79 of the fifth edition of the A.M.A., *Guides.* Dr. Blum, the Office medical adviser, concurred with the range of motion assessment. Dr. Ross also determined that appellant had a 15 percent impairment due to his acromioplasty surgical procedure according to Table 16-18 at page 499. However, the A.M.A., *Guides* states in section 16.7 titled "Impairment of the Upper Extremities Due to Other Disorders" at page 499:

> "Impairments from the disorders considered in this section under the category of "other disorders" are usually estimated by using other impairment evaluation criteria. *The criteria described in this section should be used only when the other criteria have not adequately encompassed the extent of the impairment.* Some of the conditions described in this section can be concurrent with each other and with decreased motion because they share overlapping pathomechanics. The evaluator must have good understanding of pathomechanics of deformities and apply proper judgment to avoid duplication of impairment ratings." (Emphasis in the original.)

Dr. Ross did not explain why Table 16-18 should be used in addition to Figures 16-40, 16-43, and 16-46 which rate impairment due to decreased motion. The Board finds that Dr. Blum properly excluded the additional impairment percentage for the disorder of the acromioclavicular joint based on Table 16-18 at page 499 of the A.M.A., *Guides.* He correctly found that appellant had a five percent impairment of the right upper extremity due to decreased range of motion.

The Board finds that the Office properly determined that there was an overpayment in this case in the amount of $21,257.44 and waiver of the overpayment was not warranted.

The record establishes that the Office properly determined that an overpayment of $21,257.44 occurred in this case. By decision dated December 20 2001, the Office previously granted appellant a schedule award for an 18 percent permanent impairment of the right upper extremity. However, as noted in the Board's December 5, 2002 decision, the December 20, 2001 schedule award was premature because appellant had not reached maximum medical improvement. Following remand of the case, Dr. Ross examined appellant, determined that he had reached maximum medical improvement and provided findings on examination. Dr. Blum correctly applied the findings of Dr. Ross to the A.M.A., *Guides* and found that appellant had a five percent impairment of the right upper extremity. Appellant had received payments totaling $29,821.72 for the incorrect 18 percent impairment schedule award. However, based on the correct five percent impairment determination, he was entitled to receive only $8,564.28. Therefore, appellant received an overpayment of $21,257.44 ($29,821.72 minus $8,564.28).

The waiver or refusal to waive an overpayment of compensation by the Office is a matter that rests within the Office's discretion pursuant to statutory guidelines.[5] These statutory guidelines are found in section 8129(b) of the Act which states: "Adjustment or recovery [of an overpayment] 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."[6] Since the Office found appellant to be without fault in the creation of the overpayment, then, in accordance with section 8129(b), the Office may only recover the overpayment if it determined that recovery of the overpayment would neither defeat the purpose of the Act nor be against equity and good conscience.

Section 10.436 of the implementing regulations[7] provides that recovery of an overpayment will defeat the purpose of the Act if 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 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.[8] An individual is deemed to need substantially all of his or her income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than $50.00.[9]

Section 10.437 provides that recovery of an overpayment is considered to be against equity and good conscience when an individual who received an overpayment would experience severe financial hardship in attempting to repay the debt; and when an individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.[10]

In this case, appellant has not established that recovery of the overpayment would defeat the purpose of the Act because he has not shown that he needs substantially all of his current income to meet ordinary and necessary living expenses and that his assets do not exceed the allowable resource base. Appellant's monthly income exceeds his monthly ordinary and necessary expenses by $1,430.00. As appellant's current income exceeds his current ordinary and necessary living expenses by more than $50.00 he has not shown that he needs substantially all of his current income to meet current ordinary and necessary living expenses. Because appellant has not met the first prong of the two-prong test of whether recovery of the

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[5] *Robert Atchison,* 41 ECAB 83 (1989).

[6] *See* 5 U.S.C. § 8129(b); *Carroll R. Davis,* 46 ECAB 361 (1994).

[7] 20 C.F.R. § 10.436.

[8] An individual's assets must exceed a 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 individual's assets not exempt from recoupment; *see Robert F. Kenney,* 42 ECAB 297 (1991).

[9] *Sherry A. Hunt,* 49 ECAB 467 (1998).

[10] 20 C.F.R. § 10.437.

overpayment would defeat the purpose of the Act, it is not necessary for the Office to consider the second prong of the test, *i.e., w*hether appellant's assets do not exceed the allowable resource base.

With respect to whether recovery of the overpayment would be against equity and good conscience, the evidence does not demonstrate that appellant relinquished a valuable right or changed his position for the worse in reliance on the overpaid compensation.

Appellant has not shown that recovery of the overpayment would defeat the purpose of the Act or would be against equity and good conscience, the Board finds that the Office properly denied waiver of recovery of the overpayment of compensation in the amount of $21, 257.44.

With respect to the recovery of the overpayment, the Board notes that its jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation benefits under the Act.[11] As appellant is not receiving continuing compensation benefits, the Board does not have jurisdiction with respect to the Office's recovery of the overpayment by requiring appellant to remit $300.00 per month.

The Board further finds that the Office properly refused to reopen appellant's case for further review of the merits of his claim pursuant to 5 U.S.C. section 8128(a).

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

> "The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --
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> (1) end, decrease, or increase the compensation awarded; or
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> (2) award compensation previously refused or discontinued."

The Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.[12] When an application for review of the merits of a claim does not meet at least one of these requirements, the Office will deny the application for review without reviewing the merits of the claim.[13]

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[11] *Levon H. Knight*, 40 ECAB 658 (1989); *Edward O. Hamilton*, 39 ECAB 1131 (1988).

[12] 20 C.F.R. § 10.606(b)(2).

[13] 20 C.F.R. § 10.608(b).

In support of his request for reconsideration of the Office's schedule award decision, appellant stated his disagreement with the Office's determination of his impairment[14] but he submitted no new evidence. As appellant did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office, or submit relevant and pertinent evidence not previously considered by the Office, the Office did not abuse its discretion in denying his request for reconsideration.

The decisions of the Office of Workers' Compensation Programs dated July 25, July 22, and June 9, 2003 are affirmed.

Dated, Washington, DC
January 9, 2004

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

[14] Lay persons are not competent to render a medical opinion. *Sheila Arbour (Victor E. Arbor)*, 43 ECAB 779 (1992); *James A. Long*, 40 ECAB 538 (1989).