United States Department of Labor
Employees' Compensation Appeals Board

J.G., Appellant	)	
and	)	**Docket No. 09-2081**
	)	**Issued: May 6, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Pittsburg, PA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 12, 2009 appellant filed a timely appeal from a March 3, 2009 merit decision of the Office of Workers' Compensation Programs finding that he received an overpayment of compensation and denying waiver. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the overpayment decision.

ISSUES

The issues are: (1) whether the Office properly determined that appellant received an overpayment of compensation in the amount of $44,010.26; and (2) whether the Office properly denied waiver of the recovery of the overpayment.

FACTUAL HISTORY

This case is before the Board for the third time. By decision dated July 15, 2007, the Board set aside June 2 and August 15, 2006 decisions granting appellant schedule awards for an

eight percent permanent impairment of each upper extremity and denying further merit review.[1] The Board found that the Office medical adviser failed to explain his use of Tables 16-15, 16-10 and 16-11 of the American Medical Association, *Guides to the Evaluation of Permanent* Impairment, (A.M.A., *Guides*) (5th ed. 2001). On August 18, 2008 the Board set aside a September 20, 2007 decision granting appellant a schedule award for a 15 percent permanent impairment of each upper extremity.[2] The Board determined that the Office medical adviser had not sufficiently described his calculation of the impairment rating under Tables 16-15, 16-10 and 16-11 of the A.M.A., *Guides*.

On September 15, 2008 an Office medical adviser found that appellant's accepted conditions of bilateral epicondylitis did not yield any neurological loss. He noted that appellant had a normal range of motion and good strength. The Office medical adviser concluded that he had no impairment pursuant to the A.M.A., *Guides*.

The Office determined that a conflict in medical opinion arose between the Office medical adviser, who found that appellant had no permanent impairment, and Dr. Daniel F. Murphy, an attending Board-certified orthopedic surgeon, who found that he had permanent impairment to each upper extremity. On October 16, 2008 it referred appellant to Dr. Robert W. Elkins, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a report dated November 18, 2008, Dr. Elkins found normal range of motion of both shoulders. He measured 0 to 120 degrees of flexion of the right elbow and 0 to 124 degrees of flexion of the left elbow with normal flexion, extension, supination and pronation. Dr. Elkins noted that appellant had tenderness at the elbow but a negative Tinel's sign. He found decreased sensation of the right distal forearm into the second to fifth fingers and a milder loss of sensation of the left forearm. Dr. Elkins diagnosed chronic bilateral-lateral epicondylitis and ulnar nerve entrapment postmultiple surgeries, decreased sensation of multiple fingers of the right hand, chronic scarring of the ulnar nerves bilaterally and postganglion cyst excisions of the left wrist. He opined that appellant reached maximum medical improvement on January 2, 2007 on the right side and December 9, 2005 on the left side. Dr. Elkins concluded:

> "I feel [appellant] has an impairment of both upper extremities due to his sensory loss, but not due to range of motion. Because of the decreased sensation in the index through the fifth fingers of the right hand, I feel, using Table 16-10 he falls into a [G]rade 2 sensory deficit and using Table 16-15 for the ulnar nerve above the forearm, a maximal sensory deficit would be [seven percent] and therefore multiplying the [percentages] together, I feel he has a [five percent] impairment of the right upper extremity due to ulnar nerve entrapment and sensory loss in the fingers.

[1] Docket No. 07-327 (issued July 15, 2007). The Office accepted that on January 14, 2003 appellant, then a 55-year-old processing clerk, sustained bilateral medial epicondylitis in the performance of duty. On September 23, 2003 he underwent surgery for left elbow chronic ulnar neuritis and cubital tunnel syndrome and on October 23, 2003 he underwent surgery for right elbow chronic medial epicondylitis. On February 16, 2005 appellant underwent surgery for cubital tunnel syndrome with an ulnar nerve compression of the left elbow and on June 13, 2005 he underwent surgery for cubital tunnel syndrome with an ulnar nerve compression of the right elbow.

[2] Docket No. 08-554 (issued August 18, 2008).

"On the left side, I feel [appellant] has a [G]rade 3 sensory loss, which would give him a [four percent] impairment of the left upper extremity."

On December 5, 2008 an Office medical adviser concurred with Dr. Elkins' impairment rating.

By decision dated December 15, 2008, the Office granted appellant a schedule award for a four percent permanent impairment of the left upper extremity and a five percent permanent impairment of the right upper extremity. The period of the awards ran for 28.08 weeks from January 2 to July 17, 2007 in the amount of $20,287.34. The Office noted that this decision superseded its September 20, 2007 decision.

On December 18, 2008 the Office notified appellant of its preliminary determination that he received an overpayment of $44,010.26 because it overpaid him compensation under the schedule awards. It calculated the overpayment by subtracting the compensation it paid him for a 15 percent permanent impairment to each upper extremity, $64,297.60, from the amount to which he was entitled for a 4 percent left arm impairment and a 5 percent right arm impairment, $20,287,34, to find an overpayment of $44,010.26. The Office advised appellant of its preliminary determination that he was without fault in the creation of the overpayment. It requested that he complete an enclosed overpayment recovery questionnaire and submit supporting financial documents so that the Office could consider whether he was eligible for waiver of the overpayment. Additionally, the Office notified appellant that, within 30 days of the date of the letter, he could request a telephone conference, a final decision based on the written evidence or a prerecoupment hearing.

In a January 15, 2009 response, appellant contested that the overpayment occurred and requested waiver. He related that his attending physician refused to send the appropriate paperwork to the Office which prevented him from receiving proper compensation for a schedule award. Appellant questioned why the Office gave weight to Dr. Elkins' opinion when he saw him almost three years after his rating by Dr. Murphy. He argued that he was not overpaid as he received the correct compensation for his permanent impairment. On January 17, 2009 appellant requested that the Office issue a final overpayment decision based on the written evidence.

By decision dated March 3, 2009, the Office finalized its determination that appellant received an overpayment of $44,010.26 because it overpaid him compensation under the schedule awards. It finalized its finding that he was not at fault in creating the overpayment but found that he was not entitled to waiver. The Office noted that appellant had not submitted the overpayment recovery questionnaire and supporting financial information. It instructed him to send $1,000.00 per month as repayment.

On appeal, appellant contends that he cannot afford to repay the overpayment.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act[3] and its implementing federal regulations[4] 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. However, the Act 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 for all claimants, the Office has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[5] Office procedures direct the use of the fifth edition of the A.M.A., *Guides*, issued in 2001, for all decisions made after February 1, 2001.[6]

When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[7]

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.[8] When the Office makes a determination that an overpayment of compensation has occurred because the claimant received a schedule award, the Office must properly resolve the schedule award issue. Before the amount of the overpayment can be determined, the evidence must properly establish the appropriate degree of permanent impairment.[9]

ANALYSIS -- ISSUE 1

The Office found an overpayment of compensation based on appellant's receipt of compensation under the schedule awards. The evidence must properly establish the appropriate degree of permanent impairment.[10] In this case, it determined that a conflict arose between Dr. Murphy, appellant's attending physician, and the Office medical adviser regarding the extent of permanent impairment to both upper extremities. The Office referred appellant to Dr. Elkins for resolution of the conflict.

Dr. Elkins found that appellant had a Grade 2 sensory deficit due to decreased sensation of ulnar nerve or an 80 percent impairment, which he multiplied by the maximum impairment of

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[3] 5 U.S.C. § 8107.

[4] 20 C.F.R. § 10.404.

[5] *Id*. at § 10.404(a).

[6] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003).

[7] *Barry Neutuch*, 54 ECAB 313 (2003); *David W. Pickett*, 54 ECAB 272 (2002).

[8] *See Richard Saldibar*, 51 ECAB 585 (2000).

[9] *Id*.

[10] *Id*.

the ulnar nerve due to a sensory deficit, 7 percent, to find a 5.6 percent impairment of the right upper extremity, which he rounded down to 5 percent impairment of the right upper extremity.[11] According to Office procedure, however, impairment percentages are rounded to the nearest whole point, and thus Dr. Elkins should have rounded up to find a six percent impairment on the right due to sensory loss.[12] On the left side, he found that appellant had a Grade 3 or 60 percent graded impairment, which he multiplied by 7 percent, the maximum impairment of the ulnar nerve for sensory loss, to find a 4 percent impairment of the left upper extremity.

Dr. Elkins determined that appellant had no impairment due to loss of range of motion. He measured elbow flexion on the right as 120 degrees and on the left as 124 degrees. According to Figure 16-34 on page 472 of the A.M.A., *Guides*, however, 120 degrees of flexion on the right would yield a two percent impairment and 124 degrees of flexion on the left would yield between a one and a two percent impairment. Dr. Elkins further did not provide specific range of motion measurements for elbow supination and pronation. His opinion, consequently, departs from the A.M.A., *Guides* and is insufficient to resolve the conflict in medical opinion. The case will be remanded for the Office to secure a supplemental report from Dr. Elkins regarding the extent of permanent impairment to appellant's upper extremities. If he is unable to clarify or elaborate on his opinion, the case should be referred to another appropriate impartial medical examiner.[13] After such further development as the Office deems necessary, it should issue an appropriate merit decision on the schedule award issue.

As Dr. Elkins' findings are insufficient to establish the degree of impairment to appellant's right and left upper extremities, the Board is unable to determine whether an overpayment occurred in this case.[14]

CONCLUSION

The Board finds that the case is not in posture for decision.

[11] A.M.A., *Guides* at 482, 492, Tables 16-10, 16-15. Dr. Elkins did not specify the exact percentage of sensory deficit within the Grade 3 classification; however, it appears that he used the highest percentage within Grade 3 in his calculations.

[12] *Supra* note 6; *see also Carl J. Cleary*, 57 ECAB 563 (2006).

[13] In situations where the Office secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the opinion from such specialist requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist for the purpose of correcting the defect in the original opinion. If the specialist is unwilling or unable to clarify and elaborate on his or her opinion, the case should be referred to another appropriate impartial medical specialist. *See Guiseppe Aversa*, 55 ECAB 164 (2003); *Terrance R. Stath*, 45 ECAB 412 (1994).

[14] *See Richard Saldibar*, *supra* note 8. As the Board is unable to determine whether an overpayment occurred, it is premature to address waiver of any overpayment.

ORDER

IT IS HEREBY ORDERED THAT the March 3, 2008 decision of the Office of Workers' Compensation Programs be set aside. The case is remanded for further proceedings consistent with this opinion of the Board.

Issued: May 6, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board