

contusions, and a fractured right elbow. Appellant stopped work on December 5, 2000 and retired on July 17, 2003.

In reports dated May 7, 2001 to March 11, 2002, Dr. Samuel J. Chmell, a Board-certified orthopedic surgeon, treated her for her work injury. He diagnosed: right elbow radial head fracture, delayed union; right shoulder tendinitis/impingement syndrome; left shoulder strain; left elbow and forearm strain and contusion; C6-7 disc bulge; bilateral knee contusion; degenerative disc disease of the cervical and lumbar spine and derangement of the left ankle. Dr. Chmell advised that appellant was totally disabled. The magnetic resonance imaging (MRI) scans of the left shoulder and right knee revealed a left shoulder rotator cuff tear and torn cartilage of the right knee. Dr. Chmell recommended arthroscopic surgery for the right knee and an ankle brace for the left ankle. Thereafter, in developing the claim, the Office referred appellant to a second opinion physician and impartial medical examiners. In a decision dated April 3, 2002, the Office denied appellant's claim for right knee arthroscopy.¹ On November 8, 2002 appellant retired and elected to receive civil service retirement benefits.

On October 22, 2002 the Office requested that Dr. Chmell assess appellant's right arm impairment pursuant to the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.² On November 25, 2002 Dr. Chmell advised that maximum medical improvement occurred on that date. He opined that appellant had 55 percent impairment to the right arm under the A.M.A., *Guides*. On February 12, 2003 the Office referred the medical evidence to an Office medical adviser. In a report dated February 17, 2003, the Office medical adviser found that appellant had 11 percent permanent impairment of the right arm in accordance with the A.M.A., *Guides*.

In a decision dated March 20, 2003, the Office granted appellant a schedule award for 11 percent permanent impairment of the right upper extremity. The period of the award was from January 26 to September 23, 2003.³ On May 20, 2004 appellant requested reconsideration of the March 20, 2003 decision. She submitted a June 21, 2004 report from Dr. Chmell who noted that appellant experienced additional right elbow pain.

In a July 29, 2004 report, an Office medical adviser found that appellant had 14 percent permanent impairment of the right arm under the A.M.A., *Guides*. He noted that the range of motion findings from Dr. Chmell's November 25, 2002 report were unchanged but the physician described right elbow pain on June 21, 2004 which accounted for an additional three percent impairment of the right upper extremity.

¹ In an October 30, 2002 decision, a hearing representative affirmed the April 3, 2002 decision. Appellant requested reconsideration of the Office decision. In a decision dated March 4, 2004, the Office denied modification of the October 30, 2002 decision.

² A.M.A., *Guides* (5th ed. 2001).

³ On May 13, 2003 denied appellant's reconsideration request, of the schedule award, without a merit review and, on May 29, 2003, the Office's Branch of Hearings and Review denied her request for a review of the written record because she had previously requested reconsideration on the same issue.

In an August 13, 2004 decision, the Office issued a schedule award for 14 percent permanent impairment of the right arm. The Office noted that it previously awarded appellant 11 percent impairment and that he was entitled to an additional award of 3 percent.

On December 7, 2004 appellant requested reconsideration. In an October 4, 2004 report, Dr. Chmell opined that appellant had 70 percent impairment of the right arm based on her elbow condition.⁴ He noted examination findings of the right elbow of flexion of 90 degrees, extension of 35 degrees, pronation of 45 degrees, supination of 25 degrees and also 20 percent loss of strength.

In a November 4, 2006 report, the medical adviser found that appellant had 20 percent permanent impairment of the right arm under the A.M.A., *Guides*. The Office medical adviser noted that the range of motion figures from Dr. Chmell's October 4, 2004 report revealed flexion of 90 degrees for 8 percent impairment;⁵ extension of 35 degrees for 3 percent impairment;⁶ pronation of 45 degrees for 3 percent impairment;⁷ and supination of 25 degrees for 2 percent impairment.⁸ He noted that appellant reported pain about the elbow made worse with strenuous activity. The medical adviser determined that appellant had four percent impairment of the right arm due to sensory deficits. He calculated that impairment due to sensory deficit or pain was a Grade 3 impairment of the anti-brachial cutaneous nerve, or a 40 percent sensory deficit, which has a maximum impairment value of 5 percent for upper extremity impairment due to sensory deficits of the antibrachial cutaneous nerve, for 2 percent impairment for the right upper extremity.⁹ The medical adviser calculated that impairment due to sensory deficit or pain was a Grade 3 impairment of the radial nerve, or a 40 percent sensory deficit, which has a maximum impairment value of 5 percent for upper extremity impairment due to sensory deficits of the radial nerve, for 2 percent impairment for the right upper extremity.¹⁰ He combined these impairment values to find 20 percent permanent impairment of the right arm.

A payment worksheet dated November 28, 2006 noted that appellant was issued a direct payment that date for an additional 9 percent permanent impairment to the right arm, for a total impairment of 20 percent, for the period November 28, 2003 to June 11, 2004, in the amount of \$15,231.58.

⁴ On September 25, 2006 the Office denied appellant's reconsideration request finding it to be not timely filed. In a December 7, 2006 decision, the Office vacated the September 25, 2006 decision and further addressed the claim as set forth in the text of this decision.

⁵ A.M.A., *Guides* 472, Figure 16-34.

⁶ *Id.*

⁷ *Id.* at 474, Figure 16-37.

⁸ *Id.*

⁹ *Id.* at 482, 492, Table 16-10, 16-15.

¹⁰ *Id.*

In a December 7, 2006 overpayment calculation worksheet, the Office noted that appellant was entitled to an additional six percent impairment for the right arm for the period November 28, 2003 to April 7, 2004, for a total award of \$10,116.34.¹¹ However, appellant was paid an additional nine percent impairment of the right arm for the period November 28, 2003 to June 11, 2004, in the amount of \$15,231.58. This resulted in an overpayment of \$5,115.24.

In a decision dated December 7, 2006, the Office granted appellant a schedule award for 20 percent permanent impairment of the right arm. The period of the award was from November 28, 2003 to April 7, 2004. The Office noted that appellant was previously granted a 14 percent permanent impairment and was entitled to an additional award of 6 percent. The Office also noted that appellant had erroneously been issued a check for \$15,231.58 and the resulting overpayment was addressed in an accompanying letter.

In a December 7, 2006 preliminary overpayment determination, the Office found that appellant was erroneously paid an additional nine percent impairment for the right arm, instead of six percent as calculated by the medical adviser, for the period November 28, 2003 to June 11, 2004. The Office noted that the total amount of the schedule award for an additional six percent permanent impairment was \$10,116.34; however, the Office erroneously issued appellant a check for an additional nine percent permanent impairment in the amount of \$15,231.58, which resulted in a \$5,115.24 overpayment. The Office determined that appellant was not at fault in creating the overpayment. The Office advised her that she had 30 days to submit evidence or arguments regarding the overpayment and her eligibility for waiver of the overpayment and provided appellant with an overpayment questionnaire to submit.

Appellant submitted an overpayment questionnaire dated December 20, 2006 and financial documents. She indicated that her income was \$1,800.00 and her expenses were \$1,689.00. The overpayment questionnaire noted a monthly payment of rent or mortgage of \$550.00, food of \$340.00, clothing of \$175.00, utilities of \$218.00, other expenses of \$150.00, Asset Accept account of \$35.00, Asset Accept account of \$30.00, Apice credit account of \$35.00, Tribute credit account of \$40.00, Bank card account of \$30.00, Finger Hut credit card \$16.00, Thorax Hospital of \$25.00, Southwest Hospital of \$35.00 and Dr. Elisa \$20.00. Appellant further noted that cash on hand of \$75.00, a checking account balance of zero, savings account balance of \$900.00 for a total of \$975.00.

In a telephone log dated January 17, 2007, appellant informed the Office that she used the entire schedule award to pay her bills. The claims examiner requested that appellant provide receipts for the bills paid within 30 days.

On March 1, 2007 the Office finalized the overpayment determination, finding that appellant received a \$5,115.24 overpayment of compensation, for the period November 28, 2003 to June 11, 2004, for which she was without fault. The Office addressed how the overpayment occurred and further found that appellant was not eligible for waiver as recovery of the overpayment would not defeat the purpose of the Act and it would be against equity and good

¹¹ The Office noted that for the period November 28, 2003 to February 29, 2004 appellant was entitled to \$7,224.57 and for the period March 1 to April 7, 2004 appellant was entitled to \$2,891.77.

conscience. The Office requested that she repay the overpayment by remitting \$100.00 every month.¹²

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act¹³ and its implementing regulations¹⁴ 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, the Act 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 regulation as the appropriate standard for evaluating schedule losses.¹⁵

ANALYSIS -- ISSUE 1

The Board has carefully reviewed Dr. Chmell's report of October 4, 2004 which determined appellant's upper extremity impairment with regard to her right elbow condition. Although Dr. Chmell determined that appellant sustained a 70 percent permanent impairment of the right arm due to her accepted elbow condition, it is not clear how he made this rating in accordance with the relevant standards of the A.M.A., *Guides*.¹⁶

Dr. Chmell measured flexion of 90 degrees for 8 percent impairment rating; extension of 35 degrees for 3 percent impairment rating; pronation of 45 degrees for 3 percent impairment rating; and supination of 25 degrees for 2 percent impairment rating, for a total loss of range of motion of the right arm of 16 percent. He further concluded that appellant had 20 percent impairment due to loss of strength; however, he failed to cite to the tables or charts he utilized in support of his rating of 70 percent impairment. Dr. Chmell did not adequately explain how he calculated the specific strength deficit value in conformance with Figures 16-10, 16-15, pages 482 and 492 of the A.M.A., *Guides*.¹⁷ The Board finds that he did not properly follow the

¹² On February 9, 2007 appellant requested reconsideration of the December 7, 2006 schedule award decision and asked that a schedule award be considered for her right shoulder. With her request, she submitted a January 17, 2007 report from Dr. Chmell. The Office did not issue a final decision on appellant's reconsideration request prior to the filing of the present appeal on March 26, 2007. Thus, the Board may not consider the January 17, 2007 report on appeal. See 20 C.F.R. § 501.2(c).

¹³ 5 U.S.C. § 8107.

¹⁴ 20 C.F.R. § 10.404 (1999).

¹⁵ *Id.*

¹⁶ See *Tonya R. Bell*, 43 ECAB 845, 849 (1992).

¹⁷ A.M.A., *Guides*, 482, 492, Table 16-10, 16-15.

A.M.A., *Guides*. An attending physician's opinion is of diminished probative value where the A.M.A., *Guides* are not properly followed.¹⁸

The medical adviser utilized the findings in Dr. Chmell's October 4, 2004 report, and correlated them to specific provisions in the A.M.A., *Guides* to determine the impairment rating. He noted the range of motion figures from Dr. Chmell's October 4, 2004 report revealed flexion of 90 degrees for 8 percent impairment rating;¹⁹ extension of 35 degrees for 3 percent impairment rating;²⁰ pronation of 45 degrees for 3 percent impairment rating;²¹ and supination of 25 degrees for 2 percent impairment rating,²² for a total 16 percent impairment due to lost elbow range of motion. The medical adviser also found that appellant had four percent impairment of the right arm due to sensory deficits. He calculated the impairment due to sensory deficit or pain of the anti-brachial cutaneous nerve, which has a maximum impairment value of 5 percent of the arm, was a Grade 3, or a 40 percent sensory deficit. The medical adviser multiplied the 40 percent grade and the 5 percent maximum impairment for the nerve to arrive at 2 percent impairment.²³ He calculated that impairment due to sensory deficit or pain of the radial nerve, which has a maximum impairment value of 5 percent for the arm, was a Grade 3 impairment, or a 40 percent sensory deficit. He multiplied the 40 percent grade and the 5 percent maximum impairment for the nerve to arrive at 2 percent impairment.²⁴ Using the Combined Values Chart, page 604, he determined that appellant had 20 percent permanent impairment of the right arm under the A.M.A., *Guides*. The medical adviser properly applied the A.M.A., *Guides* and reached an impairment rating of 20 percent of the right arm. This evaluation conforms to the A.M.A., *Guides* and establishes that appellant has no more than a 20 percent impairment of the right arm.

There is no other medical evaluation of record explaining how, pursuant to the fifth edition of the A.M.A., *Guides*, appellant has more than a 20 percent impairment of the right arm due to her elbow condition. The Office properly noted that appellant was previously granted an award for 14 percent permanent impairment of the right upper extremity and was entitled to an additional 6 percent permanent impairment of the right upper extremity.

¹⁸ See *Paul R. Evans, Jr.*, 44 ECAB 646 (1993); *John Constantin*, 39 ECAB 1090 (1988) (medical report not explaining how the A.M.A., *Guides* are utilized is of little probative value).

¹⁹ A.M.A., *Guides* 472, Figure 16-34.

²⁰ *Id.*

²¹ *Id.* at 474, Figure 16-37.

²² *Id.*

²³ *Id.* at 482, 492, Table 16-10, 16-15.

²⁴ *Id.* at 482, 492, Table 16-10, 16-15.

LEGAL PRECEDENT -- ISSUE 2

If a claimant receives a schedule award and the medical evidence does not support the degree of permanent impairment awarded, an overpayment of compensation may be created.²⁵ When the Office makes a determination that an overpayment of compensation has occurred because the claimant received an erroneous schedule award, the Office must properly resolve the schedule award issue. Before the amount of the overpayment of compensation can be determined, the evidence must establish the degree of permanent impairment.²⁶

ANALYSIS -- ISSUE 2

As noted, the evidence establishes that appellant has no more than 20 percent permanent impairment of her right arm. The Office paid appellant schedule awards representing a total of 14 percent impairment, the Office found that appellant was entitled to an additional award of 6 percent, for a total of 20 percent impairment. However, the Office erroneously awarded compensation for an additional nine percent impairment. The Board finds that this resulted in a \$5,115.24 overpayment of compensation. The evidence shows that on November 28, 2006 the Office issued appellant \$15,231.58 in compensation, for the period November 28, 2003 to June 11, 2004, for an additional nine percent impairment for the right arm. However, appellant was only entitled to an additional six percent permanent impairment to the right upper extremity, or \$10,116.34. The Office calculated that the additional three percent that appellant received, to which she was not entitled, was \$5,115.24. Appellant did not allege or submit evidence to show that she did not receive a \$5,115.24 overpayment for this period. The Office properly determined the fact and amount of the overpayment.

LEGAL PRECEDENT -- ISSUE 3

Sections 10.441(a) of the implementing regulations provides that where an overpayment has been made to an individual by reason of an error of fact or law, such individual, as soon as the mistake is discovered or her attention is called to same, shall refund to the Office any amount so paid or, upon failure to make such refund, the Office may proceed to recover the same. However, section 8129(b) provides: “[a]djustment or recovery by the United States may not be made when incorrect payment had 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.”²⁷

Section 10.436 of Title 20 of the Code of Federal Regulations²⁸ provides that recovery of an overpayment will defeat the purpose of the Act if recovery would cause hardship by depriving the overpaid beneficiary of income and resources needed for ordinary and necessary living

²⁵ See *Michael Reed*, Docket No. 04-734 (issued October 5, 2004).

²⁶ See *Richard Saldibar*, 51 ECAB 585 (2000) (the Board found that the overpayment issue, due to erroneous receipt of a schedule award, was not in posture because the Office had not properly resolved the schedule award issue).

²⁷ *Id.*; 5 U.S.C. § 8129(b).

²⁸ 20 C.F.R. § 10.436.

expenses. The Office's procedure manual states that recovery would defeat the purpose of the Act if both of the following apply:

“(a) The individual from whom recovery is sought needs substantially all of his or her current income (including [Federal] FECA monthly benefits) to meet current ordinary and necessary living expenses; and

“(b) The individual's assets do not exceed the resource base of \$4,800.00 for an individual or \$8,000.00 for an individual with a spouse or one dependent plus \$960.00 for each additional dependent. This base includes all of the claimants assets not exempted from recoupment in (4) below. The first \$4,800 or more, depending on the number of [the individual's] dependents, is also exempted from recoupment as a necessary emergency resource.

“An individual is deemed to need substantially all of his or her current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50[.00]. In other words, the amount of monthly funds available for debt repayment is the difference between current income and adjusted living expenses (*i.e.*, ordinary and necessary living expenses plus \$50[.00]).

“Both conditions in (a) and (b) above must be met to defeat the purpose of [the Act]. If an individual has disposable current income or assets in excess of the allowable amount, a reasonable repayment schedule can be established over a reasonable, specified period of time. It is the individual's burden to submit evidence to show that recovery of the overpayment would cause the degree of financial hardship sufficient to justify waiver.”²⁹

Recovery of an overpayment is considered to be against equity and good conscience if an individual who was never entitled to benefits would experience severe financial hardship in attempting to repay the debt, with “severe financial hardship” determined by the same criteria set forth in section 10.436 above or if the individual, in reliance on the overpaid compensation, relinquished a valuable right or changed his or her position for the worse.³⁰ To establish a change in position for the worse, the individual must show that she made a decision she otherwise would not have made in reliance on the overpaid amounts and that this decision resulted in a loss; conversion of the overpayment into a different form from which the claimant derived some benefit does not constitute loss for this purpose. In making such a decision, the individual's present ability to repay the overpayment is not considered.³¹

²⁹ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a)(1) (October 2004).

³⁰ See 20 C.F.R. § 10.437.

³¹ See *Jorge O. Diaz*, 51 ECAB 124, 129 (1999).

ANALYSIS -- ISSUE 3

The Office determined that appellant was without fault in creating the overpayment. Because she is without fault, the Office must adjust later payments only if adjustment would not defeat the purpose of the Act or be against equity and good conscience.

Appellant requested waiver of the overpayment and provided information on an overpayment recovery questionnaire. The questionnaire revealed that appellant had monthly expenses which included rent or mortgage of \$550.00, food of \$340.00, clothing of \$175.00, utilities of \$218.00, other expenses of \$150.00, Asset Accept account of \$35.00, Asset Accept account of \$30.00, Apice credit account of \$35.00, Tribute credit account of \$40.00, Bank card account of \$30.00, Finger Hut credit card \$16.00, Thorax Hospital of \$25.00, Southwest Hospital of \$25.00 and Dr. Elisa \$20.00 for a total of \$1,689.00. The questionnaire further noted that appellant had monthly income of \$1,800.00 from her civil service pension and her expenses were \$1,689.00.³² Appellant noted a checking account balance of zero, savings account balance of \$900.00 and cash on hand of \$75.00 for a total of \$975.00. The record establishes that her current income exceeds her monthly expenses by more than \$50.00, therefore she is deemed not to need substantially all of her income to meet her ordinary and necessary living expenses. Because appellant has income which exceeds her monthly expenses by more than \$50.00, as set forth by the Office in its procedure manual, the Board concludes that appellant has failed to demonstrate that recovery of the overpayment would defeat the purposes of the Act.³³

Appellant asserts on appeal that recovery would be against equity and good conscience as she relied upon the representations of the Office when she was granted an additional nine percent schedule award and spent the proceeds of the award to pay off bills. The record reflects that appellant was issued a schedule award check for \$15,231.58 and supporting financial documents indicate that appellant paid bills which she otherwise was obligated to pay totaling \$5,150.00.³⁴ She has not established that she changed her position for the worse in reliance on the overpaid amounts. Moreover, appellant has submitted no evidence that repayment of the overpayment would result in financial hardship.³⁵ She has not submitted any other evidence substantiating that she relinquished a valuable right that she was unable to get back and that her action was based chiefly or solely on reliance on payments or notice of payment.³⁶ Appellant has not established

³² The Board notes that, analyzing the financial information provided by appellant, her income exceeds her expenses by \$111.00.

³³ *Supra* note 28.

³⁴ The record reveals that appellant paid QBI Incorporated \$1,325.00 on December 5 and \$1,325.00 on December 28, 2006 and Dr. Thometz, \$2,000.00 on December 15, 2006 and \$500.00 on December 11, 2006.

³⁵ See Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(b)(1) (October 2004) (recovery will be found to be "against equity and good conscience" when an individual who was not entitled to benefits would experience severe financial hardship in attempting to repay the debt; the factors to consider in making a financial hardship determination are the same as those used to determine whether recovery will defeat the purpose of the Act).

³⁶ See 20 C.F.R. § 10.438(a) (it is the responsibility of the overpaid individual to provide evidence of income, expenses and assets that will be used in determining whether the overpayment may be waived).

that, if required to repay the overpayment, she would be in a worse position after repayment than would have been the case if the benefits had never been received in the first place.³⁷

Appellant has not established that she relinquished a valuable right or changed her position for the worse in reliance on the overpayment. The Board finds that the Office properly found that she was not entitled to waiver on the grounds that recovery would be against equity and good conscience.

As the evidence in this case fails to support that recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience, the Board finds that the Office did not abuse its discretion by denying waiver of recovery.³⁸

CONCLUSION

The Board finds that the Office properly determined that appellant had no more than a 20 percent permanent impairment of the right upper extremity. The Board finds that appellant received an overpayment of \$5,115.24 in compensation from November 28, 2003 to June 11, 2004. The Board also finds that the Office did not abuse its discretion in denying waiver of recovery of the overpayment.³⁹

³⁷ See Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(b)(3) (October 2004).

³⁸ As the Office did not direct recovery of the overpayment from continuing compensation payments, the Board does not have jurisdiction over the recovery of the overpayment. See *Desiderio Martinez*, 55 ECAB 245 (2004) (with respect to the recovery of overpayments, the Board's jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation benefits under the Act).

³⁹ With her appeal appellant submitted financial information. However, the Board may not consider new evidence on appeal; see 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the March 1, 2007 and December 7, 2006 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: April 22, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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