

**United States Department of Labor  
Employees' Compensation Appeals Board**

---

E.M., Appellant )  
and ) Docket No. 13-1378  
U.S. POSTAL SERVICE, POST OFFICE, ) Issued: February 12, 2014  
Oakland, CA, Employer )  
\_\_\_\_\_  
)

*Appearances:*  
John Casey, for the appellant  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
RICHARD J. DASCHBACH, Chief Judge  
ALEC J. KOROMILAS, Alternate Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On May 20, 2013 appellant, through her representative, filed a timely appeal from a January 15, 2013 decision of the Office of Workers' Compensation Programs (OWCP) regarding an overpayment of compensation. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUES**

The issues are: (1) whether OWCP properly found that an overpayment of \$5,906.26 was created; and (2) whether it properly denied waiver of recovery of the overpayment.

**FACTUAL HISTORY**

OWCP accepted that on or before May 26, 2006 appellant, then a 49-year-old letter carrier, sustained bilateral carpal tunnel syndrome. On September 6, 2007 she underwent left

---

<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

open carpal tunnel release and de Quervain's tenosynovectomy.<sup>2</sup> OWCP later expanded the claim to accept bilateral de Quervain's tenosynovitis.<sup>3</sup>

Dr. Michael E. Hebrard, an attending Board-certified physiatrist, submitted reports through January 2008 diagnosing complex regional pain syndrome and reflex sympathetic dystrophy syndrome of the left upper extremity, superimposed on carpal tunnel syndrome and de Quervain's tenosynovitis. On February 4, 2008 OWCP obtained a second opinion from Dr. Robert R. Ferretti, a Board-certified orthopedic surgeon, who opined that appellant had no objective evidence of carpal tunnel syndrome or de Quervain's tenosynovitis.<sup>4</sup>

On June 16, 2009 appellant claimed a schedule award. She submitted a November 16, 2009 impairment rating from Dr. Hebrard. On examination of the left hand, Dr. Hebrard noted paresthesias in the first, second and third digits and 4/5 grip strength. Referring to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), he noted that appellant scored 66 on a *QuickDASH* questionnaire. Dr. Hebrard diagnosed carpal tunnel syndrome, status post carpal tunnel release, de Quervain's tenosynovitis and status post radial styloid tenosynovectomy. He found that a *QuickDASH* score of 66 equaled a grade modifier of 3 for Functional History (GMFH) according to Table 15-7.<sup>5</sup> Dr. Hebrard assessed a grade modifier of 2 for Physical Examination (GMPE) findings according to Table 15-8,<sup>6</sup> with no applicable grade modifier for Clinical Studies (GMCS). He found a diagnosis-based impairment (CDX) of class 1, grade E. Applying the net adjustment formula of (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX), Dr. Hebrard found a net adjustment of +2, which he opined equaled 13 percent impairment of the left upper extremity.

In September 1 and October 28, 2010 reports, Dr. Arthur S. Harris, an OWCP medical adviser, reviewed the medical record and explained that Dr. Hebrard misapplied the A.M.A., *Guides* and did not provide complete calculations. Applying the net adjustment formula to

---

<sup>2</sup> On December 8, 2010 OWCP issued a decision denying authorization for a right carpal tunnel release following a May 6, 2011 hearing, it affirmed the December 8, 2010 decision on July 25, 2011.

<sup>3</sup> The overpayment at issue pertains only to the percentage of impairment to the left upper extremity. Therefore, the Board will address only the medical evidence pertinent to the left upper extremity.

<sup>4</sup> OWCP found a conflict of medical opinion between Dr. Hebrard and Dr. Ferretti regarding the nature and extent of the accepted conditions. It selected Dr. Victoria L. Barber, a Board-certified orthopedic surgeon, to resolve the conflict. In August 25 and September 25, 2008 reports, Dr. Barber diagnosed residuals of carpal tunnel syndrome and de Quervain's tenosynovitis bilaterally. OWCP obtained an updated second opinion on June 8, 2009 from Dr. Philip Wirganowicz, a Board-certified orthopedic surgeon, who diagnosed continued left carpal tunnel syndrome and de Quervain's tenosynovitis but opined that appellant did not have reflex sympathetic dystrophy syndrome. It found a conflict of medical opinion between Dr. Hebrard and Dr. Wirganowicz regarding the presence of reflex sympathetic dystrophy syndrome. OWCP selected Dr. C. Arthur Sciaroni, a Board-certified orthopedic surgeon, to resolve the conflict. Dr. Sciaroni submitted August 3 and September 17, 2010 reports finding a normal motor and sensory examination of the left arm. He attributed minor electrodiagnostic findings due to diabetes mellitus.

<sup>5</sup> Table 15-7, page 406 of the sixth edition of the A.M.A., *Guides* is entitled "Functional History Adjustment: Upper Extremities."

<sup>6</sup> Table 15-8, page 408 of the sixth edition of the A.M.A., *Guides* is entitled "Physical Examination Adjustment: Upper Extremities."

Dr. Hebrard's clinical findings, he found a GMFH of 3, a GMCS of 1 for electrodiagnostic findings of carpal tunnel syndrome and a GMPE of 1, resulting in an average grade modifier of 2 according to Table 15-23.<sup>7</sup> However, appellant's functional scale results including the *QuickDASH* score of 66 merited a grade modifier of 3, raising the classification to 2D, equaling six percent upper extremity impairment. Dr. Harris assessed an additional two percent impairment for de Quervain's tenosynovitis according to Table 15-3,<sup>8</sup> totaling eight percent impairment of the left upper extremity.

By decision dated February 2, 2011, OWCP granted appellant a schedule award for eight percent impairment of the left upper extremity and three percent impairment of the right upper extremity. The period of the award ran from July 14, 2009 to March 11, 2010, equivalent to 34.32 weeks of compensation. It was based on appellant's September 6, 2007 weekly pay rate of \$946.52 at the 66 2/3 percent compensation rate. The total compensation awarded was \$21,687.80.

Appellant's representative requested a hearing, held June 30, 2011. At the hearing, he asserted that OWCP should accord Dr. Hebrard's finding of 13 percent impairment of the left upper extremity as the weight of the medical evidence. Alternatively, appellant's representative presented his own calculations which he asserted established more than 13 percent impairment of the left arm. He did not submit any additional medical evidence regarding the left upper extremity.

By decision dated and finalized September 22, 2011, OWCP's hearing representative affirmed the February 2, 2011 schedule award determination. She found that appellant submitted no new medical evidence to establish greater impairment.

On September 8, 2012 appellant filed a claim for an additional schedule award. In support of the claim, her representative referred appellant to Dr. Ferretti for an impairment rating. Dr. Ferretti submitted a July 26, 2012 report finding slight swelling in the left thenar eminence, a positive Tinel's sign at the wrist and cubital tunnel and a positive Finkelstein's test. He diagnosed status post carpal tunnel and de Quervain's tenosynovitis release. Referring to Table 15-23 of the A.M.A., *Guides*, Dr. Ferretti found a CDX of 2, GMCS of 1 for sensory and motor conduction delay, a GMFH of 3 for constant symptoms and a GMPE of 2 for decreased sensation. Using the net adjustment formula of  $(GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX)$ , he found an average grade modifier of 2. Dr. Ferretti explained that the "functional scale [was] moderate grade 2 modifier consistent with a *QuickDASH* score of 44." As the functional scale score was equal to CDX, the total left upper extremity impairment was the default value of five percent.

---

<sup>7</sup> Table 15-23, page 449 of the sixth edition of the A.M.A., *Guides* is entitled "Entrapment/Compression Neuropathy Impairment."

<sup>8</sup> Table 15-3, page 395 of the sixth edition of the A.M.A., *Guides* is entitled "Wrist Regional Grid."

Appellant also submitted reports from Dr. Hebrard dated from May 22 to August 13, 2012, opining that she had progressive weakness in the left hand.<sup>9</sup>

In a September 29, 2012 report, Dr. Harris opined that appellant's left upper extremity condition had improved. He concurred with Dr. Ferretti's impairment rating of five percent of the left upper extremity due to residual, moderate carpal tunnel syndrome. The medical evidence noted that appellant had attained maximum medical improvement as of July 26, 2012, the date of Dr. Ferretti's evaluation.

By notice dated November 15, 2012, OWCP advised appellant of its preliminary determination that she was overpaid \$5,906.28 in compensation. Appellant received a schedule award for eight percent impairment of the left upper extremity, equal to 174.72 days of compensation, but subsequent evidence indicated only five percent impairment, equal to 109.2 days of compensation. The compensation received for the 65.52 day difference constituted an overpayment. OWCP made the preliminary finding that appellant was not at fault in creation of the overpayment. It provided her an overpayment recovery questionnaire (Form OWCP-20) and afforded her 30 days to provide financial information about her income, assets and expenses. OWCP explained that this information was required to consider waiver of recovery of the overpayment.

In response, appellant submitted July 2 and October 22, 2012 reports from Dr. Hebrard noting pain, swelling and weakness in the left hand and wrist due to a failed carpal tunnel release. She did not submit financial information.

By decision dated January 15, 2013, OWCP finalized the fact and amount of the overpayment and the finding that appellant was not at fault in its creation. It denied waiver of recovery as she did not submit financial information. Therefore, appellant did not establish that recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience. OWCP directed recovery by submitting a check for the full amount of the overpayment.

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

The schedule award provisions of FECA<sup>10</sup> provide for compensation to employees sustaining permanent impairment from loss or loss of use of specified members 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 sound 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. A.M.A., *Guides* has been adopted by OWCP as a standard for evaluation of schedule losses and

---

<sup>9</sup> January 25 and July 3, 2012 electromyography and nerve conduction velocity studies showed severe bilateral median sensorimotor mononeuropathy across the wrists.

<sup>10</sup> 5 U.S.C. § 8107.

the Board has concurred in such adoption.<sup>11</sup> For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition of the A.M.A., *Guides*, published in 2008.<sup>12</sup>

If a claimant received a schedule award and the medical evidence does not support the degree of permanent impairment awarded, an overpayment of compensation may be created. Claims for an increased schedule award based on the same edition of the A.M.A., *Guides* are subject to overpayment.<sup>13</sup>

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

OWCP accepted that appellant sustained carpal tunnel syndrome and de Quervain's tenosynovitis of the left upper extremity. Appellant claimed a schedule award on June 16, 2009. Dr. Hebrard, an attending Board-certified physiatrist, found a 13 percent impairment of the left upper extremity on November 16, 2009. However, OWCP's medical adviser found errors in Dr. Hebrard's application of the A.M.A., *Guides*. On February 2, 2011 OWCP issued a schedule award for eight percent impairment of the left arm on February 2, 2011, based on Dr. Harris' application of the sixth edition of the A.M.A., *Guides* to his clinical findings. Appellant disagreed and requested a hearing, but did not provide additional medical evidence. Therefore, OWCP affirmed the schedule award by decision issued September 22, 2011.

Appellant claimed an additional schedule award on September 8, 2012, based on the July 26, 2012 findings of Dr. Ferretti, a Board-certified orthopedic surgeon, who provided detailed clinical findings and impairment rating of five percent impairment of the left upper extremity according to the sixth edition of the A.M.A., *Guides*. Although Dr. Hebrard provided an opinion that appellant's condition worsened in 2012, he did not provide a new impairment rating. OWCP's medical adviser concurred with Dr. Ferretti's calculations.

The Board finds that the schedule award issue has been properly resolved.<sup>14</sup> OWCP appropriately developed the medical evidence in determining that appellant's left upper extremity impairment had improved from an eight to five percent impairment.<sup>15</sup> Both impairment ratings were performed under the same edition of the A.M.A., *Guides*. OWCP calculated that appellant had received compensation for 174.72 days but was only entitled to 109.2 days. Appellant received \$5,906.28 for the 65.52 day difference. The Board notes that she does not contest the amount of the overpayment or OWCP's calculations. Also, there is no contrary medical evidence indicating a greater percentage of impairment. Therefore, OWCP's

---

<sup>11</sup> *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

<sup>12</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5.a (February 2013); see also Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

<sup>13</sup> *W.M.*, Docket No. 13-291 (issued June 12, 2013). See *Richard Saldibar*, 51 ECAB 585 (2000). Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards Claims for Increased Schedule Award*, Chapter 2.808.9.e (February 2013).

<sup>14</sup> *W.M.*, *supra* note 13, *Richard Saldibar*, *supra* note 13.

<sup>15</sup> *Richard Saldibar*, *supra* note 13.

January 15, 2013 decision finding a \$5,906.28 overpayment of compensation was proper under the law and facts of this case.

Appellant's representative asserted that the case is not in posture for a decision as OWCP did not resolve the issue of the appropriate percentage of permanent impairment. As noted, however, the Board finds that OWCP properly determined the percentage of permanent impairment. Appellant did not submit any medical evidence indicating a greater percentage of impairment.

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

Section 8129(a) of FECA<sup>16</sup> provides that, where an overpayment of compensation has been made because of an error of fact or law, adjustments shall be made by decreasing later payments to which an individual is entitled.<sup>17</sup> The only exception to this requirement is found in section 8129(b) of FECA, which provides that adjustments or recovery may not be made when incorrect payments have been made to an individual who is without fault and when such adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.<sup>18</sup>

Thus, a finding that appellant was without fault is not sufficient, in and of itself, for OWCP to waive the overpayment.<sup>19</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>20</sup>

Section 10.438 of FECA's implementing regulations provide that 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. 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>21</sup>

---

<sup>16</sup> 5 U.S.C. § 8129(a).

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

<sup>18</sup> *Id.* at § 8129(b).

<sup>19</sup> *James Lloyd Otte*, 48 ECAB 334, 338 (1997); *see William J. Murphy*, 40 ECAB 569, 571 (1989).

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

<sup>21</sup> *Id.* at § 10.438; *Linda Hilton*, 52 ECAB 476 (2001).

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>22</sup>

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

OWCP advised appellant by November 15, 2012 notice of its preliminary determination of the \$5,906.28 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. However, appellant 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>23</sup>

### **CONCLUSION**

The Board finds that OWCP properly found an overpayment of \$5,906.26 was created. The Board further finds that it properly denied waiver of recovery.

---

<sup>22</sup> *Daniel J. Perea*, 42 ECAB 214 (1990).

<sup>23</sup> *Supra* note 21.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated January 15, 2013 is affirmed.

Issued: February 12, 2014  
Washington, DC

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

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

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