

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

B.M., Appellant

and

**U.S. POSTAL SERVICE, LAKELAND
DISTRICT-PALATINE OFFICE, Palatine, IL,
Employer**

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**Docket No. 12-94
Issued: July 9, 2012**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

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

JURISDICTION

On October 24, 2011 appellant, through her attorney, filed a timely appeal from the July 15, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) finding an overpayment of compensation. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received a \$12,659.40 overpayment of compensation; (2) whether it properly denied waiver of recovery of the overpayment; and (3) whether OWCP properly denied appellant's request for a hearing.

¹ 5 U.S.C. §§ 8101-8193.

² Appellant also filed a timely appeal of the September 8, 2011 nonmerit decision of OWCP which denied her request for a hearing.

FACTUAL HISTORY

OWCP accepted that on March 11, 2004 appellant, then a 51-year-old expediter, sustained a lumbar sprain, lumbar spinal stenosis and displacement of a lumbar intervertebral disc without myelopathy due to stacking mail above her head at work. It also accepted two right arm conditions under separate claim files. OWCP accepted that appellant sustained a traumatic aggravation of preexisting right elbow epicondylitis on June 1, 2008 and that, prior to September 2009, she sustained an occupational disease in the form of right shoulder bursitis.

On May 17, 2010 appellant filed a claim for a schedule award due to her work injuries.

In an October 19, 2010 decision, OWCP granted appellant a schedule award for a four percent permanent impairment of her right leg, a four percent permanent impairment of her left leg and a five percent permanent impairment of her right arm.

In a March 8, 2011 decision, OWCP's hearing representative determined that OWCP properly found that appellant had a four percent permanent impairment of her right leg, a four percent permanent impairment of her left leg and a five percent permanent impairment of her right arm. The hearing representative indicated that appellant should not have received a schedule award relating to her right arm in connection with the present claim -- a claim which only concerned her March 17, 2004 back injury and its effect on her legs. The case was remanded to OWCP for issuance of a *de novo* decision clarifying that appellant's schedule award for a five percent permanent impairment of her right arm should have been paid under the claim files concerning her right arm injuries. The hearing representative stated, "If deemed appropriate, [OWCP] could also consider making a determination on if [sic] the claimant was overpaid in the instant claim."³

In a June 8, 2011 letter, OWCP advised appellant of its preliminary determination that she received a \$12,659.40 overpayment of compensation. It indicated that \$12,659.40 was the amount she received for the schedule award granted on March 8, 2011 for a five percent permanent impairment of her right arm. Regarding the manner in which the overpayment was created, OWCP stated that appellant was "only entitled to a schedule award for impairment to the bilateral lower extremities under case ... as this case has been accepted for injuries that affect only the bilateral lower extremities. Impairment to the right upper extremity should be paid under cases(s) that are accepted for injuries to the right upper extremity."

OWCP also made a preliminary determination that appellant was not at fault in the creation of the overpayment. It advised her that she could submit evidence challenging the fact or amount of the overpayment and that she could request waiver of the overpayment. OWCP informed appellant that she could submit additional evidence in writing or at precoupment hearing, but that a precoupment hearing must be requested within 30 days of the date of the written notice of overpayment. It requested that she complete and return an enclosed financial information questionnaire within 30 days even if she was not requesting waiver of the overpayment.

³ It does not appear that another decision regarding appellant's entitlement to schedule award compensation was issued.

In a July 15, 2011 decision, OWCP finalized its preliminary determinations that appellant received a \$12,659.40 overpayment of compensation and that she was not at fault in the creation of the overpayment. It found that the overpayment was not subject to waiver of recovery because she did not respond to its June 8, 2011 letter or otherwise submit evidence showing that waiver of recovery was warranted. OWCP did not provide any further explanation of how the \$12,659.40 overpayment was created.

In a letter faxed to OWCP on August 1, 2011, appellant's authorized counsel indicated that appellant was requesting reconsideration of the July 15, 2011 overpayment decision and noted that she wished to participate in a telephone hearing regarding the overpayment matter.

In a September 8, 2011 decision, OWCP denied appellant's request for a hearing in connection with the overpayment matter. It indicated that the hearing request was not made within 30 days of the June 8, 2011 preliminary overpayment determination and stated that final overpayment decisions were not subject to the hearing provision of 5 U.S.C. § 8124(b).

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty.⁴ Section 8129(a) of FECA provides, in pertinent part, "When an overpayment has been made to an individual under this subchapter because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled."⁵ Section 8116(a) of FECA provides that while an employee is receiving compensation or if he has been paid a lump sum in commutation of installment payments until the expiration of the period during which the installment payments would have continued, the employee may not receive salary, pay or remuneration of any type from the United States, except in limited specified instances.⁶

The schedule award provision of FECA⁷ and its implementing regulations⁸ 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. The American Medical Association, *Guides to the Evaluation of Permanent Impairment* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.⁹

⁴ 5 U.S.C. § 8102(a).

⁵ *Id.* at § 8129(a).

⁶ *Id.* at § 8116(a).

⁷ *Id.* at § 8107.

⁸ 20 C.F.R. § 10.404 (1999).

⁹ *Id.* The effective date of the sixth edition of the A.M.A., *Guides* is May 1, 2009. FECA Bulletin No. 09-03 (issued March 15, 2009).

ANALYSIS

The Board finds that OWCP did not establish that appellant received a \$12,659.40 overpayment of compensation. Regarding the manner in which the overpayment was created, OWCP stated that appellant was “only entitled to a schedule award for impairment to the bilateral lower extremities under case ... as this case has been accepted for injuries that affect only the bilateral lower extremities.” It further asserted that impairment to the right arm should be paid under cases that are accepted for injuries to the right arm.¹⁰

The Board finds, however, that OWCP has not established that appellant was not entitled to receive the \$12,659.40 she received for the schedule award granted on October 19, 2010 for a five percent permanent impairment of her right arm, nor has it claimed or shown that she received a double recovery in the form of another schedule award for at least the same degree of impairment of her right. OWCP did not present any evidence that appellant had already received compensation for the five percent permanent impairment of her right arm. In addition, it did not challenge the validity of her entitlement to receive schedule award compensation in the amount of \$12,659.40 for the five percent permanent impairment of her right arm.¹¹ OWCP did not attempt to explain that the medical evidence established that appellant was not entitled to such compensation. The mere fact that it felt that the schedule award should have been granted under one or both of appellant’s two claims files for a right arm condition, rather than under her claim file for a back injury, would not show that she was not entitled to the \$12,659.40 she received under the October 19, 2010 schedule award for a five percent permanent impairment of her right arm. For these reasons, OWCP has not shown that appellant received a \$12,659.40 overpayment of compensation.¹²

CONCLUSION

The Board finds that OWCP improperly determined that appellant received a \$12,659.40 overpayment of compensation.

¹⁰ OWCP accepted that on March 17, 2004 appellant sustained a lumbar sprain, lumbar spinal stenosis and displacement of a lumbar intervertebral disc without myelopathy. It also accepted two right arm conditions under separate claim files. OWCP accepted that appellant sustained a traumatic aggravation of preexisting right elbow epicondylitis on June 1, 2008 and that, prior to September 2009, she sustained an occupational disease in the form of right shoulder bursitis.

¹¹ The record does not contain any decision indicating that appellant was not entitled to receive a schedule award for a five percent permanent impairment of her right arm.

¹² Given the Board’s finding that OWCP improperly determined that appellant received a \$12,659.40 overpayment of compensation, it is not necessary to consider whether OWCP properly denied waiver of recovery of the overpayment or the denial of her hearing request.

ORDER

IT IS HEREBY ORDERED THAT the July 15, 2011 merit decision of the Office of Workers' Compensation Programs is reversed.

Issued: July 9, 2012
Washington, DC

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

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

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