

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

D.A., Appellant)	
)	
and)	Docket No. 11-414
)	Issued: September 21, 2011
U.S. POSTAL SERVICE, POSTAL)	
INSPECTION SERVICE, Newark, NJ, Employer)	
)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 17, 2010 appellant filed a timely appeal from an October 4, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act (FECA)¹ and 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 a permanent impairment to her left arm; (2) whether OWCP properly found an overpayment of \$6,448.76 was created due to payment of a schedule award for which appellant was not entitled; (3) whether OWCP properly denied waiver of the overpayment; and (4) whether OWCP properly denied appellant's request for reconsideration of a June 1, 2010 decision.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

In the present case, OWCP accepted that appellant sustained aggravation of lumbar strain and left arm contusion in the performance of duty on May 3, 2002. On a prior appeal, the Board affirmed the termination of compensation for wage-loss and medical benefits effective May 18, 2003.² The history of the case as provided in the Board's prior decision is incorporated herein by reference.

In a report dated July 17, 2008, Dr. David Weiss, an attending osteopath, opined that, under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), appellant had a 51 percent permanent impairment to the left arm. OWCP referred appellant for a second opinion examination by Dr. Kevin Hanley, an orthopedic surgeon. In a report dated March 19, 2009, Dr. Hanley opined that appellant had a four percent left arm permanent impairment under the sixth edition of the A.M.A., *Guides*.

By decision dated May 12, 2009, OWCP issued a schedule award for a four percent permanent impairment to the left arm. The period of the award was 12.48 weeks commencing May 18, 2003.

Appellant requested a hearing before OWCP's hearing representative. By decision dated August 14, 2009, the hearing representative set aside the May 12, 2009 decision, finding there was a conflict in the medical evidence as to the extent of a left arm permanent impairment.³ OWCP referred appellant to Dr. E. Michael Okin, a Board-certified orthopedic surgeon, to resolve the conflict.

In a report dated November 12, 2009, Dr. Okin provided a history and results on examination. He opined that appellant had a two percent left arm impairment due to shoulder tendinitis. Dr. Okin identified Table 15-5 of the A.M.A., *Guides*.

OWCP's medical adviser provided a report dated November 25, 2009. The medical adviser noted there were four other compensation claims filed by appellant. According to the medical adviser, the impairment for the left shoulder was not causally related to an accepted condition and therefore there was no employment-related impairment.

By decision dated December 1, 2009, OWCP stated that the May 12, 2009 decision was set aside and appellant's claim for a schedule award was denied based on the medical evidence. In a letter dated December 14, 2009, it notified her of a preliminary determination that an

² Docket No. 07-1790 (issued February 6, 2008).

³ FECA provides that, if there is a 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 the examination. 5 U.S.C. § 8123(a). The implementing regulations states that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or OWCP's medical adviser, OWCP shall appoint a third physician to make an examination. This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case. 20 C.F.R. § 10.321 (1999).

overpayment of \$6,448.76 had been created. OWCP explained that the medical evidence established appellant had no permanent impairment to the left arm, and therefore the payment of the schedule award resulted in an overpayment of compensation. Appellant was advised that she was without fault in creating the overpayment, and was advised as to actions she could take with respect to the preliminary overpayment decision and waiver of the overpayment.

On January 15, 2010 appellant submitted an overpayment recovery questionnaire (Form OWCP-20) and requested a preresumption hearing. By decision dated February 24, 2010, an OWCP hearing representative reversed the preliminary overpayment determination. The hearing representative found the overpayment issue was moot, citing OWCP regulations.⁴

By decision dated April 1, 2010, OWCP's Branch of Hearings and Review vacated the February 24, 2010 decision. The Branch found that this was not a situation where a schedule award had been issued under the fifth edition, and the preliminary overpayment determination should be reinstated.

In a decision dated June 1, 2010, a hearing representative affirmed the determination that appellant was not entitled to a schedule award. The hearing representative found the weight of the evidence was represented by Dr. Okin, who indicated that the shoulder condition was preexisting.

By decision dated September 13, 2010, OWCP denied reconsideration, without review of the merits, of the June 1, 2010 OWCP decision. In a decision dated October 4, 2010, it finalized the determination of a \$6,448.76 overpayment of compensation. OWCP denied waiver of the overpayment, indicating the financial information on the OWCP-20 form was incomplete.

LEGAL PRECEDENT -- ISSUE 1

Section 8107 of FECA provides that, if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.⁵ Neither FECA nor the regulations specify the manner in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal justice for all claimants OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.⁶ For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition.⁷

⁴ The hearing representative cited FECA Bulletin No. 09-03, which provides that, if a calculation under the sixth edition results in a lesser impairment than previously awarded under the fifth edition, OWCP should find there was no increased impairment, but there was no basis for an overpayment.

⁵ 5 U.S.C. § 8107. This section enumerates specific members or functions of the body for which a schedule award is payable and the maximum number of weeks of compensation to be paid; additional members of the body are found at 20 C.F.R. § 10.404(a).

⁶ A. George Lampo, 45 ECAB 441 (1994).

⁷ FECA Bulletin No. 09-03 (March 15, 2009).

ANALYSIS

OWCP has made a finding that appellant does not have an employment-related permanent impairment to her left arm, based on the November 12, 2009 report from the physician selected as a referee, Dr. Okin. A review of this report does not, however, support the OWCP findings. According to OWCP's medical adviser, in a November 25, 2009 report, Dr. Okin had found the accepted conditions had resolved, but Dr. Okin did not provide an opinion that employment-related conditions had resolved, or provide any accompanying medical rationale in support of such opinion. Dr. Okin noted in his review of medical records that Dr. Hanley had opined that appellant's lumbosacral sprain had resolved, without offering his own opinion.

Dr. Okin stated that appellant had a two percent left arm impairment based on shoulder tendinitis, citing Table 15-5 of the sixth edition of the A.M.A., *Guides*. The accompanying worksheet does not clearly explain how Table 15-5 was applied. OWCP's medical adviser finds that this impairment was not employment related, but Dr. Okin did not provide such an opinion. He was asked to provide an opinion as to an employment-related permanent impairment, and he offered an opinion as to a left arm impairment. If OWCP required clarification as to whether Dr. Okin felt the described impairment was employment related, it should have asked for clarification. The Board notes that, when the case is referred to a referee physician, it is the referee physician who must resolve the conflict.⁸ OWCP's medical adviser cannot resolve a conflict in the medical evidence.⁹ In addition, Dr. Okin did not comment on the prior schedule award or discuss appellant's condition as of May 12, 2009, the date of the original schedule award. The medical evidence must address appellant's condition at that time before OWCP can properly make a determination that the May 12, 2009 decision did not reflect the degree of employment-related permanent impairment.

As Dr. Okin did not provide a rationalized opinion on the issues presented, the case will be remanded to OWCP to properly resolve the medical issues.¹⁰ Since the overpayment was based on a finding that appellant was not entitled to a schedule award, the overpayment issues are not in posture for decision until the underlying medical issues are resolved.¹¹ After such further development of the evidence as is deemed warranted, OWCP should issue an appropriate decision.

⁸ See *Thomas J. Fragale*, 55 ECAB 619 (2004).

⁹ *M.M.*, Docket No. 10-2252 (issued June 15, 2011).

¹⁰ OWCP should refer appellant to a new physician selected as a referee physician in accord with its procedures. The Board will not address appellant's arguments regarding the selection of Dr. Okin since the case will be remanded for selection of a new referee physician.

¹¹ The Board also will not address the September 13, 2010 decision denying merit review, as appellant will receive a merit decision on the issues presented.

CONCLUSION

The Board finds the case is not in posture for decision and is remanded for further development of the evidence.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 4, 2010 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: September 21, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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