United States Department of Labor
Employees' Compensation Appeals Board

LINDA S. MOUNCE, Appellant	)	
and	)	**Docket No. 04-1424**
	)	**Issued: February 7, 2005**
U.S. POSTAL SERVICE, TULSA REMOTE ENCODING CENTER, Tulsa, OK, Employer	)	

Appearances:
Linda S. Mounce, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On May 5, 2004 appellant filed a timely appeal from a February 3, 2004 decision in which a hearing representative of the Office of Workers' Compensation Programs affirmed a January 30, 2003 schedule award and found that she was at fault in the creation of a $22,274.89 overpayment in compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merit issues of this case.

ISSUES

The issues are: (1) whether appellant met her burden of proof to establish that she has more than a 27 percent permanent impairment of the right upper extremity and a 21 percent permanent impairment of the left upper extremity; (2) whether the Office properly determined that appellant received an overpayment in compensation in the amount of $22,274.99; and (3) whether the Office properly found that appellant was at fault in the creation of the overpayment and, therefore, it was not subject to waiver. On appeal appellant contends that there was no overpayment in compensation because she was entitled to simultaneous temporary total disability compensation and a schedule award payment.

FACTUAL HISTORY

On June 20, 1997 appellant, then a 41-year-old data conversion operator, filed an occupational disease claim, alleging that factors of her employment caused bilateral carpal tunnel syndrome. She did not stop work. The Office accepted that appellant sustained employment-related bilateral carpal tunnel syndrome and epicondylitis. On July 18, 1997 she came under the care of Dr. Perry D. Inhofe, a Board-certified orthopedic surgeon specializing in hand surgery. On August 7, 1997 she underwent a right carpal tunnel release. Appellant returned to limited duty on September 19, 1997. On September 24, 1997 and February 2, 1998 she filed schedule award claims. By decision dated March 4, 1998, the Office determined that her limited-duty position, which met or exceeded her date-of-injury earnings, fairly and reasonably represented her wage-earning capacity.

In a decision dated April 6, 1998, appellant was granted a schedule award for an eight percent permanent impairment of the right upper extremity, for a total of 24.96 weeks of compensation, to run from December 10, 1997 to June 2, 1998.[1]

On March 16, 1999 appellant underwent left carpal tunnel release and left elbow surgery, and was placed on the periodic rolls. She returned to limited duty on June 15, 1999. She underwent right elbow surgery on June 29, 1999, after which she was returned to the periodic rolls. She returned to full-time limited duty on July 22, 1999, but shortly thereafter began working approximately four hours a day.

By report dated December 10, 1999, Dr. Inhofe advised that appellant had reached maximum medical improvement. He noted examination findings of good range of motion and good muscular tone with considerable soreness of both elbows. Jamar grip strength testing revealed 24 kilograms (kg) on the left and 26 kg on the right. Dr. Inhofe provided permanent restrictions to appellant's physical activity and, generally referencing the A.M.A., *Guides*, opined that she had an 18 percent left upper extremity impairment and a 16 percent right upper extremity impairment.

Appellant stopped work on December 24, 1999. The Office thereafter referred her to Dr. Alan Holderness, a Board-certified orthopedic surgeon, for an impairment evaluation. In a report dated February 28, 2000, he advised that maximum medical improvement had been reached on December 10, 1999. Dr. Holderness referenced the fourth edition of the A.M.A., *Guides* and provided physical findings and range of motion measurements, stating that he observed a mild clinical decrease in grip strength but did no dynamometer measurements. He was unable to measure or discern any evidence of atrophy, ankylosis or gross sensory or motor changes. Dr. Holderness noted appellant's complaints of occasional numbness in the right hand

[1] In a report dated March 30, 1998, an Office medical adviser agreed with Dr. Inhofe's finding that appellant was entitled to an eight percent impairment based on Table 16 of the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment.* Office procedures direct the use of the fourth edition of the A.M.A., *Guides*, issued in 1993, for schedule awards determined on and after November 1, 1993. *John Yera*, 48 ECAB 243 (1996). Effective February 1, 2001, the Office began using the fifth edition of the A.M.A., *Guides*. *Joseph Lawrence, Jr.*, 53 ECAB ___ (Docket No. 01-1361, issued February 4, 2002).

and right index finger with occasional aching in both elbows. He advised that the thumb range of motion at the interphalangeal (IP) joint demonstrated flexion of 40 degrees and extension of 0 degrees on the right and 44 degrees and 0 degrees on the left; opposition of each thumb was 95 percent of normal. Regarding the fingers, Dr. Holderness stated that there was approximately 50 degrees retained in flexion in each of the distal interphalangeal (DIP) joints for a 10 percent impairment, 70 percent of flexion of each of the metacarpophalangeal (MCP) joints for an 11 percent impairment, and 0 degrees of extension for a 5 percent impairment. He stated that he followed the instructions found on pages 322 through 341 of the A.M.A., *Guides* and arrived a 5 percent right thumb impairment and a 4 percent left thumb impairment. Dr. Holderness determined that each finger of each hand had a 25 percent impairment. He then combined the values and arrived at an 18 percent bilateral hand which equaled a 16 percent upper extremity impairment for her hands.

Dr. Holderness noted that bilateral wrist flexion was 80 degrees with 20 degrees of extension on the right and 50 degrees on the left. Radial deviation was 15 degrees on the right and 20 degrees on the left. Ulnar deviation was 15 on the right and 20 on the left. He advised that these measurements provided an 11 percent right upper extremity impairment and a 4 percent impairment on the left. Elbow range of motion demonstrated 135 degrees of flexion on the right and 130 on the left with extension of minus 5 on the right and 10 on the left. Bilateral supination and pronation of the wrists was 90 degrees. The physician advised that appellant had a one percent impairment of the right elbow and two percent of the left.

Dr. Holderness concluded that appellant's right hand had a 16 percent upper extremity impairment, her right wrist an 11 percent upper extremity impairment, and her right elbow a 1 percent impairment which combined to equal a 26 percent right upper extremity impairment. Her left hand impairment equaled 16 percent of the upper extremity, left wrist 4 percent and left elbow 2 percent, combined to equal a 21 percent left upper extremity impairment.[2]

In a report dated March 20, 2000, an Office medical adviser noted his review of the medical record. He advised that maximum medical improvement had been reached on December 10, 1999 and converted the measurements found in Dr. Holderness' report to the appropriate tables found in the A.M.A., *Guides.* He concluded that appellant had a 27 percent right upper extremity impairment and a 15 percent left upper extremity impairment.

By report dated March 24, 2000, Dr. Inhofe advised that appellant continued to have problems with her arms and noted tenderness throughout the upper extremities on physical examination which he characterized as chronic.

In a decision dated March 28, 2000, appellant was granted a schedule award for a 42 percent upper extremity impairment, for a total of 131.04 weeks of compensation, to run from December 10, 1999 to June 15, 2002. In a check dated March 31, 2000, she was paid $6,470.05 for the period December 10, 1999 to March 25, 2000. Also on March 31, 2000, the Office offered appellant a lump-sum schedule award payment in the amount of $46,376.78, commuted to April 23, 2000, which she accepted on April 4, 2000.

[2] Appellant married on January 10, 2000, and her name was changed from Linda Jones to Linda Mounce.

Following an inquiry by the employing establishment, the Office issued an amended schedule award on April 4, 2000. The Office noted that appellant had previously received a schedule award for an 8 percent right upper extremity impairment, and awarded her a 34 percent upper extremity impairment, for a total of 102.48 weeks, to run from December 10, 1999 to November 27, 2001. On April 11, 2000 the Office offered appellant an amended lump-sum schedule award, in the amount of $35,212.57, with a commutation date of April 23, 2000. Appellant telephoned the Office on April 20, 2000 advising that she did not wish to receive her schedule award in a lump sum. By letter dated May 30, 2000, the Office informed appellant that she would receive a lump-sum schedule award payment of $44,648.78 for the period April 23, 2000 to June 15, 2002, as provided in the March 28, 2000 schedule award, for a 42 percent upper extremity impairment. The Office explicitly informed appellant that she would not be entitled to further compensation until the expiration of the schedule award in June 2002.[3] The record contains a copy of the check, in the amount of $44,648.78, issued on June 2, 2000, properly endorsed by appellant.[4] She also continued to receive compensation for the schedule award on the periodic rolls.[5]

On February 15, 2001 appellant's husband filed for bankruptcy and on August 4, 2001, she filed for bankruptcy. On September 27, 2001 the employing establishment notified the Office that appellant had received the lump-sum payment of $44,648.78 but continued to receive monthly compensation under her schedule award.

On October 26, 2001 the Office issued a preliminary determination that appellant had received an overpayment in compensation in the amount of $52,291.02, on the grounds that she received a lump-sum schedule award for $44,648.78 but had continued to receive monthly schedule award payments which totaled $42,854.81 for the period December 10, 1999 to October 6, 2001. The Office noted that appellant was incorrectly paid a lump sum based on a 42 percent impairment, or $44,648.78, when the lump sum should have been based on a 34 percent impairment, or $35,212.57, a difference of $9,436.21, which was added to the $42,854.81 in schedule award periodic compensation appellant had received, to find a total overpayment of $52,291.02. The Office found her to be at fault in the creation of the overpayment because she should have been aware that she was not entitled to receive both payments.

On October 31, 2001 appellant requested a prerecoupment hearing. On January 17, 2002 an Office hearing representative found the case not in posture for a hearing and remanded the case for recalculation of the amount of the schedule award. The hearing representative noted that the Office medical adviser's mathematical calculations for the left upper extremity were incorrect.

[3] A handwritten notation on the record copy of this letter indicates that the check was not issued.

[4] A notation on the check indicates it was for the period April 22, 1997 to June 15, 1999.

[5] Appellant's compensation was suspended effective April 22, 2001 because she did respond to an Office inquiry. It was reinstated On July 11, 2001, and compensation from the date of suspension was awarded.

In reports dated October 2, 2001 and May 13, 2002, Dr. Inhofe noted that appellant's upper extremity tenderness continued. He provided restrictions to her physical activity. Appellant returned to limited duty on June 5, 2002.

In a report dated October 16, 2002, an Office medical adviser reviewed Dr. Holderness' February 28, 2000 report and recalculated the schedule award. He again advised that the date of maximum medical improvement was December 10, 1999 and concluded that under the fourth edition of the A.M.A., *Guides*, appellant was entitled to a 27 percent right upper extremity impairment and a 21 percent left upper extremity impairment.

On January 30, 2003 the Office issued a preliminary determination that appellant had received an overpayment in compensation in the amount of $22,274.99 because, after receiving a lump-sum schedule award payment, she continued to receive periodic schedule award payments. In calculating this overpayment, the Office noted that appellant had received schedule award compensation totaling $96,313.21 for the period December 10, 1999 to October 23, 2002 but was entitled to a schedule award for a 48 percent total for bilateral upper extremity impairment, or $74,038.22, creating an overpayment in compensation in the amount of $22,274.99.[6] The Office found her to be at fault in the creation of the overpayment because she knew or should have known that she was not entitled to receive both payments.

On January 30, 2003 the Office issued an amended schedule award to reflect a 21 percent permanent loss of use of the left upper extremity and a 27 percent permanent loss of use of the right upper extremity.

On February 25, 2003 appellant requested a hearing, which was held on November 18, 2003. She testified that she continued to work at the employing establishment, and contended that the amount of the schedule award was incorrect as she was entitled to a total 54 percent impairment. Appellant further contended that there was no overpayment in compensation because she was entitled to wage-loss compensation for the period September 25, 1999 to June 5, 2002 when she returned to work. She also submitted an updated overpayment questionnaire with changes made at the hearing, and provided reports dated September 20, 2001 and May 13, 2002 from Dr. Inhofe.

By decision dated February 3, 2004, the Office hearing representative found that the January 30, 2003 schedule award calculation was correct and finalized the finding that an overpayment in compensation in the amount of $22,274.99 had been created for the period December 10, 1999 through October 6, 2001 because she continued to receive monthly schedule award compensation after receiving a lump-sum award. The hearing representative further found that appellant was at fault in the creation of the overpayment because she knew or should have known she was not entitled to both payments and concluded that she could repay the overpayment in compensation at the rate of $400.00 per month.

[6] The Board notes that appellant's compensation ceased on October 6, 2001.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act[7] and its implementing regulation[8] 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. The Act, however, 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.[9]

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained bilateral carpal tunnel syndrome and epicondylitis. On April 6, 1998 it issued a schedule award for an eight percent permanent impairment of the right upper extremity. On March 28, 2000 the Office issued a schedule award for an additional 27 percent permanent impairment of the right upper extremity and for a 15 percent impairment of the left upper extremity. This award was amended on April 4, 2000 to reflect a 19 percent right upper extremity impairment and a 15 percent impairment on the left, as appellant had previously received a schedule award for an 8 percent right upper extremity impairment.

Following remand by an Office hearing representative, on October 16, 2002, an Office medical adviser reviewed the February 28, 2000 report provided by Dr. Holderness, who examined appellant for the Office, and recalculated the schedule award. The Office medical adviser stated that the date of maximum medical improvement was December 10, 1999 and concluded that, under the fourth edition of the A.M.A., *Guides*, appellant was had a 27 percent right upper extremity impairment and a 21 percent left upper extremity impairment.

On January 30, 2003 the Office issued an amended schedule award to reflect a 21 percent permanent loss of use of the left upper extremity and a 27 percent permanent loss of use of the right upper extremity.

The Board finds, however, finds that this impairment rating must be modified to show that appellant is entitled to a 26 percent right upper extremity impairment and a 22 percent left upper extremity impairment.

[7] 5 U.S.C. §§ 8101-8193.

[8] 20 C.F.R. § 10.404.

[9] *Ronald R. Kraynak*, 53 ECAB ___(Docket No. 00-1541, issued October 2, 2001).

Regarding the right upper extremity, the Office medical adviser correctly determined that under Figures 8, 10, 11 and 13-16 and Tables 6 and 7 of the fourth edition of the A.M.A., *Guides*,[10] appellant had a two percent upper extremity impairment due to loss of motion of the thumb.[11] Regarding loss of motion for each of the fingers, the Office medical adviser properly determined that, under Figures 19 and 23, 50 degrees of flexion of the DIP joint equaled a 10 percent impairment, that 70 degrees of flexion of the MP joint equaled an 11 percent impairment, and that 0 degrees of extension of the MP joint equaled a 5 percent impairment.[12] The Office medical adviser then utilized the Combined Values Chart and determined that appellant had a 24 percent impairment of each finger.[13] He then properly determined that, under Table 1, a 24 percent impairment of the index and long finger equaled a 5 percent hand impairment each[14] which, under Table 2, also equaled a 5 percent upper extremity impairment respectively.[15] The Office medical adviser properly determined that, under Table 1, a 24 percent impairment of the ring and little finger equaled a 2 percent impairment each.[16] He then utilized Table 2 and found that these also equaled a two percent upper extremity impairment.[17]

Regarding appellant's loss of right elbow motion, the Office medical adviser correctly determined that, under Figure 35, 90 degrees of pronation and supination respectively entitled appellant to no impairment.[18] He also properly determined that, under Figure 32, 135 degrees of flexion equaled a 1 percent impairment.[19] He erred, however, in his determination that under Figure 32 minus -5 degrees of extension is equal to a 1 percent impairment. Figure 32 provides that minus five degrees of extension is equal to zero percent impairment.[20] Appellant would

[10] Office procedures provide that if a claimant who has received a schedule award calculated under a previous edition of the A.M.A., *Guides* is entitled to additional benefits, the increased award will be calculated according to the fifth edition. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Payment of Schedule Awards*, Chapter 2.808.7(b)(4) (March 1995). The Board, however, notes that while the fifth edition of the A.M.A., *Guides* became effective on February 1, 2001, the hearing representative's January 17, 2002 decision clearly indicated that this case was merely remanded for recalculation of appellant's left upper extremity impairment, based on Dr. Holderness' February 28, 2000 report. Consequently, it was appropriate that the fourth edition of the A.M.A., *Guides* be used as no recalculation of the award, based on new medical evidence, resulted from the January 17, 2002 decision. *See Raymond A. Fondots*, 53 ECAB ___ (Docket No. 01-1599, issued June 26, 2002).

[11] The Office medical adviser noted that 49 degrees of flexion of the IP joint equaled a 3 percent impairment, 0 degrees of extension of the IP joint equaled a 1 percent impairment, and lack of opposition equaled a 1 percent impairment. A.M.A., *Guides*, *supra* note 1 at 25-29.

[12] A.M.A., *Guides*, *supra* note 1 at 32, 34.

[13] *Id.* at 322-24.

[14] *Id.* at 18.

[15] *Id.* at 19.

[16] *Id.* at 18.

[17] *Id.* at 19.

[18] *Id.* at 41.

[19] *Id.* at 40.

[20] *Id.*

therefore be entitled to a one percent impairment for loss of elbow motion on the right, rather than the two percent provided.

Regarding appellant's loss of right wrist motion, the Office medical adviser erred in determining that appellant had a 12 percent impairment. He correctly determined that, under Figure 29, 15 degrees of ulnar deviation equaled a 3 percent impairment and 15 degrees of radial deviation equaled a 1 percent impairment,[21] and that under Figure 26, 80 degrees of flexion equaled no impairment. Figure 26 also indicates that 20 degrees of extension equals a 7 percent impairment,[22] and the Office medical adviser indicated that this would entitled appellant to an 8 percent rating. Appellant would therefore be entitled to an 11 percent impairment for loss of wrist motion on the right, rather than the 12 percent provided.

In combining appellant's right upper extremity impairments of 11 percent for the wrist, 5 percent for the index finger, 5 percent for the middle finger, 2 percent for the ring finger, 2 percent for the little finger, 2 percent for the thumb, and 1 percent for the elbow, a 26 percent right upper extremity impairment, rather than the 27 percent as found.

Regarding appellant's left upper extremity, as explained above, the Office medical adviser properly determined under the proper tables and figures of the A.M.A., *Guides* that appellant's loss of index and long finger motion entitled appellant to a five percent impairment each, and her loss of thumb and ring and little finger motion entitled her to a two percent impairment each.[23]

Regarding appellant's loss of left elbow motion, the Office medical adviser correctly determined that, under Figure 35, 90 degrees of pronation and supination respectively entitled appellant to no impairment.[24] He also properly determined that, under Figure 32, 130 degrees of flexion equaled a 1 percent impairment.[25] He erred, however, in determining that, under Figure 32, 10 degrees of extension equaled no impairment, as Figure 32 provides that this equals a 1 percent impairment.[26]

Regarding appellant's loss of wrist motion, the Office medical adviser properly determined that appellant had a 12 percent impairment. Under Figure 29, appellant's 20 degrees of ulnar deviation equaled a 2 percent impairment and 20 degrees of radial deviation equaled a 0 percent impairment.[27] Under Figure 26, 80 degrees of flexion equaled no impairment and 50

[21] *Id.* at 38.

[22] *Id.* at 36.

[23] Appellant's thumb and finger range of motion were identical on the right and left. *Id.* at 18-19.

[24] *Id.* at 41.

[25] *Id.* at 40.

[26] *Id.* at 40.

[27] *Id.* at 38.

degrees of extension equals a 2 percent impairment.[28] Appellant would therefore be entitled to a two percent impairment for loss of wrist motion on the left, rather than the one percent provided by the Office medical adviser.

Thus, in combining appellant's left upper extremity impairments of 5 percent for the index finger, 5 percent for the middle finger, 2 percent for the ring finger, 2 percent for the little finger, 2 percent for the thumb, 2 percent for the wrist and 2 percent for the elbow, appellant has a 22 percent left upper extremity impairment, rather than the 21 percent provided.

The Board has carefully reviewed the medical evidence of record and has determined that appellant is entitled to schedule awards for a total of 48 percent upper extremity impairment. Although the Office medical adviser's determination contains the mathematical errors described above, as appellant's total bilateral upper extremity impairment remains the same, 48 percent, the Board finds this constitutes harmless error.[29] Appellant's attending physician, Dr. Inhofe, provided no analysis under the A.M.A., *Guides* which would provide the basis for greater schedule awards. While Dr. Holderness, who provided a second opinion evaluation for the Office, generally referred to the A.M.A., *Guides* in concluding that appellant had a 26 percent right upper extremity and a 21 percent left upper extremity impairment, he did not reference specific figures or tables in reaching this conclusion. The evidence of record establishes that appellant has a 26 percent impairment of the right upper extremity and a 22 percent impairment of the left upper extremity.

The Board further notes that appellant has already received schedule awards totaling 50 percent for her bilateral upper extremity impairments. By decision dated April 6, 1998, she was granted a schedule award for an 8 percent right upper extremity impairment. On March 28, 2000 she was granted schedule awards for a 27 percent impairment of the right upper extremity and a 15 percent of the left upper extremity. The lump-sum payment of $44,648.78 dated June 2, 2000 was based on this award.[30]

[28] *Id.* at 36.

[29] *See Joan F. Martin*, 51 ECAB 131 (1999); *Lan Thi Do*, 46 ECAB 366 (1994).

[30] The Board notes that the Office generally should not offset amounts owed to employees against amounts of overpayments, as this precludes the employee from obtaining waiver of the entire amount of the overpayment. In a case such as this where appellant is found to be at fault, waiver is not possible. *Compare Diana L. Booth*, 52 ECAB 370 (2001) and *Jeffrey S. Peak*, Docket No. 02-1716 (issued February 26, 2004).

LEGAL PRECEDENT -- ISSUE 2

Section 10.422(b) of the Office's regulations provides that the Office, in its exercise of discretion afforded under 5 U.S.C. § 8135(a), may make a lump-sum payment to an employee entitled to a schedule award under 5 U.S.C. § 8107 when such a payment is in the employee's best interest.[31] Section 8116(a) of the Act provides:

> "(a) While an employee is receiving compensation under this subchapter, or if he has been paid a lump sum in commutation of installment payments until the expiration of the period, during which the installment payments would have continued, he may not receive salary, pay, or remuneration of any type from the United States, except --
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> (1) in return for service actually performed;
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> (2) pension for service in the Army, Navy or Air Force;
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> (3) other benefits administered by the Department of Veterans Affairs unless such benefits are payable for the same injury or the same death; and
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> (4) retired pay, retirement pay, retainer pay, or equivalent pay for service in the Armed Forces or other uniformed services, subject to the reduction of such pay in accordance with section 5532(b) of [T]itle 5, United States Code.
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> "However, eligibility for or receipt of benefits under subchapter III of [C]hapter 83 of this title, or another retirement system for employees of the Government, does not impair the right of the employee to compensation for scheduled disabilities specified by section 8107(c) of this title."[32]

ANALYSIS -- ISSUE 2

On March 28, 2000 appellant was issued schedule awards for a 42 percent total upper extremity impairment. On April 4, 2000 the schedule award was amended to reflect a 34 percent upper extremity impairment, as she had previously received a schedule award for an 8 percent right upper extremity impairment. In the April 4, 2000 award, appellant was granted 102.48 weeks of compensation, to run from December 10, 1999 to November 27, 2001. On May 26, 2000 the Office issued a payment of $44,648.78 as a lump-sum payment for the remainder of the schedule award. In a letter dated May 30, 2000, the Office explicitly informed appellant that

[31] 20 C.F.R. § 10.422(b).

[32] 5 U.S.C. § 8116(a). *See Jorge O. Diaz*, 51 ECAB 124 (1999).

because she was receiving a lump-sum payment, she would not be entitled to further compensation until the expiration of the schedule award on June 15, 2002.[33]

However, the Office continued to issue appellant schedule award payments on the periodic rolls. As appellant had received $44,648.78 in compensation in a lump-sum schedule awards payment yet continued to receive periodic rolls payments for the same schedule award, the Board finds that an overpayment in compensation was created. Office computer printouts contained in the record indicate that appellant received schedule award payments in the amount of $96,313.21 through October 6, 2001. Based on her bilateral upper extremity impairment, appellant was entitled to schedule award compensation in the total amount of $74,038.22. The record supports that she was overpaid $22,274.99.

LEGAL PRECEDENT -- ISSUE 3

Section 8129 of the Act provides that an overpayment in 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."[34]

Section 10.433(a) of the Office's regulation provides that the Office:

> "[M]ay 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 in 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).[35]

Regarding the determination of whether an individual is at fault, 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.[36] Even if an overpayment resulted from negligence by the Office, this does not excuse the employee from accepting payment, which the employee

[33] The Board notes that the Office based the lump-sum payment on the March 28, 2000 schedule award, rather than the amended award dated April 4, 2000.

[34] 5 U.S.C. § 8129; *see Linda E. Padilla*, 45 ECAB 768 (1994).

[35] 20 C.F.R. § 10.433 (1999); *see Sinclair L. Taylor*, 52 ECAB 227 (2001); *see also* 20 C.F.R. § 10.430.

[36] *Diana L. Booth*, *supra* note 28.

knew or should have been expected to know he or she was not entitled.[37] In applying the tests to determine fault, the Office applies a "reasonable person" test.[38]

ANALYSIS -- ISSUE 3

In finding that appellant was at fault in the creation of the overpayment, the Office applied the third standard, *i.e.*, that she accepted a payment which she knew or should have known to be incorrect. The Board concurs with this determination. The May 30, 2000 correspondence sent to appellant clearly advised that the lump-sum payment pursuant to the schedule award would represent the only compensation she would receive until the expiration of the schedule award or June 15, 2002. The Board notes that the record contains a copy of the check for the lump-sum payment in the amount of $44,648.78, properly endorsed by appellant. The Board therefore finds that the May 30, 2000 letter put appellant on notice that she was not entitled to further schedule award compensation.[39] The record establishes that appellant continued to receive schedule award compensation on the periodic rolls up until October 6, 2002. When appellant continued to receive periodic payments after receiving the lump-sum payment of $44,648.78, she should have known that she was not entitled to this duplicate payment.

The Board finds that under these circumstances appellant knew or should have known that the June 2, 2000 lump-sum payment represented her entire schedule award and she had no reasonable expectation of receiving any additional compensation until the schedule award expired. The fact that appellant continued to accept periodic schedule award payments after she had received the lump-sum settlement of $44,648.78 establishes that she is at fault in the creation of the overpayment under the third criterion above, as she accepted payments she knew or should have known to be incorrect. As the evidence supports the Office's finding that appellant was at fault in the creation of the overpayment in compensation that occurred in this case, appellant is not entitled to waiver of recovery of the overpayment.[40]

The Board also notes that the record indicates that both appellant and her husband filed for bankruptcy in 2001. Office procedures provide that a claimant's obligation to repay an overpayment is nullified if a bankruptcy court has discharged the debt in a bankruptcy proceeding.[41] There is nothing of record in this case to indicate that the Office was named as a creditor in appellant's filing for bankruptcy, nor does the record contain evidence regarding the bankruptcy court's disposition of her case.[42] Appellant's bankruptcy filing is, therefore, irrelevant to the case at hand.

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[37] *Id.*

[38] *William E. McCarty*, 54 ECAB ____ (Docket No. 03-308, issued April 14, 2003).

[39] 5 U.S.C. § 8116(a).

[40] *Sinclair L. Taylor*, *supra* note 35.

[41] *William E. McCarty*, *supra* note 38.

[42] *Id.*

Finally, regarding appellant's contention that she was not at fault in the creation of the overpayment because she thought she was entitled to both wage-loss compensation and a schedule award, it is a well-established principle that a claimant is not entitled to dual workers' compensation benefits for the same injury.[43] An employee cannot concurrently receive compensation under a schedule award and wage-loss compensation for disability for work.[44] The fact that the Office was negligent in making monthly payments following the lump sum does not excuse appellant's acceptance of payments she knew or should have known to be incorrect.[45]

CONCLUSION

The Board finds that appellant has not established that she has greater than a 48 percent upper extremity impairment. The Board further finds that the Office properly found that appellant was at fault in the creation of an overpayment in compensation in the amount of $22,274.89 and is thus not entitled to waiver.[46]

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 3, 2004 be affirmed, as modified.

Issued: February 7, 2005
Washington, DC

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[43] *James E. Earle*, 51 ECAB 567 (2000).

[44] *Id.*

[45] *See Thomas P. Murray*, 51 ECAB 630 (2000).

[46] The Board notes that its jurisdiction over recovery of an overpayment is limited to reviewing those case where the Office seeks recovery from continuing compensation under the Act. *Albert Pineiro*, 51 ECAB 310 (2000). In the instant case, appellant is no longer receiving compensation benefits.