

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

W.H., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Trenton, NJ, Employer**

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**Docket No. 06-570
Issued: September 21, 2006**

Appearances:
Jeffrey Zeelander, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge

JURISDICTION

On January 13, 2006 appellant filed a timely appeal of the Office of Workers' Compensation Programs' merit decisions dated October 6, 2005 and January 10, 2006. 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 an overpayment of \$13,104.00 was created; (2) whether the Office properly denied waiver of the overpayment; and (3) whether the Office properly determined that appellant's January 31, 2005 letter was a request for reconsideration rather than a request for an increased schedule award.

FACTUAL HISTORY

The case was before the Board on prior appeals. By decision dated July 18, 2003, the Board remanded the case for additional development on the issue of whether appellant had more than a 13 percent permanent impairment to his left leg.¹ As the Board noted in its history of the

¹ Docket No. 03-911 (issued July 18, 2003).

case, the Office issued an August 1, 1996 schedule award for a 13 percent permanent impairment to the left leg. By decision dated July 20, 2001, the Office issued a schedule award for an eight percent permanent impairment to the left leg based on the opinion of Dr. Robert Dennis, a Board-certified orthopedic surgeon selected as a referee examiner. The Board noted that the “award was issued in error” since appellant had already received an award for 13 percent and Dr. Dennis opined that appellant’s left leg impairment was 8 percent. In this regard, the Office had issued a preliminary determination on April 22, 2002 that an overpayment of \$13,104.00 was created as appellant had been paid compensation from June 11 to November 19, 2001 pursuant to the July 20, 2001 schedule award decision. The Office found that appellant was not at fault in creating the overpayment and requested that he submit financial evidence relevant to waiver of the overpayment.

By decision dated May 27, 2004, the Board affirmed a November 6, 2003 Office decision finding that appellant did not have more than a 13 percent left leg impairment.² With respect to a December 4, 2003 overpayment decision, the Board found that appellant had requested a prerecoupment hearing and the case was remanded to the Office. The history of the case is contained in the Board’s July 18, 2003 decision and is incorporated herein by reference.

In a letter to the Office dated January 31, 2005, appellant indicated that he was requesting “reconsideration/increase” with respect to his schedule award. He submitted a new medical report dated July 29, 2004 from Dr. David Weiss, an osteopath, who opined that appellant had a 30 percent left leg impairment.

In a decision dated October 6, 2005, an Office hearing representative found that an overpayment of \$13,104.00 was created as appellant was erroneously paid for an additional eight percent permanent impairment to the left leg pursuant to the July 20, 2001 decision. The hearing representative denied waiver on the grounds that appellant did not submit any financial evidence on the issue.

In a decision dated January 10, 2006, the Office stated that it had reviewed the January 31, 2005 letter and found that appellant was not entitled to a reconsideration of the Board’s May 27, 2004 decision since the letter was not submitted within 30 days. The Office further found that the evidence submitted was of limited probative value and was not sufficient to reopen the claim for merit review pursuant to 5 U.S.C. § 8128. Appellant was advised that he could file a Form CA-7 to claim an additional schedule award.

LEGAL PRECEDENT -- ISSUE 1

Section 8107 of the Federal Employees’ Compensation Act 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.³ Neither the Act nor the regulations specify the manner in which the percentage of

² Docket Nos. 04-342 & 04-464 (issued May 27, 2004).

³ 5 U.S.C. § 8107. This section enumerates specific members or functions of the body for which a schedule award is payable and the maximum number of weeks of compensation to be paid; additional members of the body are found at 20 C.F.R. § 10.404(a).

impairment for a schedule award shall be determined. For consistent results and to ensure equal justice for all claimants the Office has adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the uniform standard applicable to all claimants.⁴

If a claimant receives a schedule award and the medical evidence does not support the degree of permanent impairment awarded, an overpayment of compensation may be created.⁵

ANALYSIS -- ISSUE 1

The record establishes that appellant received 37.44 weeks of compensation from April 29, 1996 to January 16, 1997, representing a 13 percent permanent impairment to the left leg. Pursuant to a July 20, 2001 decision, appellant received 23.04 weeks of compensation from June 11 to November 19, 2001, representing an additional eight percent permanent impairment to the left leg. As the Board has previously noted, the July 20, 2001 decision was issued in error. The total left leg impairment found by Dr. Dennis, the referee examiner, was eight percent. Since appellant had already received an award for a 13 percent impairment, he was not entitled to additional weeks of compensation based on the medical evidence of record.

According to the Office, appellant was paid \$13,104.00 in compensation from June 11 to November 19, 2001 pursuant to the schedule award decision. This amount therefore represents an overpayment of compensation.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Act⁶ provides: “Adjustment or recovery 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.”⁷ Since the Office found appellant to be without fault in the creation of the overpayment, the Office may only recover the overpayment if recovery would neither defeat the purpose of the Act nor be against equity and good conscience. 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 sections 10.434 to 10.437 of Title 20 of the Code of Federal Regulations.

Section 10.436 provides that recovery of an overpayment would defeat the purpose of the Act if recovery would cause hardship because the beneficiary “needs substantially all of his or her current income (including compensation benefits) to meet current ordinary and necessary living expenses,” and, also, if the beneficiary’s assets do not exceed a specified amount as

⁴ A. *George Lampo*, 45 ECAB 441 (1994).

⁵ See *Richard Saldibar*, 51 ECAB 585 (2000) (the Board found that the overpayment issue was not in posture because the Office had not properly resolved the schedule award issue).

⁶ 5 U.S.C. § 8101 *et seq.*

⁷ 5 U.S.C. § 8129(b).

determined by the Office from data provided by the Bureau of Labor Statistics.⁸ For waiver under the “defeat the purpose of the Act” standard, appellant must show that he needs substantially all of his current income to meet current ordinary and necessary living expenses, and that his assets do not exceed the resource base.⁹

According to section 10.437, recovery of an overpayment would be against equity and good conscience if: (a) the overpaid individual would experience severe financial hardship in attempting to repay the debt; (b) the individual, in reliance on 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.

ANALYSIS -- ISSUE 2

Although the Office advised appellant that he needed to submit financial evidence in order to make a determination as to whether waiver of the overpayment was warranted, the record does not contain any relevant financial information. There is no evidence with respect to monthly income, expenses or assets. Office regulations provide that the individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by the Office.¹⁰ This information is needed to determine whether or not recovery of the overpayment would defeat the purpose of the Act, or be against equity and good conscience.

In the absence of relevant financial evidence, the Office shall deny waiver of the overpayment.¹¹ The Board accordingly finds that the Office properly denied waiver in this case.

LEGAL PRECEDENT -- ISSUE 3

A claimant may seek an increased schedule award if the evidence establishes that he sustained an increased impairment at a later date causally related to the employment injury. Even if the term “reconsideration” is used, when a claimant is not attempting to show error in the prior schedule award decision and submits medical evidence regarding a permanent impairment at a date subsequent to the prior schedule award decision, it should be considered a claim for an

⁸ Office procedures provide that 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 dependent plus \$960.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200 (October 2004).

⁹ See *Robert E. Wenzholz*, 38 ECAB 311 (1986).

¹⁰ 20 C.F.R. § 10.438.

¹¹ *Id.*

increased schedule award.¹² The Office should issue a merit decision on the schedule award claim, rather than adjudicate a request for reconsideration.¹³

ANALYSIS -- ISSUE 3

Appellant submitted a letter to the Office dated January 31, 2005, requesting “reconsideration/increase” of his schedule award and he submitted a new medical report dated July 29, 2004. The January 10, 2006 Office decision stated that appellant was not entitled to a reconsideration of the Board’s decision because it was not submitted within 30 days of the Board’s decision. Appellant’s January 31, 2005 letter was not sent to the Board and there is no indication that it was intended as a petition for reconsideration of the Board’s decision pursuant to 20 C.F.R. § 501.7. The Office then made a determination that the medical evidence submitted was of little probative value and did not constitute new and material evidence sufficient to warrant reopening the claim under 5 U.S.C. § 8128. Appellant was advised he could file a claim for an additional schedule award.

Although appellant’s representative used the term “reconsideration” in the January 31, 2005 letter, he clearly indicated that he was requesting an increased schedule award based on new medical evidence. He submitted a July 29, 2004 report from Dr. Weiss, an osteopath, providing a history, results on examination and an opinion that appellant had 30 percent permanent left leg impairment. The Office should have issued a merit decision on the request for an increased schedule award rather than adjudicate a request for reconsideration. The case will be remanded for an appropriate merit decision.

CONCLUSION

The Board finds that an overpayment of \$13,104.00 was created and the Office properly denied waiver of the overpayment. The case will be remanded for a merit decision with respect to an increased schedule award.

¹² *Linda T. Brown*, 51 ECAB 115 (1999). In *Brown* the Office issued a 1995 decision denying entitlement to a schedule award as no ratable impairment was established. Appellant requested that the Office reconsider in 1997, submitting a current report with an opinion that appellant had a 25 percent permanent impairment to the arms and legs. The Office determined that appellant submitted an untimely request for reconsideration that did not show clear evidence of error and the Board remanded the case for a merit decision.

¹³ *Id.*; see also *Paul R. Reedy*, 45 ECAB 488 (1994).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 6, 2005 is affirmed. The January 10, 2006 decision is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: September 21, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board