

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

CHARLES E. GREENE, Appellant)	
)	
and)	Docket No. 05-1348
)	Issued: December 21, 2005
DEPARTMENT OF THE ARMY, ANNISTON)	
ARMY DEPOT, Anniston, AL, Employer)	
)	

Appearances:
Charles E. Greene, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
WILLIE T.C. THOMAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On June 7, 2005 appellant filed a timely appeal of an April 18, 2005 decision of the Office of Workers' Compensation Programs, finding that an overpayment of \$750.01 was created with respect to a schedule award payment and denying waiver of the overpayment and a schedule award decision issued on January 26, 2005. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the overpayment and schedule award issues in this case.

ISSUES

The issues are: (1) whether appellant has more than a six percent impairment to his left index finger, for which he received a schedule award; (2) whether the Office properly found that a \$750.01 overpayment of compensation was created with respect to the schedule award; and (3) whether the Office properly denied waiver of the overpayment.

FACTUAL HISTORY

On May 27, 2003 appellant, then a 48-year-old automotive machinist, filed a traumatic injury claim (Form CA-1) alleging that he sustained injury in the performance of duty when he

struck his left hand with a hammer. In a report dated March 28, 2003, Dr. Kenneth Vandervoort, an orthopedic surgeon, diagnosed a left index metacarpal shaft fracture, and indicated that the surgery was performed. The Office accepted the claim for a left finger fracture.¹

In a report dated December 5, 2003, Dr. Vandervoort reported that for the metacarpophalangeal (MP) joint of the left index finger, appellant had 80 degrees of flexion. He opined that appellant had reached maximum medical improvement with a six percent impairment to the index finger based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). By report dated June 4, 2004, an Office medical adviser concurred that appellant had a six percent index finger impairment based on Figure 16-25 of the A.M.A., *Guides*.

By decision dated August 4, 2004, the Office issued a schedule award for a 10 percent left index finger impairment. The period of the award was 4.6 weeks from December 5, 2003. On August 6, 2004 the Office issued a compensation payment of \$2,307.73 for the period December 5, 2003 to January 6, 2004.

Appellant requested reconsideration of the claim by letter dated October 27, 2004. By decision dated January 21, 2005, the Office vacated the August 4, 2004 decision and indicated that a schedule award for a six percent left index finger impairment would be issued. In a decision dated January 26, 2005, the Office issued a schedule award for the six percent left index finger permanent impairment. The period of the award was 2.76 weeks from December 5, 2003. The Office noted that appellant had erroneously received a prior award for a greater impairment.

In a letter dated February 1, 2005, the Office made a preliminary determination that an overpayment of \$750.01 was created. The Office explained that appellant had received a payment of \$2,307.73, but should have received payment of \$1,557.72 for 2.76 weeks of compensation pursuant to the schedule award. With respect to fault, the Office made a preliminary determination that appellant was without fault in creating the overpayment. Appellant was advised to complete the enclosed overpayment recovery questionnaire and submit relevant evidence regarding waiver of the overpayment within 30 days.

By decision dated April 18, 2005, the Office finalized its determination with respect to a \$750.01 overpayment and denied waiver on the grounds that appellant did not submit relevant evidence with regard to waiver.

LEGAL PRECEDENT -- ISSUE 1

Under section 8107 of the Federal Employees' Compensation Act² and section 10.404 of the implementing federal regulations,³ schedule awards are payable for permanent impairment of specified body members, functions or organs. The Act, however, does not specify the manner in

¹ The acceptance letter stated that the fracture was to the ring finger, but the evidence shows that it was the left index finger.

² 5 U.S.C. §§ 8101-8193.

³ 20 C.F.R. § 10.404 (1999).

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 tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the Office and the Board has concurred in such adoption, as an appropriate standard for evaluating schedule losses.⁴ As of February 1, 2001, the fifth edition of the A.M.A., *Guides* was to be used to calculate schedule awards.⁵

ANALYSIS -- ISSUE 1

The medical evidence in this case establishes a six percent left index finger permanent impairment. Dr. Vandervoort reported 80 degrees of MP joint flexion for the left index finger. Under Figure 16-25, 80 degrees of flexion is a 6 percent finger impairment.⁶ Dr. Vandervoort did not describe any additional impairment or opine that appellant had a greater impairment. An Office medical adviser concurred with the six percent left finger impairment. The Board therefore finds that the medical evidence does not establish greater than a six percent left index finger permanent impairment.

The number of weeks of compensation for a schedule award is determined by the compensation schedule at 5 U.S.C. § 8107(c). For complete loss of use of the first finger, the maximum number of weeks of compensation is 46 weeks.⁷ Appellant is therefore entitled to 6 percent of 46 or 2.76 weeks of compensation. It is well established that the period covered by a schedule award commences on the date that the employee reaches maximum medical improvement from residuals of the employment injury.⁸ The award properly runs for 2.76 weeks commencing on December 5, 2003, the date of the report by Dr. Vandervoort.

LEGAL PRECEDENT -- ISSUE 2

A claimant is entitled to compensation pursuant to 5 U.S.C. § 8107 based on the probative medical evidence of record. Where the Office pays compensation in excess of the number of weeks warranted by the relevant evidence, an overpayment of compensation is created.⁹

⁴ *James J. Hjort*, 45 ECAB 595 (1994); *Leisa D. Vassar*, 40 ECAB 1287 (1989); *Francis John Kilcoyne*, 38 ECAB 168 (1986).

⁵ FECA Bulletin No. 01-05 (issued January 29, 2001).

⁶ A.M.A., *Guides* 464, Figure 16-25 (Finger Impairments Due to Abnormal Motion at the MP Joint).

⁷ 5 U.S.C. § 8107(c)(7).

⁸ *Albert Valverde*, 36 ECAB 233, 237 (1984).

⁹ See *Desiderio Martinez*, 55 ECAB ____ (Docket No. 03-2100, issued January 9, 2004) (appellant received a schedule award for an 18 percent permanent impairment to the right arm, but should have received 5 percent, thereby creating an overpayment of compensation).

ANALYSIS -- ISSUE 2

In this case, the Office paid appellant \$2,307.73 in compensation, representing 4.6 weeks of compensation from December 5, 2003. As noted above, based on the probative medical evidence, appellant was entitled to 2.76 weeks of compensation for a 6 percent left index finger impairment. The Office indicated that 2.76 weeks of compensation would result in a payment of \$1,557.72. The Office therefore properly found that an overpayment of \$750.01 was created.

LEGAL PRECEDENT -- ISSUE 3

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.¹⁰ 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."¹¹ 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 regulations¹² 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.¹³ 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 \$50.00.¹⁴

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

¹⁰ *Robert Atchison*, 41 ECAB 83 (1989).

¹¹ *See* 5 U.S.C. § 8129(b); *Carroll R. Davis*, 46 ECAB 361 (1994).

¹² 20 C.F.R. § 10.436 (1999).

¹³ The assets must not exceed a resource base of \$4,800.00 for an individual or \$8,000.00 for an individual with a spouse or one dependent plus \$960.00 for each additional dependent. This base includes all of the individual's assets not exempt from recoupment; *see* Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6 (October 2004).

¹⁴ *Sherry A. Hunt*, 49 ECAB 467 (1998).

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.¹⁵

ANALYSIS -- ISSUE 3

The Office requested that appellant submit relevant financial information in order to determine whether repayment of the overpayment would defeat the purpose of the Act or be against equity and good conscience. The individual who receives an overpayment is responsible for providing information about income, expenses and assets as specified by the Office. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of the Act or be against equity and good conscience.¹⁶ Appellant did not submit any evidence in response to the Office's preliminary overpayment. He stated on appeal that he believed that since he was without fault he did not need to do anything further, but the February 1, 2005 preliminary determination letter clearly advised appellant of his obligations regarding any request for waiver of the overpayment. Failure to submit the requested information within 30 days of the request resulted in the denial of waiver and no further request for waiver is considered until the requested information is furnished.¹⁷ The Board finds that the Office properly denied waiver in this case.

CONCLUSION

The Board finds that the record does not establish more than a six percent permanent impairment to the left index finger. The Board further finds that an overpayment of \$750.01 was created as the Office paid appellant 4.6 weeks of compensation instead of 2.76 weeks and the Office properly denied waiver of the overpayment.

¹⁵ 20 C.F.R. § 10.437 (1999).

¹⁶ *Id.* at § 10.438(a).

¹⁷ *Id.* at § 10.438(b).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated April 18, January 26 and 21, 2005 are affirmed.

Issued: December 21, 2005
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board