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

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| **T.B., Appellant** | ) | |
| **and** | ) | **Docket No. 06-237** |
| | ) | **Issued: September 11, 2006** |
| **DEPARTMENT OF JUSTICE, FEDERAL CORRECTIONAL INSTITUTION, Lompoc, CA, Employer** | ) | |

*Appearances:*
*T.B., pro se*
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

### ***JURISDICTION***

On November 7, 2005 appellant filed a timely appeal from the March 7, 2005 merit decision of the Office of Workers' Compensation Programs denying her request for a schedule award, and the September 29, 2005 merit decision finding that she received an overpayment in the amount of $8,659.90 and denying her request for waiver of recovery. Pursuant to 20 C.F.R. §§ 501.2 and 501.3, the Board has jurisdiction over the merits of this case.

### ***ISSUES***

The issues are: (1) whether appellant met her burden of proof to establish that she has any permanent impairment of her upper extremities; (2) whether she received an overpayment in the amount of $8,659.90 for the period September 5, 2004 through March 19, 2005; (3) whether the Office properly determined that appellant was not entitled to a waiver of recovery; and (4) whether the Office abused its discretion in setting the rate of recovery.

## ***FACTUAL HISTORY***

On December 30, 1998 appellant, then a 34-year-old secretary, filed a traumatic injury claim, alleging that on August 5, 1998 she injured her neck during target practice at a law enforcement training center. Her claim was accepted for cervical strain and she was placed on the periodic rolls. Appellant's claim was later expanded to include herniated disc C3-4, with excision of disc and cervical fusion.

On September 27, 2002 appellant requested a schedule award. The Office referred appellant to Dr. Anil Agarwal, a Board-certified internist, for an opinion as to whether she was permanently impaired as a result of her August 5, 1988 injury. In a February 3, 2003 report, Dr. Agarwal referred to the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* and opined that appellant had an eight percent whole body impairment based on her loss of motion and muscle spasms, particularly in the left upper extremity. His examination revealed a zero percent impairment of sensation and no motor weakness. Dr. Agarwal calculated appellant's motor impairment as follows: "C5 – 30 x 25 percent = 7.5 = 8 percent."

On March 1, 2003 the district medical director, Dr. Daniel Zimmerman, a Board-certified internist, asked Dr. Agarwal to clarify how he determined that appellant had a 25 percent motor deficit pursuant to Table 15-16, in light of the fact that he found no motor weakness. He also asked Dr. Agarwal to explain his eight percent rating due to motor deficit in C5 distribution. Dr. Zimmerman advised that a whole body impairment rating was not appropriate and that "spasm" does not equate to a muscle weakness.

In a supplemental report dated March 26, 2003, Dr. Agarwal stated that appellant had pain in her left shoulder and deltoid strength of 4/5. He reiterated that appellant had an eight percent left upper extremity impairment.

In an April 18, 2003 report, Dr. Zimmerman concluded that appellant did not have a ratable impairment based on the fifth edition of the A.M.A., *Guides*. He opined that Dr. Agarwal's finding of weakness on March 26, 2003 was not credible. Dr. Zimmerman stated that, although Dr. Agarwal equated "spasm" with "weakness," there was no medical evidence of weakness in either of Dr. Agarwal's reports. Based on findings of no weakness and no sensory or pain symptoms, Dr. Zimmerman found no impairment of the left upper extremity.

On May 2, 2003 the Office denied appellant's request for a schedule award based on Dr. Zimmerman's report. On May 30, 2003 appellant requested an oral hearing. By decision dated September 24, 2003, the Office hearing representative set aside the Office's May 2, 2003 decision and remanded the case for another second opinion evaluation.

In a November 5, 2003 report, Dr. Lonnie Mercier, a Board-certified orthopedic surgeon, found that there was no anatomical evidence of any radiculopathy or peripheral nerve change which would warrant an impairment rating. His examination of appellant revealed no abnormality of gait. Extension of the cervical spine was normal. Appellant had full range of motion of the shoulders and entire upper extremities, with no residual weakness. Range of motion testing of the lower extremities was normal, with no restriction of movements in any

joints. Neurological examinations of the upper and lower extremities were normal, with no weakness. Dr. Mercier noted that there were no radicular abnormalities present involving the upper extremities. A complete sensory and motor examination of the upper extremities revealed no loss of sensitivity or abnormal sensation and no motor deficit. Referring to Tables 15-15 through 15-18 of the A.M.A., *Guides*, Dr. Mercier determined that there were no physical findings consistent with any radiculopathy involving the upper or lower extremities. Referring to Table 16-10, he found no anatomical sensory deficit or pain from either radicular or peripheral nerve conditions. Referring to Table 16-11, Dr. Mercier found no evidence of motor loss or power deficit from either peripheral or spinal nerve disorder. He further noted complete range of motion actively against gravity, with full resistance of all upper extremity muscles and no evidence of atrophy.

On November 12, 2003 Dr. Zimmerman concluded, based on Dr. Mercier's November 5, 2003 report, that appellant had no impairment of her right or left upper and lower extremities as a result of her accepted August 5, 1988 injury.

The Office denied appellant's request for a schedule award by decision dated November 21, 2003. On December 18, 2003 she requested an oral hearing.

Appellant submitted reports dated February 27 and August 20, 2003 from Dr. Angela Pruden, a Board-certified family physician, who indicated that appellant had weakness in her left arm and leg, as well as intermittent neck pain and spasms of the left hand.[1]

At the November 29, 2004 hearing, appellant testified that her left leg was numb; she experienced vertigo and tingling of the hands and had limited range of motion of her neck. The hearing officer advised appellant that the record would remain open for 30 days for the submission of additional medical evidence.

Appellant submitted a June 2, 2003 report from Dr. Pruden, who stated that appellant's spasms were becoming less frequent. An unsigned progress note from Dr. Katherine Harrison dated February 10, 2004 reflected appellant's complaints of tingling in the left arm and spasms in the left hand. On March 31, 2004 she stated that spasms in appellant's left arm were increasing and her pain was usually 4 out of 10 and interfering with her ability to function.

In an April 16, 2004 report, Dr. John Goldner, a Board-certified psychiatrist and neurologist, opined that appellant's symptoms were "probably a residual of her cervical condition suffered in her accident of 1998" and that the myelomalacia noted in her cervical spine magnetic resonance imaging scan was "certainly related to the 1998 injury." He found no evidence of any peripheral abnormality in her left upper extremity. Examination of the neck revealed mild restriction in flexion related to her fusion. Dr. Goldner found no tenderness to palpation in the back or medial scapula region bilaterally. He determined appellant's strength to be normal. Sensory examination was normal, with no muscle atrophy observed.

In June 7 and August 16, 2002 progress notes, Dr. Pruden indicated that appellant had neck pain, left hand spasms and left arm weakness. On February 10, 2004 she found limited

[1] Dr. Pruden's February 27, 2002 report was unsigned.

range of motion in the cervical spine, with no pain, strength five out of five and sensation decreased in the right upper and lower extremities.

In a January 6, 2005 report, Dr. Goldner opined that the intermittent symptoms described by appellant affecting her left upper and lower extremities and left side of her face represented 10 percent permanent impairment of the body as a whole. He opined that appellant's neurologic abnormalities, including mild flexion of the neck, related to her cervical spine fusion and hyperactive reflexes on the left side and spasm of the left hand, were related to her 1998 employment injury.

By decision dated March 7, 2005, the Office hearing representative affirmed the November 21, 2003 denial of appellant's request for a schedule award.

The record contains a January 4, 2005 letter from appellant advising the Office that she was returning a check in the amount of $1,913.80 for payment received for the period November 28 through December 25, 2004, and requesting that her future payments be reduced to reflect her proper entitlement. The record also contains a copy of a cancelled check (# 4318), signed by appellant and payable to the Office, in the amount of $1,913.80, bearing the notation "returning check for December 1 [through] December 25."

On July 8, 2005 the Office issued a preliminary finding that appellant had received an overpayment for the period September 5, 2004 through March 19, 2005 in the amount of $9,538.30, due to the fact that she had received seven periodic roll cycles of $1,913.80, for a total of $13,396.60, but was only entitled to receive a total amount of $3,858.30. In an accompanying memorandum, the Office found that appellant was at fault in the creation of the overpayment, in that she should have been reasonably aware that she was not entitled to an increase of $1,555.80 per month, but rather was entitled to an increase of only $97.80 per pay cycle as a result of the cancellation of her health insurance.

A worksheet dated June 27, 2005 reflects that appellant received eight payments in the amount of $1,921.00 from September 5, 2004 through March 19, 2005. Appellant was paid twice for the period December 26, 2004 through January 22, 2005, but reimbursed the Office for the duplicate payment in the amount of $1,921.00 on May 20, 2005. The Office calculated that appellant had been paid the amount of $13,447.00, when she should have received a total of $3,858.30 for the same period, resulting in an overpayment of $9,588.70. A separate calculation on the same worksheet reflected:

"$1,913.80 x 7 (cycles) = $13,396.60

Less $3,858.30

$9,538.30"

A worksheet dated June 22, 2005 reflected that, based on the constructed amount of $474.00, appellant should have received $3,858.30 for the period September 5, 2004 through May 14, 2005.

A statement dated May 17, 2005 reflected that appellant received compensation in the amount of $456.00 for the period May 14, 2004 through March 20, 2005. A statement dated June 24, 2005 reflected that appellant received compensation in the amount of $439.20 for the period July 9, 2004 and June 12, 2005. A statement dated July 26, 2005 reflected that appellant received supplemental compensation in the amount of $38.42 for the period August 25 through September 4, 2004.

On July 26, 2005 the Office notified appellant that she would receive a direct deposit of $38.42 as a refund for a health benefit deducted for the period August 25 to September 4, 2004, and that her insurance enrollment was terminated effective August 25, 2004.

On August 5, 2005 appellant requested review of the written record, disputing allegations of fault and requesting waiver. Appellant alleged that she had notified the Office in August 2004 that she would be required to take leave without pay (LWOP) for cancer surgery and believed that the increase in benefits she received was due to her complete loss of income during her LWOP status. Although she had expected her benefit payments to be reduced upon her return to work, they continued at the same rate. Appellant further alleged that she notified the Office immediately upon realizing the mistake and made repeated requests that the Office reduce the amount of the benefit payments. She noted that she returned a payment to the Office in the amount of $1,913.80.

By decision dated September 29, 2005, the Office found that appellant had received an overpayment in the amount of $9,538.30. Determining that appellant had not received payment for compensation to which she was entitled for the period March 20 through April 16, 2005 in the amount of $439.20, and for the period April 17 through May 14, 2005 in the amount of $439.20, the Office reduced the overpayment amount from $9,538.30 to $8,659.90. The Office further found that appellant was not at fault in the creation of the overpayment, but denied her request for waiver because she had presented no evidence to support her inability to repay the overpayment.

## ***LEGAL PRECEDENT -- ISSUE 1***

Section 8107 of the Act[2] 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.[3] The schedule award provisions of the Act and its implementing federal regulation[4] sets 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, the Act does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal

[2] 5 U.S.C. § 8107(a).

[3] *Id.*

[4] 20 C.F.R. § 10.404.

justice under the law to all claimants, the Office has adopted the A.M.A., *Guides*[5] as the uniform standard applicable to all claimants.

## ***ANALYSIS -- ISSUE 1***

The Office determined that appellant was not entitled to a schedule award based upon the November 5, 2003 report of Dr. Mercier, an Office referral physician, who found that there was no anatomical evidence of any radiculopathy or peripheral nerve change which would warrant an impairment rating. His examination of appellant revealed no abnormality of gait. Extension of the cervical spine was normal. Appellant had full range of motion of the shoulders and entire upper extremities, with no residual weakness. Range of motion testing of the lower extremities was normal, with no restriction of movements in any joints. Neurological examinations of the upper and lower extremities were normal, with no weakness. Dr. Mercier noted particularly that there were no radicular abnormalities present involving the upper extremities. A complete sensory and motor examination of the upper extremities revealed no loss of sensitivity or abnormal sensation and no motor deficit. Referring to Tables 15-15 through 15-18, Dr. Mercier determined that there were no physical findings consistent with any radiculopathy involving the upper or lower extremities. Referring to Table 16-10, he found no anatomical sensory deficit or pain from either radicular or peripheral nerve conditions. Referring to Table 16-11, Dr. Mercier found no evidence of motor loss or power deficit from either peripheral or spinal nerve disorder. He further noted complete range of motion actively against gravity, with full resistance of all upper extremity muscles and no evidence of atrophy. The district medical director reviewed Dr. Mercier's report and found that he had referenced the appropriate sections of the A.M.A., *Guides* in forming his opinion that appellant's condition was not ratable. Dr. Mercier's report is thorough, well rationalized and makes reference to the appropriate tables of the fifth edition of the A.M.A., *Guides*. For these reasons, the Board finds that Dr. Mercier's report represents the weight of the medical evidence in this case.

Dr. Agarwal initially opined that appellant had an eight percent whole body impairment based on her loss of motion and muscle spasms, particularly in the left upper extremity. After Dr. Zimmerman informed him that a whole body rating was inappropriate and asked him to clarify why he suggested that appellant had a 25 percent motor deficit pursuant to Table 15-16, in light of the fact that he found no motor weakness, Dr. Agarwal revised his opinion to reflect an eight percent left upper extremity impairment. The Board finds that Dr. Agarwal's opinion lacks probative value due to unexplained inconsistencies between his reports. Dr. Agarwal described no medical evidence suggesting weakness or pain in his February 13, 2003 report, which followed an examination of appellant. A March 26, 2003 addendum, prepared without a follow-up examination, found that appellant's deltoid strength was four out of five and that "she ha[d] pain." Dr. Agarwal failed to properly utilize the appropriate sections and tables of the A.M.A., *Guides* or to adequately explain the grounds for his conclusion that appellant had diminished strength and pain. Moreover, as noted by Dr. Zimmerman, it appears that Dr. Agarwal mistakenly equated "spasms" with "weakness."

[5] A.M.A., *Guides* (5th ed. 2001).

Appellant submitted reports from Dr. Pruden, who indicated that appellant had weakness in her left arm and leg, as well as intermittent neck pain, spasms of the left hand, limited range of motion in the cervical spine and sensation decreased in the right upper and lower extremities. Progress notes from Dr. Harrison reflected appellant's complaints of pain and tingling in the left arm and spasms in the left hand. However, these physicians did not provide an impairment rating or otherwise provide adequate rationale addressing how appellant had sustained permanent impairment as a result of her work-related condition. Therefore, these reports lack probative value.

Dr. Goldner opined that the intermittent symptoms described by appellant affecting her left upper and lower extremities and left side of her face "present in a 10 percent permanent partial impairment of the body as a whole." He further opined that appellant's neurologic abnormalities, including mild flexion of the neck related to her cervical spine fusion and hyperactive reflexes on the left side and spasm of the left hand, were related to her 1998 employment injury. Neither the Act nor its regulations provide for a schedule award for impairment to the body as a whole.[6] Moreover, although Dr. Goldner provided an impairment rating in his January 6, 2005 report, he did not explain his estimate based on the application of appropriate edition of the A.M.A., *Guides*. Therefore, his opinion lacks probative value.

The Board finds that there is no probative medical evidence of record, based upon a correct application of the A.M.A., *Guides*, to establish that appellant has any permanent impairment of her upper extremities due to her accepted cervical condition. Accordingly, the Board finds that appellant is not entitled to a schedule award.

## ***LEGAL PRECEDENT -- ISSUE 2***

The Federal Employees' Compensation Act[7] 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 duty.[8] When an overpayment has been made to an individual 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 the individual is entitled.[9]

## ***ANALYSIS -- ISSUE 2***

The Board finds that appellant received an overpayment of compensation as a result of an erroneous increase in compensation payments made by the Office following her request to cancel her health insurance. However, the amount of the overpayment is in question.

[6] *See Terry E. Mills*, 47 ECAB 309 (1996).

[7] 5 U.S.C. §§ 8101-8193.

[8] 5 U.S.C. § 8102(a).

[9] *Id*. at § 8129(a).

On September 17, 2004 appellant submitted a request to cancel her health insurance benefit effective August 25, 2004. Based on her request, appellant was entitled to an increase of $97.80 per cycle, as a result of the cancellation. However, the Office increased appellant's compensation benefit by approximately $1,555.00 per cycle. Appellant does not dispute that she received an overpayment; however, she disputes the amount of overpayment.

On July 8, 2005 the Office determined that appellant had received a total of $13,396.60 for the period September 5, 2004 through March 19, 2005 when she was only entitled to receive $3,858.30, resulting in an overpayment of $9,538.30. The worksheet prepared by the Office contains conflicting information regarding compensation payments received by appellant. On the one hand, it reflects that appellant received eight payments in the amount of $1,921.00 from September 5, 2004 through March 19, 2005, but that she had reimbursed the Office for one such payment on May 20, 2005. Apparently taking into account appellant's reimbursement of $1,921.00, the worksheet indicates that appellant received the total amount of $13,447.00 for that period. The worksheet also reflects that appellant should have received a total of $3,858.30 for this period, resulting in an overpayment of $9,588.70. On the same worksheet, however, a separate calculation reflects that appellant received seven payments in the amount of $1,913.80, totaling $13,396.00, when she should have received $3,858.30, resulting in an overpayment of $9,538.30. Without an explanation from the Office regarding its calculations, it is impossible to reconcile this inconsistency or to determine the exact amount of the overpayment.

Appellant submitted a cancelled check payable to the Office in the amount of $1,913.80. The check bears the notation "return check for December 1 [through] December 25." The record reflects that appellant reimbursed the Office for one payment on May 20, 2005, but the reported amount of the reimbursement was $1,921.00, rather than $1,913.80. Therefore, it is unclear from the record whether the Office considered the repayment amount of $1,913.80 in calculating the overpayment.

On September 29, 2005 the Office further reduced the amount of overpayment by $879.90, finding that appellant had not received payments for compensation to which she was entitled for the periods March 20 to April 16, 2005 and April 17 to May 14, 2005, both in the amount of $439.20. The Board finds that the Office erred by offsetting the amount of overpayment with payments to which appellant was entitled. Although such an offset appears administratively straightforward, the Board finds that it circumvents established legal procedures and protections. Extensive due process rights attach to any attempt by the Office to recoup benefits already paid, even if paid in error.[10] The Office's act of offsetting the amounts to which appellant was entitled against the overpayment precluded the proper consideration of waiver of the overpayment as it relates to the amount of the offset. This Board has found that such a

[10] *See generally* FECA Circular No. 82-48, "Overpayments and Waiver" (issued December 1, 1982). In *Califano v. Yamasaki*, 442 U.S. 682 (1979), the Supreme Court held that due process required the Social Security Administration to defer any measures to recover suspected overpayments until it informed the claimant of the grounds for waiver under the Social Security Act. The wording of the waiver provision in the Social Security Act is similar to that in the Federal Employees' Compensation Act and the Director has determined that the holding of the Supreme Court in *Califano* is applicable to the recovery of overpayments under the Federal Employees' Compensation Act. This policy was announced in FECA Bulletin No. 80-35 (issued October 20, 1989) and is presently incorporated into the Federal (FECA) Procedure Manual, Part 6 -- Debt Management (September 1994).

practice denies administrative due process with respect to the amount offset[11] and permits an unrestricted recovery of the offset portion of the overpayment without regard to the relevant factors set forth in 20 C.F.R. § 10.441.[12]

As the calculation of the overpayment appears to be in error and it is unclear how the Office determined the overpayment amount, this case will be remanded to the Office for recalculation. On remand, the Office should reevaluate the issues of waiver and recovery, in order to preserve appellant's right to appeal.[13]

## ***CONCLUSION***

The Board finds that appellant has failed to meet her burden of proof to establish that she has more than a zero percent permanent impairment of her upper extremities.

The Board further finds that an overpayment occurred for the period from September 5, 2004 through March 19, 2005, but that the amount of overpayment is unclear from the record. Given that the amount of overpayment is in question, this case is not in posture for a decision on the issues of waiver and recovery.

[11] *Diana L. Booth*, 52 ECAB 370 (2001); *Michael A. Grossman*, 51 ECAB 673 (2000).

[12] *See Robert L. Curry*, 54 ECAB 675 (2003).

[13] *James Tackett*, 54 ECAB 611 (2003).

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the March 7, 2005 decision of the Office of Workers' Compensation Programs is affirmed. It is further ordered that the Office's September 29, 2005 decision is hereby affirmed insofar as it determined the fact of overpayment. It is remanded for further development consistent with this decision on the issues of amount of the overpayment, waiver and rate of recovery.

Issued: September 11, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board