

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**MARY J. JOYNER, Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Omaha, TX, Employer**

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**Docket No. 04-677  
Issued: July 15, 2004**

*Appearances:*  
*Mary J. Joyner, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Member  
MICHAEL E. GROOM, Alternate Member  
A. PETER KANJORSKI, Alternate Member

**JURISDICTION**

On January 14, 2004 appellant filed a timely appeal from an Office of Workers' Compensation Programs' decision dated October 4, 2003 granting a schedule award and an April 1, 2003 decision finding an overpayment of compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award and overpayment issues.

**ISSUES**

The issues are: (1) whether an overpayment was created in the amount of \$25,676.01 for the period May 20, 2001 to January 26, 2002; (2) whether the Office properly determined that appellant was at fault in the creation of the overpayment, thus precluding waiver of recovery; (3) whether the Office properly determined that it would recover the overpayment by deducting the amount from her schedule award; and (4) whether appellant has more than an 18 percent permanent impairment of the left upper extremity for which she received a schedule award.

## **FACTUAL HISTORY**

On November 27, 2000 appellant, then a 62-year-old rural mail carrier, filed an occupational disease claim alleging that she injured her left arm and shoulder due to the repetitive reaching and stretching required in her job. She was released to return to work without restrictions on April 26, 2001. The Office accepted her claim for left shoulder bursitis. She retired from the employing establishment on May 3, 2001.

By letter dated February 8, 2001, the Office advised appellant that effective December 30, 2000 she would receive regular compensation payments for temporary total disability. Appellant was advised to notify the Office immediately if she returned to work. The Office noted that each compensation payment showed the period covered by the payment, and if appellant worked for any portion of this period, she should return the payment to the Office.

On March 26, 2001 appellant underwent left arm surgery consisting of a distal clavicle excision (arthroplasty). In a report dated May 15, 2002, Dr. Barry M. Green, appellant's attending Board-certified orthopedic surgeon, provided findings on examination and opined that she had an 18 percent permanent impairment of the left upper extremity. The impairment rating included 10 percent for distal clavicle arthroplasty according to Table 16-27 at page 506 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (5<sup>th</sup> ed. 2001) (A.M.A., *Guides*) and a nine percent impairment due to decreased flexion and abduction.<sup>1</sup> He provided range of motion findings that included 110 degrees of flexion, 50 degrees of extension, 90 degrees of abduction, 50 degrees of adduction and 90 degrees of internal and external rotation.

In a report dated February 6, 2003, an Office district medical adviser indicated that Dr. Green had correctly determined that appellant had an 18 percent impairment of the left upper extremity based on Figures 16-40, 16-43 and 16-46 at pages 476, 477 and 479, respectively, and Table 16-27 at page 506 of the fifth edition of the A.M.A., *Guides*.

By letter dated February 27, 2003, the Office advised appellant of its preliminary determination that an overpayment was created in the amount of \$25,676.01 for the period May 20, 2001 to January 26, 2002 because she had returned to work on April 26, 2001 but continued to receive compensation for total disability.<sup>2</sup> The Office asked appellant to submit a completed overpayment recovery questionnaire and copies of supporting financial documents within 30 days if she disagreed with the fact or amount of the overpayment and advised her of her right to request a precoupment hearing or telephone conference.

By final decision dated April 1, 2003, the Office advised appellant that she had accepted nine compensation checks (each in the amount of \$2,910.64, totaling \$26,195.76) for total disability for the period May 20, 2001 to January 26, 2002 but had returned to work on April 26, 2001 and received wages for the same period. This resulted in an overpayment of

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<sup>1</sup> Dr. Green combined the 10 percent and 9 percent impairments according to the Combined Values Chart at page 604 of the A.M.A., *Guides* and the result was an 18 percent total impairment of the left upper extremity.

<sup>2</sup> The Office noted that the compensation check for the period April 22 to May 19, 2001 was returned.

\$25,676.01 (\$26,195.76 minus \$519.75 owed for the period April 22 to May 19, 2001). The Office advised that appellant was found to be with fault in the creation of the overpayment because she accepted payment that she knew or should have known to be incorrect. The Office asked appellant to submit a check in the amount of \$25,676.01 within 30 days or contact the Office regarding installment payments.

By decision dated April 4, 2003, the Office granted appellant a schedule award for a 15 percent impairment of the left upper extremity, for 56.16 weeks of compensation.<sup>3</sup>

By letter dated March 20, 2003, received by the Office on May 19, 2003, appellant requested a hearing regarding the April 1, 2003 overpayment decision.

By letter dated April 21, 2003, appellant requested a review of the written record regarding the Office's April 4, 2003 schedule award decision.

By decision dated October 4, 2003, the Office corrected the error in its April 4, 2003 schedule award finding a 15 percent impairment rather than 18 percent impairment. The Office granted appellant a schedule award for an 18 percent impairment of the left upper extremity, for 56.16 weeks<sup>4</sup> of compensation.<sup>5</sup>

#### **LEGAL PRECEDENT -- ISSUE 1**

Section 8129(a) of the Federal Employees' Compensation Act<sup>6</sup> provides in pertinent part:

“When an overpayment has been made to an individual under this subchapter because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.”

Section 8116(a) of the Act provides that an employee who is receiving compensation for an employment injury may not receive wages for the same time period.<sup>7</sup>

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<sup>3</sup> The Office indicated that it would recover the overpayment by deducting it from appellant's schedule award.

<sup>4</sup> Under the Act, the maximum award for loss or loss of use of an arm is 312 weeks of compensation. 5 U.S.C. § 8107(c)(1). An 18 percent impairment of the arm equals 56.16 weeks of compensation (312 weeks multiplied by 18 percent).

<sup>5</sup> Appellant submitted additional evidence subsequent to the Office decision of October 4, 2003. However, the Board's jurisdiction is limited to the evidence that was before the Office at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c).

<sup>6</sup> 5 U.S.C. § 8129(a).

<sup>7</sup> 5 U.S.C. § 8116(a).

### **ANALYSIS -- ISSUE 1**

The record shows that appellant received nine compensation checks for the period May 20, 2001 to January 26, 2002 totaling \$26,195.76. Deducting \$515.75 from that amount for compensation she was entitled for the period April 22 to May 19, 2001, equals \$25,676.01. Because appellant received regular full-time wages from the employing establishment during the period May 20, 2001 to January 26, 2002, she was not entitled to disability compensation from the Office for the same period. The record establishes that she received an overpayment of compensation in the amount of \$25,676.01.

### **LEGAL PRECEDENT -- ISSUE 2**

The Office may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from the Office are proper. The recipient must show good faith and exercise a high degree of care in reporting events which may affect entitlement to, or the amount of, benefits. 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 (this provision applies only to the overpaid individual).<sup>8</sup>

Whether or not the Office determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid.<sup>9</sup>

### **ANALYSIS -- ISSUE 2**

The Office found that appellant was at fault in the creation of the overpayment based on the third criterion above, that she accepted payments which she knew or should have known to be incorrect. In order for the Office to establish that appellant was at fault in creating the overpayment, the Office must show that, at the time she received the compensation checks in question, she knew or should have known that the payment was incorrect.<sup>10</sup> The Board finds that appellant should have known that she was not entitled to receive compensation checks for total disability for the period May 20, 2001 to January 26, 2002 because she had returned to work on April 26, 2001 and was receiving wages for full-time work from the employing establishment for that same period. The Office had advised appellant in the February 8, 2001 CA-1049 letter that she must notify the Office immediately upon returning to work, and if she worked any period covered by the compensation payment she should return the payment to the Office. As appellant

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<sup>8</sup> 20 C.F.R. § 10.433(a).

<sup>9</sup> 20 C.F.R. § 10.433(b).

<sup>10</sup> *Robin O. Porter*, 40 ECAB 421 (1989).

was receiving her salary for full-time employment, there was no reasonable basis on which compensation entitlement would continue. The Board finds that appellant accepted payments she knew or should have known to be incorrect, and she is at fault under section 10.433(a). Since appellant was at fault in the creation of the overpayment, waiver of recovery of the overpayment is precluded.

### **LEGAL PRECEDENT -- ISSUE 3**

Section 10.441 of Title 20 of the Code of Federal Regulations, addressing recovery of overpayments, provides in relevant part:

“(a) When an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to [the Office] the amount of the overpayment as soon as the error is discovered or his or her attention is called to same. If no refund is made, [the Office] shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize any hardship.”<sup>11</sup>

### **ANALYSIS -- ISSUE 3**

The Board finds that the Office properly required repayment by withholding the overpayment amount from the amount of compensation due appellant on her schedule award. On February 27, 2003 the Office advised appellant of her right to request a hearing or telephone conference regarding its preliminary decision that an overpayment had occurred and that she should submit any such request and supporting documents such as copies of income tax returns, bank account statements, bills, canceled checks and any other records to support the income and expenses listed in the questionnaire, along with a completed overpayment recovery questionnaire, within 30 days. Appellant’s request for a hearing, did not include any financial documentation prior to the Office’s April 1, 2003 decision in determining the manner of recovery of the overpayment. The individual who received the overpayment is responsible for providing financial information as specified by the Office.<sup>12</sup> This information is used to determine a repayment schedule, if necessary.<sup>13</sup> Based on the circumstances of this case, including appellant’s failure to provide the required financial information, the Office acted properly in determining that the \$25,676.01 overpayment would be recovered by deducting this amount from appellant’s schedule award.

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<sup>11</sup> 20 C.F.R. § 10.441. *See also Levon H. Knight*, 40 ECAB 658 (1989).

<sup>12</sup> 20 C.F.R. § 10.438.

<sup>13</sup> *Id.*

#### **LEGAL PRECEDENT -- ISSUE 4**

A claimant seeking compensation under the Act<sup>14</sup> has the burden of establishing the essential elements of her claim by the weight of the reliable, probative and substantial evidence.<sup>15</sup> Section 8107 provides that, if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.<sup>16</sup> The schedule award provision of the Act<sup>17</sup> and its implementing regulation<sup>18</sup> 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*<sup>19</sup> has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.<sup>20</sup>

#### **ANALYSIS -- ISSUE 4**

In a report dated May 15, 2002, Dr. Green, appellant's attending physician, provided physical findings on examination and determined that appellant had an 18 percent impairment of the left upper extremity, 10 percent impairment for distal clavicle arthroplasty and 9 percent impairment due to decreased flexion and abduction of the shoulder according to the fifth edition of the A.M.A., *Guides*. He provided range of motion findings that included 110 degrees of flexion, 50 degrees of extension, 90 degrees of abduction, 50 degrees of adduction and 90 degrees of internal and external rotation. In a report dated February 6, 2003, the Office medical adviser reviewed Dr. Green's findings and agreed that appellant had an 18 percent impairment of the left upper extremity. Table 16-27 provides for a 10 percent impairment for a distal clavicle arthroplasty, Figure 16-40 provides for a 5 percent impairment for 110 degrees of flexion and Figure 16-43 provides for a 4 percent impairment for 90 degrees of abduction. Appellant has no impairment due to shoulder extension, adduction and internal and external rotation according to Figures 16-40, 16-43 and 16-46. The 10 percent impairment for the distal clavicle arthroplasty and the 9 percent impairment for loss of range of motion, were combined under the Combined Values Chart at page 604 to total 18 percent impairment of the shoulder. There is no evidence of

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<sup>14</sup> 5 U.S.C. §§ 8101-8193.

<sup>15</sup> *Edward W. Spohr*, 54 ECAB \_\_\_\_ (Docket No. 03-1173, issued September 10, 2003); *Nathaniel Milton*, 37 ECAB 712 (1986).

<sup>16</sup> 5 U.S.C. § 8107(a).

<sup>17</sup> 5 U.S.C. § 8107.

<sup>18</sup> 20 C.F.R. § 10.404.

<sup>19</sup> A.M.A., *Guides* (5<sup>th</sup> ed. 2001); *Joseph Lawrence, Jr.*, 53 ECAB \_\_\_\_ (Docket No. 01-1361, issued February 4, 2002).

<sup>20</sup> 20 C.F.R. § 10.404.

record that appellant has more than an 18 percent permanent impairment of the left upper extremity.

On appeal, appellant argues that she did not receive the full amount of her schedule award. She asserts that she received \$41,651.35 for her schedule award but should have received \$42,386.76 (her weekly compensation of \$754.75 multiplied by 56.16 weeks) for 18 percent impairment). The Board notes that the schedule award indicates that \$754.75 was appellant's weekly compensation for portion of the period eligible for a cost-of-living adjustment. Following return of the case record, appellant may make further inquiry of the Office as to its calculation.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated October 4 and April 1, 2003 are affirmed.

Issued: July 15, 2004  
Washington, DC

Colleen Duffy Kiko  
Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member