



## **FACTUAL HISTORY**

OWCP accepted that on January 12, 2012 appellant, then a 51-year-old mail clerk, sustained a right shoulder injury when she slipped and fell on ice in the parking lot. She stopped work. Appellant's claim was accepted for right shoulder fracture of the humerus. She returned to limited duty on March 5, 2012. On March 11, 2012 appellant stopped work as the employing establishment could not accommodate her restrictions. OWCP paid wage-loss compensation and on August 9, 2012 placed her on the periodic rolls.

In a September 26, 2012 report, Dr. John J. Aschberger, Board-certified in physical medicine and rehabilitation, related appellant's complaints of right arm pain, restriction of motion at the hand and neck pain with increasing irritation and tightness. He noted that on January 12, 2012 she fractured her right humerus when she fell on ice at work. Dr. Aschberger reported that appellant underwent a conservative course of treatment and noted that electrodiagnostic testing showed no identifiable abnormality. He initially examined her on March 1, 2012 and expected her distal issues to resolve but she never actually regained full motion. Upon examination, Dr. Aschberger observed that appellant carried her right shoulder slightly elevated and noted restriction of motion at the digits with some flexion tightening. Regarding appellant's physical examination of the right shoulder, he reported that shoulder range of motion was assessed utilizing the goniometric technique. Three trials in each plane of motion were performed with maximum measurements recorded. Dr. Aschberger noted that the measurements were consistent results on three trials. "For flexion [appellant] measured 110, 110 and 100 degrees, extension of 30 degrees three times, abduction 110, 105 and 110 with 30 degrees of adduction, internal rotation -- 20 degrees, 20 degrees and 10 degrees and external rotation 50 degrees." Pursuant to Table 15-34, at page 475 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6<sup>th</sup> ed. 2009) (hereinafter, A.M.A., *Guides*), range of motion of the shoulder demonstrated flexion of 110 degrees, a three percent impairment; extension to 30 degrees, a one percent impairment; abduction to 110 degrees, a three percent impairment; adduction to 30 degrees, a one percent impairment; internal rotation to 20 degrees, a four percent impairment; and external rotation to 50 degrees, a two percent impairment. Dr. Aschberger diagnosed right humeral fracture with symptoms of restricted motion at the shoulder.

Utilizing the sixth edition of the A.M.A., *Guides*, Dr. Aschberger opined that, based on loss of range of motion to the shoulder and hand, appellant had 22 percent impairment of the upper extremity for the hand. He referred to Table 15-3 and rated her range of motion for each digit for a total of 24 percent impairment of the hand, which converted to 22 percent impairment of the upper extremity. Dr. Aschberger also noted 14 percent impairment for limitations in range of motion at appellant's shoulder, pursuant to Table 15-34. He calculated that the values combined to a total impairment of 33 percent impairment of the upper extremity, which converted to 20 percent whole person impairment. Dr. Aschberger reported that appellant was at maximum medical improvement. He recommended that she work with restrictions.

Dr. Stephen Danahey, a general surgeon, in his November 7, 2012 report, related appellant's complaints of discomfort in her shoulder and hand, that her fingers locked and that she felt popping and clicking in her neck. He reported that her physical examination was basically unchanged from the prior visit and diagnosed right humeral fracture with symptoms of

restricted motion at the shoulder and at the right hand. Dr. Danahey reviewed Dr. Aschberger's September 26, 2012 impairment rating and agreed that appellant reached maximum medical improvement.

In a January 22, 2013 report, Dr. Danahey stated that appellant felt that she could do her job but noted that she still complained of difficulty squeezing, making a fist with her right hand and bending or flexing the digits of her right hand. He diagnosed status post right humeral fracture with symptoms of restricted motion at the shoulder and at the right hand.

Appellant returned to full duty on February 25, 2013. A payroll computer printout listed that she continued to receive compensation until March 9, 2013 for a total of 13 days. Appellant was paid \$15.78 from March 1 to 9, 2013 and \$1,285.60 from February 25 to March 9, 2013. OWCP determined that she was overpaid a total of \$1,301.38.

In a February 27, 2013 letter, the employing establishment advised OWCP that appellant had returned to full duty on February 25, 2013.

In a March 14, 2013 report, Dr. Morley Slutsky, Board-certified in occupational medicine and OWCP's medical adviser, reviewed the medical evidence, including Dr. Aschberger's September 26, 2012 impairment rating. He noted that Dr. Aschberger used the less preferred impairment rating method for loss of range of motion. Further, Dr. Aschberger included an impairment rating for loss of hand motion, which was not an accepted condition. Dr. Slutsky explained that according to the sixth edition of the A.M.A., *Guides* the diagnosis-based impairment method was the preferred rating method for the upper extremities or that range of motion impairment method should be used as a physical adjustment factor and when no other approach is available. He quoted the A.M.A., *Guides* as follows:

“Section 15.2, page 387 indicates, ‘Range of motion is used primarily as a physical examination adjustment factor and only to determine actual impairment values in the rare case when it is not possible to otherwise define impairment; this is a significant change from prior editions.’”

Utilizing Table 15-5 of the sixth edition of the A.M.A., *Guides*, Dr. Slutsky stated that the accepted diagnosis of humerus fracture would be used for the impairment rating. He noted that appellant was treated conservatively and healed but she continued to complain of persistent symptoms in the right upper extremity. Dr. Slutsky pointed out that thermograms and electrodiagnostic testing were negative for peripheral nerve damage. Appellant was a class 1 for a displaced humerus fracture. Dr. Slutsky utilized Table 15-34 to determine that she had 14 percent impairment of the right upper extremity for loss of range of the shoulder. He referred to Table 15-35 to determine that appellant's loss of range of motion of her right shoulder equaled a grade modifier of 2. Appellant also had a grade modifier of 2 based on physical examination for tenderness and some evidence of dysvascularization. Dr. Slutsky applied the net adjustment formula of 2 to rate five percent impairment of the right upper extremity.

On April 10, 2013 OWCP issued a preliminary decision that appellant received an overpayment in the amount of \$1,285.60 because she received wage-loss compensation for total disability after she returned to work on March 9, 2013 at full salary. An overpayment calculation

worksheet noted that appellant was paid \$2,768.98 from February 10 to March 9, 2013 but she should have only received \$1,483.38, which resulted in an overpayment of \$1,285.60. OWCP found that she was without fault in the creation of the overpayment. It requested that appellant complete the enclosed overpayment recovery questionnaire and submit supporting financial documents within 30 days of the date of the letter.

Appellant claimed on April 19, 2013 that she returned to work on February 26, 2013 and submitted a Form SF-50.

Based on that evidence OWCP amended its preliminary determination to find that appellant received an overpayment of \$1,186.71. An amended overpayment worksheet found that appellant was paid \$2,768.98 from February 10 to March 9, 2013 but was only entitled to \$1,582.27 for a total overpayment of \$1,186.71.

Appellant noted her disagreement with the amount of the overpayment on May 23, 2013. She stated that the overpayment needed to be corrected to reflect the insurance deduction amount that she paid covering the period February 10 to March 9, 2013. Appellant explained that, after she returned to work on February 26, 2013, she was no longer on OWCP payrolls and paid for basic life and health insurance for the period February 10 to March 9, 2013. She noted that the total deduction for this period was \$134.94. Appellant did not request a telephone conference or precoupment hearing.

By decision dated July 2, 2013, OWCP finalized the overpayment in the amount of \$1,186.71. It found that appellant was without fault in the creation of the overpayment but denied waiver of recovery because she did not submit any information to support that recovery would defeat the purpose of FECA or be against equity and good conscience. OWCP noted that while she responded to the preliminary determination she did not request a waiver or precoupment hearing. It determined that it would deduct the full of amount of \$1,186.71 from appellant's July 2, 2013 schedule award payment.

In a separate July 2, 2013 decision, OWCP granted a schedule award for five percent impairment of the right upper extremity. The award ran for a period March 10 to June 27, 2013 for 15.6 weeks. OWCP noted that an overpayment of \$1,186.71 would be deducted from the schedule award payment.

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

The schedule award provision of FECA and its implementing regulations<sup>3</sup> 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. FECA, however, does not specify the manner in which the percentage of loss of a member shall be determined. The method used in making such a determination is a matter that rests within the sound discretion of OWCP.<sup>4</sup> For consistent results and to ensure equal justice, the Board has authorized the use of a

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<sup>3</sup> 20 C.F.R. § 10.404.

<sup>4</sup> *Linda R. Sherman*, 56 ECAB 127 (2004); *Danniel C. Goings*, 37 ECAB 781 (1986).

single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by OWCP as the appropriate standard for evaluating schedule losses.<sup>5</sup> Effective May 1, 2009, OWCP adopted the sixth edition of the A.M.A., *Guides* as the appropriate edition for all awards issued after that date.<sup>6</sup>

In determining impairment for the upper extremities under the sixth edition of the A.M.A., *Guides*, an evaluator identifies the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE) and Clinical Studies (GMCS).<sup>7</sup> The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).<sup>8</sup>

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to OWCP's medical adviser for an opinion concerning the nature and percentage in accordance with the A.M.A., *Guides* with the medical adviser providing rationale for the percentage of impairment specified.<sup>9</sup>

### ANALYSIS -- ISSUE 1

Appellant's claim was accepted for right shoulder fracture of the humerus. She submitted an impairment rating by her treating physician for a schedule award. On July 2, 2013 OWCP granted appellant a schedule award for five percent impairment of the right upper extremity. The Board finds that the medical evidence of record establishes that appellant has 14 percent impairment of her right arm.

In a September 26, 2012 report, Dr. Aschberger found that appellant had 33 percent impairment of the upper extremity, which converted to 20 percent whole person impairment. He referred to Table 15-13 of the sixth edition of the A.M.A., *Guides* and rated her range of motion for each digit of the hand for a total of 24 percent impairment of the hand, which converted to 22 percent impairment. The only accepted condition in this case, however, is the right shoulder fracture. Therefore, there is no entitlement to a schedule award for a hand injury.

Dr. Aschberger rated a 14 percent permanent impairment for limitation in range of motion of appellant's right shoulder. Regarding the accepted shoulder condition, he provided an impairment rating based on the sixth edition of the A.M.A., *Guides* and examination findings.

On March 12, 2013 OWCP referred appellant's schedule award claim to the district medical adviser. In a report dated March 12, 2013, Dr. Slutsky, an OWCP medical adviser,

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<sup>5</sup> *R.D.*, 59 ECAB 127 (2007); *Bernard Babcock, Jr.*, 52 ECAB 143 (2000); *see also* 20 C.F.R. § 10.404.

<sup>6</sup> Federal (FECA) Procedure Manual, Part 3 -- Claims, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 9, 2010).

<sup>7</sup> A.M.A., *Guides* 383-419.

<sup>8</sup> *Id.* at 411.

<sup>9</sup> *See supra* note 6 at Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(d) (August 2002).

reviewed the medical evidence for rating impairment under the A.M.A., *Guides*. He noted that while Dr. Aschberger had properly determined that appellant has a 14 percent permanent impairment of the right upper extremity due to loss of motion of the shoulder, loss of range of motion was the less preferred method for rating impairment under Chapter 15. Dr. Slutsky explained that according to pages 387 and 481 of the sixth edition of the A.M.A., *Guides*, the diagnosis-based impairment method is the preferred rating method for the upper extremities or that range of motion impairment method should be used as a physical adjustment factor and when no other approach is available. Utilizing Table 15-5 of the sixth edition of the A.M.A., *Guides*, he stated that appellant was a class 1 for a diagnosis of displaced humerus fracture. Dr. Slutsky determined that appellant had grade modifiers of 2 for functional history and grade modifier for physical examination based on findings. Applying the net adjustment formula of 2, he found that appellant had five percent impairment of the right upper extremity. Dr. Slutsky indicated a date of maximum medical improvement of September 26, 2012, the date of Dr. Aschberger's impairment rating report.

The Board finds that OWCP's medical adviser incorrectly determined that the range of motion method should be only used when no other approach was available and only used as an alternative to the diagnosis-based rating when there were no diagnosis-based ratings available.<sup>10</sup> Section 15.2 at page 387 of the A.M.A., *Guides* states that "range of motion is used primarily as a physical examination adjustment factor and only to determine actual impairment values when a grid permits its use as an option." Appellant's claim has been accepted for fracture of the right shoulder. Fracture of the shoulder is evaluated on page 405 of the A.M.A., *Guides*, Table 15-5, Shoulder Regional Grid.<sup>11</sup> By means of an asterisk, Table 15-5, the Shoulder Regional Grid provides that for a fracture of the shoulder "if motion loss is present, this impairment may alternatively be assessed using Section 15.7, Range of Motion Impairment." The Board has previously affirmed that appellant is entitled to a range of motion impairment rating under the sixth edition of the A.M.A., *Guides*, for shoulder impairment, when such impairment is greater than the diagnosis-based rating.<sup>12</sup>

Regarding the range of motion examination, the A.M.A., *Guides* state that the range of motion examination is performed by recording the active measurements from three separate range of motion efforts. Measurements should be rounded up or down to the nearest number ending in zero. All measurements should fall within 10 degrees of the mean of these three measurements. The maximum observed measurement is used to determine the range of motion impairment.<sup>13</sup>

Dr. Aschberger explained that range of motion of the shoulder had been tested in three trials. The maximum observed measurement for flexion was 110 degrees, extension 30 degrees,

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<sup>10</sup> See *T.T.*, Docket No. 13-258 (issued April 17, 2013).

<sup>11</sup> A.M.A., *Guides* 405.

<sup>12</sup> *G.O.*, Docket No. 13-1973 (issued March 11, 2014).

<sup>13</sup> A.M.A., *Guides* 464. Compare *D.U.*, Docket No. 13-2086 (issued February 11, 2014). (The examining physician did not establish that he conformed to this protocol in providing a loss of range of motion rating of the employee's arms).

abduction 110 degrees, adduction 30 degrees, internal rotation 20 degrees and external rotation 50 degrees. Each measurement fell within 10 degrees of the mean. Shoulder range of motion is evaluated under Table 15-34.<sup>14</sup> Pursuant to this table, flexion of 110 degrees is a 3 percent impairment, extension to 30 degrees is a 1 percent impairment, abduction of 110 degrees is a 3 percent impairment, adduction to 30 degrees is a 1 percent impairment, internal rotation to 20 degrees is a 4 percent impairment, external rotation to 50 degrees is a 2 percent impairment, for a total impairment of 14 percent.

Dr. Slutsky reviewed the medical evidence from Dr. Aschberger and concurred that appellant had a 14 percent impairment of the right upper extremity under the sixth edition of the A.M.A., *Guides* for loss of motion, but used the preferred diagnosis-based estimate of 5 percent. The Board finds that Dr. Aschberger's range of motion rating is in accordance with the protocols pertaining to upper extremity impairment determinations and represents the weight of medical opinion. Appellant has a 14 percent permanent impairment of the right arm.

On appeal, appellant contends that her schedule award is very little for the lifetime permanent work injuries. She also addressed several discrepancies between the ratings of Dr. Aschberger and the district medical adviser. As noted, applying the protocols pertaining to upper extremity impairment under the sixth edition of the A.M.A., *Guides* both Dr. Aschberger and Dr. Slutsky determined that appellant had a 14 percent permanent impairment of the right shoulder due to loss of motion.

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.

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

Section 8102 of FECA 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>15</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 or she may not receive salary, pay or remuneration of any type from the United States, except in limited circumstances.<sup>16</sup> A claimant is not entitled to receive total disability compensation and actual earnings for the same period. OWCP procedures provide that an overpayment in compensation is created when a claimant returns to work but continues to receive wage-loss compensation.<sup>17</sup>

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<sup>14</sup> *Id.* at 475.

<sup>15</sup> 5 U.S.C. § 8102.

<sup>16</sup> *Id.* at § 8116(a).

<sup>17</sup> *Danny E. Haley*, 56 ECAB 393 (2005); *supra* note 6 at Part 6 -- Debt Management, *Initial Overpayment Action*, Chapter 6.200.2(a) (May 2004).

## **ANALYSIS -- ISSUE 2**

The Board finds that appellant received an overpayment of compensation in the amount of \$1,186.71. OWCP accepted that on January 12, 2012 she sustained a right shoulder injury in the performance of duty and stopped work. On March 5, 2012 appellant returned to limited duty. On March 11, 2012 she stopped work again because the employing establishment could not accommodate her restrictions. OWCP paid disability compensation and placed appellant on the periodic rolls. The record reveals that she returned to work on February 26, 2013 but continued to receive compensation until March 9, 2013. Because she returned to work on February 26, 2013, appellant was no longer entitled to receive compensation after that date.<sup>18</sup> OWCP calculated the overpayment by subtracting the amount she should have received for the period February 10 to March 9, 2013, \$1,582.27, from the amount that she actually received, \$2,768.98, to find an overpayment of \$1,186.71. Accordingly, the Board will affirm the fact and amount of overpayment.

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

Section 8129(a) of FECA provides that, when an overpayment of compensation has been made because of an error of fact or law, adjustment shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is when an incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of FECA or be against equity and good conscience.<sup>19</sup>

Thus, a finding that appellant was without fault is not sufficient, in and of itself, for OWCP to waive the overpayment.<sup>20</sup> 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 sections 10.434 and 10.437 of the implementing federal regulations.<sup>21</sup>

Recovery of an overpayment will defeat the purpose of FECA if such recovery would cause hardship to a currently or formerly entitled beneficiary because the beneficiary from whom OWCP seeks recovery needs substantially all of his or her current income, including compensation benefits, to meet current ordinary and necessary living expenses and the beneficiary's assets do not exceed a specified amount as determined by OWCP.<sup>22</sup> Additionally, recovery of an overpayment is considered to be against equity and good conscience when any individual who received an overpayment would experience severe financial hardship in attempting to repay the debt or when any individual, in reliance on such payment or on notice

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<sup>18</sup> See *supra* note 16; 20 C.F.R. § 10.500.

<sup>19</sup> *Id.* at § 8129(b).

<sup>20</sup> *James Lloyd Otte*, 48 ECAB 334, 338 (1997); see *William J. Murphy*, 40 ECAB 569, 571 (1989).

<sup>21</sup> 20 C.F.R. §§ 10.434 and 10.437.

<sup>22</sup> *Id.* at § 10.436(a)(b). For an individual with no eligible dependents, the asset base is \$4,800.00. The base increases to \$8,000.00 for an individual with a spouse or one dependent, plus \$960.00 for each additional dependent. *Supra* note 17 at Chapter 6.200.6(a)(1)(b) (June 2009).

that such payments would be made, gives up a valuable right or changes his or her position for the worse.<sup>23</sup>

The individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by OWCP. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of FECA or be against equity and good conscience. This information will also be used to determine the repayment schedule, if necessary.<sup>24</sup> Failure to submit the requested information within 30 days of the request shall result in the denial of waiver and no further request for waiver shall be considered until the requested information is furnished.<sup>25</sup>

As the only limitation on OWCP's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deductions from known facts.<sup>26</sup>

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

OWCP advised appellant by an April 10, 2013 notice of its preliminary determination of the \$1,186.71 overpayment and that she was not at fault. It advised her to submit information regarding her income, assets and expenses by completing a questionnaire and providing supporting documentation. Appellant, however, did not provide any financial information or documentation. In the absence of the information requested, OWCP could not determine whether or not recovery of the overpayment could defeat the purpose of FECA or be against equity and good conscience. Therefore, it properly denied waiver of recovery.<sup>27</sup>

### **CONCLUSION**

The Board finds that appellant's impairment rating is modified to reflect a 14 percent impairment of her right upper extremity. The Board also finds that she received an overpayment of compensation of \$1,186.71 for the period February 26 to March 9, 2013 because she received compensation after she returned to work. The Board further finds that OWCP properly denied waiver of recovery of the overpayment.

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<sup>23</sup> *Id.* at § 10.437(a)(b).

<sup>24</sup> *Id.* at § 10.438(a); *Ralph P. Beachum, Sr.*, 55 ECAB 442 (2004).

<sup>25</sup> *Id.* at § 10.438; *Linda Hilton*, 52 ECAB 476 (2001).

<sup>26</sup> *Daniel J. Perea*, 42 ECAB 214 (1990).

<sup>27</sup> *Supra* note 25.

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 2, 2013 schedule award is affirmed as modified. The July 2, 2013 overpayment decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 12, 2014  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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