United States Department of Labor
Employees' Compensation Appeals Board

WILLIAM M. MIRACLE, Appellant	)	
and	)	**Docket No. 04-1673**
	)	**Issued: September 20, 2005**
U.S. POSTAL SERVICE, POST OFFICE, Louisville, KY, Employer	)	

Appearances:
William M. Miracle, 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 21, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated August 13, 2003, which denied a schedule award; a December 1, 2003 decision denying his claim for a recurrence of disability; a January 15, 2004 decision which denied an April 13, 2004 decision finding a $2,538.23 overpayment of compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish entitlement to a schedule award; (2) whether appellant sustained a recurrence of disability on August 4, 2003 causally related to his November 14, 2000 employment injury; (3) whether the Office properly denied appellant's request for review of the merits of his claim under 5 U.S.C. § 8128(a); (4) whether the Office properly determined that appellant received an overpayment in the amount of $2,536.23; and (5) whether the Office properly denied waiver of recovery of the overpayment.

FACTUAL HISTORY

On November 14, 2000 appellant, then a 36-year-old mail processor, filed a claim for a traumatic injury occurring on that day while in the performance of duty. Appellant alleged that he injured his right wrist as a result of pressing hard on the cancelled stamp equipment. Appellant did not initially stop work but later claimed compensation from December 29, 2000 to February 23, 2001.[1] The Office accepted the claim for a strain and tendinitis of the right wrist.

Initial medical records diagnosed a strain and tendinitis of the right wrist, while x-rays of the right arm were reported as normal. A February 13, 2001 ultrasound of the right wrist diagnosed a six millimeter cyst consistent with a ganglion cyst.

By letter dated May 2, 2001, the Office requested that appellant's treating physician, Dr. Tsu-Min Tsai, a Board-certified orthopedic surgeon, provide information regarding his treatment plan. In a May 9, 2001 work capacity evaluation, Dr. Tsai indicated that appellant had a lifting restriction of no more than 20 pounds, with restrictions on reaching above the shoulder and repetitive movements of the wrists and elbows.

Appellant stopped worked on August 17, 2001 and received compensation for temporary total disability until he returned to a light-duty position on November 26, 2001.

In an October 2, 2001 report, Dr. Tsai noted that appellant hurt his left wrist in 1999 and sustained a second injury in 2000 to his right wrist. Dr. Tsai advised that appellant was last seen on September 25, 2001 for complaints of dorsal wrist pain with movement and occasional tingling in the fingers. He indicated that appellant had "tenderness at the scapholunate ligament region but no mass was palpable." Dr. Tsai diagnosed a small ganglion cyst on the left, with left carpal tunnel and possible right carpal tunnel. He recommended conservative treatment as he did not believe appellant's symptoms were severe enough to warrant surgery and recommended permanent restrictions for light duty, to include a 20-pound maximum lifting restriction, frequent lifting of 10 pounds or less, avoiding constant repetitive use of the hands, pushing or pulling, flexion and extension, pinching and gripping and pronation and supination. Dr. Tsai also recommended avoidance of vibratory tools and overhead work. He noted that the work restrictions in appellant's light-duty position included heavy lifting, which was contrary to his recommendation.

The employing establishment subsequently forwarded an August 22, 2001 report from Dr. Thomas M. Gabriel, a Board-certified orthopedic surgeon and fitness-for-duty physician, who noted appellant's history of injury and conducted a physical examination. He determined that there was no evidence of persistent tendinitis or sprain and opined that appellant had recovered. Dr. Gabriel stated that appellant's inability to perform his regular assignment was due to his own perceived limitations.

By letter dated December 19, 2001, the Office advised appellant that he would be placed on the periodic rolls and paid compensation commencing August 17, 2001.

[1] The Office paid appellant for these dates.

In a January 10, 2002 memorandum, the Office noted that appellant had accepted a limited-duty offer on November 26, 2001; however, he was still on the periodic rolls in receipt of compensation.

In a December 18, 2001 report, Dr. Tsai diagnosed left trigger thumb, left cubital tunnel syndrome and bilateral carpal tunnel syndrome and advised that appellant had a total extremity impairment of two percent on the left and three percent on the right. He added three percent for pain and opined that appellant had a six percent total body impairment.

In a January 30, 2002 report, Dr. Tsai recommended work restrictions of medium lifting with a maxing weight of 45 pounds using both hands and 40 pounds frequently. He indicated that appellant should avoid constant repetitive tasks that required pinching, gripping, wrist flexion and extension and pronation and supination. Dr. Tsai advised that appellant's restrictions were permanent.

On July 15, 2002 appellant filed a claim for a schedule award.

By letter dated July 30, 2002, the Office requested that Dr. Tsai provide an assessment of permanent impairment of the right upper extremity in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (5th ed. 2001) (hereafter, A.M.A., *Guides).*

In a report dated June 25, 2003, an Office medical adviser noted appellant's history of injury and treatment, including an August 22, 2001 fitness-for-duty report from Dr. Gabriel, and concluded that appellant did not have any permanent impairment as his motion and sensory examination were completely normal. In an August 7, 2003 report, the Office medical adviser again reviewed appellant's history of injury and treatment, including the December 18, 2001 report of Dr. Tsai, and concluded that appellant did not have any permanent impairment. He stated: "[t]he alleged two percent of left hand and three percent of right hand are not adequately described in the exam[ination] report to be accepted at face value. Claimant still has zero percent impairment."

By decision dated August 13, 2003, the Office denied appellant's claim for a schedule award as the medical evidence failed to demonstrate any ratable impairment in conformance with the A.M.A., *Guides*.

On September 29, 2003 appellant filed a claim for a recurrence of disability beginning on August 4, 2003. He stated that he experienced increased pain in both wrists, with shooting pain in his left arm up to the shoulder and neck and that he was dropping things and could not hold or grasp.

By letter dated October 22, 2003, the Office advised appellant that additional factual and medical evidence was needed. The Office allotted appellant 30 days within which to submit additional evidence.

By letter dated November 24, 2003, appellant requested reconsideration of the August 13, 2003 schedule award decision. He stated that he was not fully recovered and questioned the Office with regard to the use of Dr. Gabriel's report since Dr. Tsai was his treating physician.

By decision dated December 1, 2003, the Office denied appellant's claim for a recurrence of disability on August 4, 2003. The Office found that appellant had not responded to the request for additional evidence and the medical evidence of record failed to establish a recurrence of total disability.

On January 7, 2004 the Office issued a preliminary determination that an overpayment in the amount of $2,536.23 had occurred, as appellant had returned to full-time work but continued to receive compensation for temporary total disability. The Office noted that appellant was not at fault in the creation of the overpayment, and advised that he could submit information in support of a waiver of the overpayment. In a separate memorandum of the date, the Office noted that appellant received compensation from February 22 to 23, 2001 equal to $201.02 and that he also received compensation from November 26 to December 29, 2001 in the amount of $2,330.96, or a total overpayment of $2,536.23 following his return to limited duty.

By decision dated January 15, 2004, the Office denied appellant's request for reconsideration of the August 13, 2003 schedule award decision on the grounds that he did not submit any new evidence or arguments in support of his request.

By decision dated April 13, 2004, the Office finalized the overpayment of $2,538.23. The Office noted that, as appellant had not responded to the preliminary determination, it was "not possible to determine whether recovery of the overpayment would defeat the purpose of the Act." The Office determined that the overpayment could not be waived. The Office directed appellant to either repay the entire amount of the overpayment or to contact the Office to make appropriate arrangements for repayment.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act[2] and its implementing regulation[3] sets 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 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*[4] has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.

[2] 5 U.S.C. § 8107.

[3] 20 C.F.R. § 10.404 (1999).

[4] A.M.A., *Guides* (5th ed. 2001).

ANALYSIS -- ISSUE 1

The Office accepted appellant's claim for a right wrist strain and tendinitis and paid appellant appropriate compensation as a result of his November 14, 2000 employment injury. On July 15, 2002 appellant filed a claim for a schedule award.

Dr. Tsai submitted a December 18, 2001 report in which he diagnosed left cubital tunnel syndrome and bilateral carpal tunnel syndrome and reported a total body impairment of six percent. However, a schedule award is not payable for an impairment of the whole person.[5] Rather, the Act provides for payments to specific members of the body such as the upper extremities. Dr. Tsai provided impairment ratings of two percent for the left upper extremity and three percent for the right upper extremity. Additionally, he advised that appellant was entitled to an additional three percent for pain. However, Dr. Tsai did not explain how his impairment ratings were in conformance with the protocols of the A.M.A., *Guides*. The physician diagnosed left trigger thumb, left cubital tunnel syndrome and bilateral carpal tunnel syndrome. None of these conditions have been accepted by the Office as related to the 2000 injury. Where an employee claims that a condition not accepted or approved by the Office was due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury.[6] Dr. Tsai did not explain how he derived his impairment ratings in accordance with the protocols contained in the A.M.A., *Guides.*

The Office medical adviser reviewed the medical record and the August 22, 2001 fitness-for-duty report from Dr. Gabriel, who advised that appellant had normal motion and sensory examinations. He explained that, as a result, appellant did not have any permanent impairment. On August 7, 2003 the Office medical adviser reviewed the December 18, 2001 report of Dr. Tsai and again concluded that appellant did not have any ratable permanent impairment. He explained that Dr. Tsai did not describe his findings or conclusions in terms of the standards of the A.M.A., *Guides*. There is no other medical evidence of record which establishes that appellant sustained a ratable impairment of his right upper extremity so as to be entitled to a schedule award under 5 U.S.C. § 8107.

LEGAL PRECEDENT -- ISSUE 2

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that the employee can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantive evidence, a recurrence of total disability and to show that he or she cannot perform such light duty. As part of this burden, the employee must show a change in the nature and extent of the light-duty job requirements.[7]

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[5] *See Richard R. Lemay*, 56 ECAB ___ (Docket No. 04-1652, issued February 16, 2005).

[6] *Jaja K. Asaramo,* 55 *ECAB* ___ (Docket No. 03-1327, issued January 5, 2004).

[7] *Richard E. Konnen,* 47 ECAB 388 (1996); *Terry R. Hedman,* 38 ECAB 222, 227 (1986). For the Office's definition of a recurrence of disability, see 20 C.F.R. § 10.5(x).

ANALYSIS -- ISSUE 2

The Office accepted that appellant sustained a right wrist sprain and tendinitis. Appellant returned to a light-duty position on November 26, 2001. On September 29, 2003 appellant filed a claim for recurrence of disability beginning on August 4, 2003. On October 22, 2003 the Office advised appellant of the evidence needed to establish his claim for a recurrence of total disability. However, appellant did not submit any medical reports from a physician who, on the basis of a complete and accurate factual and medical history, concluded that he sustained total disability as of November 26, 2001 due to residuals of his November 14, 2000 injury. The evidence from Dr. Tsai addressed the issue of permanent impairment. The physician did not address the relevant issue of total disability for work. The reports of record do not show a change in the nature of his injury-related condition. The Board finds that that there is no evidence showing a change in the nature and extent of the light-duty job requirements.[8]

An award of compensation may not be based on surmise, conjecture, speculation or upon appellant's own belief that there is causal relationship between his claimed condition and his employment.[9] Appellant has failed to submit medical evidence which establishes a change in the nature and extent of his injury-related condition. The reports of Dr. Tsai do not provide a rationalized opinion to explain why appellant could no longer perform the duties of his light-duty position.[10] As appellant has not submitted any medical evidence showing that he sustained a recurrence of disability beginning August 4, 2003 due to his accepted employment injury, he has not met his burden of proof.

LEGAL PRECEDENT -- ISSUE 3

Under section 8128(a) of the Federal Employees' Compensation Act,[11] the Office may reopen a case for review on the merits in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations, which provides that a claimant may obtain review of the merits if the written application for reconsideration, including all supporting documents, sets forth arguments and contains evidence which:

> "(i) shows that [the Office] erroneously applied or interpreted a specific point of law; or

[8] Furthermore, the Board notes that appellant returned to work on November 26, 2001. There is no evidence to support that appellant stopped work after August 4, 2003. Disability is defined in the implementing federal regulations as "the incapacity, because of employment injury, to earn the wages the employee was receiving at the time of injury." 20 C.F.R. § 10.5(f).

[9] *Robert Broome*, 55 ECAB ___ (Docket No. 04-93, issued February 23, 2004).

[10] The opinion of the physician must by based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant; *see Charles E. Burke*, 47 ECAB 185 (1995).

[11] 5 U.S.C. § 8128(a).

"(ii) advances a relevant legal argument not previously considered by the Office; or

"(iii) constitutes relevant and pertinent new evidence not previously considered by the [the Office]."[12]

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.[13]

ANALYSIS -- ISSUE 3

In a November 24, 2003 letter, appellant requested reconsideration of the denial of his schedule award. The underlying issue is medical in nature, whether appellant has established any permanent impairment of the right wrist. However, appellant did not provide any relevant new evidence to support his reconsideration request.

Appellant stated that he was not fully recovered and that the Office should utilize the reports of his treating physician, Dr. Tsai. This is not a relevant legal argument as the record reflects that the Office considered the reports of his treating physician and, as noted above, determined that the impairment ratings provided by Dr. Tsai were not in accordance with the A.M.A., *Guides.* Appellant did not submit any other medical evidence.

Appellant has not submitted any new and relevant evidence, did not show that the Office erroneously applied or interpreted a specific point of law, nor advanced a relevant new argument not previously considered. Therefore, the Office properly denied his request for reconsideration.

LEGAL PRECEDENT -- ISSUE 4

Section 8116 of the Federal Employees' Compensation Act[14] defines the limitations on the right to receive compensation benefits. This section of the Act provides that, while an employee is receiving compensation, he may not receive salary, pay or remuneration of any type from the United States, except in limited circumstances.[15] The Office's regulations state in pertinent part: "compensation for wage loss due to disability is available only for any periods during which an employee's work-related medical condition prevents him or her from earning the wages earned before the work-related injury."[16]

[12] 20 C.F.R. § 10.606(b).

[13] 20 C.F.R. § 10.608(b).

[14] 5 U.S.C. §§ 8101-8193.

[15] 5 U.S.C. § 8116(a).

[16] 20 C.F.R. § 10.500.

ANALYSIS -- ISSUE 4

The record reveals that appellant was paid wage-loss compensation on February 22 and 23, 2001 in the amount of $201.02 after his return to work on February 22, 2001. He also received compensation for temporary total disability for the period November 26 through December 29, 2001 in the amount of $2,330.06, although he had returned to work on November 26, 2001. This resulted in an overpayment of compensation in the amount of $2,536.23. As noted above, once appellant returned to work and received a salary, he was no longer entitled to receive compensation for temporary disability.[17] There is no evidence that this amount was not correctly calculated. As appellant received a salary and compensation for disability, the Board finds that he received an overpayment in the amount of $2,536.23.

LEGAL PRECEDENT -- ISSUE 5

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.[18] 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."[19] Since the Office found appellant to be without fault in the creation of the overpayment, then, in accordance with 5 U.S.C. § 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.

20 C.F.R. § 10.438 provides:

> (a) The individual who received the 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. This information will also be used to determine the repayment schedule, if necessary.
>
> (b) Failure to submit the requested information within 30 days of the request shall result in denial of waiver and no further request for waiver shall be considered until the requested information is furnished.

ANALYSIS -- ISSUE 5

The Office found appellant to be without fault in the creation of the overpayment and requested that he submit information to support any request for waiver. However, appellant did

[17] *Id*.

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

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

not respond to the Office's request for the financial information needed to determine whether recovery of the overpayment should be waived. The finding that a claimant is without fault in and of itself does not establish entitlement to waiver of the overpayment.[20] Rather, such a finding entitles the employee to the opportunity to establish a basis for granting waiver of the recovery of the overpayment. The Office's January 7, 2004 preliminary overpayment determination requested that appellant provide relevant financial information. However, he did not respond. As noted above, the Office's regulations provide that waiver shall be denied where requested financial information is not submitted. The Board finds that the Office properly denied waiver of the overpayment in this case under its implementing regulations as appellant did not make a request for waiver or submit the requested information within 30 days.[21]

CONCLUSION

The Board finds that appellant did not meet his proof to establish entitlement to a schedule award. The Board further finds that appellant did not sustain a recurrence of total disability on August 4, 2003 causally related to his accepted employment injury. The Board further finds that the Office properly refused to reopen appellant's schedule award claim for further review of the merits under 5 U.S.C. § 8128(a). The Board also finds that the Office properly determined that appellant received an overpayment in the amount of $2,536.23 and properly denied waiver of recovery of the overpayment.

[20] *See Jorge O. Diaz*, 51 ECAB 124 (1999).

[21] Regarding recovery of the overpayment, the Board's jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation benefits under the Act. As the Office has not issued a decision seeking to recover the overpayment from continuing benefits under the Act, the Board is without jurisdiction over recovery of the overpayment. *See Desiderio Martinez*, 55 ECAB ___ (Docket No. 03-2100, issued January 9, 2004).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated April 13 and January 15, 2004 and December 1 and August 13, 2003 are affirmed.

Issued: September 20, 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