

FACTUAL HISTORY

OWCP accepted that on November 3, 2004 appellant, then a 32-year-old city carrier, sustained a lumbar strain and an aggravation of a preexisting lumbar spondylolisthesis when assaulted by a coworker. After a period of light-duty work, he stopped work in August 2005 and did not return. Appellant received total disability compensation on the periodic rolls beginning on August 27, 2005.²

On August 24, 2006 Dr. John E. Cobb, an attending Board-certified orthopedic surgeon, performed a transformational lumbar interbody fusion at L5-S1 with instrumentation and allograft stabilization. OWCP accepted that the lumbar fusion was necessitated by the accepted injury. In reports from September 11, 2006 to January 14, 2008, Dr. Cobb diagnosed postoperative neuropathic pain, weakness and blunted sensation in the L5 dermatome of the left lower extremity.³ In a June 25, 2008 report, Dr. Daniel L. Hodges, an attending Board-certified physiatrist, diagnosed postoperative arachnoidopathy affecting the left L5 nerve root. He submitted periodic reports through December 8, 2010 finding continued L5 arachnoidopathy. Dr. Hodges found that appellant had attained maximum medical improvement as of May 27, 2010.⁴

In a July 8, 2011 report, Dr. Kenneth J.H. Lee, an attending Board-certified orthopedic surgeon, noted that appellant was hospitalized in December 2010 for left foot numbness and was found to have a small amount of spinal fluid in his pelvic area. In an August 23, 2011 report, Dr. Lee diagnosed an anterior listhesis of L5 on S1, with no compression of the exiting nerve root.

On September 1, 2011 appellant elected to receive retirement benefits through the Office of Personnel Management (OPM) in lieu of FECA benefits effective September 7, 2011.

By notice dated September 23, 2011, OWCP advised appellant of its preliminary determination that he received an overpayment in the amount of \$1,597.02 as he was issued FECA compensation in conjunction with OPM benefits for the period September 7 to 24, 2011.⁵

² OWCP suspended appellant's compensation on June 17, 2011 as he failed to return an affidavit of earnings and employment (Form EN1032). By decision issued August 2, 2011, it directed retroactive reinstatement of compensation as he returned the form as requested.

³ A March 20, 2007 electromyogram (EMG) and nerve conduction velocity (NCV) study showed L5-S1 changes on the left.

⁴ On November 2, 2010 OWCP obtained a second opinion from Dr. Douglas N. Lurie, a Board-certified orthopedic surgeon, who opined that appellant's left leg pain was psychological. It then found a conflict of opinion between Dr. Hodges, for appellant and Dr. Lurie, for the government. To resolve the conflict, OWCP selected Dr. Gordon Nutik, a Board-certified orthopedic surgeon, as impartial medical examiner. In a January 6, 2011 report, Dr. Nutik noted that x-rays he obtained that day showed a fractured fusion screw on the right. He attributed appellant's left leg pain to chronic S1 nerve involvement. After viewing investigative video obtained by the employing establishment showing appellant engaging in heavy lifting with no apparent difficulty Dr. Nutik submitted a February 9, 2011 report finding that appellant could perform full-time light-duty work.

⁵ OWCP calculated the overpayment by dividing appellant's \$2,484.26 compensation payment by the 28-day payment period, resulting in \$88.72, then multiplying the result by the 18 days from September 7 to 24, 2011.

It made the preliminary finding that he was at fault in creation of the overpayment as he knowingly accepted compensation to which he was not entitled.

On September 24, 2011 OWCP issued appellant an electronic compensation payment for the period August 28 to September 24, 2011, in the amount of \$2,484.26.

In response to the preliminary notice of overpayment, appellant submitted an October 3, 2011 letter requesting a prerecoupment hearing. He contended that OWCP had adequate notice of his election of OPM benefits and that he had no control over the compensation check amount. Appellant asserted that he could not repay the overpayment due to financial hardship.

On December 30, 2011 appellant claimed a schedule award. In a January 10, 2012 letter, OWCP advised him of the evidence needed to establish his claim, including a physician's impairment rating to a scheduled member utilizing the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). Appellant was afforded 30 days in which to submit such evidence. In response, he submitted reports dated October 5 to December 14, 2011 from Dr. Hodges, who diagnosed chronic arachnoidopathy causing weakness and numbness in the left lower extremity.

At the prerecoupment hearing, held on February 14, 2012, appellant contended that repaying the overpayment would cause severe financial hardship. He also asserted that his OPM benefits were temporary due to a difficulty calculating his annuity. The hearing representative advised appellant of the financial information needed to consider waiver of the overpayment based on financial hardship. The hearing representative held the record open for 30 days to allow for submission of additional evidence. Following the hearing, appellant submitted a January 23, 2012 letter from OPM, noting that it may have underestimated his retirement annuity and that he may be owed additional benefits. On February 21, 2012 the hearing representative sent appellant a second copy of the overpayment recovery questionnaire (Form OWCP-20). Appellant did not respond prior to May 11, 2012.

By decision dated March 9, 2012, OWCP denied appellant's schedule award claim on the grounds that the medical evidence did not establish that the accepted back injury caused permanent impairment to a scheduled member of the body.

By decision dated May 11, 2012, an OWCP hearing representative finalized the fact and amount of the preliminary overpayment determination. The hearing representative found that appellant was at fault in creation of the overpayment as he elected OPM benefits on September 7, 2011 but accepted a payment of FECA benefits through September 24, 2011. The hearing representative found that appellant was not entitled to waiver of the overpayment under the "against equity and good conscience" clause as he did not demonstrate severe financial hardship and did not assert or establish detrimental reliance. The hearing representative directed recovery of the overpayment by lump-sum payment, as appellant did not submit any financial information that could have been used to set a repayment schedule.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of FECA⁶ and its implementing regulations⁷ 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. However, FECA 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. A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.⁸

No schedule award is payable for a member, function or organ of the body not specified in FECA or in the regulations.⁹ Because neither FECA nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back,¹⁰ no claimant is entitled to such an award.¹¹ However, in 1966, amendments to FECA modified the schedule award provision to provide for an award for permanent impairment to a member of the body covered by the schedule regardless of whether the cause of the impairment originated in a scheduled or nonscheduled member. As the schedule award provision of FECA includes the extremities, a claimant may be entitled to a schedule award for permanent impairment to an extremity even though the cause of the impairment originated in the spine.¹²

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained a lumbar strain and aggravation of a preexisting lumbar spondylolisthesis, necessitating an L5-S1 fusion on August 24, 2006. Appellant claimed a schedule award on December 30, 2011. Although FECA does not provide for a schedule award for the back or spine, impairment of the extremities due to a spinal injury may be compensable.¹³

Appellant's physicians noted postoperative neurologic deficits in the left leg. Dr. Cobb, an attending Board-certified orthopedic surgeon, observed postoperative sensory and motor abnormalities in the left L5 dermatome through January 14, 2008. Dr. Hodges, an attending Board-certified physiatrist, diagnosed postoperative arachnoidopathy, causing weakness and

⁶ 5 U.S.C. § 8107.

⁷ 20 C.F.R. § 10.404.

⁸ *Id.*; *Jacqueline S. Harris*, 54 ECAB 139 (2002).

⁹ *Henry B. Floyd, III*, 52 ECAB 220 (2001).

¹⁰ FECA itself specifically excludes the back from the definition of "organ." 5 U.S.C. § 8101(19).

¹¹ *Thomas Martinez*, 54 ECAB 623 (2003).

¹² *See Thomas J. Engelhart*, 50 ECAB 319 (1999).

¹³ *See id.*

numbness in the left L5 dermatome, with maximum medical improvement attained as of May 27, 2010. Dr. Lee, an attending Board-certified orthopedic surgeon, noted a history of left foot numbness with free spinal fluid in the pelvic area. However, none of the physicians addressed permanent impairment to the leg related to the spinal fusion. Further, they did not reference the A.M.A., *Guides*. OWCP advised appellant in a January 10, 2012 letter of the necessity of obtaining a report from his attending physician diagnosing a permanent impairment according to the grading criteria of the A.M.A., *Guides*.

As appellant has not submitted sufficient medical evidence demonstrating a ratable impairment of a scheduled member of the body, OWCP's March 9, 2012 decision denying his schedule award claim was proper under the facts and circumstances of this case.

Appellant may request a schedule award or increased schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

LEGAL PRECEDENT -- ISSUE 2

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.¹⁴ Section 8129(a) of FECA provides, in pertinent part, that 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."¹⁵

ANALYSIS -- ISSUE 2

Appellant received total disability compensation on the periodic rolls beginning on August 27, 2005. On September 1, 2011 he elected to receive OPM retirement benefits in lieu of compensation benefits effective September 7, 2011. By notice dated September 23, 2011, OWCP found that a \$1,597.02 overpayment of compensation was created in appellant's case as he received a prohibited dual benefit from September 7 to 24, 2011. It finalized this notice by decision dated May 11, 2012. However, the Board finds that the notice was improper.

The record demonstrates that OWCP issued a compensation payment of \$2,484.26 on September 24, 2011, covering the period August 28 to September 24, 2011. OWCP issued its preliminary overpayment notice on September 23, 2011, the day before issuing the compensation payment. The September 23, 2011 notice was issued in error, as an overpayment had not yet occurred. The case will be remanded to OWCP to adjudicate the issue of overpayment. Based on this finding, issue 3 is moot.

¹⁴ 5 U.S.C. § 8102(a).

¹⁵ *Id.* at § 8129(a).

On appeal, appellant asserts that he was not in fault in the creation of the overpayment of compensation. As stated above, the case will be remanded to OWCP for further development on the overpayment issue.

CONCLUSION

The Board finds that OWCP properly denied appellant's schedule award claim. The Board further finds that the case is not in posture for a decision regarding the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the March 9, 2012 decision of the Office of Workers' Compensation Programs denying the schedule award claim is affirmed. The May 11, 2012 overpayment decision is set aside and the case remanded to OWCP for further development consistent with this opinion.

Issued: February 6, 2013
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

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

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