

FACTUAL HISTORY

On June 29, 2007 appellant, then a 50-year-old rural letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on June 28, 2007 she sustained an injury to her right wrist after lifting mail in a truck and feeling something snap in her wrist. OWCP accepted her claim for right wrist sprain on August 24, 2007.

In a report dated July 24, 2007, Dr. Ira Stark, a Board-certified osteopath, examined the results of a magnetic resonance imaging (MRI) scan of appellant's right wrist. He noted a possible tear of the ulna attachment of the triangular fibrocartilage, with no evidence of ligament tears or fractures.

On August 24, 2007 Dr. Eric D. Strauss, a Board-certified orthopedic surgeon, performed an arthroscopy on appellant's right wrist to repair a triangular fibrocartilage complex (TFCC) tear. During surgery, he noted that the TFCC showed no signs of damage, whereas the "volar-most aspect of the radius at its articulation with the proximal scaphoid showed an articular injury down to bone with fibrillation." Appellant's postoperative diagnosis was an osteochondral injury to the right wrist.

In a report dated November 8, 2007, Dr. Nicholas P. Diamond, a Board-certified osteopath, examined appellant, reviewed her medical history, and diagnosed a right wrist TFCC tear and status post right wrist arthroscopic debridement and TFCC repair. He noted that her right wrist injury impacted activities of her daily living, including difficulty in performing household chores, personal care when washing, sleeping, grasping, pulling, pushing, playing piano, and driving a motor vehicle. Appellant's *QuickDASH* disability index was 66 percent and her pain level was 6/10. On physical examination Dr. Diamond noted no tenderness over the palmar or dorsal aspects of the hand and no extensor carpi ulnaris tenderness. Appellant had negative results for a Tinel's sign, Phalen's sign, Finkelstein's test, carpal compression testing, metacarpal load testing, and Watson Scaphoid shift testing. Her wrist range of motion included dorsiflexion of 0 to 25/75 degrees, palmar flexion of 0 to 25/75 degrees, radial deviation of 0 to 10/20 degrees, and ulnar deviation of 0 to 20/35 degrees. Dr. Diamond noted that all ranges of motion caused pain at the extremes. TFCC load and provocative tests were positive. Grip testing performed via a Jamar hand dynamometer at Level 3 revealed 16 kilograms (kg) of force in the right hand versus 28 kg of force in the left hand. Pinch key unit testing measured 6.5 kg on the right versus 7.75 kg on the left. Manual muscle strength testing was graded at 3+ to 4/5 involving all right wrist movements. Dr. Diamond calculated that, according to the fifth edition American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), appellant had a total right upper extremity impairment of 19 percent, which included an additional 3 percent for pain.

On March 21, 2008 appellant filed a claim for a schedule award.

On September 24, 2008 OWCP forwarded appellant's medical history, along with a statement of accepted facts (SOAF), to Dr. Morley Slutsky, a district medical adviser (DMA), to determine her impairment rating according to the fifth edition of the A.M.A., *Guides*. The SOAF noted that appellant injured her wrist while lifting a mailbox. On September 25, 2008 Dr. Slutsky rated her impairment at 16 percent, noting that inclusion of an additional 3 percent

for pain-related impairment would be duplicative because her pain had already limited the maximum active motion measurements. He determined that appellant's date of maximum medical improvement was November 8, 2007, the date of Dr. Diamond's rating examination.

In an addendum report dated February 12, 2009, Dr. Diamond stated that taking appellant's pain level of 6/10 and the impact this pain had on her activities of daily living into consideration, an extra three percent should be added to her percentage of impairment.

On March 9, 2009 OWCP forwarded Dr. Diamond's addendum report, along with a SOAF, to Dr. Slutsky to determine whether he agreed with Dr. Diamond's findings and to explain any differences between their reports. The SOAF noted that appellant injured her wrist while lifting a mailbox and had conservative treatment. Dr. Slutsky responded on March 10, 2009 stating that he disagreed with Dr. Diamond's impairment rating for the same reason as in his September 25, 2008 report. He found that appellant's pain limited the maximum active motion measurements and was already incorporated in the impairment rating. Assigning an additional rating for pain-related impairment would, therefore, be duplicative.

By letter dated March 11, 2009, OWCP advised appellant that, due to the conflict in medical opinion between Drs. Diamond and Slutsky, it intended to schedule a referee medical examination.

Effective May 1, 2009, OWCP changed its procedures for rating permanent impairment. For all schedule awards calculated after May 1, 2009, the sixth edition of the A.M.A., *Guides* would be used.² Accordingly, on June 30, 2009 OWCP requested that Dr. Diamond submit an impairment rating determined in accordance with sixth edition of the A.M.A., *Guides* within 30 days.

By letter dated June 22, 2009, appellant's counsel contacted her congressional representative, contending that appellant was entitled to a formal decision with appeal rights on her schedule award request under the fifth edition of the A.M.A., *Guides*. He contended that all requests for schedule awards made prior to May 1, 2009 should be calculated according to the fifth edition of the A.M.A., *Guides*.

On August 11, 2009 OWCP forwarded appellant's medical history, along with the SOAF, to a second opinion physician for determination of permanent impairment under the sixth edition.

In a report dated September 18, 2009, Dr. Robert F. Draper, a Board-certified orthopedic surgeon, provided results on examination, noted reviewing her medical history, and provided a diagnosis of right wrist sprain and status post arthroscopic surgery for the right wrist with osteochondral injury. He noted range of motion for right wrist extension of 0 to 60 degrees, flexion of 0 to 60 degrees, ulnar deviation of 0 to 30 degrees, and radial deviation of 0 to 20 degrees. Dr. Draper stated that appellant continued to complain of pain in the right wrist, noting that the pain was exacerbated by twisting, turning, and use of the right wrist. He noted a negative Tinel's sign, no thenar or hypothenar atrophy, and normal light touch sensation.

² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability*, Chapter 2.808.5(a) (February 2013).

Dr. Draper diagnosed wrist sprain/strain as a class 1 and found a grade modifier of one each for functional history, for physical examination, and for clinical studies. He noted that this resulted in one percent permanent impairment according to Table 15-3 on page 395 of the sixth edition of the A.M.A., *Guides*. Dr. Draper stated that appellant's date of maximum medical improvement was June 28, 2008, one year from her date of injury.

On September 30, 2009 OWCP forwarded Dr. Draper's report, along with the SOAF, to a DMA for review. On October 11, 2009 Dr. Andrew Merola, a DMA, concurred with Dr. Draper's impairment rating and date of maximum medical improvement.

By decision dated December 2, 2009, OWCP granted appellant a schedule award for one percent impairment of her right upper extremity, for a total payment of \$2,479.67. The period of the award ran from June 28 to July 19, 2008. OWCP noted that the weight of the medical evidence was accorded to the September 18, 2009 report of Dr. Draper and the October 11, 2009 report of Dr. Merola in calculating the schedule award.

On December 8, 2009 appellant, through counsel, requested a hearing before an OWCP hearing representative.

With her request, appellant submitted an updated medical report from Dr. Diamond. This report dated January 8, 2010 utilized the same examination findings from the November 8, 2007 report, but added an addendum which updated its calculation of impairment to conform to the sixth edition of the A.M.A., *Guides*. Dr. Diamond rated appellant as having 15 percent right upper extremity impairment based upon her range of motion deficits and her *QuickDASH* score of 66 percent.

The hearing was held on March 30, 2010. At the hearing, appellant contended that Dr. Draper had only examined her for about 5 minutes out of a 15-minute visit. Counsel noted that OWCP delayed processing her schedule award claim for over a year and a half, and that no development of her claim was undertaken until her congressman's intervention on September 12, 2008. He stated that the conflict between Drs. Diamond and Slutsky remained as to whether 3 percent for pain should be added to appellant's 16 percent impairment rating based on range of motion, and that she should at least be paid 16 percent because at that time there was no conflict. Counsel argued that the use of the fifth edition, A.M.A., *Guides* in the reports of Drs. Diamond and Slutsky should be accepted because OWCP's delay in adjudication of her claim was improper due to no fault of her own and that this delay deprived her of her due process rights. He also argued that Dr. Draper utilized the sixth edition of the A.M.A., *Guides* improperly, because he failed to apply the range of motion method in calculating appellant's impairment rating and that, if the hearing representative found that the fifth edition of the A.M.A., *Guides* were not the proper standard to use, then he should have directed an independent medical examination to resolve the conflict of opinion between the sixth edition reports of Drs. Diamond and Draper. Counsel noted that the SOAF incorrectly stated that appellant injured herself by lifting a mailbox when, in fact, she was injured by lifting catalogues when her hand got caught in a tray. The SOAF also failed to indicate that OWCP had accepted a TFCC tear and approved the wrist surgery on August 24, 2007. Rather, it only stated that she had received conservative treatment.

By decision dated June 16, 2010, the hearing representative set aside OWCP's December 2, 2009 decision and remanded the case for further development of the medical evidence. OWCP noted that the SOAF was not accurate in that it did not describe appellant's mechanism of injury correctly or clarify that OWCP had approved surgery for her wrist. The hearing representative stated that OWCP should update its SOAF, forward the new SOAF to Dr. Draper along with Dr. Diamond's updated impairment rating, and request that Dr. Draper provide a supplemental report regarding upper right extremity impairment. She advised that OWCP should then refer Dr. Draper's report to a DMA for review and issue a new decision.

On July 6, 2010 OWCP forwarded Dr. Diamond's updated impairment rating, along with a new SOAF, to Dr. Draper for review. The SOAF indicated that appellant had undergone a right wrist arthroscopy on August 24, 2007, that her mechanism of injury was lifting mail into a truck, and that her claim had been subsequently accepted for a right TFCC tear.³ Dr. Draper responded on August 19, 2010, stating that Dr. Diamond's report of February 12, 2009 was not usable as it rendered an impairment rating according to the fifth edition of the A.M.A., *Guides*. He stated that he had reviewed all of the medical records and there was nothing to add to his report. Dr. Draper's September 18, 2009 report remained unchanged.

On September 27, 2010 OWCP requested another supplemental report from Dr. Draper. It noted that it was not clear whether he reviewed the new SOAF and that there was an updated report from Dr. Diamond, dated January 8, 2010, which had been updated to the sixth edition of the A.M.A., *Guides*.

In a report dated October 7, 2010, Dr. Draper stated that he had reviewed the medical evidence of record, but that his report remained unchanged and that the evidence did not support an increase in appellant's impairment rating beyond one percent. He continued to state that Dr. Diamond's report was calculated under the fifth edition of the A.M.A., *Guides*.

OWCP forwarded Dr. Draper's October 7, 2010 report to Dr. Henry J. Magliato, a DMA, on October 18, 2010. In a report dated November 9, 2010, Dr. Magliato concurred with Dr. Draper's impairment rating and date of maximum medical improvement.

By decision dated November 23, 2010, OWCP denied appellant's request for an increased schedule award. It found the weight of the medical evidence to be the October 7, 2010 report of Dr. Draper and the November 9, 2010 report of Dr. Magliato.

On November 30, 2010 appellant's counsel requested a hearing before an OWCP hearing representative.

The hearing was held on March 24, 2011. Counsel noted that Dr. Draper had incorrectly stated that Dr. Diamond had provided an impairment rating only under the fifth edition of the A.M.A., *Guides*. He noted that an updated report of Dr. Diamond had calculated the impairment according to the sixth edition of the A.M.A., *Guides* and was in the record. Counsel noted that Dr. Magliato simply reviewed Dr. Draper's October 7, 2010 report and concurred with his

³ The record does not contain a formal notice of acceptance, but OWCP did acknowledge in the SOAF that the claim was subsequently accepted for a right TFCC tear.

calculations. He contended that the prior hearing representative's decision had not been effectuated by OWCP. In a follow-up letter, counsel stated that Dr. Draper's report was without basis to be considered as a second opinion evaluation, and that appellant must be sent to a new second opinion evaluator or an independent medical examiner in order to resolve the conflict.

By decision dated June 28, 2011, the hearing representative vacated OWCP's November 23, 2010 decision and remanded the case for further development. She noted that Dr. Diamond's January 8, 2010 report was rendered under the sixth edition of the A.M.A., *Guides*, which used the range of motion alternative for calculating an impairment rating. The hearing representative directed that Dr. Diamond's updated report of January 8, 2010 be forwarded to a DMA for review to provide a reasoned opinion as to whether there was sufficient evidence to support that the diagnosis-based impairment method did not adequately reflect the degree of appellant's permanent impairment.

In a report dated July 19, 2011, Dr. Magliato stated that the reports of Drs. Diamond and Draper both used correct methods of calculating impairment under the sixth edition of the A.M.A., *Guides*. He noted that both examinations were old, and suggested that the conflict be resolved by referral to a referee medical examiner.

OWCP forwarded medical records, along with the SOAF, to Dr. Howard Zeidman, a Board-certified orthopedic surgeon, on August 26, 2011 for an independent medical examination. In a report dated September 15, 2011, Dr. Zeidman provided results on examination, noting reviewing the medical history, and found that appellant had no residual disability identifiable on objective examination. He noted that the operative report of August 24, 2007 found that there had been no TFCC tear.

By decision dated October 20, 2011, OWCP denied appellant's claim for an increased schedule award based on Dr. Zeidman's September 15, 2011 report, which found no residual disability. It advised her that her previously paid schedule award would be recovered as an overpayment.

On November 1, 2011 OWCP notified appellant of its preliminary finding of an overpayment in the amount of \$2,479.67 for the period June 28 through July 19, 2008.

On October 27 and November 7, 2011 appellant, through counsel, requested a pre-recoupment hearing before an OWCP hearing representative. She noted that she disagreed with the fact of overpayment, stating that she had a permanent disability to her wrist.

In a letter dated February 13, 2012, Dr. Diamond noted that Dr. Zeidman's September 15, 2011 report did not include range-of-motion measurements, even as he noted that motion was intact and symmetrical bilaterally. He contended that a TFCC tear diagnosis was reasonable because the operative report noted that appellant had an osteochondral injury with cartilage debrided.

The hearing was held on February 27, 2012. Counsel contended that the selection of an independent medical examiner was incorrect, as Dr. Draper's report had been "thrown out as insufficient" and that there was no conflict before Dr. Magliato at the time of his evaluation of Dr. Diamond's July 19, 2011 report. He noted that Dr. Zeidman's report was insufficient,

because Dr. Zeidman stated that appellant's range of motion was symmetrical and therefore full, despite the fact that she had a previous injury to her left upper extremity, and because he did not give range-of-motion measurements. Counsel also noted that Dr. Zeidman's report had not been sent to a DMA for review.

By decision dated May 7, 2012, the hearing representative vacated the October 20 and November 1, 2011 OWCP decisions. She found that Dr. Diamond's February 13, 2012 report indicated that appellant sustained a permanent impairment to the right upper extremity, and supported his findings with medical rationale. The hearing representative directed that OWCP should refer the SOAF, the case record, and Dr. Diamond's February 12, 2012 report to Dr. Zeidman for review, after which OWCP should issue a *de novo* decision.

The SOAF dated June 28, 2012 noted that appellant had sustained a work-related injury to her left wrist on February 24, 2009, which was accepted under OWCP File No. xxxxxx931 for left hand contusion, left wrist sprain, and left hand joint derangement.

In a report dated July 26, 2012, Dr. Zeidman stated that "the only item which is new at this point is the letter from Dr. Zieman, dated February 13, 2012. He discussed the question of evaluation of the motion and how it is reported."⁴ Dr. Zeidman stated that "if the opposite extremity is neither involved nor previously injured, it must be used to define normal for that individual and any losses should be made in comparison to the opposite extremity." He stated that he noted that motion was symmetrical in his previous report.

OWCP forwarded Dr. Zeidman's report, along with the SOAF and medical reports, to Dr. Merola, a DMA. In a report dated August 23, 2012, Dr. Merola noted that, with regard to Dr. Zeidman's clinical measurements of range of motion, Dr. Zeidman's supplemental report dated July 26, 2012 "backs up his objective data with comparison of motion to the uninjured side." He concurred with Dr. Zeidman's finding of no evidence of residual impairment.

By decision dated September 24, 2012, OWCP denied appellant's claim for an increased schedule award, as the evidence was insufficient to establish permanent impairment. It relied upon Dr. Zeidman's July 26, 2012 and Dr. Merola's August 23, 2012 reports in determining appellant's eligibility for a schedule award.

On October 2, 2012 appellant, through counsel, requested a hearing before an OWCP hearing representative. Counsel noted that Dr. Zeidman's July 26, 2012 report referenced that the only new evidence received was from a "Dr. Zieman," which did not make sense. He also noted that Dr. Zeidman apparently did not read the SOAF, as he justified his range of motion measurements based upon appellant's left wrist, referencing a part of the A.M.A., *Guides* that allows the opposite extremity to be used as a baseline. Appellant's left wrist sustained a work-related previous injury and thus could not be so compared. Counsel contended that, as Dr. Magliato stated that Dr. Diamond's assessment of 15 percent impairment under the sixth edition of the A.M.A., *Guides* was correct, appellant should be paid that amount. He stated that

⁴ Dr. Zeidman's reference to a "Dr. Zieman" appears to be a typographical error, as the only February 13, 2012 letter of record was a letter from Dr. Diamond.

there was no conflict for a referee yet and that appellant should be directed for a new second opinion examination.

By decision dated May 30, 2013, the hearing representative vacated the September 24, 2012 decision of OWCP. He found that direction for a referee examination based upon the reports of Drs. Diamond and Draper was proper because they were two reports of equal quality and weight. However, the hearing representative also found that Dr. Zeidman had not resolved the conflict in medical opinion because he did not explain why he did not use the accepted condition of a right wrist TFCC tear in lieu of the right wrist sprain diagnosis, and because he failed to acknowledge that appellant's left wrist was previously injured and could not be used for an accurate determination of range of motion. He directed that OWCP schedule a new impartial referee examination and that this examination be forwarded to a DMA for review.

On June 10, 2013 OWCP forwarded medical records, along with a SOAF, to Dr. Zohar Stark, a Board-certified orthopedic surgeon, in order to resolve the conflict in medical opinion between Drs. Diamond and Draper. In a report dated July 9, 2013, Dr. Stark found that appellant had zero percent permanent impairment. He noted complaints of numbness over the dorsal aspect of the third and fourth fingers of her right hand. On examination of appellant's right wrist, Dr. Stark found local tenderness to palpation over the dorsoradial aspect of the wrist, no tenderness to palpation over the ulnar aspect of the wrist, and a range of motion of dorsiflexion to 0 to 60 degrees, ulnar flexion to 0 to 70 degrees, radial deviation to 0 to 20 degrees, and ulnar deviation to 0 to 30 degrees. He noted no crepitation or clicking on motion and no sensory deficit to the digits. Dr. Stark noted strength at 28 kilogram (kg), pinch strength of 7 kg, and negative Tinell's and Phalen's tests. He stated that there was no evidence of a TFCC tear and that as such, it was not appropriate to calculate appellant's impairment with the diagnosis of a TFCC tear.

Regarding the TFCC tear, Dr. Stark wrote, "Although that was an accepted condition, it is my opinion that if [appellant] had the TFCC tear, she has completely recovered from it. At this point the diagnosis for [appellant] is nonspecific wrist pain postacute injury or surgery." He used the Wrist Regional Grid, page 395 and diagnosed a class 1 impairment for nonspecific wrist pain because there was a history of painful injury and residual symptoms without consistent objective findings. As to functional history, according to Table 15-7, page 406, Dr. Stark found pain symptoms with strenuous-vigorous activities with or without medication to control her symptoms and found appellant able to perform self-care activities independently which warranted a grade modifier of 1. For physical examination adjustment, he provided a grade modifier of 1 according to Table 15-8, page 408, based on clicking or clanking by history that is not reproducible. As for clinical study adjustments, Dr. Stark noted that no imaging studies were available thereby warranting a zero grade modifier. The net adjustment was minus one corresponding to grade B and class 1 which was zero percent permanent impairment.

On September 17, 2013 OWCP forwarded Dr. Stark's report to DMA, Dr. Magliato, for review. Dr. Magliato concurred with Dr. Stark's report. He stated that the date of maximum medical improvement was September 15, 2011.

By decision dated October 1, 2013, OWCP denied appellant's claim for an increased schedule award relying upon the well-rationalized report of Dr. Stark, the impartial medical specialist.

On October 7, 2013 appellant, through counsel, requested a hearing before an OWCP hearing representative.

By letter dated October 31, 2013, OWCP made a preliminary determination that appellant received an overpayment of compensation in the amount of \$2,479.67 from June 28 through July 19, 2008 because she received a schedule award for one percent impairment, but that subsequent formal decisions found that she actually had zero percent impairment. It found that she was without fault in the creation of the overpayment. Attached to the decision was a Form OWCP-20 overpayment recovery questionnaire. OWCP allotted appellant 30 days to complete the questionnaire and provide supporting documentation for any income or expenses listed. Appellant did not respond.

The hearing was held on February 19, 2014. Counsel contended that Dr. Stark's medical examination was lacking, because he did not perform any neurological testing other than Tinell's and Phalen's tests, range-of-motion measurements, or motor strength measurements. He stated that Dr. Stark found that there was no TFCC tear, but that this determination was contrary to the SOAF. Counsel requested that the case file be remanded for another referee medical examination.

By decision dated May 9, 2014, the hearing representative affirmed the October 1, 2013 decision of OWCP and finalized the overpayment of \$2,479.67. Appeal rights for both the schedule award decision and the overpayment decision were provided to appellant and his counsel.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of FECA⁵ and its implementing federal regulations⁶ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members, functions, and organs of the body. FECA, however, does not specify the manner by which the percentage loss of a member, function, or organ shall be determined. To ensure consistent results and equal justice for all claimants under the law, good administrative practice requires the use of uniform standards applicable to all claimants.⁷ The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.⁸ For decisions issued after

⁵ 5 U.S.C. § 8107.

⁶ 20 C.F.R. § 10.404.

⁷ *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

⁸ *Id.*

May 1, 2009, the sixth edition is used to calculate schedule awards.⁹ It is well established that in determining the amount of a schedule award for a member of the body that sustained an employment-related permanent impairment, preexisting impairments of the body are to be included.¹⁰

The sixth edition of the A.M.A., *Guides* provides a diagnosis-based method of evaluation utilizing the World Health Organization's International Classification of Functioning, Disability and Health (ICF).¹¹ Under the sixth edition, the evaluator identifies the impairment Class of Diagnosis condition (CDX), which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE) and Clinical Studies (GMCS).¹² The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).¹³

FECA provides that, 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 the examination.¹⁴ The implementing regulations state that if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination. This is called a referee or impartial examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.¹⁵

To be of probative value, a medical opinion must be based on a complete factual and medical background, must be of reasonable medical certainty, and be supported by medical rationale.¹⁶ Medical rationale is a medically sound explanation for the opinion offered.¹⁷

It is well established that, when a case is referred to an impartial medical 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.¹⁸

⁹ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700 Exhibit 1 (January 2010).

¹⁰ See *Dale B. Larson*, 41 ECAB 481, 490 (1990); *id.* at Chapter 3.700.3.a.3 (January 2010). This portion of OWCP procedures provide that the impairment rating of a given scheduled member should include any preexisting permanent impairment of the same member or function.

¹¹ A.M.A., *Guides* (6th ed. 2009), page 3, section 1.3, The International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement.

¹² *Id.* at 383-419.

¹³ *Id.* at 411.

¹⁴ 5 U.S.C. § 8123(a).

¹⁵ 20 C.F.R. § 10.321.

¹⁶ *Jennifer Atkerson*, 55 ECAB 317, 319 (2004).

¹⁷ See *Ronald D. James, Sr.*, Docket No. 03-1700 (issued August 27, 2003); *Kenneth J. Deerman*, 34 ECAB 641 (1983) (the evidence must convince the adjudicator that the conclusion drawn is rational, sound, and logical).

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained right wrist sprain and a right TFCC tear as a result of her June 28, 2007 employment injury. By decision dated December 2, 2009, it granted a schedule award for one percent impairment of her right upper extremity. However, in subsequent decisions by OWCP and hearing representatives, OWCP denied increased schedule awards and found that the previous award of one percent impairment had been issued in error. The most recent OWCP decision of May 9, 2014 affirmed the finding of no permanent impairment and finalized the \$2,479.67 overpayment due to the previously-awarded one percent schedule award.

On June 10, 2013 OWCP forwarded medical records, along with a SOAF, to Dr. Stark, to resolve the conflict in medical opinion between Drs. Diamond and Draper. In a report dated July 9, 2013, Dr. Stark found zero percent impairment. He noted: "Although [TFCC tear] was an accepted condition, it is my opinion that if she had the TFCC tear, she has completely recovered from it. At this point the diagnosis for [appellant] is nonspecific wrist pain post-acute injury or surgery." Dr. Stark found no tenderness over the area of the TFCC and a full range of motion and no instabilities of her wrist. As such he opined that it was inappropriate to include any calculations for a TFCC tear in his schedule award calculation.

With regard to the impairment calculation, Dr. Stark calculated the impairment of the wrist using the Wrist Regional Grid on page 395. He placed appellant in class 1 impairment for nonspecific wrist pain given the history of painful injury and residual symptoms without consistent findings. As to functional history Dr. Stark indicated that she was able to perform self-care activities independently which warranted a grade modifier of 1. For physical examination adjustment he assigned a grade modifier 1 for clicking or clanking that was not reproducible. For clinical studies, Dr. Stark reported no relevant imaging studies in the record warranting a grade modifier of 0. The net adjustment formula of (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX) would equal $(1-1) + (1-1) + (0-1) = -1$. This would correspond to grade B and class 1, grade B which is zero percent impairment.

The Board finds that Dr. Stark's report is well rationalized, based on the SOAF, and properly applies the A.M.A., *Guides* to the examination results. Dr. Stark is properly afforded the weight of the medical evidence.

On appeal, counsel argues that Dr. Stark's July 9, 2013 report is insufficiently rationalized because Dr. Stark stated that appellant had no sensory deficit in the digits without indicating neurological testing, and he did not indicate whether he performed a measurement of range of motion in accordance with the A.M.A., *Guides*. He also contends that Dr. Stark inappropriately found that appellant did not have a TFCC tear, which was contrary to the accepted conditions listed in the SOAF. However, Dr. Stark's report provided results on examination and was based on all of the relevant medical records and diagnostic studies. Furthermore, his report is not contrary to the SOAF. Dr. Stark recognized that OWCP accepted the condition of right TFCC tear, but he opined that "if she had the TFCC tear, she has

¹⁸ Gloria J. Godfrey, 52 ECAB 486, 489 (2001).

completely recovered from it.” This observation was based on a physical examination and a complete review of the medical record. As such, the Board finds the permanent impairment rating of zero percent was appropriate and based on sound medical explanation.

The Board finds that OWCP properly found an impairment rating of zero percent of the right upper extremity.

LEGAL PRECEDENT -- ISSUE 2

Section 8102(a) of FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of her duty.¹⁹ Section 8129(a) of FECA provides, in pertinent part: When an overpayment has been made to an individual under this subchapter because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.²⁰

ANALYSIS -- ISSUE 2

By decision dated December 2, 2009, OWCP granted appellant a schedule award for one percent permanent impairment of her right upper extremity, for a total payment of \$2,479.67. As it later correctly established that appellant did not have a ratable permanent impairment of the right upper extremity, she was not entitled to a schedule award for such impairment.²¹ The entire amount of the December 2, 2009 schedule award constituted an overpayment of compensation. Therefore, OWCP’s May 9, 2014 decision finding an overpayment of compensation in the amount of \$2,479.67 was proper under the law and facts of this case.

LEGAL PRECEDENT -- ISSUE 3

Section 8129(a) of FECA²² 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.²³ 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.²⁴

¹⁹ 5 U.S.C. § 8102(a).

²⁰ *Id.* at § 8129(a).

²¹ *See Charles H. Potter*, 39 ECAB 645 (1988).

²² 5 U.S.C. § 8129(a).

²³ *Id.* at § 8129(a).

²⁴ *Id.* at § 8129(b).

Thus, a finding that appellant was without fault is not sufficient, in and of itself, for OWCP to waive the overpayment.²⁵ 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 10.434-37 of the implementing federal regulations.²⁶ Recovery of an overpayment will defeat the purpose of FECA if such recovery would cause hardship to a currently or formerly entitled beneficiary because: (a) 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 (b) the beneficiary's assets do not exceed a specified amount as determined by OWCP from data furnished by the Bureau of Labor Statistics.²⁷ A higher amount is specified for a beneficiary with one or more dependents.²⁸ 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.²⁹ Recovery of an overpayment is also 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 his or her position for the worse.³⁰

Section 10.438 of the 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.³¹

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.³²

ANALYSIS -- ISSUE 3

In this case, appellant was found to be without fault in the creation of the overpayment. Accompanying the October 31, 2013 preliminary notice of overpayment, OWCP provided her

²⁵ *James Lloyd Otte*, 48 ECAB 334, 338 (1997); *see William J. Murphy*, 40 ECAB 569, 571 (1989).

²⁶ 20 C.F.R. §§ 10.434-37.

²⁷ *See* Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6a(1)(b) (June 2009).

²⁸ 20 C.F.R. § 10.436.

²⁹ *Id.* at § 10.437(a).

³⁰ *Id.* at § 10.437(b).

³¹ *Id.* at § 10.438; *Linda Hilton*, 52 ECAB 476 (2001).

³² *Daniel J. Perea*, 42 ECAB 214 (1990).

with a Form OWCP-20 overpayment recovery questionnaire to obtain information about her income, assets, and expenses. Appellant did not provide a response to this questionnaire. As a result, OWCP was unable to review her financial information to determine if recovery of the overpayment would defeat the purpose of FECA or if recovery would be against equity and good conscience.

Consequently, as appellant did not submit the financial information required under OWCP's regulations, which was necessary to determine her eligibility for waiver, OWCP properly denied waiver of recovery of the overpayment of compensation in the amount of \$2,479.67.

CONCLUSION

The Board finds that appellant has no ratable impairment of her right upper extremity. The Board further finds that OWCP properly determined that she received an overpayment of compensation in the amount of \$2,479.67, and OWCP did not abuse its discretion in denying waiver of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 9, 2014 is affirmed.

Issued: December 28, 2015
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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