

FACTUAL HISTORY

On December 30, 2002 appellant, then a 54-year-old letter carrier, filed a traumatic injury claim alleging that on May 28, 2002 he sustained injury to his feet, legs and hands while emptying mailboxes. The Office accepted that his work duties resulted in temporary aggravation of diabetes which resolved approximately three months after the incident. Compensation for wage loss and medical care was paid through August 31, 2002.²

Appellant submitted an August 17, 2006 report in which Dr. Nicholas Diamond, an attending osteopath, opined that he had a 58 percent permanent impairment of his right arm, a 58 percent permanent impairment of his left arm, a 13 percent permanent impairment of his right leg and a 26 percent permanent impairment of his left leg. On December 21, 2006 he filed a claim for a schedule award. The Office requested that an Office medical adviser review the report of Dr. Diamond.

In a February 14, 2007 decision, the Office granted appellant schedule awards for 12 percent impairment to both the left and right upper extremity, 5 percent impairment to the left leg and 3 percent impairment of the right lower extremity.³ In a March 8, 2007 decision, it set aside the February 14, 2007 decision on the grounds that the medical evidence was not sufficient to support any permanent impairment as a result of the accepted conditions. In a March 8, 2007 letter, the Office advised appellant that it had made a preliminary determination that he received a \$17,943.38 overpayment of compensation because the medical evidence did not support permanent impairment causally related to the accepted work-related condition.

In an April 12, 2007 decision, the Office set aside its March 8, 2007 decision as further development of the evidence was needed. In a June 6, 2007 decision, it found that a February 17, 2005 report of Dr. Leonard Kamen, an attending Board-certified physical medicine and rehabilitation physician, represented the weight of the medical opinion. It supported that appellant no longer had residuals of the accepted temporary aggravation of his preexisting diabetes. Therefore, appellant had no permanent impairment as a result of the accepted work-related condition and his schedule award claim was denied.

In a November 21, 2007 decision, an Office hearing representative found that clarification should be obtained from Dr. Kamen and a *de novo* decision issued regarding appellant's entitlement to schedule award compensation. In a March 13, 2008 report, Dr. Kamen provided additional discussion of how he concluded that appellant had a temporary aggravation of his diabetes which had resolved. In a March 28, 2008 decision, the Office again found that appellant had no permanent impairment as a result of the accepted work-related condition.

² Appellant stopped work on May 28, 2002 and did not return. He had a prior claim for occupational disease in which he claimed that his diabetes was aggravated by his work duties. This claim was accepted on December 7, 2001, under a separate claim number, for temporary aggravation of diabetes. Appellant alleged a recurrence of his condition on May 29, 2002 and this claim was denied in an August 16, 2002 decision in which the Office found that he had not submitted sufficient evidence to support a causal relationship between his condition on May 29, 2002 and the previously accepted injury. In decisions dated December 13, 2002 and June 20, 2003, the Office affirmed its August 16, 2002 decision.

³ The award ran for 97.92 weeks.

In a June 11, 2008 decision, an Office hearing representative determined that further development by a more appropriate medical specialist was warranted. The Office was directed to refer appellant for a second opinion evaluation with a Board-certified endocrinologist.

In July 22 and September 8, 2008 reports, Dr. Michael Cooperman, a Board-certified endocrinologist who served as an Office referral physician, opined that appellant did not sustain any permanent aggravation of his underlying diabetes as a result of the May 28, 2002 work injury. The Office found that Dr. Cooperman's opinion had the weight of medical evidence.

In an October 16, 2008 decision, the Office denied appellant's schedule award claim finding that the medical evidence did not support that he had sustained permanent impairment as a result of the temporary aggravation of his preexisting condition. In an October 16, 2008 letter, it advised appellant of its preliminary overpayment determination that he received a \$17,943.38 overpayment of compensation due to the incorrect payment of a schedule award. The Office also made a preliminary determination that he was not at fault in the creation of the overpayment.

In a May 19, 2009 decision, an Office hearing representative set aside the Office's October 16, 2008 decision and remanded the case for further development. The hearing representative found that there was a conflict in the medical opinion between Dr. Cooperman, the Office referral physician, and of Dr. Terry Kanefsky, an attending Board-certified endocrinologist, regarding whether appellant's diabetes was permanently aggravated.⁴ The case was remanded for referral to an impartial medical specialist to examine appellant and to provide an opinion on the matter. The Office hearing representative stated that following any further required development, a *de novo* decision should be issued regarding whether appellant's "diabetic condition was aggravated, accelerated or exacerbated by his employment and/or the May 28, 2002 work injury and therefore caused permanent impairment of the upper and lower extremities."

The Office hearing representative indicated that the Office's "decision" regarding a \$17,943.38 overpayment of compensation should be "vacated" until a determination was made regarding whether appellant continued to have an aggravation of his preexisting diabetes which caused permanent impairment to his lower extremities.⁵ She concluded that his claim was not accepted for an upper extremity condition and therefore the schedule award paid for a 24 percent permanent impairment of the upper extremities was in error. The Office hearing representative noted that neither the factual nor medical evidence supported an aggravation of the diabetic neuropathies to the upper extremities and affirmed that an overpayment existed for this portion of the schedule award. The Office was directed to recalculate the schedule award paid for the upper extremities and to declare an overpayment for this amount.

In a May 22, 2009 letter, appellant was advised that a preliminary determination had been made that he received a \$2,183.09 overpayment of compensation because he had received schedule awards totaling 24 percent permanent impairment of the upper extremities. It was

⁴ Appellant submitted a March 25, 2009 report of Dr. Kanefsky.

⁵ The Board notes that the Office had only made a preliminary determination that appellant received a \$17,943.38 overpayment of compensation at this point.

noted that although the total period of the award was August 17, 2006 to July 2, 2008, only the period August 17, 2006 to January 25, 2007 had actually been paid. Appellant had also been found to have an eight percent lower extremity impairment which was still under development by the Office. The Office determined that the eight percent impairment to the lower extremities constituted 162 calendar days of the total days of compensation paid and equaled \$15,760.29 in compensation. It found that since only \$17,943.38 had been paid, this resulted in an overpayment of compensation for the upper extremities of \$2,183.09. The Office made a preliminary determination that appellant was without fault in the matter of this overpayment as he had not accepted a payment that he knew or should have known was incorrect.

Appellant disagreed with the Office's preliminary overpayment determination and requested a precoupment hearing before an Office hearing representative. At the September 15, 2009 hearing, counsel argued that the prior Office hearing representative's decision was inconsistent and it was premature to declare an overpayment as a result of payment of the schedule award for the upper extremity impairment when the Office had not finalized the percentage of lower extremity impairment. Following the hearing, the Office received information regarding appellant finances which showed \$6,097.81 in total monthly income and \$5,178.91 in total monthly expenses.

In a December 9, 2009 decision, the Office hearing representative found that appellant received a \$2,183.09 overpayment of compensation as the medical evidence did not support that he was entitled to schedule award compensation for permanent impairment of his upper extremities. She found that he was not at fault in the creation of the overpayment but determined that, given his financial circumstances, the overpayment was not subject to waiver. The overpayment was to be repaid by paying \$200.00 per month.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of the Federal Employees' Compensation Act⁶ provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.⁷ Section 8129(a) of the Act provides, in pertinent part, "When an overpayment has been made to an individual under this subchapter because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled."⁸

Section 8128 of the Act provides that the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.⁹ The Board has upheld the Office's authority to reopen a claim at any time on its own motion under section 8128 of the Act and, where supported by the evidence, set aside or modify a prior decision and

⁶ 5 U.S.C. §§ 8101-8193.

⁷ *Id.* at § 8102(a).

⁸ *Id.* at § 8129(a).

⁹ *Id.* at § 8128.

issue a new decision.¹⁰ The Board has noted, however, that the power to annul an award is not an arbitrary one and that an award for compensation can only be set aside in the manner provided by the compensation statute.¹¹

ANALYSIS -- ISSUE 1

The Office accepted that appellant's work duties on May 29, 2002 resulted in temporary aggravation of diabetes which resolved approximately three months after the work incident. Compensation for wage loss and medical care was paid through August 31, 2002.¹² In a February 14, 2007 decision, the Office granted appellant schedule awards for a 24 percent upper extremity impairment (12 percent to both the left and right upper extremity) and an 8 percent lower extremity impairment (5 percent to the left lower extremity and 3 percent to the right lower extremity).

On appeal, counsel argued that the Office made a premature determination that appellant received a \$2,183.09 overpayment of compensation because the matter of his upper extremity impairment was still under development.

The Board finds that the Office prematurely made a determination that appellant received a \$2,183.09 overpayment of compensation based on its finding that he was not entitled to schedule awards for upper extremity impairment (12 percent to each the left and right upper extremity). In making such a determination, the Office effectively rescinded its prior schedule award for a 24 percent upper extremity impairment. However, at the time of its December 9, 2009 overpayment decision, it had not yet developed the evidence to support a rescission of appellant's schedule award for the upper extremities.¹³

In a May 19, 2009 decision, the Office properly determined that there was a conflict in the medical opinion between Dr. Cooperman and Dr. Kanefsky regarding whether appellant's diabetes was permanently aggravated due to work factors and whether he sustained permanent impairment of his upper and lower extremities as a result.¹⁴ A portion of the May 19, 2009 decision suggested that there was no conflict in the medical opinion regarding whether he had work-related permanent impairment of his upper extremities; however, the evidence of record reflects that a conflict in the medical opinion did exist. Therefore, the Office did not meet its burden of proof to rescind the schedule awards for impairment to the upper extremities.

¹⁰ *John W. Graves*, 52 ECAB 160, 161 (2000).

¹¹ *See* 20 C.F.R. § 10.610.

¹² Appellant had a prior claim for occupational disease in which he claimed that his diabetes was aggravated by his work duties. This claim was accepted on December 7, 2001, under a separate claim number, for temporary aggravation of diabetes.

¹³ *See supra* notes 9 through 11.

¹⁴ Section 8123(a) of the Act provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination." 5 U.S.C. § 8123(a).

Given that the Office had based its finding of a \$2,183.09 overpayment on its finding that appellant was not entitled to schedule awards for a 24 percent upper extremity impairment, it was premature for it to make such an overpayment determination. For these reasons, the December 9, 2009 overpayment decision shall be set aside. The Office may not make an overpayment determination based on compensation granted for upper extremity impairment until it has established that appellant received compensation for upper extremity impairment to which he was not entitled. The case is remanded to the Office for further development of the evidence regarding this matter. After such development as it deems necessary, the Office shall issue an appropriate decision.

CONCLUSION

The Board finds that the case is not in posture for decision regarding the fact, amount, fault and waiver of an overpayment. The case is remanded to the Office for further development.

ORDER

IT IS HEREBY ORDERED THAT the December 9, 2009 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Issued: March 3, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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