United States Department of Labor
Employees' Compensation Appeals Board

N.D., Appellant	)	
	)	
and	)	**Docket No. 10-1601**
	)	**Issued: April 6, 2011**
U.S. POSTAL SERVICE, CARRIER ANNEX, Newhall, CA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 1, 2010 appellant filed a timely appeal from the January 29, 2010 merit decision of the Office of Workers' Compensation Programs, which found an overpayment of compensation, and from the Office's May 6, 2010 merit decision finding a two percent impairment of her left lower extremity. Pursuant to the Federal Employees' Compensation Act[1] and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the case. The Board also has jurisdiction to review the Office's May 4, 2010 nonmerit decision denying appellant's request for a prerecoupment hearing.

ISSUES

The issues are: (1) whether appellant received a $2,519.33 overpayment of compensation from October 19 through December 19, 2009; (2) whether she was at fault in the creation of the overpayment; (3) whether the Office properly denied appellant's request for a prerecoupment hearing; and (4) whether the Office properly compensated her for the two percent impairment of her left lower limb.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On March 16, 2009 appellant, then a 50-year-old part-time rural carrier associate, sustained an injury in the performance of duty when she stepped down from her postal vehicle, twisted her left foot and fell. She stopped work the following workday. The Office accepted appellant's claim for left knee contusion, lumbar sprain, and temporary aggravation of preexisting left knee degenerative arthritis and a torn left medial meniscus. The employing establishment continued her pay through April 30, 2009 and the Office thereafter paid compensation for temporary total disability.[2]

On July 21, 2009 the Office informed appellant that the pay rate of a part-time employee was determined by multiplying the average weekly hours for the year prior to injury by the hourly wages on the date of injury. Information provided by the employing establishment showed that she worked a total of 861.25 hours in the year prior to her injury or an average of 16.5625 hours a week.[3] The employing establishment also reported an hourly pay rate of $18.24 on the date of injury. Multiplying these figures, the Office informed appellant that the weekly pay rate used to compute gross compensation was $302.10. It also noted that her compensation rate was 75 percent, the augmented rate for claimants with a dependent.

The Office further informed appellant that she would receive regular compensation payments every four weeks in the amount of $1,137.76 "until you return to work." It instructed: "**To avoid an overpayment of compensation, NOTIFY THIS OFFICE IMMEDIATELY WHEN YOU RETURN TO WORK.**" The Office explained that the period covered by the payment was shown on each check and that, if a payment included monies for a period after a return to duty, there would be an overpayment and she would be responsible for repayment.

On October 24, 2009 the Office issued a compensation check for $1,137.76 covering the period September 27 to October 24, 2009.

On October 27, 2009 the Office received a report from appellant's orthopedic surgeon, who noted that she had apparently found a job as an appraiser trainee and was to begin work on October 19, 2009. It acknowledged her new employment two days later. On November 9, 2009 the Office received a Form EN1032, in which appellant disclosed that she began working for the County of Los Angeles on October 19, 2009 at the rate of $3,284.09 a month.

Appellant's compensation history shows that the October 24, 2009 check (#93980629) was canceled. The Office issued two more checks on November 21 and December 19, 2009, each for $1,137.76. Those checks, totaling $2,275.52, were negotiated.

On December 29, 2009 the Office issued a preliminary notice of overpayment finding that appellant received a $2,519.33 overpayment after she returned to full-time work on

[2] Appellant had worked in her date-of-injury employment during substantially the whole year immediately preceding the injury. She had an irregular schedule with fixed hours and days of duty.

[3] Appellant worked as many as 40 hours a couple of weeks and as few as 7.17 hours one week. She did not work at all for six of the weeks.

October 19, 2009. It found her at fault because she failed to provide information which she knew or should have known was material and because she accepted payment that she knew or reasonably should have known was incorrect. The Office informed appellant that she had 30 days to request a prerecoupment hearing.

In a decision dated January 29, 2010, the Office found that appellant was at fault in the creation of a $2,519.33 overpayment beginning October 19, 2009.

On February 11, 2010 appellant requested a prerecoupment hearing before an Office hearing representative.[4] In a decision dated May 4, 2010, the Office denied her request as untimely.

On May 6, 2010 the Office issued a schedule award for a two percent impairment of the left lower limb, a diagnosis-based estimate from appellant's torn medial meniscus. The period of the award was for 5.76 weeks. The Office indicated that appellant's weekly pay rate was $302.10 times the compensation rate of 75 percent or $226.58.[5]

On appeal, appellant argues that the Office incorrectly calculated her pay rate. She argues the amount of the overpayment is therefore incorrect and that, in fact, the Office owes her additional compensation for that period. Appellant also wants the correct pay rate used for her schedule award. She ask whether there is a minimum statutory amount that is used in schedule award calculations. Appellant does not think it is fair that she now has permanent injuries but is eligible for only a fraction of the compensation.

LEGAL PRECEDENT -- ISSUE 1

The Act places limitations on the right to receive compensation. While an employee is receiving compensation, she may not receive salary, pay or remuneration of any type from the United States, with certain exceptions.[6] It is therefore well established that an employee is not entitled to compensation for temporary total disability after returning to work.[7] "Temporary total disability" is defined as the inability to return to the position held at the time of injury or earn equivalent wages or perform other gainful employment.[8]

[4] Although appellant dated her hearing request form January 28, 2010, she mailed the request on February 11, 2010, as shown by the postmark on the envelope.

[5] The Office applied the amount of the schedule award, $1,305.07, toward the overpayment.

[6] 5 U.S.C. § 8116(a).

[7] *E.g., Tammi L. Wright*, 51 ECAB 463, 465 (2000) (where the record established that the employee returned to work at the employing establishment for four hours per day from August 7, 1996 to January 8, 1997 but received compensation for total disability for that same period, the Board found that the employee received an overpayment of compensation).

[8] 20 C.F.R. § 10.400(b) (1999).

ANALYSIS -- ISSUE 1

Beginning May 1, 2009, the Office paid appellant compensation for total disability resulting from her employment injury. On October 19, 2009 appellant returned to a nonfederal job with no wage loss. The Office continued to pay compensation for total disability through December 19, 2009. Because no employee may receive compensation for total disability after returning to work, appellant received an overpayment of compensation.

Appellant was entitled to no compensation for disability beginning October 19, 2009 because she returned to work with no wage loss. The amount of the overpayment, therefore, is simply the total compensation paid from October 19 to December 19, 2009 and this is so regardless of the pay rate the Office used to calculate her compensation during this period.

The Office paid compensation at the rate of $1,137.76 every 28-calendar days or $40.63 a day. As the period of the overpayment spanned 62 days, it calculated that the total compensation paid from October 19 to December 19, 2009 was $2,519.33. Appellant's compensation history shows that the check issued on October 24, 2009 was canceled. That leaves two negotiated checks totaling $2,275.52 covering the period October 25 to December 19, 2009. This is the extent of the overpayment established by the record on appeal.

The Board will therefore affirm the Office's January 29, 2010 decision on the issue of fact of overpayment but will modify the amount of the overpayment to $2,275.52.

LEGAL PRECEDENT -- ISSUE 2

The Office may 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 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 with respect to creating an overpayment: (1) made an incorrect statement as to a material fact which she knew or should have known to be incorrect; or (2) failed to provide information which she knew or should have known to be material; or (3) accepted a payment which she knew or should have known to be incorrect.[9]

In addition to providing narrative descriptions to recipients of benefits paid or payable, the Office includes on each periodic check a clear indication of the period for which payment is being made. A form is sent to the recipient with each supplemental check which states the date and amount of the payment and the period for which payment is being made. By these means, the Office puts the recipient on notice that a payment was made and the amount of the payment.[10]

[9] *Id*. at § 10.433(a).

[10] *Id*. at § 10.430.

Whether the Office determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances of the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that she is being overpaid.[11]

ANALYSIS -- ISSUE 2

The Office found appellant at fault in creating the overpayment because she accepted a payment that she knew or should have known was incorrect. It well informed her on July 21, 2009 that she was being paid regular compensation until she returned to work. The Office emphasized that appellant was to notify the Office immediately when she returned to work in order to avoid an overpayment. It also explained how the period covered by the payments was written on each check.

So when appellant received the checks dated November 21 and December 19, 2009, she should have known that they covered periods following her return to work on October 19, 2009. She should have known that she was not entitled to that money, but she negotiated the checks anyway. Because appellant accepted payments that she should have known were incorrect, the Board finds that she was at fault in creating the overpayment. The Board will affirm the Office's January 29, 2010 decision on the issue of fault.

LEGAL PRECEDENT -- ISSUE 3

In response to a preliminary notice of overpayment, the individual may present evidence to the Office in writing or at a prerecoupment hearing. The evidence must be presented or the hearing requested within 30 days of the date of the written notice of overpayment. Failure to request the hearing within this 30-day time period shall constitute a waiver of that right.[12]

ANALYSIS -- ISSUE 3

The Office issued its preliminary overpayment notice on December 29, 2009 and informed appellant that she had 30 days to request a prerecoupment hearing. Appellant did not make her request until February 11, 2010, as determined by the postmark on the envelope.[13] Her failure to request a prerecoupment hearing within 30 days constitutes a waiver of that right. The Board will therefore affirm the Office's May 4, 2010 decision denying appellant's request.

[11] *Id*. at § 10.433(b).

[12] *Id*. at § 10.432.

[13] *See id*. at § 10.439 (prerecoupment hearings shall be conducted in exactly the same manner as provided for hearings under 5 U.S.C. § 8124(b)); *id*. at § 10.616(a) (the hearing request must be sent within 30 days as determined by postmark or other carrier's date marking).

LEGAL PRECEDENT -- ISSUE 4

Section 8107 of the Act[14] authorizes the payment of schedule awards for the loss or loss of use of specified members, organs or functions of the body. Such loss or loss of use is known as permanent impairment. The Office evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment.*[15]

The Act provides a maximum of 288 weeks' compensation for the total loss of a leg.[16] Partial losses are compensated proportionately.[17]

ANALYSIS -- ISSUE 4

Diagnosis-based estimate is the primary method of evaluation for the lower limbs.[18] Table 16-3, page 509 of the sixth edition of the A.M.A. *Guides* shows that the default impairment estimate for a meniscal tear is two percent of the lower limb, which the Office awarded.

A two percent impairment of the lower limb is proportionately compensated as two percent of 288 weeks of compensation, or 5.76 weeks of compensation, which the Office correctly awarded. Although appellant's impairment may be permanent, the Act limits compensation for impairment to a specific number of weeks.

On appeal, appellant questions the pay rate used for her schedule award. As the Office indicated in its July 21, 2009 correspondence, her pay rate is determined by her hourly wage at the time of injury and the average number of hours she worked a week in the year immediately prior to her injury.[19] The employer provided the Office with the number of hours appellant worked each week: a total of 861.25 hours for the year and an average of 16.5625 hours a week. As appellant earned $18.24 an hour at the time of injury, her weekly pay rate is $302.10.

Compensation for an employee with a dependent is paid at the rate of 75 percent.[20] So appellant's pay rate for compensation purposes is $302.10 times 75 percent or $226.58, which

[14] 5 U.S.C. § 8107.

[15] 20 C.F.R. § 10.404. For impairment ratings calculated on and after May 1, 2009, the Office should advise any physician evaluating permanent impairment to use the sixth edition of the A.M.A., *Guides*. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.0808.6.a (January 2010).

[16] 5 U.S.C. § 8107(c)(2).

[17] *Id*. at § 8107(c)(19).

[18] A.M.A., *Guides* 497 (6th ed. 2009).

[19] 5 U.S.C. § 8114(c) (when compensation is paid on a weekly basis, the weekly equivalent is one-fifty-second of the average annual earnings).

[20] *Id*. at §§ 8017(a), 8110(b)(1).

her schedule award correctly reflected. The Board will affirm the Office's May 6, 2010 decision.[21]

Appellant questions why her continuation of pay was paid at a different rate than the compensation she received from the Office. To be clear, it is the employing establishment, not the Office, who pays continuation of pay. Unlike compensation for wage loss from the Office, the employing establishment's continuation of pay is subject to taxes and all other payroll deductions that are made from regular income.[22] So the amount directly deposited by the employing establishment for continuation of pay cannot be treated as the equivalent of compensation received by the Office. Appellant makes this mistake in the calculations she submitted on appeal.

Another mistake appellant makes is supplementing the number of hours she actually worked in the year prior to her injury with 9.4 hours for each week she did not work. The record, however, does not establish a factual basis for this inflation of hours and wages.

CONCLUSION

The Board finds that appellant was at fault in the creation of a $2,275.52 overpayment of compensation from October 25 to December 19, 2009. The Board finds that the Office properly denied appellant's untimely request for a prerecoupment hearing. The Board further finds that the Office properly compensated her for the two percent impairment of her left lower limb.

[21] The Office paid appellant for total disability at the rate of $1,137.76 every four weeks, or a rate of $284.44 a week, which is higher than the weekly pay rate of $226.58 it used for her schedule award. The record does not explain why the Office paid her compensation for total disability at this higher rate, but the issue does not affect the overpayment or schedule award decisions reviewed on this appeal.

[22] 20 C.F.R. § 10.200.

ORDER

IT IS HEREBY ORDERED THAT the May 6 and 4, 2010 decisions of the Office of Workers' Compensation Programs are affirmed. The Office's January 29, 2010 decision is affirmed as modified.

Issued: April 6, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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