

FACTUAL HISTORY

OWCP accepted that by early 2002 appellant, then a 33-year-old patient services assistant, sustained bilateral cubital tunnel syndrome, bilateral carpal tunnel syndrome and bilateral lesions of his ulnar nerves due to the performance of his repetitive work duties.

In an April 10, 2007 award of compensation, OWCP granted appellant schedule awards for 23 percent permanent impairment of his left arm and 20 percent permanent impairment of his right arm. The awards ran for 134.16 weeks from December 14, 2006 to July 10, 2009. It was based on an impairment calculation made under the standards of the fifth edition of American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (5th ed. 2001).

On March 12, 2009 Dr. Ronald H. Blum, a Board-certified orthopedic surgeon serving as an OWCP medical adviser, reviewed additional medical evidence and determined that appellant then had 31 percent permanent impairment of his left arm and 20 percent permanent impairment of his right arm under the standards of the fifth edition of the A.M.A., *Guides*.

OWCP issued a July 20, 2009 decision granting appellant a schedule award for an additional eight percent permanent impairment of his left arm.² The award ran from December 11, 2008 to January 1, 2010.³

On July 1, 2010 Dr. Blum provided a new calculation of appellant's arm impairment under the standards of the sixth edition of the A.M.A., *Guides*.⁴ He determined that appellant had an eight percent permanent impairment of his left arm under these standards.⁵

In a July 15, 2010 decision, OWCP determined that appellant was not entitled to any schedule award compensation for additional permanent impairment as the evidence did not establish more than 31 percent permanent impairment of his left arm and the 20 percent permanent impairment of his right arm.

In a September 28, 2010 decision, an OWCP hearing representative affirmed the July 15, 2010 decision but indicated that appellant was not entitled to receive the July 20, 2009 schedule award for an eight percent right arm impairment because it was calculated under the fifth edition of the A.M.A., *Guides* rather than under the sixth edition of the A.M.A., *Guides*. The hearing

² As it was determined that appellant had 31 percent left arm impairment and he had already received a schedule award for 23 percent left arm impairment, he was entitled to receive a schedule award for the difference between these percentages.

³ In its award of compensation, OWCP suggested that the schedule award was calculated under the sixth edition of the A.M.A., *Guides*. However, it was actually based on a calculation made by Dr. Blum under the fifth edition of the A.M.A., *Guides*. In connection with the award, appellant received compensation in the amount of \$11,045.77.

⁴ Dr. Blum indicated that he had reviewed an April 13, 2010 report of Dr. Roshan Sharma, an attending Board-certified physical medicine and rehabilitation physician.

⁵ Dr. Blum also determined that appellant had an eight percent permanent impairment of his right arm.

representative remanded the case to OWCP in order to issue a preliminary determination regarding an overpayment in the amount of \$11,045.77.⁶

In a May 12, 2011 letter, OWCP advised appellant of its preliminary determination that he received an \$11,045.77 overpayment of compensation because he received schedule award compensation to which he was not entitled. It also made a preliminary determination that he was not at fault in the creation of the overpayment. Regarding the creation of the overpayment, OWCP stated that appellant “received a schedule award by decision dated July 20, 2009, which awarded you an eight percent impairment of your left upper extremity under [the fifth edition of the A.M.A., *Guides*].⁷ Effective May 1, 2009, OWCP began using the sixth edition of the A.M.A., *Guides*; therefore, the decision on July 29, 2009 was issued in error because it was based on the fifth edition.”

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

Appellant submitted a completed financial information questionnaire and requested waiver of the overpayment. He requested a precoupment hearing with an OWCP hearing representative that was scheduled for September 28, 2011.

In an October 18, 2011 decision, OWCP determined that appellant abandoned the precoupment hearing that had been scheduled for September 28, 2011. It indicated that he failed to appear for the hearing and did not contact it before or after the scheduled hearing to explain his failure to appear.

In a December 8, 2011 decision, OWCP determined that appellant received an \$11,045.77 overpayment of compensation.⁸ It further found that he was not at fault in the creation of the overpayment but that the overpayment was not subject to waiver. OWCP noted that, although appellant completed a financial information questionnaire, the information was “not specific enough to determine the claimant’s ordinary and necessary expenses” and, therefore, the overpayment was declared due and payable in full.

⁶ In a March 10, 2011 decision, OWCP again affirmed its July 15, 2010 decision.

⁷ Appellant received \$11,045.77 of schedule award compensation in connection with the July 20, 2009 award of compensation for an eight percent impairment of his right arm.

⁸ OWCP stated that its December 8, 2011 decision superseded its October 18, 2011 decision. It found that, even though it had properly determined that appellant abandoned the precoupment telephone hearing scheduled for September 28, 2011, it still was required to issue a final decision on the overpayment matters, including fact and amount of the overpayment and appellant’s request for waiver.

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.⁹ 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.”¹⁰

The schedule award provision of FECA¹¹ and its implementing regulations¹² 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 A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.¹³

The effective date of the sixth edition of the A.M.A., *Guides* is May 1, 2009.¹⁴ If a claimant who has received a schedule award calculated under a previous edition of the A.M.A., *Guides* is entitled to additional benefits, the increased award will be calculated according to the sixth edition. Should the subsequent calculation result in a percentage of impairment lower than the original award, a finding should be made that the claimant has no more than the percentage of impairment originally awarded, that the evidence does not establish an increased impairment and that OWCP has no basis for declaring an overpayment. Awards made under a previous edition of the A.M.A., *Guides* should not be reconsidered merely on the basis that the A.M.A., *Guides* have changed.¹⁵

It is well established that, once OWCP accepts a claim, it has the burden of justifying the termination or modification of compensation benefits. This holds true where, as here, OWCP later decides that it erroneously accepted a claim. In establishing that, its prior acceptance was erroneous, OWCP is required to provide a clear explanation of the rationale for rescission.¹⁶

OWCP’s procedures specify that a final decision of OWCP must include findings of fact and provide clear reasoning which allows the claimant to “understand the precise defect of the

⁹ 5 U.S.C. § 8102(a).

¹⁰ *Id.* at § 8129(a).

¹¹ *Id.* at § 8107.

¹² 20 C.F.R. § 10.404 (1999).

¹³ *Id.*

¹⁴ FECA Bulletin No. 09-03 (issued March 15, 2009).

¹⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.7(b)(4) (January 2010); FECA Bulletin No. 09-03 (issued March 15, 2009).

¹⁶ *John W. Graves*, 52 ECAB 160, 161 (2000).

claim and the kind of evidence which would tend to overcome it.”¹⁷ These requirements are supported by Board precedent.¹⁸

ANALYSIS -- ISSUE 1

The Board finds that OWCP did not adequately explain the basis for its finding that appellant received an \$11,045.77 overpayment of compensation. Prior to the issuance of its May 12, 2011 preliminary overpayment notice, OWCP had not issued a formal decision rescinding a portion of his entitlement to schedule award compensation for his left arm.¹⁹ As noted, before it modifies an award of compensation it must clearly explain the basis for such modification.²⁰ Through the overpayment determination, it effectively rescinded a portion of appellant’s entitlement to schedule award compensation, but it did not adequately explain the basis for such decision. In its May 12, 2011 preliminary overpayment notice, OWCP briefly discussed a July 1, 2010 report of Dr. Blum, a Board-certified orthopedic surgeon serving as an OWCP medical adviser, which contained impairment calculations made under the standards of the sixth edition of the A.M.A., *Guides*. It ostensibly used these calculations as the basis for its overpayment determination, but it did not provide an explanation of the calculations provided by Dr. Blum or otherwise establish the correctness of the calculations.

In the preliminary overpayment letter and final overpayment decision, OWCP pointed out that it should have applied the standards of the sixth edition of the A.M.A., *Guides*, rather than the standards of the fifth edition, when it granted appellant an additional schedule award for an eight percent right impairment on July 20, 2009, *i.e.*, after the May 1, 2009 effective date of the sixth edition.²¹ However, it did in fact apply the fifth edition of the A.M.A., *Guides* in granting appellant additional schedule award compensation on July 20, 2009 and it did not address the applicability of its procedure which provides that, if a subsequent calculation of a schedule award under a later edition of the A.M.A., *Guides* results in a lower percentage of impairment than that derived under an earlier edition, a finding should be made that the claimant has no more than the percentage of impairment originally awarded and there is no basis for declaring an overpayment.²² OWCP did not discuss this portion of its applicable procedure in either its preliminary overpayment notice or its final overpayment decision or adequately explain why it was not applicable to the facts of the present case.

Under these circumstances, appellant would not adequately understand, with respect to the creation of the claimed overpayment, the precise defect of his claim and the kind of evidence

¹⁷ See Federal (FECA) Procedure Manual, *supra* note 15, *Disallowances*, Chapter 2.1400.4 (July 1997).

¹⁸ See *James D. Boller, Jr.*, 12 ECAB 45, 46 (1960).

¹⁹ In a September 28, 2010 decision, an OWCP hearing representative suggested that an overpayment should be declared, but the hearing representative actually affirmed OWCP’s July 15, 2010 decision, which found that appellant was entitled to the compensation he had already received for his arm impairment.

²⁰ See *supra* note 16.

²¹ See *supra* note 14.

²² See *supra* note 15.

which would tend to overcome it.²³ OWCP did not adequately justify or explain its effective rescission of a portion of his entitlement to schedule award compensation which in turn served as the basis for the claimed overpayment.²⁴ The case will be remanded to OWCP for further development concerning the applicable procedures and fact of overpayment.²⁵ After such development as it deems necessary, OWCP should issue an appropriate decision on the overpayment matters at issue in the present case.

CONCLUSION

The Board finds that the case is not in posture for decision regarding whether OWCP properly determined that appellant received an \$11,045.77 overpayment of compensation and whether OWCP abused its discretion by refusing to waive recovery of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the December 8, 2011 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to OWCP for further proceedings consistent with decision of the Board.

Issued: August 10, 2012
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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

²³ See *supra* notes 17 and 18.

²⁴ See *J.T.*, Docket 11-1164 (issued February 22, 2012).

²⁵ Given the Board's disposition of the first issue of this case, it is premature to address the second issue at the present time.