

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

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**B.C., Appellant**

**and**

**DEPARTMENT OF HEALTH & HUMAN  
SERVICES, INDIAN HEALTH SERVICE,  
Claremore, OK, Employer**  
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**Docket No. 23-1018  
Issued: October 7, 2024**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge  
JAMES D. MCGINLEY, Alternate Judge

**JURISDICTION**

On July 26, 2023 appellant filed a timely appeal from a February 1, 2023 merit decision of the Office of Workers’ Compensation Programs (OWCP). 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.<sup>2</sup>

**ISSUE**

The issue is whether OWCP met its burden of proof to rescind appellant’s schedule award for an additional one percent permanent impairment of her right upper extremity.

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

<sup>2</sup> The Board notes that following the February 1, 2023 decision, OWCP received additional evidence. However, the Board’s *Rules of Procedure* provides: “The Board’s review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal.” 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

## **FACTUAL HISTORY**

This case has previously been before the Board.<sup>3</sup> The facts and circumstances as set forth in the Board's prior order are incorporated herein by reference. The relevant facts are as follows.

Appellant, then a 45-year-old registered nurse, filed a traumatic injury claim (Form CA-1) alleging that on September 7, 1999 she sustained a left wrist injury while stocking intravenous (IV) bags in the performance of duty. OWCP accepted the claim for aggravation of left wrist tendinitis and authorized left first dorsal release surgery, which was performed on November 18, 1999. It subsequently expanded the acceptance of appellant's claim to include major depression, pneumonia organism unspecified, and dental caries. OWCP paid appellant wage-loss compensation on the periodic rolls as of June 16, 2002.<sup>4</sup>

On August 28, 2018 appellant filed a claim for compensation (Form CA-7) for an additional schedule award.<sup>5</sup>

By decision dated October 17, 2019, OWCP denied appellant's schedule award claim.

On November 8, 2019 appellant requested an oral hearing before a representative OWCP's Branch of Hearing and Review. In support thereof, she resubmitted an October 22, 2001 impairment rating by an OWCP District Medical Adviser (DMA), Dr. H. Mobley, an internist, and the October 23, 2001 letter from OWCP.

By decision dated March 31, 2020, OWCP's hearing representative affirmed the October 17, 2019 decision, finding that the medical evidence of record was insufficient to support a schedule award, and that appellant was still in receipt of wage-loss compensation.

On July 13, 2020 appellant appealed to the Board. By order dated July 21, 2021, the Board found that OWCP's hearing representative summarily affirmed the denial of appellant's additional schedule award claim. The Board, therefore, remanded the case for a *de novo* decision regarding whether appellant had greater than 25 percent permanent impairment of her right upper extremity,

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<sup>3</sup> *Order Remanding Case*, Docket No. 20-1423 (issued July 21, 2021).

<sup>4</sup> OWCP assigned the present claim OWCP File No. xxxxxx800. Appellant has other claims before OWCP. Under OWCP File No. xxxxxx573, she filed a Form CA-1 alleging that on March 25, 1999 she sustained left hand and thumb injuries when picking up several files and a thick chart while in the performance of duty. OWCP accepted that claim for left wrist and thumb tenosynovitis and recurrent major depression. Under OWCP File No. xxxxxx845, appellant filed an occupational disease claim (Form CA-2) on August 18, 1998 alleging a left thumb injury. OWCP accepted that claim for left thumb tendinitis. Under OWCP File No. xxxxxx436, appellant filed a Form CA-1 alleging a September 19, 1995 injury to her right shoulder. OWCP accepted that claim for right shoulder and upper arm sprain, and aggravation of right rotator cuff tear. It has administratively combined File Nos. xxxxxx800, xxxxxx436, xxxxxx845, and xxxxxx573, with the latter serving as the master file.

<sup>5</sup> In a letter dated August 30, 2019, appellant stated that she was previously granted schedule award compensation; however, she elected to wait to receive the award as she was receiving disability wage-loss benefits. The Board notes that in a letter dated October 23, 2001, OWCP advised appellant that the medical evidence of record established a total of 25 percent permanent impairment of the right upper extremity (an increase of 7 percent over a prior award of 18 percent), and 75 percent permanent impairment of the left upper extremity. However, as appellant was in receipt of wage-loss compensation for temporary total disability, the schedule award would not be issued at that time.

greater than 75 percent permanent impairment of the left upper extremity, and/or any permanent impairment of her lower extremities.<sup>6</sup>

On January 31, 2022 OWCP referred appellant, along with the case record, a statement of accepted facts (SOAF), and a series of questions, to Dr. Timothy G. Pettingell, a Board-certified physiatrist, for a second opinion evaluation.

In a report dated March 21, 2022, Dr. Pettingell rated appellant's left upper extremity permanent impairment for the diagnosis of complex regional pain syndrome (CRPS) I of the left upper extremity. Using Table 15-25 of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),<sup>7</sup> he found that she had 23 percent permanent impairment of the left upper extremity. Dr. Pettingell did not rate appellant's right upper extremity.

On May 18, 2022 OWCP routed Dr. Pettingell's March 21, 2022 report, along with the case record and SOAF to Dr. Todd Fellars, a Board-certified orthopedic surgeon serving as a DMA, for a review and determination of appellant's permanent impairment under the sixth edition of the A.M.A., *Guides*. It noted that she was previously awarded 18 percent permanent impairment of the right upper extremity (shoulder) and had requested a current impairment rating. OWCP requested the DMA discuss whether appellant had greater than 25 percent permanent impairment of the right upper extremity and/or greater than 75 percent permanent impairment of the left upper extremity.

On June 14, 2022 Dr. Fellars reviewed the medical record, including Dr. Pettingell's March 21, 2022 report. He noted that appellant was status post bilateral de Quervain's release for both wrists. Using Table 15-25, page 453 of the sixth edition of the A.M.A., *Guides*, Dr. Fellars identified a class of diagnosis (CDX) of CRPS of the left wrist. He also noted that while Dr. Pettingell had not provided a permanent impairment rating for appellant's right upper extremity, she had a history of right wrist de Quervain's tenosynovitis, which he found resulted in an additional one percent permanent impairment of her right upper extremity. Dr. Fellars concluded that appellant had a total of 7 percent left upper extremity permanent impairment and an additional 1 percent permanent impairment of the right upper extremity (for a total of 19 percent). He advised that according to the A.M.A., *Guides*, appellant's permanent impairment could not be rated using the range of motion (ROM) methodology.

By decision dated July 13, 2022, OWCP expanded the acceptance of appellant's claim to include left upper extremity CRPS I.

On July 13, 2022 OWCP requested clarification and an addendum report from Dr. Fellars.

In an addendum to his report dated July 26, 2022, Dr. Fellars explained that using Table 15-3, page 395 of the A.M.A., *Guides*, appellant had one percent permanent impairment of the right upper extremity for the diagnosis of right wrist de Quervain's tenosynovitis. He noted that

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<sup>6</sup> *Order Remanding Case*, Docket No. 20-1423 (issued July 21, 2021).

<sup>7</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

her previous right upper extremity rating was for the right shoulder; however, she would be entitled to an additional schedule award for one percent permanent impairment of her right wrist.

By *de novo* decision dated August 4, 2022, OWCP granted appellant a schedule award for an additional one percent permanent impairment of the right upper extremity, and 23 percent permanent impairment of the left upper extremity. The period of the award was for 74.88 weeks and ran from July 17 through December 23, 2022.

On August 25, 2022 appellant requested both a review of the written record and an oral hearing by a representative of OWCP's Branch of Hearings and Review.

By decision December 5, 2022, OWCP's hearing representative performed a preliminary review and found the case not in posture for a decision. The hearing representative set aside the August 4, 2022 decision, finding that it was unclear why a schedule award was issued for the right upper extremity under the current claim since no right upper extremity condition had been accepted. The hearing representative noted that the second opinion physician only evaluated appellant's left upper extremity for a schedule award while the DMA offered an impairment rating for the right upper extremity. The hearing representative instructed OWCP to refer appellant back to second opinion physician Dr. Pettingell for a complete right upper extremity physical examination, including valid ROM measurements. The hearing representative also instructed OWCP to clarify the conditions accepted under the current claim, update the SOAF and follow the rescission procedure under the Federal (FECA) Procedure Manual if it determined that a right upper extremity condition had not been accepted under the current claim.

On December 29, 2022 OWCP issued a notice proposing to rescind appellant's entitlement to a schedule award for the right upper extremity, which was initially granted on August 4, 2022. It explained that right upper extremity conditions had not been accepted under the current claim, although she had previously been granted schedule award compensation for the right upper extremity under OWCP File No. xxxxxx436. OWCP also noted that it was unclear how the DMA rated appellant's right upper extremity permanent impairment, as Dr. Pettingell, OWCP's second opinion physician, had not rated her right upper extremity.

By decision dated February 1, 2023, OWCP finalized the rescission of the August 4, 2022 schedule award for an additional one percent permanent impairment of the right upper extremity.

### **LEGAL PRECEDENT**

The schedule award provisions of FECA,<sup>8</sup> and its implementing federal regulations,<sup>9</sup> set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members or functions of the body. FECA, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such a determination is a matter which rests in the 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. OWCP evaluates the degree of permanent impairment according to the standards set forth in the

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<sup>8</sup> *Supra* note 1.

<sup>9</sup> 20 C.F.R. § 10.404.

specified edition of the A.M.A., *Guides*, published in 2009.<sup>10</sup> 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.<sup>11</sup>

A schedule award is payable consecutively, but not concurrently, with an award for wage loss for disability for the same injury.<sup>12</sup> A schedule award for one injury may be paid concurrently with compensation for wage loss paid for another injury, as long as the two injuries do not involve the same part of the body and/or extremity.<sup>13</sup>

OWCP bears the burden of proof to justify rescission of acceptance based on new evidence, legal argument, and/or rationale.<sup>14</sup> Probative and substantial positive evidence or sufficient legal argument must establish that the original determination was erroneous. OWCP must also provide a clear explanation of the rationale for rescission.<sup>15</sup>

### ANALYSIS

The Board finds that OWCP failed to meet its burden of proof to rescind appellant's schedule award for an additional one percent permanent impairment of her right upper extremity.

In a report dated March 21, 2022, Dr. Pettingell, OWCP's second opinion physician, evaluated and rated appellant's left upper extremity permanent impairment. He did not evaluate or rate appellant's right upper extremity permanent impairment. On June 14, 2022 Dr. Fellars, OWCP's DMA, reviewed Dr. Pettingell's March 21, 2022 report. He noted that while Dr. Pettingell had not provided a permanent impairment rating for appellant's right upper extremity, she had a history of right wrist de Quervain's tenosynovitis, which he found resulted in an additional one percent permanent impairment of her right upper extremity.

On August 4, 2022 OWCP granted appellant a schedule award for an additional one percent permanent impairment of the right upper extremity. By decision December 5, 2022, OWCP's hearing representative set aside the August 4, 2022 decision, finding that it was unclear why an award was issued for the right upper extremity under the current claim since no right upper extremity condition had been accepted. The hearing representative specifically noted that Dr. Pettingill had not evaluated appellant's right upper extremity and had not provided a permanent

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<sup>10</sup> For decisions issued after May 1, 2009, the sixth edition of the A.M.A., *Guides* is used. A.M.A., *Guides* (6<sup>th</sup> ed. 2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (March 2017); *see also id.* at Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

<sup>11</sup> *R.B.*, Docket No. 22-0190 (issued June 21, 2022); *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

<sup>12</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.4a(3) (February 2013); *see S.M.*, Docket No. 17-1557 (issued September 4, 2018); *E.S.*, Docket No. 16-1248 (issued May 15, 2017); *S.W.*, Docket No. 10-2071 (issued July 11, 2011).

<sup>13</sup> *Id.* at Chapter 2.808.4a(5); *Michael J. Biggs*, 54 ECAB 595, 596-97 (2003).

<sup>14</sup> *See R.B.*, *supra* note 11; *D.P.*, Docket No. 18-1213 (issued July 30, 2020); *L.G.*, Docket No. 17-0124 (issued May 1, 2018).

<sup>15</sup> *See R.B.*, *id.*; *W.H.*, Docket No. 17-1390 (issued April 23, 2018).

impairment rating for her right upper extremity. The hearing representative instructed OWCP to refer appellant back to second opinion physician Dr. Pettingell for a complete physical examination of appellant's right upper extremity, and rating of appellant's permanent impairment, including valid ROM measurements. It was then to clarify the conditions accepted under the current claim, and determine appellant's entitlement to an additional schedule award. OWCP, however, issued the decision rescinding appellant's August 4, 2022 schedule award claim without obtaining a supplemental report from Dr. Pettingell.

OWCP bears the burden of proof to rescind the acceptance of a claim.<sup>16</sup> Once OWCP undertook development of the evidence, it was required to obtain a proper evaluation and report regarding the issue in this case.<sup>17</sup> As OWCP did not obtain a supplemental report from second opinion physician Dr. Pettingell, prior to rescinding the schedule award for an additional one percent permanent impairment right upper extremity, the Board finds that OWCP failed to meet its burden of proof.

### CONCLUSION

The Board finds that OWCP failed to meet its burden of proof to rescind appellant's schedule award for an additional one percent permanent impairment of her right upper extremity.

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<sup>16</sup> *J.C.*, Docket No. 21-0124 (issued October 24, 2022); *D.V.*, Docket No. 16-0849 (issued March 6, 2017).

<sup>17</sup> *J.M.*, Docket No. 21-0569 (issued December 6, 2021); *see R.L.*, Docket No. 20-1069 (issued April 7, 2021); *W.W.*, Docket No. 18-0093 (issued October 9, 2018); *Peter C. Belkind*, 56 ECAB 580 (2005).

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 1, 2023 decision of the Office of Workers' Compensation Programs is reversed.

Issued: October 7, 2024  
Washington, DC

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

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

James D. McGinley, Alternate Judge  
Employees' Compensation Appeals Board