



## **FACTUAL HISTORY**

On April 27, 1993 appellant, then a 34-year-old accounting technician, filed a traumatic injury claim (Form CA-1) alleging that she sustained injuries on April 23, 1993 when her chair slid backwards and she twisted and fell. OWCP accepted the claim for cervical, lumbosacral, left thumb and ring finger strains, as well as metacarpophalangeal (MP) joint reconstruction surgery on May 2, 1994. Appellant was involved in a motor vehicle accident on June 6, 1994 and OWCP accepted aggravation of the left thumb as a consequential injury.

By decision dated September 11, 1995, OWCP terminated compensation for wage loss on the grounds that she had refused an offer of suitable work. Appellant returned to work on October 10, 1995 at four hours per day.

On October 27, 1995 appellant filed a traumatic injury claim alleging that she injured the fingers on her left hand when she slammed her fingers in a door while in the performance of duty. She stopped working and began receiving compensation for wage loss. OWCP accepted the claim for contusion and sprains of the left third and fourth fingers and left MP joint surgery, April 23, 1996.<sup>2</sup> The pay rate for compensation purposes was \$416.73 per week, based on a full-time pay rate as of October 27, 1995.<sup>3</sup>

By decision dated July 2, 1996, an OWCP hearing representative reversed the September 11, 1995 refusal of suitable work termination. The hearing representative found OWCP did not meet its burden of proof to terminate compensation.

OWCP referred appellant for a second opinion evaluation by Dr. Pietro Seni, an orthopedic surgeon.<sup>4</sup> In a report dated May 15, 1999, Dr. Seni provided a history and results on examination. He diagnosed postarthrodesis of the MP joint of the left thumb, fibromyalgia or myofascial-type syndrome, lumbar spondylosis with axial back pain, degenerative spondylolisthesis L5-S1 noted on MRI scan and right S1 radiculopathy. Dr. Seni opined that there were no residuals of a left thumb strain or left third and fourth finger strains. He indicated that appellant could work as an accounting technician.

In a report dated June 27, 2009, Dr. Charles May, an attending osteopath, stated that he did not agree with all of Dr. Seni's medical opinions. He opined that appellant could not work as an accounting technician because of the MP joint fusion. OWCP determined that a conflict in the medical evidence existed and referred appellant for a referee examination by Dr. Ralph Rohner, a Board-certified orthopedic surgeon.<sup>5</sup>

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<sup>2</sup> The April 23, 1993 injury claim is considered the master file and the October 27, 1995 injury is a subsidiary.

<sup>3</sup> The employing establishment indicated that appellant earned \$10.27 per hour.

<sup>4</sup> 5 U.S.C. § 8123(a) provides that an employee shall submit to an examination by a physician designated or approved by the Secretary of Labor, as frequently and at the times and places as may be reasonably required.

<sup>5</sup> When there is a disagreement between an attending physician and a physician making an examination for OWCP, then a third physician shall be selected to make an examination. 5 U.S.C. § 8123(a).

In a report dated September 29, 2009, Dr. Rohner provided a history and results on examination. He opined there were no objective findings to support residuals of the accepted strains or contusions. In addition, Dr. Rohner stated that he could not relate any current cervical or lumbar complaints to the work injuries. He stated that appellant had a good, solid arthrodesis of the left thumb MP joint, but there would be permanent residuals. Dr. Rohner opined that, after reviewing appellant's job description, he could not see why appellant could not "return to substantial gainful employment in performing those duties required by her employment. It is my medical judgment that she could accommodate any incapacity caused by the fusion with routine work activity adjustments -- not cessation of work." He also provided an opinion as to a permanent impairment under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter referred to as the A.M.A., *Guides*).

By letter dated October 19, 2009, OWCP requested additional information from Dr. Rohner regarding disability and permanent impairment. Dr. Rohner submitted an OWCP-5c (work capacity evaluation) stating that "there are no work restrictions based on the claim as allowed." With respect to permanent impairment, Dr. Rohner submitted notes indicating that he would not offer an opinion under the sixth edition of the A.M.A., *Guides*.

In a letter dated December 1, 2009, OWCP advised appellant of a preliminary determination that it proposed to terminate compensation for wage-loss and medical benefits, with the exception of medical benefits for the left thumb. By decision dated January 4, 2010, OWCP terminated compensation benefits other than medical benefits for the left thumb MP joint fusion.

Appellant requested a hearing before an OWCP hearing representative, which was held on April 8, 2010. By decision dated June 8, 2010, the hearing representative affirmed the January 4, 2010 decision.

With respect to a permanent impairment, appellant submitted a June 8, 2010 report from Dr. Richard Ward, a Board-certified orthopedic surgeon, who opined that appellant had a 15 percent arm impairment based on left thumb loss of range of motion. Dr. Ward also stated that appellant had mild sensory deficits for an 8 percent impairment, as well as an additional 3 percent for the ring and longer finger, resulting in a 29 percent left arm impairment.

An OWCP medical adviser reviewed the report of Dr. Ward and indicated in a September 2, 2010 report that the report was incomplete. In a February 3, 2011 letter, OWCP requested that Dr. Ward provide a supplemental report.

On February 28, 2011 appellant submitted a January 31, 2011 report from Dr. James Rutherford, a Board-certified orthopedic surgeon, who provided a history, results on examination and reviewed medical records. Regarding the left thumb, Dr. Rutherford found 29 percent thumb impairment based on loss of range of motion. He also found 20 percent thumb impairment based on sensory deficit. Combining the 29 percent and 20 percent under the A.M.A., *Guides* resulted in 43 percent thumb impairment, or 15 percent arm impairment.

On March 15, 2011 OWCP received an undated report from Dr. Ward who again opined that appellant had a 29 percent left arm impairment. Dr. Ward identified tables and indicated

that the impairment was based on loss of range of motion, sensory deficit and pain. By report dated March 31, 2011, an OWCP medical adviser concurred that the impairment was 15 percent based on Dr. Rutherford's report. The date of maximum medical improvement was reported as June 8, 2010.

In a memorandum dated April 19, 2011, OWCP stated that appellant had been paid compensation with an incorrect rate of pay. According to it, the disability for the October 27, 1995 injury was "relatively minor" and she was only working four hours per day. OWCP stated that the correct pay rate date should be April 23, 1993, the date of the original injury. A worksheet indicated that based on a pay rate of \$376.19 per week, effective April 23, 1993, appellant was overpaid \$11,631.61 from December 12, 1995 to January 4, 2010.

By letter dated April 20, 2011, OWCP advised appellant of a preliminary determination that an overpayment of \$11,631.61 had occurred due to compensation paid based on an incorrect rate of pay. It found that the pay rate of \$416.73 was incorrect as appellant had not returned to full-time work on October 27, 1995, and it was not a recurrence of disability more than six months after a return to full-time work. According to OWCP the compensation benefits had been reinstated when the September 11, 1995 suitable work termination was reversed, but there was no basis to change the pay rate from the initial date of injury on April 23, 1993. It also found appellant was not at fault in creating the overpayment.

In a decision dated July 12, 2011, OWCP denied modification of the termination decisions. It found the report from Dr. Rutherford was not sufficient to warrant modification.

By decision dated August 9, 2011, OWCP finalized the overpayment determination of \$11,631.61 from December 12, 1995 to January 4, 2010. With respect to waiver, it found "the evidence of record demonstrates that you do not have any money left over after paying your monthly living expenses." OWCP then found that waiver was denied and since appellant was entitled to a schedule award, the debt should be recovered by a single deduction from compensation owed.

By decision dated August 10, 2011, OWCP issued a schedule award for a 15 percent left arm permanent impairment. The period of the award was 46.80 weeks from June 8, 2010. The pay rate was reported as \$376.19 per week.

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

Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation. After it has been determined that an employee has disability causally related to his employment, OWCP may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.<sup>6</sup>

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<sup>6</sup> *Elaine Sneed*, 56 ECAB 373 (2005); *Patricia A. Keller*, 45 ECAB 278 (1993); 20 C.F.R. § 10.503.

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

In the present case, there was a conflict in the medical evidence as to the nature and extent of a continuing employment-related condition. Dr. Seni, the second opinion physician, opined that appellant could return to work as an accounting technician. The attending physician, Dr. May, disagreed, stating that appellant's left thumb condition disabled her for the date-of-injury position.

The referee physician, Dr. Rohner, submitted a detailed medical report providing results on examination and reviewing the medical history. He found that the only residuals of an employment-related condition were related to the MP joint surgery. Dr. Rohner clearly stated in the work capacity evaluation that there were no work restrictions causally related to the accepted employment injuries. The Board finds that he provided a rationalized medical opinion based on a complete background. It is well established that when a case is referred to a referee specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.<sup>7</sup> The Board finds that Dr. Rohner represents the weight of the medical evidence on the issue presented. OWCP met its burden of proof to terminate compensation for wage-loss and medical benefits, other than those related to the left thumb, as of January 4, 2010.

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

Under 5 U.S.C. § 8101(2), “‘monthly pay’ means the monthly pay at the time of injury, or the monthly pay at the time disability begins, or the monthly pay at the time compensable disability recurs, if the recurrence begins more than [six] months after the injured employee resumes regular full-time employment with the United States, whichever is greater....”

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

OWCP found that an overpayment of compensation occurred from December 12, 1995 to January 4, 2010 because appellant was paid compensation based on an incorrect pay rate. The record indicates that she received compensation based on a pay rate on October 27, 1995 for a full-time position of \$416.73 per week. According to OWCP, the pay rate should have been based on a date of injury of April 23, 1993 or 376.19 per week.

The record in this case indicates that appellant had an accepted injury on October 27, 1995 and was totally disabled as of that date. OWCP found that the \$416.73 pay rate was incorrect because appellant was working four hours at the time, and the date did not represent a recurrence of disability. October 27, 1995 does not represent a date “compensable disability recurs,” but it does represent a date of injury and a date disability begins. Under 5 U.S.C § 8101(2), the pay rate on October 27, 1995 could represent the pay rate for compensation purposes, if it is greater than the pay rate on April 23, 1993.

In this case, OWCP's finding that appellant was working four hours since October 10, 1995 does not resolve the issue. The pay rate for compensation purposes on October 27, 1995 is

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<sup>7</sup> *Harrison Combs, Jr.*, 45 ECAB 716, 727 (1994).

properly determined by applying 5 U.S.C. § 8114.<sup>8</sup> This section requires OWCP to determine whether appellant worked in the job substantially the whole year prior to injury, or whether the job would have provided employment for substantially the whole year prior to injury. If neither of those methods could be applied reasonably and fairly, OWCP applies 5 U.S.C. § 8114(d)(3) to determine a sum that reasonably represents the employee's earning capacity.

OWCP did not attempt to apply the provisions of 5 U.S.C. § 8114 to properly determine appellant's pay rate as of October 27, 1995. The case will accordingly be remanded to OWCP for a proper determination. The Board will not address the waiver issue at this time as the issues of fact and amount of overpayment have not been resolved.

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

FECA provides that, if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.<sup>9</sup> Neither FECA nor the regulations specify the manner in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal justice for all claimants OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.<sup>10</sup> For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition.<sup>11</sup>

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

In the present case, OWCP received reports from Dr. Ward and Dr. Rutherford with respect to a permanent impairment. The Board notes that Dr. Rutherford's report provided detailed results on physical examination and reviewed the medical history. Dr. Ward provided brief reports with little history or results on examination. In addition, Dr. Rutherford's examination was the more recent of the two, as he examined appellant on January 31, 2011 and Dr. Ward on June 8, 2010. The Board finds that it was reasonable for OWCP to base its schedule award determination on the findings of Dr. Rutherford.

In his January 31, 2011 report, Dr. Rutherford finds that, under Table 15-30, the left thumb ankylosed at five degrees was five percent thumb impairment. The table indicates that ankylosis at 20 degrees is a five percent impairment, while ankylosis at 5 degrees is a seven percent thumb impairment.<sup>12</sup> For three centimeters of thumb opposition, the thumb impairment under Table 15-30 is nine percent.<sup>13</sup> Pursuant to Table 15-30, 30 degrees of adduction is five

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<sup>8</sup> See *H.S.*, 58 ECAB 511 (2007); 20 C.F.R. § 10.5(s).

<sup>9</sup> 5 U.S.C. § 8107. This section enumerates specific members or functions of the body for which a schedule award is payable and the maximum number of weeks of compensation to be paid; additional members of the body are found at 20 C.F.R. § 10.404(a).

<sup>10</sup> *A. George Lampo*, 45 ECAB 441 (1994).

<sup>11</sup> FECA Bulletin No. 09-03 (issued March 15, 2009).

<sup>12</sup> A.M.A., *Guides* 468, Table 15-30. Dr. Rutherford identified grade modifier 4 for ankylosis.

<sup>13</sup> *Id.*

percent thumb impairment and four centimeters abduction is a four percent thumb impairment. As to the interphalangeal (IP) joint, 30 degrees flexion is a three percent thumb impairment and -10 degrees extension is also a three percent thumb impairment.

The Board accordingly finds that using the correct 7 percent impairment for MP joint ankylosis at five degrees, the range of motion impairment for the thumb is 31 percent, as opposed to the 29 percent reported by Dr. Rutherford and OWCP's medical adviser. With respect to sensory deficit, Dr. Rutherford found appellant had 20 percent thumb impairment under Table 15-16.<sup>14</sup> Under this table, radial digital nerve sensory loss along the total length of the thumb is 20 percent thumb impairment. Combining the 31 percent with the 20 percent results in 45 percent thumb impairment.<sup>15</sup> Applying Table 15-12, 45 percent thumb impairment is 16 percent arm impairment.<sup>16</sup>

Based on the medical evidence of record, appellant has a 16 percent left arm permanent impairment based on thumb loss of range of motion and sensory deficit. On return of the case record OWCP should issue an appropriate decision for an additional one percent left arm permanent impairment. The Board also notes that the August 10, 2011 schedule award decision used a pay rate of 376.19 per week. Once OWCP resolves the pay rate issue, the schedule award should be consistent with OWCP's findings in this regard.

### **CONCLUSION**

The Board finds that OWCP properly terminated compensation for wage-loss and medical benefits for conditions other than the left thumb as of January 4, 2010. The Board further finds that OWCP did not establish an overpayment of compensation of \$11,630.61 from

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<sup>14</sup> A.M.A., *Guides* 427, Table 15-16.

<sup>15</sup> *See id.* at 604, Combined Values Chart.

<sup>16</sup> A.M.A., *Guides* 422, Table 15-12.

December 12, 1995 to January 4, 2010, and the case is remanded for further development. In addition, the Board finds appellant has a 16 percent left arm permanent impairment.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated July 12, 2011 is affirmed. The decision dated August 9, 2011 is set aside and the case remanded for further action consistent with this decision of the Board. The decision dated August 10, 2011 is modified to reflect a 16 percent left arm permanent impairment and affirmed, as modified.

Issued: September 10, 2012  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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