



## **FACTUAL HISTORY**

On June 29, 2010 appellant, then a 41-year-old carrier technician, filed a notice of traumatic injury alleging on January 5, 2008 that he felt a pop in his right shoulder while lifting a tray of mail. He underwent a computed tomography (CT) scan on March 1, 2010 which demonstrated postsurgical changes in the posteriorsuperior and posterior glenoid, focal articular irregularity along the glenoid rim and articular surface irregularity with fraying and partial thickness tearing of the distal subscapularis tendon.

Dr. Zubin G. Khubchandani, a Board-certified orthopedic surgeon, examined appellant on January 10, 2008 and obtained appellant's history of injury. He diagnosed right shoulder pain, but found no instability. Dr. Khubchandani released appellant to return to work with his previous restrictions. On June 29, 2010 he stated that appellant had posterior burning in the right shoulder with spasms. Dr. Khubchandani diagnosed right shoulder posterior instability.

Appellant underwent an arthrogram of his right shoulder on March 1, 2010. This test did not find evidence of a rotator cuff tear.

By decision dated July 19, 2010, OWCP accepted appellant's claim for sprain of the shoulder and upper arm.

Dr. Khubchandani examined appellant on April 1, 2010 and noted that he had previously undergone right shoulder surgery. He found tenderness in the anterior glenohumeral joint and posterior glenohumeral joint. Appellant had a giving way weakness secondary to pain in the supraspinatus and infraspinatus. Dr. Khubchandani diagnosed right shoulder posterior labrum tear with mechanical symptoms and posterior instability. He recommended surgical repair and opined that appellant's current condition was a recurrence of his previous injury. Dr. Khubchandani stated, "It does appear that the capsule may have stretched out a bit and he has developed a recurrent tear or nonhealing of his previous labrum tear because of the subluxation of the shoulder." He examined appellant on April 20 and May 7, 2010 and found decreasing range of motion with pain as well as posterior popping when his arm was abducted. Dr. Khubchandani indicated that appellant could perform light-duty work on May 8, 2010. He examined appellant on June 29, 2010 and diagnosed right shoulder posterior instability. Dr. Khubchandani recommended surgery. He indicated that appellant could perform light-duty work.

In a form report dated July 8, 2010, Dr. Khubchandani diagnosed right shoulder posterior instability and stated that appellant had a possible right shoulder labrum tear and fraying and partial tearing of the subscapularis. He opined that appellant had sustained a new injury lifting heavy mailbags and packages. Dr. Khubchandani examined appellant on July 15, 2010 and noted that he wished to return to work. He referred appellant for testing and released him to return to limited work duties.

In a report dated August 13, 2010, Dr. Martin D. Solomon, a Board-certified neurologist, noted that appellant initially injured his shoulder in 2000 lifting a heavy mailbag and has undergone four operations on his shoulder. He found that motor and nerve conduction studies

were normal and that appellant's complaints of right upper extremity numbness, tingling and pain were of uncertain cause with no evidence of entrapment neuropathy or radiculopathy.

On September 22, 2010 Dr. Khubchandani performed a right shoulder arthroscopy with posterior and posterior-inferior capsular placcation, SLAP repair and extensive debridement including anterior and posterior labral tears, undersurface rotator cuff tear and partial tearing of the subscapularis.

On October 4, 2010 appellant filed a claim for compensation requesting wage-loss compensation from February 13 through March 8, 2010. He also requested compensation from June 18 through July 20, 2010 and September 23 through October 26, 2010.

On January 29, 2010 Dr. Khubchandani examined appellant and stated that he experienced pain lifting his arm at work. He diagnosed acute right shoulder pain and stated, "no use of the right arm at work." In a report dated February 9, 2010, Dr. Khubchandani stated that appellant reported developing pain in his shoulder three to four weeks earlier. He stated that appellant felt pain raising his arm at work. Dr. Khubchandani diagnosed recurrent right shoulder pain and stated that appellant could not use his right arm at work. On March 2, 2010 he stated that appellant's work duties had caused an exacerbation of his previous injury. Dr. Khubchandani reviewed the CT scan and diagnosed right shoulder posterior labrum tearing with mechanical symptoms.

In separate letters dated October 15, 2010, OWCP requested additional evidence to support disability for work for the periods February 13 through March 5, 2010 and June 18 through July 20, 2010. It authorized compensation benefits beginning September 23, 2010. OWCP entered appellant on the periodic rolls on October 20, 2010.

Appellant informed OWCP on November 30, 2010 that the employing establishment had sent him home due to the National Reassessment Process (NRP) from February 13 through March 8, 2010 and June 18 through July 20, 2010. The employer stated that he went through NRP on November 2, 2010.

By decision dated December 10, 2010, OWCP denied appellant's claim for compensation for the periods February 13 through March 8, 2010 and June 18 through July 20, 2010. It reviewed the medical evidence and found that Dr. Khubchandani stated that appellant could work but not use his right arm on February 9, 2010 and there was no medical evidence that he was total disabled for the periods claimed.

Appellant requested an oral hearing before an OWCP hearing representative on December 24, 2010.

Appellant returned to work on January 3, 2011.

In a preliminary notice dated January 18, 2011, OWCP determined that appellant received an overpayment in the amount of \$1,301.93 because he returned to work on January 3, 2011 but received wage-loss benefits through January 15, 2011. It found that he was not at fault in the creation of the overpayment. OWCP determined that appellant received compensation benefits from December 29, 2010 through January 15, 2011 but was not entitled to benefits from

January 3 through 15, 2011 resulting in an overpayment of \$1,301.93. It requested that he provide financial information in support of any request for waiver of the overpayment.

Appellant requested a schedule award on March 10, 2011. In a report dated March 1, 2011, Dr. Khubchandani found that appellant had reached maximum medical improvement. Appellant had 100 degrees of flexion and 20 degrees of extension or 11 percent upper extremity impairment. Dr. Khubchandani found 90 degrees of abduction and 10 degrees of adduction or four percent impairment of the right upper extremity. He found external rotation of 80 degrees and internal rotation of 20 degrees or four percent upper extremity impairment. Dr. Khubchandani concluded that appellant had 19 percent impairment of his right upper extremity. He noted that appellant had moderate limitation based on his functional history and was a grade 2 with a total upper extremity impairment of 19 percent.

OWCP requested that its medical adviser review the medical evidence pertaining to appellant's right upper extremity for schedule award purposes. On March 29, 2011 the medical adviser found that, based on loss of shoulder range of motion, appellant had 13 percent impairment. He asked for a supplemental report from Dr. Khubchandani documenting the range of motion figures and correlating his findings to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).

Appellant testified at the oral hearing on April 7, 2011. He testified that on February 13, 2010 he attempted to go to work and was told that there was no work available. Appellant stated that he was not allowed to work unless he had no restrictions.

On April 21, 2011 Dr. Khubchandani advised that, based on the range of motion measurements, appellant had five percent impairment due to loss of flexion and extension. He concluded that the total upper extremity impairment was 13 percent.

By decision dated May 11, 2011, OWCP determined that appellant had received an overpayment of compensation in the amount of \$1,301.93, for which he was not at fault. Appellant did not contest the preliminary determination or provide any financial information. OWCP found that he had not established that recovery would defeat the purpose of FECA or be against equity and good conscience. It requested payment of the full amount of the overpayment within 30 days.

By decision dated June 13, 2011, an OWCP hearing representative found that appellant had not submitted sufficient medical evidence to establish that he was totally disabled from February 13 through March 8, 2010 or June 19 to July 20, 2010. She found that Dr. Khubchandani found that appellant was capable of light-duty work with restrictions.

In a report dated May 19, 2011, an OWCP medical adviser found that appellant had 15 percent impairment of his right upper extremity due to loss of range of motion. He determined that flexion of 100 degrees was 3 percent impairment, extension of 20 degrees was 2 percent impairment, abduction of 90 degrees was 3 percent impairment adduction of 10 percent was 1 percent impairment, internal rotation of 20 degrees was 6 percent impairment.

By decision dated June 23, 2011, OWCP denied appellant's claim for a schedule award finding that he had no more than 34 percent impairment of his right upper extremity for which he had previously received schedule awards in other claims.<sup>2</sup>

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

An employee seeking benefits under FECA<sup>3</sup> has the burden of establishing the essential elements of his or her claim, including that any disability or specific condition for which compensation is claimed is causally related to the employment injury.<sup>4</sup> The term disability is defined as the incapacity because of an employment injury to earn the wages the employee was receiving at the time of the injury, *i.e.*, a physical impairment resulting in loss of wage-earning capacity.<sup>5</sup>

Whether a particular injury causes an employee to be disabled for employment and the duration of that disability are medical issues which must be proved by a preponderance of the reliable, probative and substantial medical evidence.<sup>6</sup> Findings on examination are generally needed to support a physician's opinion that an employee is disabled for work. When a physician's statements regarding an employee's ability to work consist only of repetition of the employee's complaints that she hurt too much to work, without objective findings of disability being shown, the physician has not presented a medical opinion on the issue of disability or a basis for payment of compensation.<sup>7</sup> The Board will not require OWCP to pay compensation for disability in the absence of any medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.<sup>8</sup>

Causal relationship is a medical issue and the medical evidence required to establish causal relationship is rationalized medical evidence.<sup>9</sup> Rationalized medical evidence is medical evidence which includes a physician's rationalized medical opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and

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<sup>2</sup> The record reveals that appellant received schedule awards for an impairment to the right upper extremity under OWCP File No. xxxxxx004 in the amount of 15 percent in 2003 and 7 percent in 2004. Additionally, in 2006 appellant received an additional schedule award in 2006 for 12 percent right upper extremity impairment under OWCP File No. xxxxxx972.

<sup>3</sup> 5 U.S.C. §§ 8101-8193.

<sup>4</sup> *G.T.*, 59 ECAB 447 (2008); *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

<sup>5</sup> 20 C.F.R. § 10.5(f); *see, e.g., Cheryl L. Decavitch*, 50 ECAB 397 (1999) (where appellant had an injury but no loss of wage-earning capacity).

<sup>6</sup> *See Fereidoon Kharabi*, 52 ECAB 291 (2001).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.<sup>10</sup> Neither the fact that a disease or condition manifests itself during a period of employment nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.<sup>11</sup>

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

Appellant alleged that he could not return to work in February 2010 because the employing establishment did not have work available to him under the NRP. The employing establishment disputed this contention and stated that he was not impacted by the NRP until November 1, 2010. Appellant has not submitted any evidence that light-duty work was not available for him or met his burden of proof in this regard.

The medical evidence consists of reports from Dr. Khubchandani, who examined appellant on January 29, 2010 diagnosed acute right shoulder pain and limited him to, “no use of the right arm at work.” He did not find that appellant was totally disabled. Dr. Khubchandani stated that appellant was capable of working with restrictions on the use of his right arm. The record does not contain any medical evidence supporting that appellant was total disability for work for the periods February 13 to March 8, 2010 or June 18 to July 20, 2010. Without medical evidence establishing that he was totally disabled, appellant failed to meet his burden of proof and is not entitled to wage-loss compensation for total disability during those periods.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

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

The schedule award provision of FECA<sup>12</sup> and its implementing regulations<sup>13</sup> set forth the number of weeks of compensation payable to employees sustaining permanent impairment for loss of loss of use, of scheduled members or functions of the body. FECA, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which rests in the discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. OWCP evaluates the

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<sup>10</sup> *Leslie C. Moore*, 52 ECAB 132 (2000).

<sup>11</sup> *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

<sup>12</sup> 5 U.S.C. §§ 8101-8193, 8107.

<sup>13</sup> 20 C.F.R. § 10.404.

degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*.<sup>14</sup>

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

Dr. Khubchandani provided range of motion for appellant's right upper extremity. He found that appellant had 100 degrees of flexion, three percent impairment<sup>15</sup> and 20 degrees of extension two percent impairment.<sup>16</sup> Dr. Khubchandani found 90 degrees of abduction, three percent impairment and 10 degrees of adduction one percent impairment of the right upper extremity. He found internal rotation of 20 degrees was four percent upper extremity impairment.<sup>17</sup> Based on Table 15-36 Functional History Grade Adjustment, Dr. Khubchandani concluded that appellant had moderate limitation based on his functional history and was a grade 1 with a total upper extremity impairment of 13 percent.<sup>18</sup>

The record establishes that appellant previously received schedule awards for his right upper extremity impairment totaling 34 percent. Section 8107 of FECA provides that schedule awards are payable for permanent impairment of specified body members, functions or organs, not for specific injuries.<sup>19</sup> Section 8108(1) provides that the period of compensation payable under section 8107 is reduced by the period compensation paid or payable under the schedule for an earlier injury if compensation in both cases is for disability of the same member, which in this case is the right upper extremity. Appellant therefore has not established that he is entitled to a schedule award for upper extremity impairment greater than the total 34 percent previously awarded.

Appellant may request a schedule award or increased schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

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<sup>14</sup> For new decisions issued after May 1, 2009 OWCP began using the sixth edition of the A.M.A., *Guides*. A.M.A., *Guides*, (6<sup>th</sup> ed. 2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.6a (January 2010); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

<sup>15</sup> A.M.A., *Guides* 475, Table 15-34.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> A.M.A., *Guides* 477, Table 15-36.

<sup>19</sup> 5 U.S.C. § 8107, *P.W.*, Docket No. 09-1289 (issued March 24, 2010).

### **LEGAL PRECEDENT -- ISSUE 3**

Section 8102 of FECA<sup>20</sup> 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.<sup>21</sup>

Section 8116 of FECA defines the limitations on the right to receive compensation benefits. This section of FECA provides that, while an employee is receiving compensation, he may not receive salary, pay or remuneration of any type from the United States, except for services actually performed or for certain payments related to service in the Armed Forces, including benefits administered by the Department of Veterans Affairs unless such benefits are payable for the same injury or the same death being compensated for under FECA.<sup>22</sup> The implementing regulations provide that a beneficiary may not receive wage-loss compensation concurrently with a federal retirement or survivor annuity.<sup>23</sup> The beneficiary must elect the benefit that he or she wishes to receive.<sup>24</sup>

### **ANALYSIS -- ISSUE 3**

Appellant returned to work on January 3, 2011 but received wage-loss benefits from OWCP through January 15, 2011. As such, any wage-loss compensation he received from OWCP after January 3, 2011 constitutes an overpayment of compensation.<sup>25</sup> The record shows that OWCP continued to pay appellant compensation until January 15, 2011; thus he received an overpayment. It calculated the amount of the overpayment as \$1,301.93 and he did not contest this amount. The Board finds that appellant has received an overpayment in the amount of \$1,301.93 for which he was not at fault.

### **LEGAL PRECEDENT -- ISSUE 4**

Section 8129(a) of FECA provides that when an overpayment of compensation occurs “because of an error of fact of law,” adjustment or recovery shall be made by decreasing later payment to which the individual is entitled.<sup>26</sup> The only exception to this requirement that an overpayment must be recovered is set forth in section 8129(b):

“Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when

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<sup>20</sup> *Id.* at §§ 8101-8193, 8102.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at § 8116(a).

<sup>23</sup> 20 C.F.R. § 10.421(a).

<sup>24</sup> *Id.*

<sup>25</sup> *A.L.*, Docket No. 09-1529 (issued January 13, 2010); *Franklin L. Bryan*, 56 ECAB 310 (2005).

<sup>26</sup> 5 U.S.C. § 8129(a).

adjustment or recovery would defeat the purpose of [FECA] or would be against equity and good conscience.”

Thus, a finding that appellant was without fault is not sufficient, in and of itself, for OWCP to waive the overpayment. OWCP must exercise its discretion to determine whether recovery of the overpayment would “defeat the purpose of [FECA] or would be against equity and good conscience,” pursuant to the guidelines provided in the implementing federal regulations.

Section 10.436 of the implementing regulations<sup>27</sup> provide that recovery of an overpayment will defeat the purpose of FECA if recovery would cause hardship to a currently or formerly entitled beneficiary such that: (a) the beneficiary from whom OWCP seeks recovery needs substantially all of her current income, including compensation benefits, to meet current ordinary and necessary living expenses; and (b) the beneficiary’s assets do not exceed the resource base of \$4,800.00 for an individual.<sup>28</sup> 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).<sup>29</sup>

Recovery of an overpayment is considered to be against equity and good conscience when any individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes her position for the worse.<sup>30</sup> Conversion of the overpayment into a different form, such as food, consumer goods, real estate, *etc.*, from which the claimant derived some benefit, is not to be considered a loss.<sup>31</sup>

#### **ANALYSIS -- ISSUE 4**

Appellant did not respond to OWCP’s request for financial information. The Board has held that failure to submit the requested information within 30 days of the request shall result in denial of waiver and no further request for waiver shall be considered until the requested information is furnished.<sup>32</sup> The Board finds that OWCP properly denied waiver of the overpayment as appellant did not submit the requested and necessary financial documents.

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<sup>27</sup> 20 C.F.R. § 10.436.

<sup>28</sup> *Id.*; Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6.a(1)(b) (October 2004).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at § 10.437(b).

<sup>31</sup> *Supra* note 28, Chapter 6.200.6.b(3) (October 2004).

<sup>32</sup> *R.W.(A.T.)*, 59 ECAB 241, (2007).

### **LEGAL PRECEDENT -- ISSUE 5**

Section 10.321(a)<sup>33</sup> provides that, if an overpayment of compensation has been made to one entitled to future payments, proper adjustment shall be made by decreasing subsequent payments of compensation, “having due regard to the probable extent of future payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize any resulting hardship upon such individual.”

### **ANALYSIS -- ISSUE 5**

In this case, appellant failed to provide any information on income, expenses and assets. OWCP is to follow minimum collection guidelines, which state in general that government claims should be collected in full and that, if an installment plan is accepted, the installments should be large enough to collect the debt promptly.<sup>34</sup> The Board finds that OWCP did not abuse its discretion in following those guidelines in this case and requesting repayment of the debt in full.

### **CONCLUSION**

The Board finds that appellant has not established that he is entitled to compensation benefits from February 13 to March 8, 2010 and from June 18 to July 20, 2010. The Board further finds that he has not established that he has more than 34 percent impairment of his right upper extremity for which he has received schedule awards. The Board also finds that appellant received an overpayment of compensation in the amount of \$1,301.93 for the period from January 3 to 15, 2011, for which he was not at fault, which was not subject to waiver and for which payment in full was proper.

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<sup>33</sup> 20 C.F.R. § 10.321(a).

<sup>34</sup> *Gail M. Roe*, 47 ECAB 268 (1995).

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 23 and 13 and May 11, 2011 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: April 11, 2012  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

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

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