

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

C.S., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Colorado Springs, CO, Employer)

**Docket No. 16-0752
Issued: April 19, 2017**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 4, 2016 appellant filed a timely appeal from a November 13, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$10,736.75 for the period May 29 to September 15, 2010; and (2) whether OWCP properly denied waiver of recovery of the overpayment.

FACTUAL HISTORY

On May 22, 2009 appellant, then a 48-year-old city letter carrier, filed an occupational disease claim (Form CA-2) alleging that on October 6, 2000 she first became aware of a right

¹ 5 U.S.C. § 8101 *et seq.*

shoulder condition. However, it was not until May 19, 2009 that she realized that it had been caused or aggravated by her federal employment duties of casing and carrying mail. OWCP accepted the claim for right shoulder impingement, which subsequently was expanded to include the conditions of right brachial lesions, right complete rotator cuff rupture, and right bicipital tenosynovitis.

On February 8, 2010 appellant filed a claim for a schedule award (Form CA-7).

In support of her claim, appellant submitted a January 20, 2010 impairment rating by Dr. John Ogrodnick, a physician Board-certified in family medicine and occupational medicine. In this report, Dr. Ogrodnick determined that appellant had six percent permanent impairment of the right upper extremity pursuant to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). He diagnosed right shoulder strain and provided physical examination findings. Dr. Ogrodnick calculated appellant's permanent impairment rating using the range of motion (ROM) method and, based on Table 15-35 and Table 15-36, page 477. He determined the date of maximum medical improvement to be December 4, 2009.

On April 5, 2010 OWCP referred Dr. Ogrodnick's January 10, 2010 impairment rating to a district medical adviser (DMA) for review. In a report dated April 9, 2010, Dr. Ronald J. Swarsen, an occupational medicine specialist Board-certified in family medicine and the designated DMA, reviewed Dr. Ogrodnick's report and concluded that appellant had 12 percent permanent impairment of the right upper extremity using the ROM method and basing his findings on Dr. Ogrodnick's ROM measurements. Dr. Swarsen requested OWCP contact Dr. Ogrodnick to provide an addendum report to clarify his impairment rating.

Dr. Ogrodnick, in an April 20, 2010 addendum, assigned a grade modifier of 1 for appellant's ROM using Table 15-35, page 477 and a grade modifier of 1 for functional history using Table 15-36, page 477. Next, Dr. Ogrodnick reported the functional history adjustment was a grade higher than the modifier for ROM. He then multiplied 6 percent by 5 percent, which resulted in a 0.30 percent additional impairment. The 0.30 percent was rounded to zero or no adjustment. Dr. Ogrodnick determined that appellant had a total six percent permanent impairment of the right upper extremity.

In a May 7, 2010 report, Dr. Swarsen reviewed Dr. Ogrodnick's April 20, 2010 addendum. He noted the accepted conditions were right shoulder impingement and arthroscopic subacromial decompression and determined that appellant had 13 percent right upper extremity permanent impairment. Using Table 15-36, page 477, Dr. Swarsen assigned a grade modifier of 2 for the 12 percent impairment due to ROM deficits. Next, using Table 15-36, page 477, he adjusted the impairment rating using functional history total ROM by 10 percent (12 percent x 10 percent or 1.2 percent adjustment), which resulted in 12 percent + 1.2 percent or 13.2 percent right upper extremity impairment. Dr. Swarsen rounded the number down to 13 percent.

By decision dated May 26, 2010, OWCP granted appellant a schedule award for 13 percent permanent impairment of the right upper extremity based on Dr. Swarsen's May 7, 2010 report. The award was for 40.56 weeks and ran from December 6, 2009 to September 15, 2010.

In a report dated June 24, 2013, Dr. Jack L. Rook, a Board-certified physiatrist, noted appellant's medical history, provided examination findings, and diagnosed chronic right shoulder pain, diminished right shoulder ROM, and status post right subacromial decompression surgery with rotator cuff and biceps tendon repairs. ROM findings for appellant's right shoulder were provided. Dr. Rook noted that appellant's 22 percent right upper extremity impairment placed into a grade modifier of 2 and no change in her impairment rating using Table 15-35 and Table 15-35, page 477. Using the sixth edition of the A.M.A., *Guides*, Dr. Rook determined that appellant had 22 percent right upper extremity impairment.

On July 24, 2013 appellant filed a claim for an additional schedule award.

On December 12, 2013 OWCP referred Dr. Rook's June 24, 2013 impairment rating to a DMA for review. In a report dated December 14, 2013, Dr. Morley Slutsky, a Board-certified occupational medicine specialist and the designated DMA, determined that a diagnosis-based impairment (DBI) was more appropriate than ROM in calculating appellant's impairment rating.² He used the diagnosis of partial right shoulder rotator cuff tear and determined that appellant had five percent right upper extremity impairment using Table 15-5, pages 401-05. Dr. Slutsky assigned a grade modifier of 1 for diagnosis, a grade modifier of 2 for functional history using Table 15-7, page 406; a grade modifier of 2 for physical examination findings using Table 15-8, page 408; and a grade modifier of 2 for clinical studies using Table 15-9, pages 410-11. Using the net adjustment formula resulted in a net adjustment of 2, which moved the default grade of C to E and a final impairment rating of five percent.

By decision dated December 19, 2013, OWCP denied appellant's request for an additional schedule award. It found Dr. Slutsky's December 14, 2013 report constituted the weight of the evidence in establishing that appellant was not entitled to an increased schedule award.

Dr. Rook, in a January 30, 2014 supplemental report, noted that appellant underwent a subacromial decompression with rotator cuff repair on October 20, 2010 and underwent another surgery for rotator cuff tear in March 2013. He explained that the original impairment rating of 13 percent for the right upper extremity was made following appellant's October 2010 shoulder surgery. Dr. Rook noted that her condition had deteriorated, such that she was no longer at maximum medical improvement and had required additional surgery, which occurred in March 2013. He explained that the earlier impairment rating was based on the ROM method as her motion had significantly deteriorated from her prior date of maximum medical improvement. Dr. Rook disagreed with the Dr. Slutsky's impairment rating using DBI instead of the ROM method.

On November 25, 2014 appellant requested reconsideration of the denial of her request for an additional schedule award.

On February 9, 2015 OWCP referred appellant and the medical record to Dr. Hendrick J. Arnold, III, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion

² Dr. Slutsky is Board-certified in occupational medicine.

evidence between the Dr. Slutsky, the DMA, and Dr. Rook, appellant's physician, regarding the degree of right upper extremity permanent impairment.

In a March 12, 2015 report, Dr. Arnold, based upon a review of the medical evidence, statement of accepted facts, and physical examination, determined that appellant had eight percent permanent impairment of the right upper extremity using ROM findings. He noted that the accepted conditions as partial right shoulder rotator cuff tear, bicipital tenosynovitis, and brachial plexus lesion. Dr. Arnold accepted the date of maximum medical improvement to be June 24, 2013. Using the ROM method and Table 15-35 and Table 15-36 at page 477, he assigned a grade modifier of 1 or eight percent upper extremity impairment. Dr. Arnold found a grade modifier of 2 for functional history based on a *QuickDASH* score of 57, a grade modifier of 1 for physical examination. Using the net adjustment formula resulted in no net adjustment.

On April 13, 2015 OWCP referred Dr. Arnold's March 12, 2015 impairment rating to a DMA for review. In an April 24, 2015 report, Dr. Daniel D. Zimmerman, a Board-certified internist and DMA, reviewed Dr. Arnold's report and concurred with the right upper extremity permanent impairment rating of eight percent.³ He noted that as appellant had previously received a schedule award for 13 percent permanent right upper extremity impairment that she was not entitled to an additional schedule award.

In an April 30, 2015 decision, OWCP found the evidence did not support an increased impairment over the previous schedule award. It further advised appellant that a separate decision was forthcoming addressing any overpayment.

On May 5, 2015 OWCP issued a preliminary finding that appellant had received an overpayment of compensation in the amount of \$10,736.75 for the period May 29 to September 15, 2010. It explained the overpayment was the result of Dr. Arnold's finding that appellant currently had an eight percent impairment of the right upper extremity, which was a lesser rating than the May 26, 2010 schedule award of 13 percent. OWCP further advised that appellant was not at fault in the creation of the overpayment.

Appellant requested a pre-recoupment hearing before an OWCP hearing representative. She also submitted a September 7, 2015 overpayment recovery questionnaire (OWCP-20) and supporting financial documentation.

By decision dated November 13, 2015, an OWCP hearing representative finalized the May 5, 2015 preliminary determination regarding fact and amount of the overpayment including OWCP's finding that appellant was not at fault in the creation of the overpayment. As to the issue of waiver of recovery, the hearing representative denied appellant's request as the evidence established that appellant was capable of repaying the overpayment and it would not be against equity and good conscience.

³ Dr. Zimmerman is a Board-certified internist.

LEGAL PRECEDENT -- ISSUE 1

Section 8149 of FECA delegates to the Secretary of Labor the authority to prescribe rules and regulations for the administration and enforcement of FECA. The Secretary of Labor has vested the authority to implement the FECA program with the Director of OWCP.⁴ Section 8107 of FECA sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions, and organs of the body.⁵ 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 under the law, good administrative practice requires the use of uniform standards applicable to all claimants. Through its implementing regulations, OWCP adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.⁶

The sixth edition of the A.M.A., *Guides* was first printed in 2008. Within months of the initial printing, the A.M.A. issued a 52-page document entitled “Clarifications and Corrections, Sixth Edition, *Guides to the Evaluation of Permanent Impairment.*” The document included various changes to the original text, intended to serve as an erratum/supplement to the first printing of the A.M.A., *Guides*. In April 2009, these changes were formally incorporated into the second printing of the sixth edition.

As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).⁷ The Board has approved the use by OWCP of the A.M.A., *Guides* for the purpose of determining the percentage loss of use of a member of the body for schedule award purposes.⁸

If a claimant who has received a schedule award calculated under a previous edition of the A.M.A., *Guides* is entitled to additional benefits, the increased award will be calculated according to the current, sixth edition.⁹ Should the subsequent calculation result in a percentage of impairment lower than the original award, as sometimes occurs, a finding should be made that the claimant has no more than the percentage of impairment originally awarded, that the evidence does not establish an increased impairment, and that OWCP has no basis for declaring an overpayment.¹⁰ However, where both the prior and subsequent ratings were calculated under

⁴ See 20 C.F.R. §§ 1.1-1.4.

⁵ For a complete loss of use of an arm, an employee shall receive 312 weeks of compensation. 5 U.S.C. § 8107(c)(1).

⁶ 20 C.F.R. § 10.404. See also *Ronald R. Kraynak*, 53 ECAB 130 (2001).

⁷ See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (February 2013).

⁸ *Isidoro Rivera*, 12 ECAB 348 (1961).

⁹ *Supra* note 7 at Chapter 2.808.9(d).

¹⁰ *Id.*

the sixth edition of the A.M.A., *Guides*, a subsequent determination that there is a lesser degree of impairment than previously awarded may support a finding of overpayment.¹¹

ANALYSIS -- ISSUE 1

The issue on appeal is whether appellant received an overpayment of compensation in the amount of \$10,736.75 due to an adjustment in her schedule award determination based on new medical evidence.

The Board finds that this case is not in posture for decision as the underlying schedule award determination is not in posture for decision and, thus, the issues of fact of overpayment and waiver are premature.

The Board has found that OWCP has inconsistently applied Chapter 15 of the sixth edition of the A.M.A., *Guides* when granting schedule awards for upper extremity claims. No consistent interpretation has been followed regarding the proper use of the DBI or the ROM methodology when assessing the extent of permanent impairment for schedule award purposes.¹² The purpose of the use of uniform standards is to ensure consistent results and to ensure equal justice under the law to all claimants.¹³ In *T.H.*, the Board concluded that OWCP physicians are at odds over the proper methodology for rating upper extremity impairment, having observed attending physicians, evaluating physicians, second opinion physicians, impartial medical examiners, and district medical advisers use both DBI and ROM methodologies interchangeably without any consistent basis. Furthermore, the Board has observed that physicians interchangeably cite to language in the first printing or the second printing when justifying use of either ROM or DBI methodology. Because OWCP's own physicians are inconsistent in the application of the A.M.A., *Guides*, the Board finds that OWCP can no longer ensure consistent results and equal justice under the law for all claimants.¹⁴

In light of the conflicting interpretation by OWCP of the sixth edition with respect to upper extremity impairment ratings, it is incumbent upon OWCP, through its implementing regulations and/or internal procedures, to establish a consistent method for rating upper extremity impairment. In order to ensure consistent results and equal justice under the law for cases involving upper extremity impairment, the Board will set aside the November 13, 2015 decision. Following OWCP's development of a consistent method for calculating permanent impairment for upper extremities to be applied uniformly, and such other development as may be deemed necessary, OWCP shall issue a *de novo* decision on appellant's claim for an upper extremity schedule award.

¹¹ *Id.* at Chapter 2.808.9(e).

¹² *T.H.*, Docket No. 14-0943 (issued November 25, 2016).

¹³ *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

¹⁴ *Supra* note 12.

CONCLUSION

The Board finds this case not in posture for decision as to whether appellant received an overpayment of compensation in the amount of \$10,736.75 for the period May 29 to September 15, 2010. In view of the Board's decision regarding appellant's schedule award, the issues of whether there is an overpayment and waiver are premature.

ORDER

IT IS HEREBY ORDERED THAT the decision of the November 13, 2015 Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision.

Issued: April 19, 2017
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board