United States Department of Labor
Employees' Compensation Appeals Board

S.M., Appellant	)	
and	)	**Docket No. 17-0914**
	)	**Issued: October 11, 2017**
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Capital Heights, MD	)	
Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 20, 2017 appellant filed a timely appeal from a February 28, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

ISSUES

The issues are: (1) whether OWCP properly determined the extent of appellant's permanent impairment of her right upper extremity for schedule award purposes; (2) whether OWCP properly found that an overpayment of compensation in the amount of $14,267.07 was created due to duplicative schedule award payments; (3) whether it properly found that appellant was at fault in creating the overpayment and therefore was ineligible for waiver of recovery; and (4) whether OWCP properly deducted $100.00 every 28 days from appellant's continuing compensation benefits.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On November 8, 1998 appellant, then a 31-year-old mail handler, filed an occupational disease claim (Form CA-2) alleging a right wrist condition after throwing bundles of mail in the performance of her job duties. OWCP assigned the claim OWCP File No. xxxxxx255 and accepted it on February 2, 1999 for right wrist strain, right carpal tunnel syndrome, and right carpal tunnel release. In 2001, Dr. David Dorin, a Board-certified orthopedic surgeon, performed an arthroscopic debridement of appellant's right wrist. On June 17, 2003 he diagnosed carpal tunnel syndrome. Dr. Dorin completed an attending physician's report (Form CA-20) and attributed appellant's right carpal tunnel syndrome and chronic sprain to throwing bundles of mail at work on November 8, 1998.

On June 17, 2003 appellant filed a claim for a schedule award (Form CA-7). Dr. Dorin opined on September 7, 2003 that she had 10 percent permanent impairment of the right upper extremity due to her accepted wrist conditions based on application of the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*[2] (A.M.A., *Guides*). OWCP referred this report to its medical adviser and on October 24, 2003 he evaluated appellant's permanent impairment for schedule award purposes based on the fifth edition of the A.M.A., *Guides*,[3] finding that she had four percent permanent impairment of her right upper extremity due to her wrist conditions.

By decision dated November 12, 2003, OWCP granted appellant a schedule award for four percent permanent impairment of her right upper extremity.

Appellant underwent a nerve conduction velocity (NCV) study on March 29, 2005 which was found to be within normal limits. Her March 29, 2005 electromyogram (EMG) did not reveal any significant abnormalities.

On March 5, 2007 appellant filed a traumatic injury claim (Form CA-1) alleging a chest wall strain and shoulder sprain from pulling equipment in the performance of her job duties. The claim was assigned OWCP File No. xxxxxx780.[4] Appellant stopped work on March 6, 2007. She underwent a magnetic resonance imaging (MRI) scan of her right shoulder on March 22, 2007 which showed tendinosis and partial tears of the supraspinatus tendon, but no full thickness rotator cuff tear.

In an April 23, 2007 decision, OWCP denied appellant's March 5, 2007 traumatic injury claim, finding that she had not submitted sufficient factual evidence describing the employment incident. Appellant requested an oral hearing from OWCP's Branch of Hearings and Review on April 30, 2007.

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[2] A.M.A., *Guides* (4th ed. 1993).

[3] A.M.A., *Guides* (5th ed. 2001).

[4] OWCP administratively combined OWCP File No. xxxxxx780 with appellant's other claims in File Nos. xxxxxx255, xxxxxx983, and xxxxxx914, with File No. xxxxxx780 serving as the master file.

On August 1, 2007 an OWCP hearing representative reversed the April 23, 2007 decision and found that appellant had established the conditions of impingement syndrome and partial tear of the right rotator cuff as causally related to her federal job duties. OWCP accepted her claim on August 29, 2007 for right shoulder impingement syndrome and partial tear of the right rotator cuff. It authorized compensation benefits beginning April 27, 2007.

Appellant underwent an additional MRI scan of the right shoulder on September 17, 2007 which demonstrated impingement of the supraspinatus muscle and tendon with mild acromioclavicular joint hypertrophy.

Appellant underwent authorized right shoulder surgery on January 21, 2008 with excision of the distal end of the right clavicle, Neer anterior and inferior acromioplasty, and excision of the coracoacromial ligament. She returned to part-time light-duty work on July 8, 2008.

On August 25, 2008 appellant underwent an additional EMG and on September 4, 2008 Dr. Rafik D. Muawwad, a Board-certified orthopedic surgeon, found that this testing revealed sensory deficit of the right median nerve, but no major compression.

Appellant filed a schedule award claim (Form CA-7) on November 4, 2008 for additional impairment. On December 9, 2008 OWCP requested that Dr. Muawwad provide a rating of permanent functional impairment for schedule award purposes. In a report dated January 20 2009, Dr. Muawwad applied the fifth edition of the A.M.A., *Guides*[5] and found 28 percent permanent impairment of the right upper extremity due to loss of range of motion (ROM) of the shoulder and 10 percent permanent impairment of the right upper extremity due to carpal tunnel syndrome.

On February 23, 2009 an OWCP medical adviser reviewed the medical evidence of record and applied the fifth edition of the A.M.A., *Guides*. He determined that appellant had 10 percent permanent impairment due to distal clavicle excision, which should be combined with 7 percent permanent impairment due to loss of ROM of the right shoulder for a total of 16 percent right upper extremity permanent impairment. The medical adviser opined, "This 16 percent [permanent] impairment is based strictly on the shoulder. It does not include the impairment given previously for carpal tunnel syndrome." He found that appellant had no more than four percent permanent impairment due to carpal tunnel syndrome for which she had previously received a schedule award.

In a May 18, 2009 decision, OWCP granted appellant a schedule award for 16 percent permanent impairment of her right arm due to her right shoulder conditions. It noted that her impairment was determined before the adoption of the sixth edition of the A.M.A., *Guides* and that the decision reflected calculations under the fifth edition of the A.M.A., *Guides*.[6]

[5] *Supra* note 3.

[6] For new decisions issued after May 1, 2009 OWCP uses the sixth edition of the A.M.A., *Guides*. A.M.A., *Guides*, (6th ed. 2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.5a (February 2013); *id*. at Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

Appellant's attending physician, Dr. Rida N. Azer, a Board-certified orthopedic surgeon, recommended an additional MRI scan. She diagnosed progressive adhesive capsulitis beginning on May 26, 2009. Appellant stopped work on May 26, 2009. The period of her schedule award payments ended on January 5, 2010 and OWCP informed her that she could request wage-loss compensation after that date.

On May 18, 2010 Dr. Azer performed an authorized surgical decompression of the right carpal tunnel. OWCP authorized wage-loss compensation benefits beginning May 17, 2010. Appellant returned to full-time light duty on November 8, 2010 and full duty on November 23, 2010. In a letter dated January 26, 2011, OWCP noted that she had returned to her full-duty position with no wage loss.

On June 3, 2011 appellant filed a schedule award claim (Form CA-7) for additional impairment. In a report dated August 24, 2011, Dr. Azer found that appellant's August 22, 2011 EMG/NCV studies demonstrated chronic right median neuritis, left carpal tunnel syndrome, and chronic right brachial neuritis. She found that appellant had reached maximum medical improvement. Dr. Azer applied the sixth edition of the A.M.A., *Guides* and found that appellant had 45 percent permanent impairment of her right upper extremity due to loss of ROM in the shoulder, weakness in the deltoid muscle, and loss of grip strength following repeated carpal tunnel surgeries.

In a note dated September 29, 2011, an OWCP medical adviser reviewed the medical evidence of record and found that appellant had 11 percent permanent impairment of her right upper extremity utilizing the diagnosis-based impairment (DBI) estimate of distal clavicle resection. He found that applying the ROM figures of the A.M.A., *Guides* resulted in eight percent permanent impairment of the right upper extremity. In regard to appellant's compression neuropathy, the medical adviser found six percent permanent impairment. He combined the DBI estimates to reach 16 percent permanent impairment of the right arm. The medical adviser noted that appellant had previously received a schedule award for 4 percent permanent impairment of the right upper extremity and concluded that she was entitled to a schedule award for an additional 12 percent permanent impairment of her right upper extremity.

By decision dated November 21, 2011, OWCP found that appellant had 11 percent permanent impairment of her right shoulder and 6 percent permanent impairment of her right arm.[7] It noted that she was previously paid for 16 percent permanent impairment of her right shoulder and 4 percent permanent impairment of her right arm. OWCP determined that appellant was entitled to a schedule award for an additional two percent permanent impairment of the right arm.

OWCP authorized additional wage-loss compensation benefits beginning September 14, 2012. On November 15, 2012 appellant underwent additional right upper extremity surgeries for impingement syndrome of the right shoulder with adhesive capsulitis and compression neuropathy of the right ulnar nerve of the right elbow. Following this surgery she did not return to work. OWCP authorized wage-loss compensation benefits.

[7] From the context of the decision and the prior awards, OWCP indicated that the six percent permanent impairment of the arm was attributable to appellant's right carpal tunnel syndrome.

On August 1, 2016 appellant filed schedule award claim (Form CA-7) for additional impairment. In a letter dated August 12, 2016, OWCP requested that she provide additional medical evidence in support of the schedule award claim.[8]

In a January 24, 2017 preliminary determination dated, OWCP found that appellant received a $14,267.07 overpayment of compensation because she received duplicative schedule awards. Appellant had received a schedule award on November 12, 2003 for four percent permanent impairment of her right arm due to carpal tunnel syndrome; a schedule award on May 18, 2009 for 16 percent permanent impairment of appellant's right arm due to her accepted shoulder conditions. The award was not adjusted for her November 12, 2003 schedule award; a schedule award on November 21, 2011 for an additional two percent permanent impairment of appellant's right arm due to carpal tunnel syndrome which was not adjusted for her prior awards; a schedule award on May 18, 2009 for an additional 12 percent permanent impairment of the right upper extremity for which appellant was overpaid for 12.48 weeks or $9,740.39. It determined that she was not entitled to the November 21, 2011 schedule award for the additional two percent permanent impairment or 6.24 weeks of compensation which resulted in an overpayment of $4,526.68. The total of the two overpayment amounts was $14,267.07. OWCP found that appellant was without fault in creating the overpayment. It requested that she complete an overpayment recovery questionnaire (OWCP-20) and advised her of the actions she could take in response to the preliminary notice of overpayment.

Appellant responded to the notice and requested that OWCP make a decision based on the written evidence. She disagreed that an overpayment of compensation had occurred and requested waiver of recovery. The record does not contain a completed Form OWCP-20 or any financial information.

By decision dated February 28, 2017, OWCP found that appellant had received an overpayment of compensation in the amount of $14,267.07 due to duplicative schedule awards. It further found that she was not entitled to waiver of recovery of the overpayment. OWCP determined that it would collect the overpayment by withholding $100.00 from appellant's continuing compensation payments effective March 31, 2017.

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 FECA program with the Director of OWCP.[9] 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.[10] FECA, however, does not specify the

[8] OWCP issued a final decision on this claim on March 24, 2017. However, the Board acquired jurisdiction over this issue on March 20, 2017. Therefore, the March 24, 2017 decision is null and void. The Board and OWCP may not have concurrent jurisdiction over the same issue in a case. *See Russell E. Lerman,* 43 ECAB 770 (1992); *Douglas E. Billings,* 41 ECAB 880 (1990); *see also* 20 C.F.R. § 501.2(c)(3).

[9] *See* 20 C.F.R. §§ 1.1-1.4.

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

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.[11]

The sixth edition of the A.M.A., *Guides* was first printed in 2008. Within months of the initial printing, the A.M.A., *Guides* issued a 52-page document entitled "Clarifications and Corrections, [s]ixth [e]dition, *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).[12] 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.[13]

ANALYSIS -- ISSUE 1

The Board finds that this case is not in posture for decision.

The Board initially notes that OWCP accepted right wrist strain, right carpal tunnel syndrome, as well as right shoulder impingement syndrome and partial tear of the right rotator cuff. Appellant received schedule awards attributable to both regions of the arm. On November 12, 2003 she received a schedule award for four percent permanent right arm impairment attributable to the accepted wrist conditions. On November 21, 2011 appellant received an additional schedule award for two percent right arm impairment due to her accepted wrist conditions. On May 18, 2009 she received a schedule award for 16 percent permanent impairment of her right arm due to her accepted right shoulder conditions. OWCP regulations provide that an employee's schedule award benefits will be reduced by compensation paid under the schedule for an earlier injury if the impairment is to the same body part or function or different parts of the same part or function; and compensation payable for the later impairment in whole or in part would duplicate the earlier payment.[14] In finding that appellant received an overpayment of compensation due to duplicative schedule awards, OWCP did not explain how her award for permanent impairment attributable to her accepted right shoulder conditions was

[11] 20 C.F.R. § 10.404. *See also, Ronald R. Kraynak*, 53 ECAB 130 (2001).

[12] *See supra* note 6 at Chapter 3.700, Exhibit 1 (January 2010); *supra* note 6 at Chapter 2.808.6a (February 2013).

[13] *In the Matter of Isidoro Rivera*, 12 ECAB 348 (1961).

[14] *See* 20 C.F.R. § 10.404(d)(1)-(2); *M.P.*, Docket No. 17-0150 (issued June 21, 2017).

duplicated by the awards for her right wrist conditions.[15] Consequently, OWCP has not properly shown, pursuant to its regulations and Board precedent, how her current impairment duplicated the prior impairment. As such, the case must be remanded for proper findings on the schedule award issue presented.[16]

Furthermore, in developing the proper extent of permanent impairment and making proper findings, the Board notes 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 had been followed regarding the proper use of the DBI or the ROM methodology when assessing the extent of permanent impairment for schedule award purposes.[17] The purpose of the use of uniform standards is to ensure consistent results and to ensure equal justice under the law to all claimants.[18] In *T.H.*, the Board concluded that OWCP physicians were 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 observed that physicians interchangeably cited to language in the first printing or the second printing when justifying use of either ROM or DBI methodology. Because OWCP's own physicians were inconsistent in the application of the A.M.A., *Guides*, the Board found that OWCP could no longer ensure consistent results and equal justice under the law for all claimants.[19]

In order to ensure a consistent result and equal justice under the law for cases involving upper extremity permanent impairment, the Board will set aside the February 28, 2017 decision. Utilizing a consistent method for calculating permanent impairment for upper extremities to be applied uniformly, after 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.[20]

CONCLUSION

The Board finds that this case not in posture for decision regarding whether OWCP properly determined the extent of appellant's permanent impairment of her right upper extremity for which she previously received schedule awards.

[15] *See M.P., id*.; *V.T.*, Docket No. 14-0296 (issued May 5, 2014). The Board also notes that the A.M.A., *Guides* contemplate that there may be impairments in different regions of the same extremity. Chapter 15 of the A.M.A., *Guides* specifies that the wrist and shoulder are two distinct regions of the upper extremity. A.M.A., *Guides* 384, Figure 15-1, Upper Extremity Regions; 419 (procedure for combining multiple upper extremity impairments); *see also P.B.*, Docket No. 14-0899 (issued July 28, 2014).

[16] *See V.T., id*.

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

[18] *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

[19] *Supra* note 17.

[20] As the underlying schedule award determination is not in posture for a decision, the issues of fact of overpayment and waiver are premature. *C.S.*, Docket No. 16-0752 (issued April 19, 2017).

ORDER

IT IS HEREBY ORDERED THAT the February 28, 2017 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further actions consistent with this decision.

Issued: October 11, 2017
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

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