

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ANNE J. MATHEWS and DEPARTMENT OF EDUCATION,
RESEARCH LIBRARY, Washington, DC

*Docket No. 99-31; Submitted on the Record;
Issued May 17, 2000*

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether appellant has more than a 15 percent permanent impairment to her left arm; (2) whether the Office of Workers' Compensation Programs properly found an overpayment of \$1,096.87; and (3) whether the Office properly denied waiver of the overpayment.

In a decision dated March 10, 1997, the Office issued a schedule award for a 10 percent permanent impairment of the left arm. This decision was affirmed by a hearing representative in a decision dated July 15, 1997. By decision dated October 9, 1997, the Office issued a schedule award for an additional 6 percent permanent impairment, for a total of 16 percent. In a decision dated October 23, 1997, the Office modified the decision to reflect that appellant's total impairment was 15 percent for the left arm. The Office denied modification of the schedule award in a decision dated June 5, 1998.

In a letter dated February 3, 1998, the Office advised appellant that a preliminary determination had been made that an overpayment of \$1,096.87 had been created. The Office also determined that appellant was not at fault in creating the overpayment and appellant was advised to submit evidence with respect to waiver of the overpayment within 30 days. By decision dated March 31, 1998, the Office finalized the overpayment.

The Board has reviewed the record and finds that appellant has not established more than a 15 percent permanent impairment to the left arm.

Section 8107 of the Federal Employees' Compensation Act 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.¹ Neither the Act 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 the Office has adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the uniform standard applicable to all claimants.²

In the present case, the Office referred appellant to Dr. Ralph L. Cotton, an orthopedic surgeon. Dr. Cotton submitted a report dated November 12, 1996, opining that appellant had a 56 percent permanent impairment to the left arm, based on loss of range of motion in the shoulder, loss of strength and pain. As noted by an Office medical adviser in a report dated November 12, 1996, the range of motion impairments are inconsistent, since Dr. Cotton included impairments for ankylosis, as well as impairments for flexion, extension, adduction and abduction.³ In addition, he did not provide an explanation for his impairment as to loss of strength. The medical adviser indicated that appellant had a 10 percent impairment based on the loss of range of motion for flexion, extension, adduction and abduction.⁴ Based on this evidence, the Office initially issued a schedule award for a 10 percent permanent impairment.

In a report dated August 25, 1997, Dr. Douglas J. Strahley, an orthopedic surgeon, opined that appellant had an 18 percent permanent impairment to the left arm under the A.M.A., *Guides*. Dr. Strahley indicated that appellant had 10 percent for loss of motion, 4 percent for weakness due to absent rotator cuff function and 6 percent for mild joint crepitus, which is combined for a total 18 percent. An Office medical adviser reviewed the report in a memorandum dated October 2, 1997. He noted that the 10 percent for loss of range of motion was in accord with the previous schedule award. With respect to crepitus, the medical adviser noted that under the A.M.A., *Guides* is determined by application of Tables 18 and 19.⁵ Using these tables, the maximum impairment for the glenohumeral joint is 60 percent and a mild crepitus is graded at 10 percent of the maximum, for a 6 percent impairment.

As noted above, Dr. Strahley had included a four percent impairment weakness due to absent rotator cuff. The medical adviser indicated that, under the A.M.A., *Guides*, there was no provision for adding an impairment for weakness in this situation. The Board notes that the A.M.A., *Guides* do provide impairments for motor deficits and loss of power, but these impairments are related to peripheral nerve disorders and require the identification of the

¹ 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. § 10.304(b).

² A. George Lampo, 45 ECAB 441 (1994).

³ An ankylosed joint is a completely immobile joint; see A.M.A., *Guides* 15 (fourth edition 1993). The results for flexion and extension, for example, are inconsistent with an immobile shoulder joint.

⁴ Under the A.M.A., *Guides*, Figure 38, 130 degrees of flexion results in a 3 percent impairment, 20 degrees of extension a 2 percent impairment. Under Figure 41, abduction of 100 degrees is a 4 percent impairment, an adduction of 10 degrees is a 1 percent impairment.

⁵ A.M.A., *Guides*, 58, 59, Tables 18-19.

affected nerve and application of the appropriate tables.⁶ In a report dated April 3, 1998, Dr. Straehley apparently concedes that the A.M.A., *Guides* do not provide for an additional impairment due to loss of strength in the present case, arguing that the A.M.A., *Guides* are unfair in this respect. The A.M.A., *Guides* are, however, the standard for evaluating permanent impairment under the Act and in this case, the evidence does not establish an additional impairment for loss of strength.

Based on the medical evidence, the Office medical adviser properly concluded that appellant's impairment was 10 percent for loss of range of motion and 6 percent for mild crepitus. Under the A.M.A., *Guides*, these values are not added but combined using the Combined Values Chart, resulting in a 15 percent impairment.⁷

The Board further finds that the Office properly found that an overpayment of \$1,096.87 was created.

In this case, the Office apparently misinterpreted the Office medical adviser's October 2, 1997 report. The medical adviser properly indicated that the 10 percent impairment for loss of range of motion and the 6 percent for crepitus were to be combined for a total of 15, but the Office added the results and issued a schedule award for a 16 percent impairment. This was incorrect and resulted in an overpayment of 1 percent, or 3.12 weeks of compensation, totaling \$1,096.87.

The Board further finds that the Office properly denied waiver of the overpayment.

Section 8129(b) of the Act⁸ provides: "Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience."⁹ Since the Office found appellant to be without fault in the creation of the overpayment, the Office may only recover the overpayment if recovery would neither defeat the purpose of the Act nor be against equity and good conscience. The guidelines for determining whether recovery of an overpayment would defeat the purpose of the Act or would be against equity and good conscience are set forth, respectively, in sections 10.322 and 10.323 of Title 20 of the Code of Federal Regulations.

Section 10.322(a) provides, generally, that recovery of an overpayment would defeat the purpose of the Act if recovery would cause hardship by depriving the overpaid individual of income and resources needed for ordinary and necessary living expenses and, also, if the individual's assets, those, which are not exempt from recovery, do not exceed a resource base of

⁶ *Id.*, 48-54.

⁷ *Id.*, 322, 24. The A.M.A., *Guides* note that the method for combining impairments is based on the idea that a second or succeeding impairment should apply not to the whole, but only to the part that remains after the first impairments have been applied.

⁸ 5 U.S.C. §§ 8101-8193.

⁹ 5 U.S.C. § 8129(b).

\$3,000.00 (or \$5,000.00 if the individual has a spouse or one dependent).¹⁰ Section 10.323 provides that recovery of an overpayment would be against equity and good conscience if: (1) the overpaid individual would experience severe financial hardship in attempting to repay the debt, with “severe financial hardship” determined by using the same criteria set forth in 20 C.F.R. § 10.322; or the individual, in reliance on the payment, which created the overpayment, relinquished a valuable right or changed his position for the worse.

The Office offered appellant an opportunity to submit evidence regarding waiver of the overpayment prior to finalizing the overpayment determination. The record does not indicate that appellant submitted any evidence with respect to the relevant issues on waiver. Appellant has the responsibility to provide pertinent financial information and failure to provide such information will result in denial of waiver of the overpayment.¹¹ Accordingly, the Office properly denied waiver in this case.

The decisions of the Office of Workers’ Compensation Programs dated June 5 and March 31, 1998 and October 23, 1997, are affirmed.

Dated, Washington, D.C.
May 17, 2000

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

¹⁰ To establish that recovery would defeat the purpose of the Act, appellant must show both that he needs substantially all his income to meet ordinary and necessary living expenses, and that his assets do not exceed the established resource base; *see Robert E. Wenholz*, 38 ECAB 311 (1986).

¹¹ 20 C.F.R. § 10.324.