United States Department of Labor
Employees' Compensation Appeals Board

DORA L. FLORES, Appellant	)	
and	)	**Docket No. 04-713**
	)	**Issued: October 29, 2004**
DEPARTMENT OF THE AIR FORCE, KELLY AIR FORCE BASE, TX, Employer	)	

Appearances:
Dora L. Flores, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On January 21, 2004 appellant filed a timely appeal from the merit decision of the Office of Workers' Compensation Programs dated December 2, 2003, which found that she received an overpayment in the amount of $2,591.43 and that she was at fault in the creation of the overpayment. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over this overpayment case.

ISSUES

The issues are: (1) whether the Office properly determined that appellant received an overpayment in the amount of $2,591.43; and (2) whether the Office properly determined that appellant was at fault in the creation of the overpayment and, therefore, ineligible for waiver of the overpayment.

FACTUAL HISTORY

On October 7, 1993 appellant, then a 37-year-old auto store clerk, filed a traumatic injury claim assigned number 16-0231047 alleging that on April 2, 1993 she hurt her wrist when she

tripped over her chair. On October 28, 1993 the Office accepted appellant's claim for right wrist strain and de Quervain's disease of the right wrist.

On February 22, 1995 appellant filed a claim for a schedule award. Appellant was examined by Dr. Daniel C. Valdez, her treating Board-certified orthopedic surgeon, to determine whether she sustained permanent impairment as a result of the employment injury. In a January 30, 1995 report, Dr. Valdez reported that appellant had a five percent impairment of the right upper extremity, resulting in a three percent impairment of the whole person. An Office medical adviser reviewed Dr. Valdez's report and also determined that appellant had a five percent impairment of the right upper extremity. Based on the evaluations of Dr. Valdez and the Office medical adviser, the Office, on November 30, 1995, granted appellant a schedule award for a five percent loss of use of her right arm.

On July 13, 1995 appellant filed another traumatic injury claim assigned number 16-0264091 alleging that on July 11, 1995 she pulled her shoulder and reinjured her right wrist when she slipped coming down the stairs.[1] The Office accepted appellant's claim for right carpal tunnel syndrome and authorized a release with excision of mass that was performed by Dr. Valdez.

On June 14, 1996 appellant filed an occupational disease claim assigned number 16-0282280 alleging that on December 20, 1995 she sustained carpal tunnel syndrome of the right wrist that was caused by factors of her federal employment. By decision dated September 27, 1996, the Office found the evidence of record insufficient to establish that appellant sustained an injury in the performance of duty. In an October 1, 1996 letter, appellant requested a review of the written record before an Office hearing representative. In a decision dated February 13, 1997 and finalized on February 26, 1997, the hearing representative set aside the Office's September 27, 1996 decision and remanded the case for further development of the medical evidence. In an internal memorandum dated December 23, 1997, an Office claims examiner agreed to double case file number 16-0282280 into case file number 16-231047 when the hearing representative's remand was completed.

On remand, the Office accepted appellant's claim for bilateral carpal tunnel syndrome by letter dated August 24, 1998.[2]

Further development of the medical evidence included a November 6, 2000 report from Dr. Valdez indicating that appellant had a 14 percent impairment of the right upper extremity and a 13 percent impairment of the left upper extremity. An Office medical adviser reviewed Dr. Valdez's report and determined that appellant had a 10 percent impairment of each upper extremity. Based on the Office medical adviser's finding, the Office, on August 10, 2001, granted appellant a schedule award for a 10 percent permanent impairment of the right upper extremity and a 10 percent permanent impairment of the left upper extremity.

[1] On December 31, 1997 the Office doubled appellant's claims assigned numbers 16-231047 and 16-0264091 into a master case file assigned number 16-0282280.

[2] On October 8, 2003 the Office accepted that appellant sustained a recurrence of disability on March 10, 2003 causally related to her December 20, 1995 employment injury.

By letter dated October 23, 2003, the Office advised appellant of a preliminary determination that an overpayment of compensation had occurred in the amount of $2,591.43. The Office noted that appellant's claims for her April 2, 1993 employment-related wrist sprain assigned number 16-0231047, July 11, 1995 employment-related right shoulder rotator cuff tear, right wrist carpal tunnel syndrome and right wrist neuroma assigned number 16-0264091 and December 20, 1995 employment-related bilateral carpal tunnel syndrome assigned number 16-0282280 had been combined under one master case file assigned number 16-0231047. The Office stated that appellant was paid for a five percent impairment of the right upper extremity under case number 16-0231047 and that she was paid for a 10 percent impairment of the right upper extremity and a 10 percent impairment of the left upper extremity under case number 16-0282280. The Office found that the prior five percent was not deducted from the latest schedule award and, thus, appellant was overpaid by five percent for her right upper extremity. The Office further found that appellant was at fault in the creation of the overpayment because she should have reasonably known that she had already been paid for a 5 percent impairment of the right upper extremity and that she was only entitled to an additional 5 percent, totaling a 10 percent impairment of the right upper extremity. Appellant was advised that she could request a telephone conference, a final decision based on the written evidence only, or a hearing within 30 days of the date of this letter if she disagreed that the overpayment occurred, if she disagreed with the amount of the overpayment and if she believed that recovery of the overpayment should be waived. The Office requested that appellant complete an accompanying overpayment recovery questionnaire (Form OWCP-20) and submit financial documents in support thereof. Appellant did not respond within 30 days.

By decision dated December 2, 2003, the Office finalized its preliminary determination regarding the fact of overpayment, the amount of the overpayment and finding of fault.[3]

LEGAL PRECEDENT -- ISSUE 1

Section 8108 of the Federal Employees' Compensation Act[4] provides for the reduction of compensation for subsequent injury to the same member:

> "The period of compensation payable under the schedule in section 8107(c) of this title is reduced by the period of compensation paid or payable under the schedule for an earlier injury if --
>
> > (1) compensation in both cases is for disability of the same member or function or different parts of the same member or function or for disfigurement; and

[3] On appeal, appellant has submitted new evidence and arguments. However, the Board cannot consider evidence that was not before the Office at the time of the final decision. *See Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952); 20 C.F.R. § 501.2(c).

[4] 5 U.S.C. § 8108.

(2) the Secretary of Labor finds that compensation payable for the later disability in whole or in part would duplicate the compensation payable for the preexisting disability."

ANALYSIS -- ISSUE 1

Appellant initially received a schedule award for a five percent permanent impairment of the right upper extremity. When later medical evidence showed that she had a 10 percent impairment of the right upper extremity, the Office issued a second schedule award for an additional 10 percent. Rather than issue a schedule award for an additional 5 percent to bring the total percentage paid to 10 percent, the Office paid for a full 10 percent impairment. As a result, appellant received compensation for a 15 percent impairment when the medical evidence showed that the total impairment to her right upper extremity was only 10 percent. The second schedule award thus created an overpayment of five percent and effectively repaid appellant for the first schedule award she had already received. As appellant was entitled to only an additional 5 percent and not the full 15 percent paid, she should have received compensation in the amount of $15,665.68 rather than $18,257.11, which created an overpayment in the amount of $2,591.43.

The fact that the second schedule award was based on a separate injury is of no consequence; otherwise, serial injuries to the same extremity could theoretically compensate appellant for an impairment exceeding 100 percent or more than she would receive had she lost her arm completely. The Act does not contemplate such a result.

Compensation under each schedule award for appellant's employment injuries was for disability of or impairment to the right upper extremity. Further, the Office found that compensation payable for the later disability or impairment would duplicate the compensation paid for the preexisting disability or impairment. The Office, therefore, properly determined that appellant was entitled to a schedule award for only an additional five percent impairment as a result of the December 20, 1995 employment injury.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Act[5] provides that an overpayment of compensation shall be recovered by the Office unless "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] Thus, the Office may not waive the overpayment of compensation unless appellant was without fault.[7] Adjustment or recovery must therefore be made when an incorrect payment has been made to an individual who is with fault.[8]

[5] 5 U.S.C. § 8129(b).

[6] *Michael H. Wacks*, 45 ECAB 791, 795 (1994).

[7] *Norman F. Bligh*, 41 ECAB 230 (1989).

[8] *Diana L. Booth*, 52 ECAB 370, 373 (2001); *William G. Norton, Jr.*, 45 ECAB 630, 639 (1994).

On the issue of fault, section 10.433 of the Office's regulations, provides that an individual will be found at fault if he or she has done any of the following:

> "(1) made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; (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 was incorrect."[9]

With respect to whether an individual is without fault, section 10.433(b) of the Office's regulations provides in relevant part:

> "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."[10]

ANALYSIS -- ISSUE 2

In this case, the Office applied the third standard in determining that appellant was at fault in the creation of the overpayment. To establish that appellant was with fault in creating the overpayment of compensation, the Office must show that, at the time appellant received the compensation checks in question, she knew or should have known that the payments were incorrect.[11] The Board finds that the record does not establish that appellant accepted any compensation which she knew or should have known was incorrect.

The Office found that appellant should have reasonably known that she was only entitled to a schedule award for an additional five percent impairment of her right upper extremity. The Office, however, has not sufficiently explained what evidence put appellant on notice that she knew or should have known that she was accepting an incorrect payment of compensation. The record does not establish that the Office advised appellant that she was not entitled to receive two schedule awards for impairment to the same member under the Act.

Further, after the hearing representative's February 13, 1997 decision, in which the case was remanded to the Office for further development of the medical evidence regarding appellant's December 20, 1995 employment injury, the Office, in its October 23, 2003 preliminary overpayment determination, doubled this claim file assigned number 16-0282280 with the claim file for appellant's April 2, 1993 and July 11, 1995 right upper extremity employment injuries assigned number 16-0231047. This was in accord with Office procedures in effect at the time of the hearing representative's February 13, 1997 decision, which indicate that cases should be doubled when a new injury is reported for an employee who previously filed an injury claim for a similar condition and further provides that cases should be doubled as soon

[9] 20 C.F.R. § 10.433(a) (2003).

[10] 20 C.F.R. § 10.433(b).

[11] *Diana L. Booth*, *supra* note 8.

as the need to do so becomes apparent.[12] For reasons unknown, however, while the two claim files were physically combined, the Office failed to formally double the claims into one claim and advise appellant of such action.[13]

Moreover, while the Office issued two valid schedule award claims, there is no evidence of record indicating that the Office rescinded either schedule award before finding that an overpayment had been created in this case.[14] Thus, the Board finds that, under the above circumstances, the evidence is insufficient to establish that appellant knew or should have known that she received an incorrect payment.

Inasmuch as it has been determined that appellant was without fault in the creation of the overpayment in the amount of $2,591.43, the Office may only recover the overpayment in accordance with section 8129(b) of the Act,[15] if a determination has been made that recovery of the overpayment would neither defeat the purpose of the Act nor be against equity and good conscience.[16] Therefore, the case should be remanded to the Office for further development with respect to whether appellant is entitled to waiver of the overpayment. After such further development as the Office may find necessary, it should issue a *de novo* decision on the issue of whether the overpayment should be waived.

CONCLUSION

The Board finds that the Office properly determined that appellant received an overpayment in the amount of $2,591.43. The Board, however, finds that the Office improperly determined that appellant was at fault in the creation of the overpayment.

[12] FECA Bulletin No. 97-10 (issued February 15, 1997) regarding case doubling. The Board notes that in February 2000 FECA Bulletin 97-10 was incorporated into the Office procedure manual. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *File Maintenance and Management*, Chapter 2.400.8(c)(1) (February 2000).

[13] *Id.* at Chapter 2.400.8(i) (February 2000).

[14] The Board has upheld the Office's authority to reopen a claim at any time on its own motion under section 8128(a) of the Act and, where supported by the evidence, set aside or modify a prior decision and issue a new decision. *See* 20 C.F.R. § 10.610. The Board, however, has noted that the power to annul an award is not an arbitrary one. An award for compensation can only be set aside in the manner provided by the compensation statue. The Office's burden of justifying termination or modification of compensation holds true where the Office later decides that it has erroneously accepted a claim for compensation. In establishing that its prior acceptance was erroneous, the Office is required to provide a clear explanation of its rationale for rescission. It is a fundamental principle of the law on rescission, as developed by the Board, that the Office should not be second-guessing a prior adjudicating claims examiner and simply arrive at a different conclusion on the same evidence. *Delphia Y. Jackson*, 55 ECAB ___ (Docket No. 04-165, issued March 10, 2004).

[15] 5 U.S.C. § 8129(b).

[16] The guidelines for determining whether recovery of an overpayment would defeat the purpose of the Act or would be against equity and good conscience are set forth in 20 C.F.R. §§ 10.434, 10.436, 10.437.

ORDER

IT IS HEREBY ORDERED THAT the December 2, 2003 decision of the Office of Workers' Compensation Programs is affirmed in part with respect to the finding of fact and amount of the overpayment and set aside with respect to the finding of fault and remanded for further proceedings consistent with this decision.

Issued: October 29, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member