

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

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**S.P., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
St. Paul, MN, Employer**

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**Docket No. 06-1419  
Issued: December 26, 2006**

*Appearances:*

*Ronald M. Fitzpatrick, Esq.*, for the appellant  
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On May 31, 2006 appellant filed a timely appeal of the May 19, 2006 decision of the Office of Workers' Compensation Programs, which found that he had received an overpayment of compensation. The Board also has jurisdiction over the Office's February 10, 2006 decision finding that he had no more than a six percent permanent impairment of the right arm. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

**ISSUES**

The issues are: (1) whether appellant has more than a six percent permanent impairment of the right upper extremity, for which he has received a schedule award; (2) whether the Office properly found that there was an overpayment in the amount of \$18,796.50 for the period March 28, 2003 to November 28, 2004; and (3) whether the Office properly denied waiver of the overpayment.

## FACTUAL HISTORY

On September 16, 1999 appellant, then a 45-year-old postal distribution clerk, filed a claim alleging that, on September 12, 1999, he injured his neck and right shoulder while lifting a box. The Office accepted his condition for cervical sprain, trapezius sprain, cervical disc herniation at C3-4, cervical radiculopathy and right-sided carpal tunnel syndrome. It authorized a cervical discectomy and fusion at C3-4, a compression and anterior cervical fusion at C6-7 and a right carpal tunnel release. Appellant did not stop work. Appropriate compensation benefits were paid.

Dr. Alexis Norelle, a Board-certified neurosurgeon, treated appellant for a September 16, 1999 injury. On February 29, 2000 she performed an anterior cervical discectomy and fusion at C3-4 with anterior cervical plating and diagnosed C3-4 herniated disc on the right. On April 28, 2000 appellant underwent an electromyogram (EMG) which revealed right carpal tunnel syndrome. Thereafter, on October 27, 2000, he underwent a right carpal tunnel release. On November 6, 2001 Dr. H.G. Sullivan, a Board-certified neurosurgeon, performed an anterior cervical discectomy with decompression of the anterior dura and the right C7 root; anterior cervical fusion with allograft fibula and anterior segmental fixation with plates and screws and diagnosed chronic compression of the C7 nerve root on the right side in the right C6 foramen.

On December 16, 2002 appellant filed a claim for a schedule award. In support of his claim, he submitted a June 6, 2002 impairment evaluation from Dr. Evan Robert Nelson, a Board-certified physiatrist, who opined that appellant sustained a 27.7 whole person impairment pursuant to the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.<sup>1</sup> The record was referred to an Office medical adviser who, in a report dated April 19, 2003, advised that appellant sustained a 28 percent permanent impairment of the right arm. He noted that in compression neuropathies additional impairment could not be given for decreased motion in the absence of complex regional pain syndrome; therefore, impairment would be based on residual subjective complaints. The medical adviser noted that appellant had a 70 percent sensory deficit for pain which prevented some activities or a Grade 2.<sup>2</sup> He noted that maximum upper extremity pain due to sensory deficit in the distribution of the median nerve below the mid-forearm was 39 percent,<sup>3</sup> which represented a 28 percent impairment of the right upper extremity.

In a decision dated May 19, 2003, the Office granted appellant a schedule award for 28 percent permanent impairment of the right arm.

On June 18, 2003 appellant requested an oral hearing before an Office hearing representative.

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<sup>1</sup> A.M.A., *Guides* (5<sup>th</sup> ed. 2001).

<sup>2</sup> *See id.* at 482, Table 16-10.

<sup>3</sup> *See id.* at 492, Table 16-15.

By decision dated August 8, 2003, the hearing representative set aside the schedule award decision and remanded the case for further development. He found that the medical adviser based his impairment rating on the accepted condition of carpal tunnel syndrome but did not address upper extremity impairment due to the accepted cervical injury. The hearing representative directed referral for a second opinion evaluation to determine the nature and extent of permanent impairment.

On September 16, 2003 appellant was referred to Dr. Bruce Davey, a Board-certified orthopedic surgeon. In an October 20, 2003 report, Dr. Davey reviewed appellant's history, opined that his sensory and motor abnormalities were not related to the C3-4 work-related disc injury and advised that appellant did not have a permanent impairment of the arm. On February 11, 2004 the Office requested clarification from him with regard to whether appellant sustained permanent impairment of the arm. It provided an updated statement of accepted facts, which noted appellant's cervical surgeries at C3-4, C6-7 and right-sided carpal tunnel syndrome. In an addendum report dated March 17, 2004, Dr. Davey opined that appellant sustained a five percent impairment of the right upper extremity. He noted that sensory deficit at C7 was a Grade 4 or 20 percent, and the maximum sensory deficit for pain at C7 was 5 for 1 percent impairment due to sensory deficit at C7.<sup>4</sup> With regard to motor loss, Dr. Davey noted that motor deficit at C7 was a Grade 4 or 10 percent, and the maximum motor deficit for pain at C7 was 35 percent motor deficit for 3.5 percent impairment for motor deficit or a 5 percent permanent impairment of the upper extremity pursuant to the fifth edition of the A.M.A., *Guides*.

On April 3, 2004 an Office medical adviser determined that appellant's residual impairment of the hand with pain and slight numbness was secondary to the C6-7 cervical injury. He concurred with Dr. Davey's impairment rating. The medical adviser noted that sensory deficit at C7 was a Grade 4 or 20 percent, and the maximum sensory deficit for pain at C7 was 5 for 1 percent impairment due to sensory deficit at C7.<sup>5</sup> With regard to motor loss, he noted that motor deficit at C7 was a Grade 4 or 10 percent, and the maximum motor deficit for pain at C7 was 35 percent motor deficit for a 3.5 percent impairment for motor deficit or a 5 percent permanent impairment of the upper extremity pursuant to the fifth edition of the A.M.A., *Guides*.<sup>6</sup>

In a decision dated April 21, 2004, the Office found that appellant had no more than five percent impairment of the right arm for which he received a schedule award.

On April 21, 2004 the Office issued a preliminary overpayment determination, finding that appellant was erroneously paid 28 percent impairment for the right arm. It determined that appellant was not at fault in the creation of the overpayment.

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<sup>4</sup> See *id.* at 482, 492, Table 16-10, 16-13.

<sup>5</sup> See *id.* at 482, 492, Table 16-10, 16-13.

<sup>6</sup> A.M.A., *Guides* (5<sup>th</sup> ed. 2001).

On May 14, 2004 appellant requested a waiver of the overpayment and a preresoupment hearing. He submitted an overpayment questionnaire and various financial documents. The hearing was held on December 15, 2004.

By decision dated March 29, 2005, the hearing representative reversed the April 21, 2004 decision. He found a conflict in medical opinion between the Office referral physician, Dr. Davey, who opined that appellant had a 5 percent permanent impairment of the right arm based on sensory and motor deficits due to the accepted injury of the C6-7 of the cervical spine and Dr. Nelson, appellant's treating physician, who opined that appellant sustained a 28 percent permanent impairment of the right arm due to appellant's accepted carpal tunnel syndrome.

To resolve the conflict the Office referred appellant to Dr. Stephen Barron, a Board-certified orthopedic surgeon. In a report dated December 12, 2005, Dr. Barron reviewed the records and examined appellant. He noted a history of appellant's work-related injury and appellant's symptoms of daily neck pain with radiation into his upper arm, numbness down his right arm to three fingers and right wrist pain. Dr. Barron noted that sensory examination of both upper extremities was normal, there was excellent grip strength bilaterally, normal motor strength and symmetrical reflexes bilaterally. He also found a negative Tinel's sign, a positive Phalen's sign on the right, 80 degrees of dorsiflexion and palmer flexion of the right wrist and 90 degrees of supination and pronation. Because appellant's examination for carpal tunnel syndrome was normal, his complaints of pain and numbness would be related to the cervical spine at C4 or C7. However, Dr. Barron opined that the motor and sensory examinations were normal and therefore appellant would have a zero percent permanent impairment of the right arm under the A.M.A., *Guides*.

In a memorandum dated December 21, 2005, the Office referred Dr. Barron's report and the case record to its medical adviser for evaluation as to the extent of permanent partial impairment of the right upper extremity in accordance with the A.M.A., *Guides*. The medical adviser determined that appellant sustained a six percent permanent impairment of the right upper extremity. He noted that the preponderance of the medical evidence supported the opinion of Dr. Barron. Appellant's residual complaints emanated from the residuals of his accepted cervical spine injury. The medical adviser noted that appellant sustained a five percent permanent impairment of the right upper extremity for residual sensory and motor deficits at C7 as noted in the medical adviser's report dated April 3, 2004.<sup>7</sup> In addition, the medical adviser determined that appellant sustained an additional one percent impairment of the right upper extremity. He noted that sensory deficit at C6, was a Grade 4, and the maximum sensory deficit for pain at C6 was eight for one percent impairment due to sensory deficit at C6.<sup>8</sup> The medical adviser noted that Dr. Barron addressed appellant's current complaints of right arm numbness radiating into the first three fingers on the right side and found that these symptoms were causally related to the accepted cervical injury. The medical adviser determined that appellant

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<sup>7</sup> See *id.* at 482, 492, Table 16-10, 16-13.

<sup>8</sup> See *id.* (although the physician failed to provide a percentage of sensory deficit between 1 and 25 as set forth in the A.M.A., *Guides*, it appears that the deficit was 12.5 percent which would be multiplied by the maximum sensory deficit or pain for C6 of 8 for a total impairment for sensory deficit at C6 of 1 percent).

sustained a six percent impairment of the right upper extremity in accordance with the A.M.A., *Guides*.

In a decision dated February 10, 2006, the Office found that appellant had no more than six percent permanent impairment of the right arm.

On February 10, 2006 the Office issued a preliminary overpayment determination, finding that appellant was erroneously paid 28 percent impairment for the right arm, in the amount of \$28,390.50, when he was entitled to compensation for 6 percent impairment of the right arm or \$9,594.00. The difference between these amounts represented an overpayment of \$18,796.50. The Office determined that appellant was not at fault in the creation of the overpayment. It advised him that he had the right to submit, within 30 days, evidence or arguments regarding the overpayment and his eligibility for waiver of the overpayment and provided appellant with an overpayment questionnaire to submit.

On February 27, 2006 appellant requested a telephone conference. Appellant submitted an overpayment questionnaire dated February 21, 2006 and financial documents. In a telephone conference dated April 3, 2006, appellant, through his attorney, advised that the entire schedule award had been spent on the following items: \$2,900.00 on a bay window in April 2003, \$2,300.00 on a couch in May 2003, \$2,700.00 on a sprinkler system in July 2003, \$1,060.00 on a trip to Las Vegas, NV, in September 2003, \$3,000.00 on an engagement ring in October 2003, \$3,050.00 on a tanning bed in January 2004, \$2,400.00 for a trip to Mexico in January 2004, \$10,000.00 on the wedding gift in May 2004 and \$3,500.00 on a driveway in May 2004. Appellant indicated that his monthly income was \$3,598.00 and his expenses were \$3,482.00. The attorney proposed a waiver of half of the overpayment for a total of \$9,398.50.

In a letter dated April 5, 2006, the Office advised that during the telephone conference appellant disclosed that the financial information on the overpayment questionnaire dated February 21, 2006 did not reflect his current financial standing. It declined the proposed compromise of the overpayment and requested that he submit proof of his current financial expenses.

In a letter dated April 25, 2006, appellant's attorney asserted that the doctrine of equitable estoppels applied and that appellant was entitled to waiver of the overpayment. Counsel asserted that appellant was granted a schedule award and acted reasonably in spending the award. He would suffer a financial hardship if he were required to reimburse the Office for the overpayment. Appellant submitted an overpayment questionnaire dated April 21, 2006, which noted monthly income of \$3,508.50 and expenses of \$3,419.00. He noted a monthly payment of rent or mortgage of \$640.00, food of \$450.00, clothing of \$50.00, utilities of \$385.00, other expenses of \$808.00, Department of Veterans Affairs' payment of \$156.00, a bike payment of \$301.20, Visa of \$70.00 and a truck payment of \$609.87. Appellant further noted a checking account balance of \$1,900.00, savings account balance of \$1,500.00 for a total of \$3,400.00. In a telephone conference dated May 18, 2006, counsel confirmed that appellant's monthly income was \$3,508.50 per month and his expenses were \$3,419.00 per month.

On May 19, 2006 the Office finalized the overpayment determination, finding that appellant received an \$18,796.50 overpayment of compensation for which he was without fault.

The overpayment arose because on April 19, 2003 he was erroneously granted a schedule award for 28 percent permanent impairment of the right arm. Subsequent medical development established that he only had six percent impairment of the right arm. The Office requested that appellant repay \$100.00 every month.

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

The schedule award provision of the Federal Employees' Compensation Act<sup>9</sup> and its implementing regulation<sup>10</sup> sets 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. However, the Act does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.<sup>11</sup>

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

The Office accepted appellant's claim for cervical sprain, trapezius sprain, cervical disc herniation at C3-4, cervical radiculopathy and right-sided carpal tunnel syndrome. It authorized a cervical discectomy and fusion at C3-4, a compression and anterior cervical fusion at C6-7 and a right carpal tunnel release. The Office determined that there was a conflict in opinion between the Office referral physician, Dr. Davey, who opined that appellant had a 5 percent permanent impairment of the right arm based on sensory and motor deficits due to the accepted injury at C6-7 and Dr. Nelson, appellant's treating physician, who opined that appellant sustained a 28 percent permanent impairment of the right arm due to his accepted carpal tunnel syndrome.

Where there exists a conflict of medical opinion and the case is referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, is entitled to special weight.<sup>12</sup>

The Board finds that the opinion of Dr. Barron is sufficiently well rationalized and based upon a proper factual background such that it is entitled to special weight.

Dr. Barron reviewed appellant's history and reported an essentially normal physical examination. He noted that appellant reached maximum medical improvement on January 1, 2001. Dr. Barron listed appellant's symptoms of daily neck pain with radiation into his upper arm, numbness down his right arm to three fingers and right wrist. He noted that the sensory examination of both upper extremities was normal, there was excellent grip strength bilaterally, normal motor strength and symmetrical reflexes bilaterally. Dr. Barron found a

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<sup>9</sup> 5 U.S.C. § 8107.

<sup>10</sup> 20 C.F.R. § 10.404 (1999).

<sup>11</sup> *Id.*

<sup>12</sup> *Aubrey Belnavis*, 37 ECAB 206 (1985). See 5 U.S.C. § 8123(a).

negative Tinel's sign, a positive Phalen's sign on the right, 80 degrees of dorsiflexion and palmar flexion of the right wrist and 90 degrees of supination and pronation. He stated that, because appellant's examination was normal for carpal tunnel syndrome, his complaints of pain and numbness would be related to the cervical spine at C4 or C7. Based on his evaluation, Dr. Barron found that appellant did not have any impairment of his right upper extremity.

In a report dated December 26, 2005, the Office medical adviser determined that appellant sustained a six percent impairment of the right upper extremity under the fifth edition of the A.M.A., *Guides*.<sup>13</sup> He noted that the preponderance of the medical evidence established that appellant's complaints of pain emanated from his accepted cervical spine injury. The medical adviser referenced the findings of a prior medical adviser, who, in a report dated April 3, 2004, noted that sensory deficit at C7 was a Grade 4 or 20 percent, and the maximum sensory deficit for pain at C7 was 5 for 1 percent impairment due to sensory deficit at C7.<sup>14</sup> With regard to motor loss, he noted that motor deficit at C7 was a Grade 4 or 10 percent, and the maximum motor deficit for pain at C7 was 35 percent motor deficit for 3.5 percent impairment for motor deficit or a 5 percent permanent impairment of the arm pursuant to the fifth edition of the A.M.A., *Guides*. The medical adviser further determined that appellant sustained an additional one percent impairment for sensory deficit at C6, which was a Grade 4, and the maximum sensory deficit for pain at C6 was eight percent for one percent impairment due to sensory deficit at C6.<sup>15</sup> He stated that, although Dr. Barron determined that appellant did not have any permanent impairment of the right upper extremity, the referee had acknowledged appellant's complaints of right arm numbness radiating into the first three fingers on the right side and opined that these symptoms were causally related to the accepted cervical injury. Using the Combined Values Chart of the A.M.A., *Guides*, appellant had a total six percent impairment of the right arm.

The Office medical adviser properly applied the A.M.A., *Guides* to the information provided in Dr. Barron's December 12, 2004 report. He determined that appellant had six percent permanent impairment of the right arm. This evaluation conforms to the A.M.A., *Guides*. There is insufficient medical evidence of greater impairment of the right arm.

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

If a claimant receives a schedule award and the medical evidence does not support the degree of permanent impairment awarded, an overpayment of compensation may be created.<sup>16</sup> When the Office makes a determination that an overpayment of compensation has occurred because the claimant received a schedule award, the Office must properly resolve the schedule

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<sup>13</sup> A.M.A., *Guides* (5<sup>th</sup> ed. 2001).

<sup>14</sup> *See id.* at 482, 492, Table 16-10, 16-13.

<sup>15</sup> *See id.* (although the physician failed to provide a percentage of sensory deficit between 1 and 25 as set forth in the A.M.A., *Guides*, it appears that the deficit was 12 percent which would be multiplied by the maximum sensory deficit or pain for C6 of 8 for a total impairment for sensory deficit at C6 of 1 percent impairment).

<sup>16</sup> *See Michael Reed*, Docket No. 04-734 (issued October 5, 2004).

award issue. Before the amount of the overpayment of compensation can be determined, the evidence must properly establish the appropriate degree of permanent impairment.<sup>17</sup>

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

As noted, appellant has no more than six percent permanent impairment of his right upper extremity. However, the Office previously awarded compensation for a total of 28 percent impairment. The Board finds that this created an overpayment of compensation in the amount of \$18,796.50. Appellant received \$28,390.50 in compensation for the period March 28 to April 19, 2003 for a 28 percent permanent impairment of his right upper extremity. However, the medical evidence establishes only six percent permanent impairment to the right arm, entitling him to \$9,594.00. The Office calculated that the difference between the two awards amounted to \$18,796.50 (\$28,390.50 minus \$9,594.00). Appellant did not allege or submit evidence to show that he did not receive an \$18,796.50 overpayment. The Office properly found that he received such an overpayment for which he was not at fault.

### **LEGAL PRECEDENT -- ISSUE 3**

Section 8129(b) of the Act provides as follows:

“Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience.<sup>18</sup> No waiver of an overpayment is possible if the claimant is at fault in creating the overpayment.<sup>19</sup>”

Sections 10.441(a) of Title 20 of the Federal Code of Regulations provides that where an overpayment has been made to an individual by reason of an error of fact or law, such individual, as soon as the mistake is discovered or his attention is called to same, shall refund to the Office any amount so paid or, upon failure to make such refund, the Office may proceed to recover the same. However, section 8129( b) provides “[a]djustment or recovery by the United States may not be made when incorrect payment had been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of the [Act] or would be against equity and good conscience.”<sup>20</sup>

Section 10.436 of Title 20 of the Code of Federal Regulations<sup>21</sup> provides that recovery of an overpayment will defeat the purpose of the Act if recovery would cause hardship by depriving the overpaid beneficiary of income and resources needed for ordinary and necessary living

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<sup>17</sup> See *Richard Saldibar*, 51 ECAB 585 (2000) (the Board found that the overpayment issue was not in posture because the Office had not properly resolved the schedule award issue).

<sup>18</sup> 5 U.S.C. § 8129(b).

<sup>19</sup> *Gregg B. Manston*, 45 ECAB 344 (1994).

<sup>20</sup> *Id.*; 5 U.S.C. § 8129(b).

<sup>21</sup> 20 C.F.R. § 10.436.



expenses. The Office's procedure manual states that recovery would defeat the purpose of the Act if both of the following apply:

“(a) The individual from whom recovery is sought needs substantially all of his or her current income (including FECA monthly benefits) to meet current ordinary and necessary living expenses and

“(b) The individual's assets do not exceed the resource base of \$4,800.00 for an individual or \$8,000.00 for an individual with a spouse or one dependent plus \$960.00 for each additional dependent. This base includes all of the claimants assets not exempted from recoupment.... The first \$4,800.00 or more, depending on the number of the individual's dependents, is also exempted from recoupment as a necessary emergency resource.

“An individual is deemed to need substantially all of his or her current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. In other words, the amount of monthly funds available for debt repayment is the difference between current income and adjusted living expenses (*i.e.*, ordinary and necessary living expenses plus \$50.00).

“Both conditions in (a) and (b) above must be met to defeat the purpose of the FECA. When an individual exceeds the limits for either disposable current income or assets, on the face of it this provides a basis for establishing a reasonable repayment schedule over a reasonable, specified period of time. It is the individual's burden to show otherwise by submitting evidence that recovery of the overpayment would cause financial hardship of a nature sufficient to justify waiver.”<sup>22</sup>

Under the first criterion, an individual is deemed to need substantially all of his or her current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. In other words, the amount of monthly funds available for debt repayment is the difference between current income and adjusted living expenses, *i.e.*, ordinary and necessary living expenses plus \$50.00.<sup>23</sup>

Recovery of an overpayment is considered to be against equity and good conscience if an individual who was never entitled to benefits would experience severe financial hardship in attempting to repay the debt, with “severe financial hardship” determined by the same criteria set forth in section 10.436 above or if the individual, in reliance on the overpaid compensation, relinquished a valuable right or changed his or her position for the worse.<sup>24</sup> To establish a change in position for the worse, the individual must show that he made a decision she otherwise

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<sup>22</sup> Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a)(1) (October 2004).

<sup>23</sup> *Id.*

<sup>24</sup> *See* 20 C.F.R. § 10.437.

would not have made in reliance on the overpaid amounts and that this decision resulted in a loss; conversion of the overpayment into a different form from which the claimant derived some benefit does not constitute loss for this purpose. In making such a decision, the individual's present ability to repay the overpayment is not considered.<sup>25</sup>

### **ANALYSIS -- ISSUE 3**

The Office determined that appellant was without fault in creating the overpayment. Because he is without fault, the Office may adjust later payments only if adjustment would not defeat the purpose of the Act or be against equity and good conscience.

Appellant was advised by the Office to provide financial information by completing an overpayment recovery questionnaire, OWCP-20. Following appellant's request for a waiver, the Office sought additional financial information and documentation to help determine whether recovery would defeat the purpose of the Act or would be against equity and good conscience. Appellant listed monthly expenses which included, rent or mortgage of \$640.00, food of \$400.00, clothing of \$50.00, utilities of \$385.00, other expenses of \$808.00, Department of Veterans Affairs' payment of \$156.00, a bike payment of \$301.20, Visa of \$70.00, and a truck payment of \$609.87 for a total of \$3,420.07.<sup>26</sup> Appellant noted monthly income of \$3,508.00. This was comprised of \$2,610.00 from an unspecified source, \$485.00 in Veterans Administration benefits and \$413.00 in military retirement.<sup>27</sup> Appellant further noted a checking account balance of \$1,900.00, savings account balance of \$1,500.00 for a total of \$3,400.00. The record establishes that his current income exceeds his monthly expenses by more than \$50.00. Therefore, he is deemed not to need substantially all of his income to meet his ordinary and necessary living expenses. Because appellant has income which exceeds his monthly expenses by more than \$50.00, as set forth by the Office in its procedure manual, the Board finds that appellant has failed to demonstrate that recovery of the overpayment would defeat the purposes of the Act.<sup>28</sup> With total income of \$3,508.00 and expenses of \$3,420.07, appellant has not shown that he would experience severe financial hardship in repaying the overpayment debt of \$18,796.50 at \$100.00 per month.

Appellant asserts on appeal that recovery would be against equity and good conscience. The Office awarded him compensation for a 28 percent permanent impairment of the right arm in 2003. Appellant relied upon the representations of the Office and subsequently spent the proceeds of the award. He asserted that by spending the money he acted to his detriment because he is no longer able to repay the debt. The Board finds that recovery of the overpayment would not be against equity and good conscience. There is no evidence of record from which to conclude that appellant relied on the compensation payments to relinquish a valuable right or

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<sup>25</sup> See *Jorge O. Diaz*, 51 ECAB 124, 129 (1999).

<sup>26</sup> The overpayment questionnaire reflects total expenses of \$3,419.00; however, this appears to be an addition error as appellant's listed expenses total \$3,420.07.

<sup>27</sup> The Board notes that analyzing the limited financial information provided by appellant, his income exceeds his expenses by \$87.93.

<sup>28</sup> *Supra* note 20.

change his position for the worse. The Board finds that appellant's unsupported assertion that he would experience severe financial hardship is insufficient. Appellant asserted that he relied on the Office's determination of the schedule award and spent the funds on various items including a driveway, a bay window, a tanning bed and vacations. However, the governing case law and Office regulations have held that conversion of a liquid asset into real or personal property does not constitute a loss.<sup>29</sup> If an individual uses his entire schedule award, for example, to buy real or personal property, and it is later found that he was never entitled to a schedule award, he has not established that he changed his position for the worse because he has not shown that he suffered a loss. He has simply converted the money into a different form and has not lost it.<sup>30</sup> Appellant has not otherwise submitted evidence substantiating that he relinquished a valuable right that he was unable to get back, and that his action was based chiefly or solely on reliance on payments or notice of payment<sup>31</sup> nor has he established that, if required to repay the overpayment, he would be in a worse position after repayment than would have been the case if the benefits had never been received in the first place.<sup>32</sup>

As appellant has failed to establish that he relinquished a valuable right or changed his position for the worse in reliance on the overpayment, the Office properly found that he was not entitled to waiver on the grounds that recovery would be against equity and good conscience. Whether to waive recovery of an overpayment of compensation is a matter that rests within the Office's discretion pursuant to statutory guidelines.<sup>33</sup>

As the evidence in this case fails to support that recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience, the Board finds that the Office did not abuse its discretion by denying waiver of recovery.<sup>34</sup>

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<sup>29</sup> See *Gail M. Roe*, 47 ECAB 268, (1995) (where the Board found that if a claimant uses her entire schedule award to make a down payment on a larger home, and it is later found that she was never entitled to a schedule award, she has not met her burden to show that she changed her position for the worse because she has not established that she suffered a loss, she has simply converted the money into a different form and has not lost it); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.0200.6(b)(3) (October 2004) (Example 4), see also Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.0200.6(b)(3) (May 2004) (the claimant must show that if required to repay the overpayment he or she would be in a worse position after repayment than would have been the case if the benefits had never been received in the first place; conversion of the overpayment into a different form, such as food, consumer goods, real estate, etc., from which the claimant derived some benefit, is not to be considered a loss).

<sup>30</sup> *Id.*

<sup>31</sup> See 20 C.F.R. § 10.438(a) (it is the responsibility of the overpaid individual to provide evidence of income, expenses and assets that will be used in determining whether the overpayment may be waived).

<sup>32</sup> See Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(b)(3) (May 2004).

<sup>33</sup> *Carroll R. Davis*, 46 ECAB 361 (1994).

<sup>34</sup> As the Office did not direct recovery of the overpayment from continuing compensation payments, the Board does not have jurisdiction over the recovery of the overpayment. See *Desiderio Martinez*, 55 ECAB 245 (2004) (with respect to the recovery of overpayments, the Board's jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation benefits under the Act).

**CONCLUSION**

The Board finds that the Office properly determined that appellant had no more than a six percent permanent impairment of the right upper extremity. The Board finds that appellant received an overpayment of \$18,796.50 in compensation from March 28, 2003 to November 28, 2004. The Board also finds that the Office did not abuse its discretion in denying waiver of recovery of the overpayment.<sup>35</sup>

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 19 and February 10, 2006 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: December 26, 2006  
Washington, DC

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

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

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>35</sup> With his appeal appellant submitted financial information. However, the Board may not consider new evidence on appeal; *see* 20 C.F.R. § 501.2(c).