United States Department of Labor
Employees' Compensation Appeals Board

P.S., Appellant	)	
and	)	**Docket No. 07-2143**
	)	**Issued: February 12, 2008**
U.S. POSTAL SERVICE, PROCESSING & DELIVERY CENTER, Fayetteville, NC, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 14, 2007 appellant filed a timely appeal of May 30, 2007 decisions of an Office of Workers' Compensation Programs' hearing representative finding that she had no more than four percent impairment of her right upper extremity and was at fault in the creation of an overpayment. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3 the Board has jurisdiction over the merits of this claim.

ISSUES

The issues are: (1) whether appellant has more than four percent impairment of her right upper extremity; (2) whether the Office properly found that she received an overpayment in the amount of $1,305.76 for which she was at fault, thereby precluding waiver.

FACTUAL HISTORY

On October 28, 2002 appellant, then a 47-year-old manual clerk, sustained injury to her right arm and wrist when lifting a tray of mail. By letter dated January 30, 2003, the Office

accepted her claim for sprain and strains of her elbow. On February 12, 2004 appellant's claim was accepted for de Quervain's/radial tenosynovitis of the right wrist. On May 13, 2004 she had a right first extensor compartment release and right wrist injection. Appropriate compensation and medical benefits were paid.

On March 7, 2005 appellant filed a claim for a schedule award.

By letter dated April 8, 2005, the Office requested that Dr. Richard D. Goldner, appellant's Board-certified orthopedic surgeon, address whether she sustained any impairment pursuant to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (fifth edition 2001). In a duty status report completed on June 21, 2005, Dr. Goldner indicated that appellant could resume work with restrictions. In a North Carolina Industrial Commission form completed on November 3, 2005, he indicated that appellant had 10 percent impairment of her right hand.

On June 21, 2005 appellant returned to work as a modified manual clerk. By decision dated May 22, 2006, the Office found that her actual wages as a modified manual clerk fairly and reasonably represented her wage-earning capacity. As appellant's earnings met or exceeded the current wages of the job she held when injured, her wage-loss benefits were terminated. The Office noted that appellant's medical benefits would continue.

On April 30, 2006 appellant submitted a rating that Dr. Goldner completed on June 21, 2005. After listing the date of maximum medical improvement as June 21, 2005, Dr. Goldner noted limitation in range of motion for appellant's wrist as follows: 20 degrees for radial deviation and 20 degrees for ulnar deviation representing an impairment of two percent; and 60 degrees for dorsiflexion and 50 degrees for palmar flexion representing an impairment of two percent. He also noted an additional impairment of function of the arm due to weakness, atrophy, pain or discomfort estimated at 10 percent. Dr. Goldner recommended an impairment rating of 14 percent of the right upper extremity.

In a report dated May 8, 2006, an Office medical adviser noted that Dr. Goldner listed appellant's maximum medical improvement at June 21, 2005 and allowed four percent permanent impairment of the right upper extremity for mild loss of range of motion of the wrist. He noted that Dr. Goldner provided 10 percent impairment for weakness of grip. However, the Office medical adviser determined that, per the A.M.A., *Guides*, page 508, decreased strength cannot be rated in the presence of decreased motion. Therefore, he found that appellant had four percent permanent impairment for loss of range of motion of the wrist.

The Office sent the medical adviser's report to Dr. Goldner for comments. In a report dated June 12, 2006,[1] Dr. Goldner summarized his treatment of appellant and his recommendation for an impairment rating:

> "[Appellant] had symptoms of first dorsal compartment tenosynovitis and Dr. Allen performed an operative procedure to release the extensor pollicis brevis and adductor pollicis longus tendons. She has previously had injections in the first dorsal compartment to try to alleviate the symptoms of tend[i]nitis. The operative procedure to release these tendons resulted in instability of the tendons. [Appellant] had discomfort at the radial side of her wrist when she flexes and extends her wrist. She also had irritation of the superficial radial nerve which causes discomfort. As a result, [appellant] has not been able to continue her regular job at the [employing establishment] but has to do modified work. She still has discomfort along the radial side of her wrist. [Appellant] has mild decreased motion of her wrist. She also has decreased grip strength as documented on several occasions and this decrease in grip strength is in a physiologic bell-shape pattern and is not a straight line curve that might be seen of an individual is malingering.
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> "In view of the entire situation, and considering the objective aspects of her exam[ination], specifically, decreased flexion, decreased ulnar deviation, decreased strengths, a prior operative procedure which was an objective event involving her wrist, instability of the extensor pollicis brevis and abductor pollicis longus tendons, sensitive over the superficial radial nerve distribution, I assigned a rating of 10 percent permanent partial impairment of her right hand on [November 30, 2005]. It is of note that there is no exact table in the [A.M.A., *Guides*] for finding this particular individual's pathology. There is Table 16-30 on page 507 which discusses impairment due to extensor tendon subluxation over the [metaphalangeal] joint and there is also Table 16-29 on page 507 which discusses digit impairment due to constrictive tenosynovitis. [Appellant's] symptoms are not at the [metacarpophalangeal] joint. They are at the radial aspect of her wrist and she does not have constrictive tenosynovitis, so these tables will not suffice in her situation. I mention this to indicate the [A.M.A., *Guides* do] try to include tendon instability. If there is not a precise table to be located, I have tried to extrapolate.
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> "[The Office medical adviser] provided me with a quotation from page 508 of the [A.M.A., *Guides*] that decreased strength cannot be rated in the presence of decreased motion, painful conditions, deformities, or absence of parts that prevent effective application of maximal force in the region being evaluated. In [appellant's] situation, the decreased strength is not related to the same amount of decreased motion. It is not related directly to pain. It is not related to specific deformities and it is not related to absence of parts. The paragraph from the

[1] Although Dr. Goldner's report is actually dated July 12, 2006, the facsimile stamp indicates that it was sent on June 12, 2006 and the Office received this report on June 13, 2006. Accordingly, the Board concludes that the date on the report was a typographical error, and that the report should be dated June 12, 2006.

[A.M.A., *Guides*] also states that 'in a rare case, if the examiner believes the individual's loss of strength represents an impairing factor that has not been considered adequately by other methods in the [A.M.A., *Guides*], the loss of strength may be rated separately.'

"In view of the decreased wrist flexion, ulnar deviation, decreased strength in a bell-shaped curve, symptoms at the abductor pollicis longus and extensor pollicis brevis tendons, sensitivity at the superficial radial nerve distribution, I had provided a rating of 10 percent permanent partial impairment of her hand on [November 30, 2005]. Ten percent permanent partial impairment of her hand would be equivalent to nine percent permanent partial impairment of her extremity according to Table 16-2 on page 439 of the [A.M.A., *Guides*]."

* * *

"Apparently, the [Office] wanted additional clarification of the rating and subsequently, I answered questions by filling out yet anther form that was sent to me from the [Office]. I completed the portion that indicated range of motion in radial and ulnar deviation, dorsi and palmar flexion, and that totaled four percent permanent partial impairment. I listed the grip strength for right and left hands, comparing the two, and demonstrated that there was a bell-shaped physiologic curve and in addition, listed key pinch and three-point pinch. Question [Number] 4 asked if there was impairment due to arm weakness, atrophy, pain or discomfort. The form did not provide an option for including impairment such as instability of the extensor pollicis brevis or adductor pollicis longus tendons. It did theoretically include a part for the sensitivity over the superficial radial nerve at the site of the prior operative procedure if those particular symptoms were going to be categorized as 'pain' although routinely, I do not provide a rating for 'pain' since it is so subjective. The [A.M.A., *Guides*] does allow for rating strength and I did so.

"Previously I had not provided rating of 10 percent for strength alone but had included the grip strength measurements along with my other findings of tendon instability, superficial radial nerve sensitivity, and decreased motion at the wrist to arrive at my rating of 10 percent permanent partial impairment of her hand. However, in trying to complete the form that was provided, I was trying to use my examination of [appellant], my understanding of the [A.M.A., *Guides*], and to complete this form in a reasonable manner. Since there was no place on the form to include tendon instability or nerve irritation and since there is a place to include weakness, and since the [A.M.A., *Guides*] assigns 10 percent impairment of the arm for her degree of weakness, I chose that.

"Question [Number five] asked for a recommended impairment of her upper extremity. My initial calculation on the N.C. Workers' Compensation form was 10 percent of the hand which would be 9 percent of the upper extremity. However, my interpretation or misinterpretation of this chart was that they wanted the blanks completed in a way to add all of the findings. If that was the situation,

then the 4 percent that I attributed to decreased motion would be added to the 10 percent which I assigned as stated above. That would add using the combined value table, provided in the [A.M.A., *Guides*] to be equivalent to 14 percent permanent partial impairment of her arm.

"Subsequently, I received a letter from Ms. Reyes and the note from Dr. Collins indicating that I had improperly calculated the impairment rating and that the rating should be four percent for loss of range of motion of her wrist. I have tried to explain in the above letter how I arrived by my rating numbness and how in fact I did use the [A.M.A., *Guides*] and how I was trying to be consistent with the [A.M.A., *Guides*] in my rating and also complete the form provided although Dr. Collins apparently disagrees with my method.

"If Dr. Collins has assigned four percent permanent partial impairment due to the patient's range of motion, how would he include objective data such as the prior operative procedure which resulted in sensitivity of the superficial radial nerve at the site of the procedure in addition to the anatomic division of the pulley over the extensor pollicis brevis and adductor pollicis longus tendons which now result in dysfunction secondary to instability of those tendons after the pulley was divided. These anatomic factors are in part responsible for the impairment she has.

"If [appellant] had merely a small amount of decreased motion of her wrist, I would not have anticipated that in itself enough to limit the function of her hand that she currently experiences.

"In summary, I believe that [appellant] has permanent partial impairment based only on decreased range of motion of her wrist which is an objective finding easily calculated from the [A.M.A., *Guides*] but I believe that she also has impairment based on the operative release of the pulley over the extensor pollicis longus and abductor pollicis brevis tendons which has resulted in instability and symptoms and signs and in addition, I believe that she has some impairment based on the sensitivity of the superficial radial nerve which was affected by the operative procedure. I believe that these factors are responsible in part of her decreased grip strength and for her dysfunction. Dr. Collins felt that [appellant] should be assigned a rating of four percent permanent partial impairment of her arm which includes only decreased range of motion. I am hopeful that this letter will explain to Dr. Collins how I arrived at my calculations. I hope that he will consider these factors when he determines her final impairment rating."

On June 14, 2006 the Office forwarded Dr. Goldner's report to a different Office medical adviser for comments. The Office medical adviser noted:

"This matter concerns the impairment following surgical release of a de Quervain's stenosis tenosynovitis of the right wrist. I have read the [three to four] page note, [June 12, 2006] by Dr. Goldner. [He] makes arguments for a [nine percent] permanent partial impairment of the [right] upper extremity.

"I do not find support for these arguments in [the A.M.A., *Guides*]. I concur [with the first Office medical adviser] using an approach which recognized objective findings, *i.e.,* decreased range of motion of the wrist."

On June 22, 2006 the Office made a preliminary determination that appellant had received an overpayment in the amount of $1,305.76 because she returned to work on October 16, 2004 but continued to receive compensation for total disability through October 30, 2004.[2] The Office made a preliminary finding that appellant was at fault in the creation of the overpayment as she accepted a payment she knew or should have reasonably known to be incorrect. On July 18, 2006 appellant indicated that she was not sure if the amount of the overpayment was correct. She believed that the overpayment arose through no fault of her own and requested waiver.

On July 6, 2006 the Office issued a schedule award for a four percent impairment of the right arm.

On August 3, 2006 appellant requested an oral hearing with regard to the July 6, 2006 schedule award.

By letter dated August 11, 2006, the Office informed appellant that she had not completed the form with regard to her overpayment and requested that she indicate the action she would like to take with regard to the alleged overpayment within 15 days. On August 22, 2006 the Office received her request for a prerecoupment hearing.

At the hearing held on April 6, 2007, appellant did not dispute that she returned to work and was overpaid. She requested waiver because there was some confusion as to the date she was supposed to return to work. When appellant received the check, she assumed that she was entitled to the period for which she was paid. She also noted that it took the Office almost two years to inform her of the overpayment. With regard to her schedule award, appellant contended that the injury to her wrist had a major impact on her life and that she was entitled to a greater schedule award.

On May 10, 2007 appellant submitted the completed financial forms with regard to the overpayment issue.

By decision dated May 30, 2007, the hearing representative found that appellant had no more than four percent impairment of her right upper extremity.

[2] The Office calculated the overpayment by finding that appellant was originally paid $2,548.00 gross for the period October 3 to 30, 2004. From this amount, the Office subtracted the amount she paid for health benefits ($53.96), basic life insurance ($13.80) and optional life insurance ($42.60), and determined that she was paid a net of $2,437.64. The Office found that appellant should have been paid for the period October 3 to 15, 2004 in the gross amount of $1,183.12. From this amount, health benefits were subtracted of $25.05, basic life insurance of $6.41 and optional life insurance of $19.78. Accordingly, the Office found that appellant should have been paid $1,131.88 net. The Office found that the net difference between what she was paid, $2,437.64, and the net amount that she should have been paid, $1,131.88, was $1,305.76.

By decision dated June 1, 2007, the hearing representative found that appellant was at fault in the creation of the overpayment of $1,305.76 as she should have been aware that she was not entitled to receive compensation payment for the same period of time that she was working. The hearing representative noted that the overpayment occurred because appellant returned to work on a full-time basis on October 16, 2004 and that a final compensation payment was made on October 30, 2004, representing compensation from October 3 to 30, 2004, including the period after appellant returned to work. As she was found at fault, the Office denied waiver.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act[3] and its implementing regulations,[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 justice under the law to all claimants, the Office has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[5] 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, 2007.[6]

Section 8123(a) of the Act provides in pertinent part: If there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.[7] When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence.[8]

ANALYSIS -- ISSUE 1

In the instant case, Dr. Goldner, appellant's treating physician, originally found 10 percent impairment of appellant's right wrist. However, in a report dated June 21, 2005, he indicated that she had 14 percent impairment of the right upper extremity. Dr. Goldner identified 4 percent impairment for limited range of motion and an additional 10 percent impairment due to weakness, atrophy pain or discomfort. An Office medical adviser noted that, pursuant to the A.M.A., *Guides*, decreased strength should be rated in the presence of decreased motion. He found that appellant had four percent impairment.

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[3] 5 U.S.C. § 8107.

[4] 20 C.F.R. § 10.404.

[5] 20 C.F.R. § 10.404(a).

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

[7] 5 U.S.C. § 8123(a).

[8] *See Ronald J. Pavlik*, 33 ECAB 1596 (1982); *Robert R. Snow*, 33 ECAB 656 (1982); *Quincy E. Malone*, 31 ECAB 846 (1980).

The Office requested that Dr. Goldner clarify his opinion as to appellant's permanent impairment. He noted that, although the A.M.A., *Guides* indicate that decreased strength cannot be rated in the presence of decreased motion, the A.M.A., *Guides*, also indicate that in rare cases an examiner who believes the individual's loss of strength represents an impairment factor not considered adequately by other methods of the A.M.A., *Guides*, may rate strength separately. Dr. Goldner stated that appellant's impairment was not adequately represented by her loss of range of motion. He noted that appellant's decreased grip strength was documented on several occasions and was in a physiologic bell-shaped pattern and not a straight line curve that might be seen in an individual who was malingering. The form he was provided by the Office did not provide an option for addressing impairment such as instability of the extensor pollicis brevis or adductor pollicis longus tendons. Since there was no place on the form to include tendon instability or nerve irritation but there was a place to include weakness, and the A.M.A., *Guides* assign 10 percent impairment of the arm for weakness, he chose to give appellant this rating. Dr. Goldner stated that, if appellant was limited to four percent impairment due to her loss of range of motion, how could he rate objective data such as the prior operative procedure which resulted in sensitivity of the superficial radial nerve in addition to the anatomic division of the pulley over the extensor pollicis brevis and adductor pollicis longus tendons which resulted in impairment secondary to instability of those tendons after the pulley was divided. This report was forwarded to a different Office medical adviser who agreed with the first Office medical adviser that appellant's award should use recognized objective findings, *i.e.*, decreased range of motion of the wrist.

The A.M.A., *Guides* do state that decreased strength cannot be rated in the presence of decreased motion.[9] However, they also provide that in the rare case, an examining physician may rate loss of strength separately. Dr. Goldner discussed why rating appellant solely on loss of range of motion would not result in a proper rating of her impairment. The medical advisers disagreed. There exists an unresolved conflict between the Office medical advisers and Dr. Goldner as to the extent of permanent impairment and the manner by which it should be related. The case will be remanded to refer appellant, together with her file and a statement of accepted facts, to an appropriate impartial specialist to resolve the conflict.

LEGAL PRECEDENT -- ISSUE 2

The Act provides that the United States shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty.[10] If the disability is total, the United States shall pay the employee during the disability monthly monetary compensation equal to 66 2/3 percent of his monthly pay, which is known as his basic compensation for total disability.[11] Under section 8106 of the Act, an employee is entitled to compensation at the augmented rate of his weekly pay if he has one or more dependents.[12] Compensation for wage loss due to disability is available

[9] A.M.A., *Guides* 508.

[10] 5 U.S.C. § 8102(a).

[11] *Id. at* § 8105(a); *see also Duane C. Rawlings*, 55 ECAB 366 (2004).

[12] 5 U.S.C. § 8106.

only for any periods during which an employee's work-related medical condition prevents him from earning the wages earned before the work-related injury.[13] Thus, wage-loss compensation paid during a period where a claimant had no wage loss constitutes an overpayment.[14]

ANALYSIS -- ISSUE 2

In the instant case, the record establishes that appellant returned to work on October 16, 2004. However, she received a compensation check for the full period October 2 to 30, 2004. The Office found that appellant was paid compensation for the period October 3 to 30, 2004 in the gross amount of $2,548.00. From this amount, the Office deducted health benefit premiums of $53.96, basic life insurance premiums of $13.80, and optional life insurance premiums of $42.60 and determined that appellant was entitled to a net payment of compensation for this period of $2,437.64. The Office found that appellant should have been compensated for wage loss for the period October 3 to 15, 2004 in the gross amount of $1,183.12. The Office deducted from this amount, health insurance premiums of $25.05, basic life insurance premiums of $6.41 and optional life insurance premiums of $19.78, and determined that appellant should have been paid a net amount of $1,131.88 for the period of time she did not work in October. The Office properly determined that appellant was not entitled to compensation benefits after she returned to work on October 16, 2004. Accordingly, the Office found that the difference between the net amount appellant was paid, $2,437.64, and the net amount she should have been paid, $1,131.88, resulted in an overpayment of compensation in the amount of $1,305.76. The Board finds that the Office accurately explained the manner in which it calculated the overpayment. Accordingly, the finding that appellant received an overpayment in the amount of $1,305.76 is affirmed.

LEGAL PRECEDENT -- ISSUE 3

Section 8129 of the Act provides that an overpayment in compensation shall be recovered by the Office unless 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.[15]

Section 10.433(a) of the Office's regulations provides:

> "[The Office] may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from [the Office] are proper. The recipient must show good faith and exercise a high degree of care in reporting events which may affect entitlement to or the amount of benefits. A recipient who has done any of the following will be found to be at fault with respect to

[13] 20 C.F.R. § 10.500(a).

[14] *Id. See also Judith A. Cariddo*, 55 ECAB 348 (2004).

[15] 5 U.S.C. § 8129; *see Linda E. Padilla*, 45 ECAB 768 (1994).

creating an overpayment: (1) made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or (2) failed to provide information which he or she knew or should have known to be material; or (3) accepted a payment which he or she knew or should have known to be incorrect.[16]"

ANALYSIS -- ISSUE 3

In finding appellant at fault in the creation of the overpayment, the Office relied on the third standard. The Office found that appellant knew or should have known that she was not entitled to receive part of the October 30, 2004 payment as she returned to work on October 16, 2004. Although the Office may have been negligent in making the incorrect payments, this does not excuse a claimant from accepting a payment that she should have known to be incorrect.[17] Appellant does not dispute that she returned to work and was overpaid as she received compensation and her salary. As such she knew or should have known that she was not entitled to both and thus the Board finds that the Office properly determined that she was at fault in the creation of the overpayment. Accordingly, as appellant was not without fault in accepting the incorrect payment, the Office properly denied her application for waiver.

CONCLUSION

This case is not in posture for decision with regard to the percentage of impairment of the right upper extremity due to an unresolved conflict in medical opinion. The Board affirms the finding that appellant received an overpayment in the amount of $1,305.76, for which she was at fault, and that she was not entitled to waiver.

[16] 20 C.F.R. § 10.433; *see Sinclair L. Taylor*, 52 ECAB 227 (2001); *see also* 20 C.F.R. § 10.430.

[17] *William E. McCarty*, 54 ECAB 525 (2003).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs' hearing representative dated May 30, 2007 relative to the schedule award is set aside; the case is remanded for further proceedings consistent with this decision of the Board. The Office hearing representative's May 30, 2007 decision relative to the overpayment is affirmed.

Issued: February 12, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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