

FACTUAL HISTORY

This case is before the Board for the sixth time. By order dated June 2, 2003, the Board granted the Director's motion to set aside an October 29, 2001 decision and remand the case for additional development of the medical evidence on the issue of the extent of appellant's permanent impairment of the right upper extremity.¹ In a decision dated August 1, 2003, the Board reversed a January 17, 2002 wage-earning capacity determination.² On appeal for the third time, by decision dated November 22, 2005, the Board set aside February 4 and November 5, 2004 decisions granting appellant a schedule award for a nine percent right upper extremity impairment.³ The Board found that the Office failed to follow the Office medical adviser's instructions to obtain a supplemental medical report addressing the extent of appellant's permanent impairment. In a decision dated October 19, 2006, the Board affirmed in part and set aside in part a February 1, 2006 decision finding that appellant had a 13 percent permanent impairment of the right upper extremity.⁴ The Board noted that Dr. Paul Cederberg, a Board-certified orthopedic surgeon and Office referral physician, opined in a January 23, 2006 report that appellant had a 13 percent impairment of the left rather than the right upper extremity. Dr. Cederberg did not address the extent of appellant's right upper extremity impairment. The Board found that appellant had a 13 percent left upper extremity impairment and remanded the case for further development to determine the extent of any permanent impairment of the right upper extremity. On appeal for the fifth time, by order dated December 31, 2007, the Board affirmed in part and set aside in part January 12 and May 23, 2007 decisions granting him a schedule award for a 13 percent left upper extremity and offsetting compensation from the schedule award to recover an amount paid to him in error for his right upper extremity.⁵ The Board found that the Office had not provided findings of fact and conclusions of law explaining why appellant had received an overpayment which should be recovered by withholding a portion of his schedule award. The findings of fact and conclusions of law from the prior decisions and orders are hereby incorporated by reference.

The relevant facts will be set forth. On December 29, 2005 the Office referred appellant to Dr. Cederberg to determine whether he had more than a nine percent permanent impairment of

¹ Order Granting Remand and Cancelling Oral Argument, Docket No. 02-1225 (issued June 2, 2003). On March 19, 1999 appellant, then a 48-year-old mail handler, filed an occupational disease claim alleging that he sustained a back condition due to factors of his federal employment. The Office accepted the claim for an acceleration of cervical spine disease. Appellant underwent bilateral posterior foraminotomies at C3-4 and C4-5 on January 27, 1999 and an anterior discectomy and fusion at C6-7 on July 2, 1999. He retired on disability effective May 15, 2001.

² Docket No. 02-1072 (issued August 1, 2003).

³ Docket No. 05-1726 (issued November 5, 2004).

⁴ Docket No. 06-122 (issued October 19, 2006). On July 11, 2006 appellant appealed the February 1, 2006 decision to the Board. In a decision dated June 21, 2006, a hearing representative set aside the Office's February 1, 2006 and instructed it to obtain a supplemental report from Dr. Cederberg addressing the extent of any right upper extremity impairment. This decision, issued while the Board had jurisdiction over the case, is null and void. *Douglas E. Billings*, 41 ECAB 880 (1990).

⁵ Docket No. 07-1753 (December 31, 2007).

the right upper extremity and whether he had permanent left upper extremity impairment. In a report dated January 23, 2006, Dr. Cederberg found that appellant had a 13 percent left upper extremity impairment. He noted that appellant had previously received an award for a nine percent permanent impairment of the right upper extremity. Dr. Cederberg measured the circumference of his right and left arms and listed grip strength of 46 pounds on the right and 35 pounds on the left. He noted appellant's complaints of left arm and hand weakness. Dr. Cederberg applied the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001) (A.M.A., *Guides*) in finding that he had a 13 percent permanent impairment of the left hand due to loss of sensation in the C6-7 nerve root.

In a supplemental report dated January 22, 2007, Dr. Cederberg reviewed his January 23, 2006 finding that appellant had a 13 percent left upper extremity impairment. He stated:

“In my original report, I also noted that he had previously been rated with a [nine percent] impairment of his right upper extremity due to a work incident. In my opinion, he does not have any amount of increased impairment to the right upper extremity related to the current injury. In my opinion he has no increase in ratable permanency to the right upper extremity for any reason.”

By decision dated February 27, 2007, the Office denied appellant's request for an increased schedule award for the right upper extremity.⁶ On March 7, 2007 he requested a review of the written record. By decision dated June 25, 2007, an Office hearing representative affirmed the February 27, 2007 decision.

On February 11, 2008 the Office notified appellant of its preliminary determination that he received an overpayment of \$6,926.26 in compensation because it erroneously paid him a schedule award for an additional four percent impairment of the right upper extremity. It further advised appellant of its preliminary determination that he was without fault in the creation of the overpayment. The Office requested that he complete the enclosed overpayment recovery questionnaire and submit supporting financial documents. Additionally, it notified appellant that, within 30 days of the date of the letter, he could request a telephone conference, a final decision based on the written evidence or a precoupment hearing.

By decision dated March 14, 2008, the Office finalized its finding that appellant received an overpayment of \$6,928.26 because he received an additional schedule award due to a typographical error. It found that he was not entitled to waiver of the overpayment. The Office noted that it had offset the underpayment to the left upper extremity to the overpayment of the right upper extremity to recover the overpayment.

⁶ The Office referred to Dr. Cederberg as an impartial medical examiner; however, the physician provided a second opinion examination rather than an impartial medical examination.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act⁷ and its implementing federal regulations⁸ 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 for all claimants, the Office has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.⁹ Office procedures direct the use of the fifth edition of the A.M.A., *Guides*, issued in 2001, for all decisions made after February 1, 2001.¹⁰

Proceedings under the Act are not adversarial in nature, nor are the Office a disinterested arbiter.¹¹ While the claimant has the responsibility to establish entitlement to compensation, it shares responsibility in the development of the evidence. It has the obligation to see that justice is done.¹² Accordingly, once it undertakes to develop the medical evidence further, it has the responsibility to do so in the proper manner.¹³

ANALYSIS -- ISSUE 1

By decision dated October 19, 2006, the Board remanded the case for the Office to further develop the medical evidence and determine the extent of any permanent impairment of appellant's right upper extremity. The Board found that Dr. Cederberg, who provided a second opinion examination, did not address whether he had an impairment of the right upper extremity in his January 23, 2006 report.

In a supplemental report dated January 22, 2007, Dr. Cederberg noted that in his January 23, 2006 report he had indicated that appellant previously received an award for a nine percent permanent impairment of the right upper extremity. He stated that appellant did not have "any amount of increased impairment to the right upper extremity related to the current injury." Dr. Cederberg, however, did not support his conclusion with reference to any physical findings or by providing any medical rationale.¹⁴ Additionally, he did not reference the A.M.A., *Guides* in reaching his determination. Given the deficiencies in Dr. Cederberg's report, the Office

⁷ 5 U.S.C. § 8107.

⁸ 20 C.F.R. § 10.404.

⁹ 20 C.F.R. § 10.404(a).

¹⁰ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003).

¹¹ *Vanessa Young*, 55 ECAB 575 (2004).

¹² *Richard E. Simpson*, 55 ECAB 490 (2004).

¹³ *Melvin James*, 55 ECAB 406 (2004).

¹⁴ A medical opinion not fortified by rationale is of diminished probative value. *Cecelia M. Corley*, 56 ECAB 662 (2005).

should not have relied upon his findings in denying appellant's claim for an increased schedule award.

Once the Office undertakes development of the record, it has the responsibility to do so in a proper manner.¹⁵ In the instant case, the Office should secure a medical opinion that resolves the question of whether appellant has more than a nine percent permanent impairment of the right upper extremity. After further development as deemed necessary, the Office should issue an impairment decision.

LEGAL PRECEDENT -- ISSUE 2

Section 8102 of the Act¹⁶ provides that the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.¹⁷ Section 8129(a) of the Act provides, in pertinent part, that when an overpayment has been made to an individual under this subchapter 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 an individual is entitled.¹⁸

When the Office makes a determination that an overpayment of compensation has occurred because the claimant received an erroneous schedule award, it must properly resolve the schedule award issue. Before the amount of the overpayment can be determined, the evidence must establish the degree of permanent impairment.¹⁹

ANALYSIS -- ISSUE 2

The Office determined that appellant received an overpayment of compensation because it erroneously paid him a schedule award for more than a nine percent permanent impairment of the right upper extremity. As noted, when it makes a determination that an overpayment of compensation has occurred because the claimant received an erroneous schedule award, the Office must first calculate the schedule award.²⁰ Because the Office has not determined the correct extent of appellant's right arm impairment, it cannot show that appellant has received an overpayment of compensation. When it resolves the schedule award issue, the Office should then consider the overpayment issue.²¹

¹⁵ See *Melvin James*, *supra* note 13.

¹⁶ 5 U.S.C. §§ 8101-8193.

¹⁷ 5 U.S.C. § 8102.

¹⁸ 5 U.S.C. § 8129(a).

¹⁹ See *Richard Saldibar*, 51 ECAB 585 (2000) (the Board found that the overpayment issue was not in posture because the Office had not properly resolved the schedule award issue).

²⁰ As noted, when it makes a determination that an overpayment of compensation has occurred because the claimant received an erroneous schedule award, the Office must first calculate the schedule award.

²¹ In view of the Board's disposition of the merits, the issues of whether the Office properly denied waiver and properly offset recovery of the overpayment are moot.

CONCLUSION

The Board finds that the case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated March 14, 2008 and June 25, 2007 are set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: December 12, 2008
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board