

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

M.S., Appellant)

and)

**DEPARTMENT OF DEFENSE, DEFENSE
LOGISTICS AGENCY, KIRKLAND AIR
FORCE BASE, NM, Employer**)

**Docket No. 08-2070
Issued: September 11, 2009**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 21, 2008 appellant filed a timely appeal of the Office of Workers' Compensation Programs' merit decision dated April 25, 2008. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount \$5,182.67 as he received duplicative schedule awards; and (2) whether the Office properly found that he was at fault in the creation of the overpayment such that it was not subject to waiver.

FACTUAL HISTORY

On September 9, 2003 appellant, then a 57-year-old meat cutter, filed a traumatic injury claim alleging that on July 17, 2003 he injured his left shoulder in the performance of duty. The Office accepted his claim for left rotator cuff tear on July 8, 2004. It granted appellant a schedule award for 21 percent permanent impairment of his left upper extremity covering the

period January 8 to September 4, 2004 in the amount of \$16,799.07 based on a weekly pay rate of \$493.94 and 65.52 weeks of compensation.

On June 10, 2004 appellant filed a second traumatic injury claim alleging that he slipped and injured his left shoulder in the performance of duty on May 22, 2004. On October 26, 2004 the Office accepted his claim for sprain and strain of the left shoulder and upper arm.¹ It also accepted tenosynovitis of the left hand and wrist on November 9, 2005.

By decision dated July 6, 2005, the Office granted appellant a schedule award for 24 percent permanent impairment of the left upper extremity.² It determined that his pay rate was \$435.99 per week and that he was entitled to 74.88 weeks of compensation. The Office paid \$5,169.69 for the period March 21 to June 11, 2005. On November 9, 2005 it amended the July 6, 2005 schedule award decision to reflect appellant's entitlement to a schedule award for 24 percent impairment of the left upper extremity less the 21 percent previously paid. The Office found that appellant was entitled to compensation in the amount of \$4,087.48 for the period March 21 through May 25, 2005, representing an additional three percent impairment of his left upper extremity.³ Appellant requested an oral hearing of the November 9, 2005 decision on November 17, 2005.

On December 8, 2005 appellant filed a recurrence of disability claim attributing his left elbow trouble and carpal tunnel syndrome to his May 22, 2004 left shoulder injury. On March 21, 2006 the Office accepted the condition of tenosynovitis of the left wrist as resulting from appellant's May 22, 2004 employment injury.

In a May 25, 2006 decision, the Branch of Hearings and Review set aside the Office's November 9, 2005 decision and remanded for additional development of the medical evidence. By decision dated August 30, 2006, the Office found that appellant was entitled to a schedule award for 39 percent impairment of his left upper extremity which included 24 percent impairment to his shoulder and 20 percent impairment to the left wrist. It stated that the amount of the award had already been paid.

In a letter dated August 30, 2006, the Office made a preliminary determination that appellant had received an overpayment in the amount of \$5,182.67 because he had previously received a schedule award for 21 percent permanent impairment of his left upper extremity under a separate claim and the Office issued a subsequent schedule award for 24 percent impairment of his left upper extremity. It found that appellant was at fault in the creation of the overpayment because he accepted a payment which he knew or should have known was incorrect as he had

¹ On November 21, 2005 the Office informed appellant that his claims, file numbers xxxxxx131 and xxxxxx326 had been combined and that file number xxxxxx131 was the master file.

² The Board notes that the Office mistakenly referred to the right upper extremity in the issuance of the schedule award.

³ The Office noted that appellant had received compensation in the amount of \$13,889.63 for the period March 21 through October 29, 2005. It stated that appellant was due \$4,087.48 and that he had received an overpayment in the amount of \$9,802.15. The Office issued a preliminary determination of overpayment on November 10, 2005 based on these calculations. It did not issue a final decision regarding this overpayment.

previously received a schedule award for his left upper extremity. By decision dated April 25, 2008, the Office found that appellant had received an overpayment of compensation in the amount of \$5,182.67 because he accepted an additional schedule award after being paid for the same body part on another claim. It found that appellant was at fault in the creation of the overpayment because he failed to return the check.⁴

LEGAL PRECEDENT -- ISSUE 1

Section 8116 of the Federal Employees' Compensation Act defines the limitations on the right to receive compensation benefits. This section of the Act provides that, while an employee is receiving compensation, he may not receive salary, pay or remuneration of any type from the United States, except in limited circumstances.⁵ When a claimant receives a duplicative compensation payment for a period that he has already received compensation for wage loss, an overpayment of compensation is created.⁶

A final decision of the Office shall contain findings of fact and a statement of reasons.⁷ With respect to overpayment decisions, the Office must provide clear reasoning showing how the overpayment was calculated.⁸

ANALYSIS -- ISSUE 1

The Office granted appellant a schedule award for 21 percent impairment of his left upper extremity under his original claim which was accepted for left rotator cuff tear. Appellant filed a second claim for an upper extremity injury which was accepted for sprain and strain of the left shoulder and upper arm. The Office granted him a schedule award for 24 percent impairment due to his second shoulder injury. It then issued an amended schedule award on November 9, 2005 to reflect appellant's entitlement to schedule award totaling 24 percent impairment of the left upper extremity, less the 21 percent previously paid. In the November 9, 2005 decision, the Office stated that he had received duplicate payments and was only entitled to payment for an additional three percent impairment. On appeal, the hearing representative set aside the Office's November 9, 2005 schedule award decision and remanded for additional development of the medical evidence. By decision dated August 30, 2006, the Office found that appellant was entitled to schedule awards which combined totaled 39 percent impairment of his left upper extremity. This amount included 24 percent impairment to his shoulder which he had already

⁴ By decision dated January 23, 2009, the Office denied appellant's claim for an additional schedule award for his left upper extremity. The Board does not have jurisdiction to consider this decision on appeal. 20 C.F.R. § 501.3(d)(2).

⁵ 5 U.S.C. § 8116(a).

⁶ See *Lawrence J. Dubuque*, 55 ECAB 667, 670-71 (2004).

⁷ 20 C.F.R. § 10.126.

⁸ *O.R.*, 59 ECAB ___ (Docket No. 07-2399, April 10, 1999); *James Tackett*, 54 ECAB 611 (2003).

received and 20 percent impairment to the left wrist.⁹ The Office noted that he had already received payment.

The record indicates that appellant received two schedule awards totaling 45 percent impairment of his upper extremity due to his accepted left shoulder conditions when he was only entitled to receive compensation for a total of 24 percent impairment of the left upper extremity due to his left shoulder conditions. The Board finds he has received an overpayment of compensation due to duplicative schedule awards.

The record before the Board does not include any calculations explaining how the Office determined the amount of the overpayment. The Board is unable to determine whether the amount of the overpayment, \$5,169.69, as calculated by the Office is correct. The Office must provide the clear reasoning showing how the overpayment was calculated.¹⁰ Without any record of the method used to determine the amount of the overpayment, the Board is unable to adequately review this aspect of the case. The case will be remanded to the Office for further development regarding the amount of overpayment. The Office should fully explain its rationale and provide adequate documentation to support its explanation. After such further development, it should issue an appropriate decision.

CONCLUSION

The Board finds that appellant received an overpayment of compensation due to duplicate schedule awards. The Board further finds, however, that the case is not in posture for decision regarding the amount of the overpayment. It is, therefore, premature to address appellant's eligibility for waiver and recovery of the overpayment.

⁹ The American Medical Association, *Guides to the Evaluation of Permanent Impairment*, 5th ed. (2001) p. 604.

¹⁰ *O.R.*, *supra* note 8.

ORDER

IT IS HEREBY ORDERED THAT the April 25, 2008 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: September 11, 2009
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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