

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

K.N., Appellant)	
)	
and)	Docket No. 11-540
)	Issued: February 2, 2012
U.S. POSTAL SERVICE, POST OFFICE, Portland, OR, Employer)	
)	

Appearances:
James D. Halstead, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On August 31, 2010 appellant, through her representative, filed a timely appeal¹ from a June 10, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP). The appeal was also timely filed from a June 10, 2010 nonmerit decision denying her request for a precoupment hearing. Pursuant to the Federal Employees' Compensation Act (FECA)² and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.³

ISSUE

The issues are: (1) whether OWCP properly rescinded a portion of appellant's entitlement to schedule award compensation; (2) whether appellant received an overpayment of compensation; (3) whether OWCP abused its discretion by refusing to waive recovery of the

¹ The Board accepted appellant's delivery confirmation dated August 31, 2010 as proof of a timely filed appeal. See 20 C.F.R. § 501.3(f)(1).

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the issuance of the June 10, 2010 OWCP decisions, appellant submitted new evidence. The Board is precluded from reviewing evidence which was not before OWCP at the time it issued its final decision. See 20 C.F.R. § 501.2(c)(1).

overpayment; and (4) whether OWCP properly denied appellant's request for a preresoupment hearing.

On appeal, appellant's representative contends that OWCP has no basis for declaring an overpayment in this case as the original schedule award was based on the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001) and the overpayment was based on an impairment rating under the standards of the sixth edition of the A.M.A., *Guides* (6th ed. 2009).

FACTUAL HISTORY

On June 22, 2005 appellant, then a 48-year-old rural carrier, filed an occupational disease claim (Form CA-2) alleging that she sustained bilateral carpal tunnel syndrome due to factors of her federal employment.

By decision dated August 11, 2005, OWCP accepted appellant's claim for bilateral carpal tunnel syndrome.

On October 26, 2005 Dr. Heidi Bloom, a Board-certified orthopedic surgeon, performed a right carpal tunnel release. Appellant received wage-loss compensation for the period October 25 to December 20, 2005. Dr. Bloom released her to full duty without limitations on February 13, 2006.

On March 12, 2006 appellant filed a claim for a schedule award.

In a February 28, 2006 report, Dr. Thomas J. Purtzer, a Board-certified neurosurgeon, opined that appellant had an 18 percent right upper extremity impairment rating. Thereafter, on January 15, 2007 Dr. Purtzer opined that appellant had 22 percent impairment to the right upper extremity.

On October 29, 2007 district medical adviser Dr. Kenneth D. Sawyer, a Board-certified general surgeon, reviewed the medical records and recommended five percent right upper extremity impairment based on the standards of the fifth edition of the A.M.A., *Guides*.

By decision dated December 3, 2007, OWCP granted appellant a schedule award for five percent impairment for the period January 15 to May 4, 2007.

On December 10, 2007 appellant requested an oral hearing which was held before an OWCP hearing representative *via* telephone on April 29, 2008.

By decision dated June 18, 2008, the hearing representative vacated the December 3, 2007 decision and, based on inconsistent physical findings, remanded the case for a second opinion examination.

In a September 30, 2008 second opinion report, Dr. Douglas P. Morrison, a Board-certified orthopedic surgeon, diagnosed residual weakness right hand, secondary to median nerve-related issues and surgery. He found that, according to the fifth edition of the A.M.A., *Guides*, appellant had no disability related to amputation or sensory changes. Appellant had four to five millimeters two-point discrimination throughout the hands. She had 16 kilograms of grip

strength on the right side and 31 kilograms on her minor side, which Dr. Morrison indicated exceeded the expected grip strength on the minor side but revealed a deficit on the major side. Appellant was normal on the dominant right side and exceeded the expected pinch strength on her left side. She appeared to fit into grade five, or a zero percent deficit, as she had normal two-point discrimination, but she did have some complaints of dysesthesias. Appellant had a 0.31 index based on both grip and pinch strength. Dr. Morrison concluded that she had 10 percent upper extremity impairment.

In an October 22, 2008 review, Dr. Morley Slutsky, a district medical adviser and a physician Board-certified in occupational medicine, found two percent right upper extremity impairment and a maximum medical improvement date of September 30, 2008. He stated that Dr. Morrison rated a median nerve motor deficit using grip strength measurements which was not the correct method per the fifth edition of the A.M.A., *Guides*. Dr. Slutsky found that appellant's grade five strength corresponded to 15 percent deficit and when that was multiplied by 10 percent, the maximum value assigned for median nerve motor impairment, the final rating was 1.5 percent. Rounding it to the nearest integer, the district medical adviser concluded that appellant's right upper extremity impairment rating was two percent.

By decision dated October 30, 2008, OWCP granted appellant a schedule award for two percent impairment to the right arm for the period September 30 to November 12, 2008, finding that Dr. Slutsky's report constituted the weight of the medical evidence.

On November 10, 2008 appellant requested an oral hearing.

On March 23, 2009 an oral hearing was held before an OWCP hearing representative.

By decision dated June 1, 2009, an OWCP hearing representative vacated the October 30, 2008 schedule award decision and remanded the case for further development, including a request for a supplemental report from Dr. Morrison utilizing the sixth edition of the A.M.A., *Guides* and for OWCP to consider the claim for impairment to the left upper extremity.

In a February 19, 2009 preliminary overpayment determination, OWCP found that appellant was erroneously paid five percent impairment for the right arm, instead of two percent as calculated by the medical adviser. OWCP noted that the amount previously paid by December 3, 2007 decision for the five percent schedule award was \$11,085.01; however, OWCP revised the schedule award to two percent entitling appellant to \$4,669.08, which resulted in a \$6,415.93 overpayment. It determined that appellant was not at fault in the creation of the overpayment. OWCP advised appellant that she had the right to submit, within 30 days, evidence or arguments regarding the overpayment and her eligibility for waiver of the overpayment and provided appellant with an overpayment questionnaire to submit.

On March 9, 2009 appellant requested a prerecoupment hearing.

On June 9, 2009 a prerecoupment hearing was held *via* telephone.

By decision dated June 30, 2009, another OWCP hearing representative vacated the preliminary overpayment decision dated February 19, 2009 on the basis that the decision had been set aside and remanded by decision dated June 1, 2009 and thus there was no overpayment of compensation at that time.

In a September 2, 2009 second opinion report, Dr. Frederick Tiley, a Board-certified orthopedic surgeon, diagnosed bilateral carpal tunnel syndrome. He indicated that there was maximum medical improvement on the right and no change on the left as no surgery had been accomplished. Dr. Tiley stated that according to the sixth edition of the A.M.A., *Guides* appellant had a grade 1 conduction delay with a grade modifier of 2 and the physical findings were grade 1 except for some weakness, with a grade modifier of 4. He stated that the correct *QuickDASH* (the disabilities of the arm, shoulder and hand) score was 50 which was high and in the moderate range. Dr. Tiley concluded that appellant had two percent upper extremity impairment, equal bilaterally.

On October 23, 2009 the district medical adviser reviewed the medical records and requested supplemental reports.

In a November 5, 2009 report, Dr. Tiley indicated that appellant had a conduction delay with a grade modifier of 2 and a *QuickDASH* score of 50 with a grade modifier of 2. He noted that she continued to have symmetric symptomatology, normal reflexes in the upper extremities, biceps, triceps and brachioradialis, slight atrophy of the thenar eminence, bilaterally, right greater than left, diminished grip strength and pinch strength on the right, negative Phalen's bilaterally, and slight Tinel's on the right, all of which would be a grade modifier of 2. Dr. Tiley stated that the average grade modifier was 2 and opined that appellant had five percent upper extremity impairment.

On December 24, 2009 the district medical adviser reviewed the medical evidence of record and opined that appellant's final right upper extremity impairment was three percent. Dr. Slutsky indicated that Dr. Tiley's report was not consistent with the sixth edition of the A.M.A., *Guides* as Table 15-23, page 449 states that conduction delays are equal to grade modifier 1, not 2.

By decision dated December 30, 2009, OWCP granted appellant a schedule award for three percent impairment to the right arm for the period September 3 to November 7, 2000, finding that Dr. Slutsky's report constituted the weight of the medical evidence.

In a February 4, 2010 preliminary overpayment determination, OWCP found that appellant was erroneously paid five percent impairment for the right arm, instead of three percent as calculated by the medical adviser, for the period January 15 to May 4, 2007. It noted that the amount previously paid under the five percent schedule award was \$11,085.01; however, it revised the schedule award to three percent entitling appellant to \$7,003.62, which resulted in a \$4,081.39 overpayment. OWCP determined that appellant was not at fault in the creation of the overpayment. It advised her that she had the right to submit, within 30 days, evidence or arguments regarding the overpayment and her eligibility for waiver of the overpayment and provided her with an overpayment questionnaire to submit.

On February 25, 2010 appellant requested a telephone conference.

By postmark dated March 31, 2010 appellant requested a prerecoupment hearing.

A telephone conference was held on April 14, 2010.

In a June 10, 2010 decision, OWCP determined that appellant received a \$4,081.39 overpayment of compensation. It addressed how the overpayment occurred and further found that she was not eligible for waiver as recovery of the overpayment would not defeat the purpose of FECA and it would be against equity and good conscience. OWCP requested that she repay the overpayment by remitting \$250.00 every month.

By decision dated June 10, 2010, OWCP denied appellant's request for a preresoupment hearing as untimely filed.

LEGAL PRECEDENT -- ISSUE 1

Section 8128 of 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.⁴ 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 and issue a new decision.⁵ 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.⁶

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.⁷

The schedule award provision of FECA⁸ and its implementing regulations⁹ 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.¹⁰

⁴ 5 U.S.C. § 8128.

⁵ See *John W. Graves*, 52 ECAB 160, 161 (2000).

⁶ See 20 C.F.R. § 10.610.

⁷ See *John W. Graves*, *supra* note 5.

⁸ 5 U.S.C. § 8107.

⁹ 20 C.F.R. § 10.404.

¹⁰ *Id.*

According to FECA Bulletin No. 09-03, the effective date of the sixth edition of the A.M.A., *Guides* is May 1, 2009.¹¹ 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 edition of the A.M.A., *Guides* is in use. A claimant who has received a schedule award calculated under a previous edition and who claims an increased award, will receive a calculation according to the sixth edition 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 claims examiner or hearing representative 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 therefore OWCP has no basis for declaring an overpayment.¹²

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained bilateral carpal tunnel syndrome due to factors of her federal employment. It granted her a schedule award for five percent permanent impairment of her right arm. The award was based on the impairment rating of Dr. Sawyer, a Board-certified general surgeon serving as a district medical adviser, who applied the standards of the fifth edition of the A.M.A., *Guides* to the clinical findings of Dr. Purtzer.

OWCP further developed the medical evidence and referred appellant to Dr. Tiley, a Board-certified orthopedic surgeon, for a second opinion examination of her arm impairment. In a September 2, 2009 report, Dr. Tiley opined that appellant had two percent upper extremity impairment, equal bilaterally, under the standards of the sixth edition of the A.M.A., *Guides*. Thereafter, on November 5, 2009 he opined that appellant had five percent upper extremity impairment. On December 24, 2009 Dr. Slutsky, a physician Board-certified in occupational medicine serving as a district medical adviser, reviewed the medical evidence of record and opined that appellant's final right upper extremity impairment was three percent based on the report of Dr. Morrison. The Board used the December 24, 2009 report of Dr. Slutsky to justify its rescission of a portion of the schedule award compensation appellant had previously received.¹³

The Board finds that OWCP did not show good cause for rescinding a portion of appellant's entitlement to schedule award compensation. OWCP granted her 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*.

¹¹ FECA Bulletin No. 09-03 (issued March 15, 2009).

¹² *Id.*

¹³ OWCP had previously granted appellant a schedule award for a five percent permanent impairment to her right arm. Given its new determination that she only had a three percent permanent impairment to her right arm, it effectively rescinded the difference between the two schedule award calculations.

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 for declaring an overpayment.¹⁴ OWCP did not follow its procedures and should have found that appellant had no more than the percentage of impairment originally awarded.¹⁵ Rather, it rescinded her 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.¹⁶ 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.¹⁷

ANALYSIS -- ISSUE 2

OWCP determined that appellant received a \$4,081.39 overpayment of compensation because she had received schedule award compensation for five percent impairment to the right arm, but was only entitled to receive schedule award compensation for three percent impairment to the right arm.¹⁸ 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 \$4,081.39 overpayment of compensation. The Board finds that OWCP improperly determined that she received a \$4,081.39 overpayment of compensation.¹⁹

¹⁴ *Supra* note 11.

¹⁵ *See S.W.*, Docket No. 10-2386 (issued September 22, 2011) (where the Board reversed OWCP's rescission and overpayment matters regarding a reduced schedule award based on a recalculation under a newer version of the A.M.A., *Guides*. The Board found OWCP did not show good cause for its rescission of a portion of a schedule award which resulted in a lesser percentage of impairment applying the sixth edition of the A.M.A., *Guides* than that originally awarded under the fifth edition of the A.M.A., *Guides* and, thus, there was no overpayment). *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).

¹⁶ 5 U.S.C. § 8102(a).

¹⁷ *Id.* at § 8129(a).

¹⁸ OWCP indicated that appellant previously received \$11,085.01 in schedule award compensation, but was only entitled to receive \$7,003.62.

¹⁹ Given the Board's finding that OWCP improperly determined that appellant received a \$4,081.39 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.

Appellant may request a schedule award or increased schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

CONCLUSION

The Board finds that OWCP improperly rescinded a portion of appellant's entitlement to schedule award compensation and improperly determined that appellant received a \$4,081.39 overpayment of compensation.

ORDER

IT IS HEREBY ORDERED THAT the June 10, 2010 merit decision of the Office of Workers' Compensation Programs is reversed.²⁰

Issued: February 2, 2012
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

²⁰ In view of the Board's disposition of the partial rescission and overpayment issues, the June 10, 2010 nonmerit decision regarding the denial of the preredemption hearing as untimely filed is rendered moot.