

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

CHRISTINE HORTON, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Locust Grove, OK, Employer**

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**Docket No. 04-2300
Issued: September 6, 2005**

Appearances:
Christine Horton, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 22, 2004 appellant filed a timely appeal of decisions of the Office of Workers' Compensation Programs dated May 5, 2004, granting her schedule awards and dated September 9, 2004 finding that she had received an overpayment of compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant has more than 15 percent impairment of her right upper extremity, 12 percent impairment of her left upper extremity, 34 percent impairment of her right lower extremity and 12 percent impairment of her left lower extremity for which she received schedule awards; (2) whether appellant received an overpayment in the amount of \$2,016.59 from June 1 through December 27, 2003; (3) whether she is entitled to waiver; and (4) whether the Office properly set the rate of recovery from future compensation payments so as to minimize any hardship.

FACTUAL HISTORY

On November 29, 2001 appellant, then a 53-year-old rural letter carrier, filed a traumatic injury claim alleging that on November 28, 2001 she sustained two broken arms and two broken legs due to an employment-related motor vehicle accident. The Office accepted appellant's claim for fractures of both arms and legs on December 4, 2001. Appellant accepted a limited-duty position on June 10, 2002 and began working two hours a day. She accepted a permanent limited-duty assignment on August 21, 2002 working two hours a day.

In a letter dated February 11, 2002, the Office requested a copy of appellant's health benefits enrollment effective January 14, 2002. The employing establishment made the transfer on February 20, 2002 effective January 14, 2002. On July 10, 2002 the Office transferred appellant's health benefits enrollment to the employing establishment as she returned to duty.

By decision dated November 20, 2002, the Office reduced appellant's compensation benefits based on her actual earnings for two hours a day as a clerk and found that this position fairly and reasonably represented her wage-earning capacity.

Appellant requested schedule awards on March 6, 2003 and submitted a report dated March 25, 2003 from Dr. David E. Nonweiler, an attending Board-certified orthopedic surgeon, who found that appellant's left shoulder had 90 degrees of flexion, 6 percent impairment, 60 degrees of internal rotation, 2 percent impairment and 100 degrees of abduction, 4 percent impairment, for 12 percent impairment of the left upper extremity due to loss of range of motion. He further found that she had left upper extremity impairment due to atrophy and loss of strength in external rotation of 4/5 and biceps of 4/5, impairment due to loss of strength of flexion, 6 percent; abduction, 3 percent and external rotation, 2 percent for a total of 11 percent impairment due to loss of strength of the left upper extremity. Dr. Nonweiler combined these impairments to reach 23 percent impairment of the left upper extremity. He stated that x-rays demonstrated continued nonunion of her left humerus. Dr. Nonweiler examined appellant's right upper extremity and found that her right elbow had 35 degrees of flexion and 130 degrees of extension and that she demonstrated mild grip strength loss of 4/5 resulting in impairment ratings of 5 percent and 10 percent, respectively, for a total of 15 percent impairment of the right upper extremity due to right elbow and fifth metacarpal fractures.

With respect to her lower extremities, he found that the right knee demonstrated a fracture of the patella of greater than 3 millimeters separation, 12 percent impairment and muscle strength of 4/5 on knee extension 12 percent impairment for a total of 24 percent impairment to the right knee. Dr. Nonweiler found that appellant's anterior articular displaced fracture of the left ankle was 28 percent impairment and that inversion ankle strength of 3/5 due to posterior tibial tendon laceration was 15 percent impairment for a combined ankle impairment of 32 percent. He found that this resulted in a combined right lower extremity impairment of 48 percent. Appellant retained dorsiflexion of -10 degrees in her right ankle, plantar flexion of 30 degrees and 5 degrees each of eversion and inversion. She demonstrated obvious pes planus with inversion strength of 3/5 and dorsiflexion strength of 4/5. Regarding appellant's left lower extremity, Dr. Nonweiler found that appellant's left knee impairments were exactly the same as her right with no contribution from her left ankle.

The Office medical adviser reviewed Dr. Nonweiler's report on April 24, 2003 and listed her accepted conditions as left humeral shaft fracture with nonunion, right olecranon and radial head fracture with dislocation of the elbow, open fracture of the right ankle, laceration of the right posterior tibial tendon and displaced left and right patellar fractures. He determined that appellant reached maximum medical improvement on March 25, 2003. The Office medical adviser agreed with Dr. Nonweiler's right upper extremity impairment of 15 percent due to loss of range of motion and grip strength. He further found that appellant had 12 percent impairment of the left upper extremity due to loss of range of motion and 11 percent impairment of the left upper extremity due to loss of strength. However, the Office medical adviser noted that loss of range of motion and loss of strength impairments could not be combined and based the impairment rating on the higher of the two for a left upper extremity impairment rating of 12 percent.

Regarding the right lower extremity, the Office medical adviser found that appellant had 20 percent impairment due to intra-articular fracture with displacement, ankle, as well as 10 degrees of dorsiflexion, 15 percent impairment; 5 degrees of inversion, 5 percent impairment; and 5 degrees of eversion, 2 percent impairment, a total combined rating of 21 percent for loss of range of motion. He found that a displaced fracture of the patella was 12 percent impairment and that appellant had 12 percent impairment of knee extension. However, the Office medical adviser noted that neither loss of range of motion nor loss of strength may be combined with a diagnosis-based estimate, excepted for the loss of strength in inversion which was related to the laceration of the posterior tibial tendon, five percent impairment. The Office medical adviser concluded that appellant had 34 percent impairment of her right lower extremity.

The Office medical adviser found that appellant had 12 percent impairment of the left lower extremity due to a displaced fracture and that loss of strength and diagnosed based estimates could not be combined.

By decision dated May 15, 2003, the Office granted schedule awards for 15 percent impairment of her right upper extremity, 12 percent impairment of her left upper extremity, 34 percent impairment of her right lower extremity and 12 percent impairment of her left lower extremity. Appellant's schedule award was to run from April 20, 2003 through June 15, 2007.

On May 19, 2003 appellant requested that her health benefits and life insurance be transferred back to the Office from the employing establishment. In a letter dated May 19, 2003, the Office informed the employing establishment that it was deducting subscriptions charges for health benefits from appellant's compensation effective April 20, 2003. By letter dated May 29, 2003, the employing establishment agreed to transfer appellant's health benefits. This transfer was made on June 27, 2003.

Appellant requested an oral hearing regarding her schedule awards on June 2, 2003. She indicated that her last day of work was March 21, 2003.

On September 5, 2003 appellant noted that the Office was not yet mailing her health benefits deduction.

The employing establishment notified the Office on September 29, 2003 that appellant had stopped work. The employing establishment further noted that the Office was not deducting health benefits from her ongoing schedule award.

In a letter dated November 12, 2003, appellant again requested that the Office began deducting her health benefits premiums from her compensation. On December 10, 2003 she indicated that she worked from November 8, 2002 through May 9, 2003.

The Office responded to the employing establishment on January 8, 2004 and stated that appellant had not filed for a recurrence, nor had a recurrence been accepted on or after March 21, 2003, the date appellant stopped work. The Office also noted that health benefits had not been accounted for since approximately July 14, 2002.

On February 3, 2004 the Office issued a preliminary finding of overpayment, noting that appellant had received an overpayment in the amount of \$4,334.80 as health benefit premiums were not deducted from periodic roll payments from June 16 through July 13, 2002. The Office made a preliminary finding that appellant was without fault in the creation of the overpayment.

In a letter dated February 25, 2004, appellant's Congressman requested information regarding the amount of the overpayment, a check that appellant had received and inquired about her wage-earning capacity determination.

On February 29, 2004 appellant requested a precouplement hearing regarding the overpayment.¹

On April 6, 2004 appellant filed a notice of recurrence of disability alleging that on March 25, 2003 she sustained a recurrence of total disability causally related to her November 28, 2001 employment injury.

By decision dated May 5, 2004, the hearing representative affirmed the Office schedule award determinations. The Branch of Hearings and Review provided appellant's Congressman with a copy of the May 5, 2004 decision in response to his February 25, 2004 letter.

On a July 30, 2004 internal worksheet, the Office recalculated appellant's overpayment amount and concluded that she owed \$2,016.59.

By letter dated August 5, 2004, the Office informed appellant's Congressman that the Branch of Hearings of Review provided a partial response on July 22, 2004 before returning the case to the Office.

On August 5, 2004 the Office issued a preliminary finding of overpayment in the amount of \$2,016.59. The Office found that it had failed to deduct health insurance premiums from appellant's compensation payments from June 1 through December 27, 2003. The Office made a

¹ The Branch of Hearings and Review has not issued a final decision regarding the February 3, 2004 preliminary overpayment finding and the Board will not address this issue on appeal. 20 C.F.R. § 501.(2)(c).

preliminary finding that appellant was not at fault in the creation of overpayment and request financial and other information.

By decision dated September 9, 2004, the Office affirmed the preliminary finding of overpayment noting that it had failed to deduct health insurance premiums from appellant's compensation from June 1 through December 27, 2003 creating an overpayment in the amount of \$2,016.59. The Office found that appellant was at fault in the creation of the overpayment, but that she was not entitled to waiver of the overpayment. The Office noted that appellant failed to supply the requested financial information and that the overpayment would be recovered by withholding \$150.00 from appellant's continuing compensation payments effective October 2, 2004.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act² and its implementing regulation³ 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 to ensure equal justice under the law to 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 American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.

ANALYSIS -- ISSUE 1

In support of her claim for schedule awards, appellant submitted a report from Dr. Nonweiler, a Board-certified orthopedic surgeon, dated March 25, 2003. He provided his findings on examination and concluded that appellant had 12 percent impairment of the left upper extremity due to loss of range of motion in her shoulder and 11 percent impairment of the left upper extremity due to loss of strength for a total impairment of 23 percent. The Office medical adviser agreed with the impairment ratings provided by Dr. Nonweiler, but noted that the A.M.A., *Guides* did not allow impairments for both loss of range of motion and loss of strength. The A.M.A., *Guides* provide that decreased strength cannot be rated in the presence of decreased motion or painful conditions in the same member.⁴ As appellant's various impairment ratings cannot be combined, the Board finds that she is entitled to only the greater of the two

² 5 U.S.C. § 8107.

³ 20 C.F.R. § 10.404 (1999).

⁴ A.M.A., *Guides*, 508 and 526, Table 17-2; *Patricia J. Horney*, 56 ECAB __ (Docket No. 04-2013, issued January 14, 2005). The A.M.A., *Guides* further note that motor weakness associated with disorders of the peripheral nerve system are evaluated in accordance with Chapter 16.5 A.M.A., *Guides*, 508, 480. This is not the evaluation method utilized by the Office medical adviser and Dr. Lenihan.

evaluation methods.⁵ The Office medical adviser properly found that appellant was entitled to 12 percent impairment of her left upper extremity.

Dr. Nonweiler found that appellant had 15 percent impairment of the right upper extremity due to loss of range of motion in the elbow and loss of grip strength due to fractures in her hand and elbow. The Office medical adviser agreed with this rating.

In evaluating appellant's right lower extremity, Dr. Nonweiler found 12 percent impairment due to fracture of the patella,⁶ 12 percent impairment due to loss of muscle strength in the appellant's right knee. He further found 28 percent impairment due to anterior articular displaced fracture of the left ankle⁷ and 15 percent impairment due to loss of ankle strength as a result of posterior tibial tendon laceration. The Board notes that, in reviewing Dr. Nonweiler's report, the Office medical adviser properly noted that appellant had 21 percent impairment of the left lower extremity due to loss of range of motion, but that neither loss of range of motion nor loss of strength could be combined with diagnosis-based estimates.⁸ He combined 12 percent due to patella fracture, 28 due to ankle fracture and 5 percent due to loss of strength due to laceration of the posterior tibial tendon to reach 34 percent impairment of the right lower extremity.

Dr. Nonweiler opined that appellant had the same impairments of the left knee as the right. The Board finds that the Office medical adviser properly concluded that appellant had 12 percent impairment of her left lower extremity. There is no medical evidence establishing greater impairment than that found by the Office.

LEGAL PRECEDENT -- ISSUE 2

The Act 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 his duty.⁹ When an overpayment has been made to an individual because of error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which the individual is entitled.¹⁰

The Office of Personnel Management (OPM) has jurisdiction over the matter of health insurance deductions from compensation and enrollment under the Federal Employees Health Benefits (FEHB) Program.¹¹ The OPM regulations regarding the FEHB Program provide that an

⁵ *Juantia L. Spencer*, 56 ECAB __ (Docket No. 05-527, issued June 21, 2005).

⁶ A.M.A., *Guides*, 546, Table 17-33.

⁷ *Id.* at 547, Table 17-33. This table provides for 28 percent impairment of the foot, but 20 percent impairment of the lower extremity due to intra-articular fracture with displacement.

⁸ A.M.A., *Guides*, 526, Table 17-2.

⁹ 5 U.S.C. §§ 8101-8193, 8102(a).

¹⁰ 5 U.S.C. § 8129(a).

¹¹ See *Raymond C. Beyer*, 50 ECAB 164 (1998)

employee or annuitant is responsible for payment of the payment of the employee's share of the cost of enrollment for every pay period during which the enrollment continues. In each pay period for which health benefits withholding or direct premium payments are not made but during which the enrollment of an employee or annuitant continues, he or she incurs an indebtedness due the United States in the amount of the proper employee withholding required for that pay period.¹² The regulations further provide that an agency that withholds less than or none of the proper health benefits contributions from an individual's pay, annuity or compensation must submit an amount equal to the sum of the uncollected deductions and any applicable agency contributions required under 5 U.S.C. § 8906 to OPM for deposit in the Employee's Health Benefits Fund.¹³

The Office's procedure manual provides that, when an overpayment is identified and calculated, the Office must release, within 30 days, a letter advising the claimant of the fact and amount of the overpayment. The procedure manual states: "The reason that the overpayment occurred must be clearly stated in the preliminary decision and the [Office] should provide a clearly written explanation indicating how the overpayment was calculated."¹⁴

ANALYSIS -- ISSUE 2

The Board finds that appellant received an overpayment of compensation that occurred because her health benefit premiums were not deducted from her schedule award payments beginning some time after she stopped work on March 21, 2003. Appellant was aware that the employing establishment was not making her health benefit payments by May 13, 2003, the date that she first request that the Office make these payments. She has not alleged that she did not receive an overpayment of some amount. However, the Board cannot determine how the Office determined the period and amount of the overpayment. The Office's August 5, 2004 preliminary determination did not comply with the requirements of the Office's procedure manual, particularly the requirement of "a clearly written explanation indicating how the overpayment was calculated." A cursory calculation of the amount of the overpayment is contained in the case record, but there is no indication of the basis of this calculation or that this calculation was provided to appellant with the preliminary determination of the overpayment, thereby precluding her from assessing whether the amount of the overpayment stated by the Office was correct.¹⁵ The case will be remanded to the Office for issuance of a new preliminary determination that should include how the overpayment was calculated.

CONCLUSION

The Board finds that appellant has no more than 15 percent impairment of her right upper extremity, 12 percent impairment of her left upper extremity, 34 percent impairment of her right

¹² 5 C.F.R. § 890.502(b)(1).

¹³ 5 C.F.R. § 890.502(d); *see John Skarbek*, 53 ECAB 630, 632-33 (2002); *Jennifer Burch*, 48 ECAB 633 (1997).

¹⁴ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.4a (May 2004).

¹⁵ *Carlos L. Campbell*, (Docket No. 04-2093, issued March 1, 2005).

lower extremity and 12 percent impairment of her left lower extremity for which she has received schedule awards. The Board further finds that appellant received an overpayment of compensation that occurred because her health benefit premiums were not deducted from her schedule award payments, but the case is remanded to the Office for issuance of a new preliminary determination that should include an explanation of the period of the overpayment and the specifics of how the overpayment was calculated.

ORDER

IT IS HEREBY ORDERED THAT the September 9, 2004 decision of the Office of Workers' Compensation Programs is set aside and remanded for further development consistent with this decision of the Board. The May 5, 2004 decision of the Office is affirmed.

Issued: September 6, 2005
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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