

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SUSANA SANCHEZ and DEPARTMENT OF JUSTICE,
BUREAU OF PRISONS, Anthony, NM

*Docket No. 99-43; Submitted on the Record;
Issued July 12, 2000*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly rescinded appellant's schedule award for a 10 percent permanent impairment of her left upper extremity on the grounds that recent medical evidence supported only a 2 percent permanent impairment of her left upper extremity; and if so (2) whether the Office abused its discretion in denying waiver of an overpayment of compensation in the amount of \$8,437.22 which constituted the difference in the schedule award.

On April 23, 1991 appellant, then a 37-year-old administrative assistant, sustained an employment injury to her left elbow while attempting to unlock and open a heavy door. On May 21, 1991 the Office accepted appellant's claim for a left elbow strain. On July 31, 1994 appellant filed a claim for a schedule award.

In support of her claim for a schedule award, appellant submitted a medical report dated August 25, 1994 from Dr. Jacob S. Heydeman, a Board-certified orthopedic surgeon and treating physician. In his report, Dr. Heydeman stated that appellant had reached maximum medical improvement and had regained full range of motion, but continued to experience some tingling or numbing down her arm in the ulnar nerve distribution, consistent with an ulnar nerve subluxation at the level of the left elbow. He diagnosed mild ulnar nerve neuropathy at the level of the left elbow and stated that pursuant to the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* this equated to a 10 percent permanent impairment of the left upper extremity.¹

¹ Dr. Heydeman stated that he had applied Table 10, page 40 of the fourth edition of the A.M.A., *Guides*; however, this appears to be a typographical error, as there is no Table 10 contained on the page indicated.

In a memorandum dated December 4, 1994, an Office medical adviser, having reviewed Dr. Heydeman's reports at the Office's request, stated that pursuant to the fourth edition of the A.M.A., *Guides*, mild ulnar nerve entrapment equates to 10 percent permanent impairment.²

By decision dated December 21, 1994, the Office granted appellant 31.20 weeks of schedule award compensation, based on a 10 percent permanent impairment of the left upper extremity.

On July 22, 1997 appellant filed a claim for an increased schedule award, alleging that her condition had worsened. She additionally requested authorization to change her treating physician to Dr. Thomas E. Alost, Jr.

By letter dated August 5, 1997, the Office authorized the change in treating physicians, and requested that appellant submit updated factual and medical evidence in support of her claim for an additional schedule award.

In response to the Office request, appellant submitted treatment notes and test results from Dr. Alost, dated August 20 through September 29, 1997. In these reports, Dr. Alost diagnosed ulnar nerve entrapment at the left elbow, with a positive Tinel's sign and palpable tenderness. In a report dated October 22, 1997, Dr. Alost stated that appellant had reached maximum medical improvement but still had some pain with activity as a result of her ulnar nerve entrapment. He concluded that, based on the fourth edition of the A.M.A., *Guides*, appellant had no less than a 2 percent permanent impairment of her left upper extremity due to a 25 percent impairment secondary to sensory defect based on Table 11, Classification A, Grade-III and that utilizing Table 15, 25 percent of 7 percent impairment of the upper extremity equates to a 2 percent impairment of the upper extremity.

By decision dated March 3, 1998, the Office rejected appellant's claim for an additional schedule award, finding that Dr. Alost's assessment of a 2 percent impairment of the left upper extremity failed to exceed the previous schedule award of 10 percent, and that in fact, it appeared that appellant had been overpaid for the permanent impairment of her left arm. In advising appellant that this second schedule award for a 2 percent impairment superseded the prior 10 percent award, the Office effectively rescinded its prior award. By letter dated March 3, 1998, the Office informed appellant that a preliminary determination had been made that she received an overpayment of compensation in the amount of \$8,437.22, representing the difference between the 10 percent previously awarded appellant and her current entitlement to only a 2 percent award, and that she was without fault in this matter. The Office advised appellant that she could submit additional evidence, including specified financial information and request a hearing or reevaluation on the record with regard to the fact or amount of the overpayment and whether the overpayment should be waived.

By decision dated August 3, 1998, after reviewing the additional evidence submitted by appellant, the Office finalized its preliminary determination, finding that appellant received an overpayment in the amount of \$8,437.22 and that the overpayment was not subject to waiver.

² A.M.A., *Guides*, fourth edition, Table 16, page 3/57.

The Board finds that the Office improperly rescinded appellant's schedule award for a 10 percent permanent impairment of her left upper extremity on the grounds that the most recent medical evidence established only a 2 percent permanent impairment of the left upper extremity.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. This holds true where, as here, the Office later decides that it had erroneously accepted the claim.³

In rescinding the schedule award, the Office relied on the October 22, 1997 opinion of Dr. Alost, who, applying the tables in the A.M.A., *Guides* used for determining impairment due to sensory defect, opined that appellant's ulnar nerve entrapment equated to a two percent permanent impairment. The Board notes, however, that impairment to the hand and upper extremity secondary to entrapment neuropathy may be derived by measuring the sensory and motor deficits, as done by Dr. Alost, or, alternatively, may be done using Table 16, page 57, as utilized by Dr. Heydeman and the Office medical adviser, whose opinions formed the basis for the original 10 percent award.⁴ As the A.M.A., *Guides* provides that either method of measuring impairment may be used, and as both Dr. Heydeman and Dr. Alost diagnosed ulnar nerve neuropathy due to entrapment, indicating that appellant's condition has not improved but has remained unchanged, Dr. Alost's report does not establish that appellant has less than a 10 percent permanent impairment of the left upper extremity. Therefore, the Office improperly rescinded appellant's schedule award.

As the Office improperly rescinded the schedule award, and therefore improperly found an overpayment of compensation based on the payment of the schedule award, the Board need not reach the question whether the Office abused its discretion in denying waiver of the overpayment.

³ *Gerald W. Keoppel*, 35 ECAB 885 (1984); *James E. Johnson*, 35 ECAB 695 (1984).

⁴ A.M.A., *Guides*, fourth edition, page 3/56.

The decisions of the Office of Workers' Compensation Programs dated August 3 and March 3, 1998 are reversed.

Dated, Washington, D.C.
July 12, 2000

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member