

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

RONALD G. CHAVEZ, Appellant

and

**DEPARTMENT OF THE AIR FORCE, HILL
AIR FORCE BASE, UT, Employer**

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**Docket No. 04-279
Issued: April 7, 2004**

Appearances:
Ronald G. Chavez, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On November 12, 2003 appellant filed a timely appeal from a decision of the Office of Workers' Compensation Programs dated February 28, 2003, which granted a schedule award for a 10 percent bilateral permanent impairment of the upper extremities. 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 appellant has greater than 10 percent bilateral permanent impairment of the upper extremities, for which he received a schedule award; (2) whether the Office properly rescinded finding that he has no measurable impairment due to his accepted Achilles heel tendinitis; and (3) whether the Office properly denied appellant's request for a hearing.

FACTUAL HISTORY

On February 7, 2000 appellant, then a 51-year-old heavy mobile mechanic, filed a notice of occupational disease alleging that he suffered from elbow and heel conditions due to work

factors.¹ The Office originally accepted the claim for left lateral epicondylitis, but it was later expanded to include bilateral epicondylitis. Appellant underwent a left ulnar nerve release on July 13, 2000 and a right ulnar nerve release on August 12, 2000. He was assigned to limited duty and received compensation for intermittent periods of disability. On November 9, 2000 the claim was again expanded to include right Achilles heel tendinitis.

On December 20, 2000 appellant filed a Form CA-7 claim for a schedule award. Appellant had been under the care of Dr. David A. Cook, a Board-certified orthopedic surgeon, for treatment of his work injuries. In a treatment note dated December 20, 2000, Dr. Cook noted that appellant was requesting a rating for his combined ankle and upper extremity impairments. Dr. Cook indicated that, since February 20, 2000, appellant's ankle condition had improved and he felt there was no measurable impairment from chronic Achilles tendinitis.

In a January 3, 2001 report, Dr. Cook stated that appellant had 37 percent combined permanent impairment of the upper extremities under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). The Office referred Dr. Cook's report to an Office medical adviser, who indicated that appellant's elbow impairment could not be measured under the A.M.A., *Guides* until he had reached maximum medical improvement with respect to the right arm, *i.e.*, more than one year after his surgery. The Office medical adviser determined that appellant had a four percent impairment of the left arm. In a February 7, 2001 letter, the Office advised appellant that he could not be assessed a schedule award for bilateral arm impairment until a year or more had elapsed since his surgery.

In an April 11, 2001 report, Dr. Kevin Walker, a Board-certified podiatrist, opined that appellant had a one percent disability due to his work-related heel condition. He indicated that appellant's disability could increase if he continued to work and stand on his feet throughout the day.

On May 31, 2001 appellant filed a second Form CA-7 claim for a schedule award. In a May 31, 2001 letter, the Office asked appellant to submit current medical evidence addressing how his right Achilles tendinitis was related to his employment since he had not worked since July 13, 2000. The Office requested that appellant submit an opinion addressing his permanent impairment rating under the fifth edition of the A.M.A., *Guides*. In a decision dated August 21, 2001, the Office issued a schedule award for 25 percent impairment of the right lower extremity. The period of the award was January 3, 2001 to May 21, 2002.

In a January 28, 2002 report, Dr. Cook noted that appellant underwent a functional capacity evaluation (FCE) for assessment of his bilateral elbow condition on January 21, 2002.² He reported that appellant underwent strength testing that showed 70 pounds of grip strength on the right and 68 pounds on the left. Pain in the elbow was also noted when appellant performed gripping activities. Dr. Cook stated that Table 16-10 was the appropriate table for assessing appellant's impairment under the A.M.A., *Guides*. He opined that appellant was Grade 3, estimated as a 30 percent impairment on the right side and Grade 4 estimated as a 10 percent

¹ Appellant also filed an occupational disease claim on March 10, 2000 alleging bilateral elbow pain.

² The record contains a copy of a FCE report dated January 25, 2002, which is signed by a physical therapist.

impairment on the left side. Under the Combined Values Chart, he calculated that appellant had a 37 percent impairment for bilateral upper extremity impairment.

On February 15, 2002 appellant was examined by Dr. Corey D. Anderson, a Board-certified physical medical and rehabilitation specialist. Range of motion findings and the results of a neurological examination were noted. Dr. Anderson found that appellant had reached maximum medical improvement and calculated that appellant had a six percent impairment of the right arm and a zero impairment of the left arm.

On October 21, 2002 an Office medical adviser reviewed the case record and opined that appellant was entitled to a 10 percent bilateral upper extremity impairment. The Office medical adviser noted specific tables and pages under the A.M.A., *Guides* to support his rating but he did not specify the physician's report, from which he extrapolated the physical findings used for his conclusions regarding appellant's impairment determination.

In a letter dated December 4, 2002, the Office advised appellant that an overpayment had occurred in the case in the amount of \$26,608.40 because he had incorrectly been issued a schedule award for an impairment related to his right Achilles tendinitis. Appellant was found without fault in the creation of the overpayment.

In a February 13, 2003 telephone conference memorandum, an Office claims examiner noted that appellant had not "received all the appeal rights he was entitled to, *i.e.*, a zero permanent partial impairment [PPI] rating for the claim for schedule award on his foot and the 10 percent PPI of his upper extremities [had] to be issued." It was noted that appellant was not challenging the "25 percent lower extremity rating he was given and paid on and, which was responsible for this overpayment." A discussion followed of appellant's financial status for determination of waiver of the overpayment. On February 28, 2003, the Office determined that recovery would defeat the purposes of the Federal Employees' Compensation Act and absolved appellant of any indebtedness resulting from the overpayment in his case.

In a decision dated February 28, 2003, the Office issued a schedule award for a 10 percent permanent impairment of the bilateral upper extremities. The period of the award was from February 15 to September 21, 2002. The Office also issued another decision on February 28, 2003 denying appellant's claim for a schedule award based on the accepted condition of Achilles tendinitis. The Office specifically found that the December 20, 2000 report from Dr. Cook established that appellant had no measurable permanent impairment due to his Achilles tendinitis condition that would entitle him to a schedule award.

By letter postmarked June 30, 2003, appellant requested a review of the written record by the Branch of Hearings and Review. In a September 23, 2003 decision, the Office denied appellant's request for a review of the written record on the grounds that the request was untimely filed.

LEGAL PRECEDENT -- ISSUES 1 and 2

Once the Office accepts a claim and pays compensation benefits, it has the burden of justifying the termination or modification of compensation. This holds true where the Office

later decides that it erroneously accepted a claim. To support rescission of acceptance, the Office must establish that its prior acceptance was erroneous. Section 10.610 of the implementing regulations of the Office state:

“The [Act] specifies that an award for or against payment of compensation may be reviewed at any time on the Director’s own motion. Such review may be made without regard to whether there is new evidence or information. If the Director determines that a review of the award is warranted (including, but not limited to circumstances indicating a mistake of fact or law or changed conditions), the Director (at any time and on the basis of existing evidence) may modify, rescind, decrease or increase compensation previously awarded, or award compensation previously denied. A review on the Director’s own motion is not subject to a request or petition and none shall be entertained.”³

Section 8107 of the Act⁴ sets forth the number of weeks compensation to be paid for the permanent loss of use of specified members, functions and organs of the body. The Act, however, does not specify the manner, by which the percentage of loss of a member, function or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants.⁵ The implementing regulation have adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses. Effective February 1, 2001, schedule awards are determined in accordance with the fifth edition of the A.M.A., *Guides*.⁶

ANALYSIS -- ISSUE 1

The Board finds that a conflict exists in the record with respect to the percentage of permanent impairment appellant has in the upper extremities due to his work-related condition of bilateral epicondylitis. The conflict exists between Drs. Cook and Anderson, whose opinions were obtained by appellant and the report of the Office medical adviser. Each physician has assessed a different impairment rating under the A.M.A., *Guides*. Dr. Cook opined that appellant had a 37 percent impairment of the upper extremities, while Dr. Anderson stated that appellant had a 6 percent right arm impairment and the Office medical adviser reported a 10 percent bilateral upper extremity impairment. The conflict in the record requires resolution by an impartial medical specialist. On remand, the Office shall schedule appellant for an impartial medical evaluation with a Board-certified specialist, in order to obtain an evaluation of appellant’s permanent impairment of the upper extremities due to his accepted employment injury. After such further medical development as the Office deems necessary, the Office shall issue a *de novo* decision regarding appellant’s entitlement to a schedule award for the upper extremities.

³ 20 C.F.R. § 10.610 (1999).

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.404.

⁶ FECA Bulletin No. 01-05 (issued January 2, 2001).

ANALYSIS -- ISSUE 2

The Office issued a second decision on February 28, 2003 finding that appellant had no measurable impairment of the right lower extremity due to the condition of Achilles tendinitis, which had been accepted previously by the Office as work related. The Board, however, notes that the Office's February 28, 2003 decision represented a rescission of its prior schedule award issued on August 21, 2001 for 25 percent right lower extremity impairment on August 21, 2001. The Board finds that the Office has not met its burden of proof to justify rescission of the August 21, 2001 schedule award. In determining that an overpayment occurred in this case, the Office erroneously stated that the Achilles tendinitis condition was not accepted as work related when appellant received his August 21, 2001 schedule award. The Board notes that the Office's August 21, 2001 schedule award was in accordance with the accepted work-related claims and notes that it was based on opinion of an Office medical adviser, who found that appellant was entitled to 25 percent impairment of the right lower extremity. Although the Office held on February 28, 2003 that the evidence did not support any percentage of impairment for the Achilles tendinitis condition, the Office has not addressed the apparent conflict between the prior Office medical adviser's opinion and the more recent medical evidence from appellant's treating physician. Based on the conflict in the medical record, the Board finds that the Office did not meet its burden of proof to justify rescission of appellant's schedule award.⁷

ANALYSIS -- ISSUE 3

Because the Board vacates the February 28, 2003 decisions on the grounds that there are conflicts to be resolved concerning appellant's permanent impairments, the Board does not address the propriety of the Office's September 23, 2003 denial of appellant's request for a review of the written record as that issue has been rendered moot by the Board's ruling.

CONCLUSION

The Board finds that a conflict exists in the record with respect to degree of permanent impairment of appellant's upper extremities; therefore, the case is not in posture for a decision with respect to whether appellant has greater than 10 percent impairment, for which he received a schedule award. The Board further finds that the Office did not meet its burden in rescinding appellant's schedule for 25 percent right lower extremity impairment based on his work-related Achilles tendinitis. The Board did not address the third issue of record as it has been rendered moot by the Board's remand.

⁷ The Office waived recovery of the overpayment but at this time the Board finds no basis for concluding that an overpayment occurred for payments made to appellant as a result of the August 21, 2001 schedule award.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated February 28, 2003 are vacated and the case is remanded for further consideration consistent with this opinion.

Issued: April 7, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member