

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

S.W., Appellant)	
)	
and)	Docket No. 10-2386
)	Issued: September 22, 2011
U.S. POSTAL SERVICE, DALLAS)	
PERFORMANCE CLUSTER, Coppell, TX,)	
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 September 24, 2010 appellant filed a timely appeal from the May 24, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) finding an overpayment of compensation based on a partial rescission of schedule award 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The issues are: (1) whether OWCP properly rescinded a portion of appellant's entitlement to schedule award compensation; (2) whether appellant received a \$22,314.67 overpayment of compensation; and (3) whether OWCP abused its discretion by refusing to waive recovery of the overpayment.

FACTUAL HISTORY

In late 2006 OWCP accepted that appellant, then a 40-year-old manual secondary clerk, sustained bilateral carpal tunnel syndrome, bilateral wrist strain, right ulnar nerve lesion and

tenosynovitis of her right thumb due to the repetitive duties of her job.¹ Dr. David Azouz, an attending Board-certified plastic surgeon, performed a right carpal tunnel release on July 3, 2007 and a right cubital tunnel transfer on January 8, 2008. He performed tenosynovectomy and tenolysis procedures on appellant's right thumb on April 22, 2008. The procedures were authorized by OWCP. Appellant periodically worked in limited-duty positions and received compensation for periods of disability.

In an October 23, 2008 report, Dr. Ronnie D. Shade, an attending Board-certified orthopedic surgeon, diagnosed tendinitis of the right wrist and forearm, suspected bilateral carpal tunnel syndrome and right cubital tunnel syndrome. He provided an opinion that appellant had a 23 percent permanent impairment of her right arm and a 9 percent permanent impairment of her left arm under the standards of the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001). The right arm impairment was comprised of a 9 percent impairment of the median nerve due to sensory and motor loss, a 13 percent impairment of the ulnar nerve due to sensory and motor loss and a 2 percent impairment of the thumb due to limited motion.² The left arm impairment of 9 percent was due to impairment of the median nerve caused by sensory and motor loss.

On December 11, 2008 Dr. Azouz stated that appellant reported that she had excellent power, strength and range of motion in both hands. On physical examination, appellant had full range of motion in her right thumb and the Tinel's and Phalen's signs were negative in both her hands.

On December 29, 2008 appellant filed a claim for a schedule award due to her work injuries.

On February 2, 2009 Dr. Henry Mobley, a Board-certified internist serving as an OWCP medical adviser, reviewed Dr. Shade's October 23, 2008 report. He noted that there was a discrepancy between Dr. Shade's findings and the findings of Dr. Azouz in his December 11, 2008 report. Dr. Mobley recommended that a second opinion be obtained regarding appellant's impairment.

In a March 12, 2009 report, Dr. Arthur Sarris, a Board-certified orthopedic surgeon serving as an OWCP referral physician, noted that physical examination revealed that appellant had normal range of motion of both wrists and fingers, but had pain in the thumb of her right hand and the second, third and fourth fingers of her left hand. Referencing the portion of the fifth edition of the A.M.A., *Guides* regarding carpal tunnel syndrome, Dr. Sarris concluded that appellant had a 10 percent permanent impairment to each arm.³

¹ OWCP later accepted that appellant also sustained work-related enthesopathy, synovitis and tenosynovitis of both upper extremities.

² These impairment ratings were combined using the Combined Values Chart starting on page 604 of the A.M.A., *Guides*.

³ Dr. Sarris referred to Table 16-10 on page 482 and indicated that appellant had a Grade 4 sensory loss in each median nerve.

On April 16, 2009 Mr. Mobley determined that Dr. Sarris had failed to consider all the accepted conditions causing impairment in his rating and recommended that appellant be referred back to Dr. Sarris for further examination and evaluation regarding the extent of impairment.

Dr. Sarris reexamined appellant on May 27, 2009. In a June 2, 2009 report, he considered appellant's relevant medical conditions in evaluating her permanent impairment under the standards of the sixth edition of the A.M.A., *Guides* (6th ed. 2009). Dr. Sarris reported range of motion findings for appellant's right thumb but concluded that there was no permanent impairment associated with the thumb under Table 15-2 on page 392 and 393. He referenced Table 15-21 on page 443, chose the diagnostic category of the ulnar nerve above the midforearm and found that appellant fell under class 1 (moderate sensory deficit or severe complex regional pain syndrome II which was objectively verified). Dr. Sarris concluded that appellant had a three percent impairment due to right ulnar nerve impairment. Using the Combined Values Chart starting on page 604, he combined the 10 percent impairment due to right carpal tunnel syndrome with the 3 percent impairment due to right ulnar nerve impairment to conclude that appellant had a 13 percent impairment of her right arm. Appellant had a total left arm impairment of 10 percent due to left carpal tunnel syndrome.

On June 29, 2009 Dr. Mobley expressed his agreement with Dr. Sarris' impairment rating.

In a July 7, 2009 decision, OWCP granted appellant schedule awards for a 13 percent permanent impairment of her right arm and a 10 percent permanent impairment of her left arm. The awards were based on the opinions of Dr. Sarris and Dr. Mobley.

Appellant requested a review of the written record by an OWCP hearing representative. On November 19, 2009 the hearing representative set aside the July 7, 2009 decision finding that there was a conflict in the medical opinion between Dr. Sarris and Dr. Shade regarding appellant's upper extremity impairment.

Appellant was referred to Dr. Benzel C. MacMaster, a Board-certified orthopedic surgeon, selected as an impartial medical specialist. In a January 4, 2010 report, Dr. MacMaster determined that appellant had an eight percent impairment of her right arm and a five percent impairment of her left arm under the standards of the sixth edition of the A.M.A., *Guides*. Based on Table 15-23 on page 449, appellant had grade modifiers in each arm of one, two, one and two (for test findings, history, physical findings and functional scale respectively). When these values were averaged and rounded, appellant fell under the default value of Grade Modifier 2 on Table 15-23 and she had a five percent impairment for each arm due to carpal tunnel syndrome. Under Table 15-23, the impairment for the right ulnar nerve entrapment at the elbow had the same grade modifiers as the right and left median nerve impairments and was equal to a five percent right arm impairment. The localized loss of sensation in the right thenar eminence was equal to a one percent right upper extremity impairment. Dr. MacMaster stated that the percentage impairment of the right upper extremity was equal to the combined value of 5 percent and 3 percent (50 percent of the second neuropathy rounded to the next highest number) and

noted that, per the A.M.A., *Guides*, the third neuropathy (related to the thenar eminence) would not be included.⁴

On April 6, 2010 Dr. Mobley agree with Dr. MacMaster's assessment of appellant's arm impairment.

In an April 21, 2010 decision, OWCP issued a schedule award determination that replaced the July 7, 2009 schedule award.⁵ It found that appellant was entitled to a schedule award for an eight percent impairment of her right arm and a five percent impairment of her left arm based on the opinions of Dr. MacMaster and Dr. Mobley. In making this new schedule award determination, OWCP rescinded a portion of the schedule award compensation it previously awarded to appellant.

In an April 21, 2010 notice, OWCP advised appellant of its preliminary determination that she received a \$22,314.67 overpayment of compensation because a portion of her schedule award compensation had been rescinded.⁶ It made a preliminary determination that she was not at fault in the creation of the overpayment. OWCP advised appellant that she could submit evidence challenging the fact, amount, or finding of fault and request waiver of the overpayment. It requested that appellant complete and return an enclosed financial information questionnaire within 30 days even if she was not requesting waiver of the overpayment.

In a May 24, 2010 decision, OWCP determined that appellant received a \$22,314.67 overpayment of compensation. It found that she was not at fault in the creation of the overpayment but that the overpayment was not subject to waiver. OWCP found that appellant did not submit the requested financial information and, therefore, there was no basis to find that waiver of recovery of the overpayment was warranted.

LEGAL PRECEDENT – ISSUE 1

Section 8128 of the FECA 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.⁷ The Board has upheld OWCP's authority to reopen a claim at any time on its own motion under section 8128 of FECA and, where supported by the evidence, set aside or modify a prior decision

⁴ Dr. MacMaster evaluated appellant's right thumb and reported range of motion values, but he did not find any impairment related to the thumb under Table 15-2 on pages 392 and 393.

⁵ OWCP had previously granted appellant a schedule award for a 13 percent permanent impairment of her right arm and a 10 percent permanent impairment of her left arm.

⁶ The record contains calculations detailing the amount of schedule award compensation appellant previously received for a 13 percent right arm impairment and a 10 percent left arm impairment as well as the amount of compensation OWCP now felt she actually was entitled to receive, *i.e.*, the amount of schedule award compensation for an 8 percent right arm impairment and a 5 percent left arm impairment. Appellant previously received \$53,758.34 in schedule award compensation, but OWCP felt she was only entitled to receive \$31,443.67. The difference between these figures equaled the \$22,314.67 overpayment.

⁷ 5 U.S.C. § 8128.

and issue a new decision.⁸ 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.⁹

Workers' compensation authorities generally recognize that compensation awards may be corrected, in the discretion of the compensation agency and in conformity with statutory provision, where there is good cause for so doing, such as mistake or fraud. It is well established that, once OWCP accepts a claim, it has the burden of justifying the termination or modification of compensation benefits. This holds true where, as here, OWCP later decides that it erroneously accepted a claim. In establishing that its prior acceptance was erroneous, OWCP is required to provide a clear explanation of the rationale for rescission.¹⁰

The schedule award provision of FECA¹¹ and its implementing regulations¹² 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, FECA 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 A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.¹³

According to FECA Bulletin No. 09-03, the effective date of the sixth edition of the A.M.A., *Guides* is May 1, 2009.¹⁴ FECA Bulletin No. 09-03 further provides:

“In accordance with [Division of Federal Employees' Compensation's] established practice when moving to an updated version of the A.M.A., *Guides*, awards made prior to May 1, 2009, are not and should not be recalculated merely because a new [e]dition of the [A.M.A.,] *Guides* is in use. A claimant who has received a schedule award calculated under a previous [e]dition and who claims an increased award, will receive a calculation according to the [s]ixth [e]dition for any decision issued on or after May 1, 2009. Should the later calculation result in a percentage impairment lower than the original award (as sometimes occurs), the [c]laims [e]xaminer or [h]earing [r]epresentative should make the finding that the claimant has no more than the percentage of impairment originally awarded, that

⁸ *John W. Graves*, 52 ECAB 160, 161 (2000).

⁹ See 20 C.F.R. § 10.610.

¹⁰ *John W. Graves*, *supra* note 8.

¹¹ 5 U.S.C. § 8107.

¹² 20 C.F.R. § 10.404 (1999).

¹³ *Id.*

¹⁴ FECA Bulletin No. 09-03 (issued March 15, 2009).

the evidence does not establish an increased impairment and that therefore [OWCP] has no basis for declaring an overpayment.”¹⁵

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained bilateral carpal tunnel syndrome, bilateral wrist strain, right ulnar nerve lesion, tenosynovitis of her right thumb and enthesopathy, synovitis and tenosynovitis of both upper extremities due to the repetitive duties of her job. It granted her schedule awards for a 13 percent permanent impairment of her right arm and a 10 percent permanent impairment of her left arm. The awards were based on the impairment rating of Dr. Sarris, a Board-certified orthopedic surgeon serving as an OWCP referral physician, who applied the standards of the fifth edition of the A.M.A., *Guides*.¹⁶

OWCP further developed the medical evidence and referred appellant to Dr. MacMaster, a Board-certified orthopedic surgeon, for an impartial medical examination and evaluation of her arm impairment. In a January 4, 2010 report, Dr. MacMaster provided an opinion that appellant had an eight percent impairment of her right arm and a five percent impairment of her left arm under the standards of the sixth edition of the A.M.A., *Guides*. The Board used the January 4, 2010 report of Dr. MacMaster to justify its rescission of a portion of the schedule award compensation appellant had previously received.¹⁷

The Board finds that OWCP did not show good cause for rescinding a portion of appellant’s entitlement to schedule award compensation. OWCP granted appellant a schedule award based on an impairment rating that was calculated primarily under the standards of the fifth edition of the A.M.A., *Guides*. After further development of the medical evidence, it rescinded a portion of appellant’s entitlement to schedule award compensation based on a lower impairment rating calculated under the standards of the sixth edition of the A.M.A., *Guides*.¹⁸

However, FECA Bulletin No. 09-03 provides that, in such a circumstance, OWCP should make the finding that the claimant has no more than the percentage of impairment originally awarded, that the evidence does not establish an increased impairment and that there is no basis

¹⁵ *Id.*

¹⁶ Dr. Mobley, a Board-certified internist serving as an OWCP medical adviser, indicated that he agreed with the impairment rating of Dr. Sarris.

¹⁷ Dr. Mobley indicated that he agreed with the impairment rating of Dr. MacMaster. OWCP had previously granted appellant a schedule award for a 13 percent permanent impairment of her right arm and a 10 percent permanent impairment of her left arm. Given its new determination that appellant only an eight percent permanent impairment of her right arm and a five percent permanent impairment of her left arm, it effectively rescinded the difference between the two schedule award calculations.

¹⁸ Appellant continued to claim entitlement to an increased schedule award throughout the period that OWCP was developing the medical evidence.

for declaring an overpayment.¹⁹ OWCP did not follow its procedures and should have found that appellant had no more than the percentage of impairment originally awarded.²⁰ Rather, it rescinded appellant's entitlement to a portion of schedule award compensation. OWCP did not present adequate justification for its rescission action. The Board finds that OWCP improperly rescinded a portion of appellant's entitlement to schedule award compensation.

LEGAL PRECEDENT -- ISSUE 2

Section 8102(a) of FECA 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 her duty.²¹ Section 8129(a) of FECA 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.”²²

ANALYSIS -- ISSUE 2

OWCP determined that appellant received a \$22,314.67 overpayment of compensation because she had received schedule award compensation for a 13 percent impairment of her right arm and a 10 percent impairment of her left arm, but was only entitled to receive schedule award compensation for an 8 percent impairment of her right arm and a 5 percent impairment of her left arm.²³ For the reasons explained above, it did not justify its rescission of the difference in schedule award compensation between these two schedule award ratings. Therefore, OWCP had no basis to declare that appellant received a \$22,314.67 overpayment of compensation. The Board finds that OWCP improperly determined that appellant received a \$22,314.67 overpayment of compensation.²⁴

¹⁹ The procedure manual provides that, if a claimant who has received a schedule award calculated under a previous edition of the A.M.A., *Guides* is entitled to additional benefits, the increased award will be calculated according to the sixth edition. Should the subsequent calculation result in a percentage of impairment lower than the original award (as sometimes occurs), a finding should be made that the claimant has not more than the percentage of impairment originally awarded, that the evidence does not establish an increased impairment, and that OWCP has not basis for declaring an overpayment. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.7(b)(4) (January 20101).

²⁰ See also *James R. Doty*, 52 ECAB 163 (2000) (OWCP should have found that appellant had no more than the percentage of impairment originally awarded when impairment rating calculated under new edition of the A.M.A., *Guides* was lower than that calculated under prior edition).

²¹ 5 U.S.C. § 8102(a).

²² *Id.* at § 8129(a).

²³ OWCP indicated that appellant previously received \$53,758.34 in schedule award compensation, but was only entitled to receive \$31,443.67.

²⁴ Given the Board's finding that OWCP improperly determined that appellant received a \$22,314.67 overpayment of compensation, it is not necessary to consider the third issue of this appeal, *i.e.*, whether OWCP abused its discretion by refusing to waive recovery of the overpayment.

CONCLUSION

The Board finds the OWCP improperly rescinded a portion of appellant's entitlement to schedule award compensation. The Board further finds that OWCP improperly determined that appellant received a \$22,314.67 overpayment of compensation.

ORDER

IT IS HEREBY ORDERED THAT the May 24, 2010 decision of the Office of Workers' Compensation Programs' decision is reversed with regard to the rescission and overpayment matters.

Issued: September 22, 2011
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