

left leg permanent impairment.² The Board also found that the date of maximum medical improvement was August 3, 2004, as opposed to the June 11, 2008 date determined by OWCP.

The record reflects that appellant had two claims for back injuries: a claim for injury on November 9, 2000, initially accepted for a lumbar strain,³ and an occupational claim filed on September 6, 2004, accepted for aggravation of degenerative disc disease at L4 and L5-S1. On August 26, 2010 OWCP also accepted aggravation of cervical disc disease C3-7. It issued an August 12, 2009 schedule award decision for a one percent permanent impairment to the left leg. The period of the award was 2.88 weeks from June 11, 2008. By decision dated November 5, 2009, OWCP granted a schedule award for an additional 10 percent permanent impairment to the left leg. The period of the award was 28.80 weeks from July 2, 2008.

The record also indicates that appellant received wage-loss compensation for 720 hours of leave without pay (LWOP) from July 12 to December 15, 2004, pursuant to the 2004 occupational claim. In a memorandum of telephone call (Form CA-110) dated March 12, 2012, the employing establishment advised that during the period August 2 to 23, 2004 appellant worked 69.46 hours and the remaining hours were LWOP.

By letter dated April 12, 2012, OWCP notified appellant of a preliminary determination that an overpayment of \$18,940.70 was created. It found that he had received \$20,018.20 in compensation based on an 11 percent left leg impairment, but should have received only \$1,077.50 covering the period August 3 to 23, 2004. OWCP calculated \$1,077.50 by deducting compensation previously paid during this period for LWOP hours. With respect to fault, it found that appellant was not at fault in creating the overpayment. He was advised to complete an overpayment recovery questionnaire (OWCP-20) and submit supporting financial documents.

Appellant requested a preresoupment hearing before an OWCP hearing representative. He submitted an OWCP-20 form stating that he had no monthly income and \$1,835.20 in monthly expenses.

By decision dated October 12, 2012, the hearing representative finalized the determination that an \$18,940.70 overpayment was created. The hearing representative denied waiver and found the overpayment could be recovered by deducting \$1,000.00 from continuing compensation payments.

LEGAL PRECEDENT -- ISSUE 1

Section 8107 of FECA provides that, if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for

² Docket No. 11-832 (issued February 24, 2012).

³ A January 30, 2004 statement of accepted facts (SOAF) noted that the claim was accepted for lumbar and cervical radiculitis. A June 30, 2010 SOAF stated that the claim was also accepted for brachial neuritis or radiculitis. An October 27, 2010 SOAF stated that the claim was accepted for lumbar stain and aggravation of lumbar and cervical degenerative disc disease, with no mention of radiculitis or neuritis.

the permanent impairment of the scheduled member or function.⁴ Neither FECA nor the regulations specify the manner in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal justice for all claimants OWCP has adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the uniform standard applicable to all claimants.⁵ OWCP procedures provide that, effective May 1, 2009, all schedule awards are to be calculated under the sixth edition of the A.M.A., *Guides*.⁶

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.⁷

ANALYSIS -- ISSUE 1

The record establishes that appellant received a schedule award for 1 percent left leg impairment on August 12, 2009, and an additional 10 percent on November 5, 2009. Appellant was paid 31.68 weeks of compensation commencing June 11, 2008. In its prior decision, the Board reviewed the evidence and found the left leg impairment under the sixth edition of the A.M.A. *Guides* was one percent. In addition, the Board found the date of maximum medical improvement was August 3, 2004.

Therefore appellant was entitled to 2.88 weeks of compensation (one percent of the maximum 288 weeks of compensation for leg impairment) from August 3, 2004. Since he received 31.68 weeks of compensation, an overpayment was created.

With respect to the amount of the overpayment, OWCP found that appellant received \$20,018.20 in net compensation pursuant to the schedule awards. For the 2.88 weeks from August 3, 2004, appellant received some wage-loss compensation for LWOP hours. It is well established that a claimant may not concurrently receive compensation under a schedule award and wage loss for disability.⁸ The employing establishment advised OWCP that for the period August 3 to 23, 2004, appellant worked 69.46 hours. OWCP calculated that he should have been paid \$1,077.50 in schedule award compensation for the one percent left leg permanent impairment from August 3 to 23, 2004. Its calculations are documented in the record and there is no contrary evidence. The overpayment is therefore \$20,018.20 minus \$1,077.50 or \$18,940.70.

⁴ 5 U.S.C. § 8107. This section enumerates specific members or functions of the body for which a schedule award is payable and the maximum number of weeks of compensation to be paid; additional members of the body are found at 20 C.F.R. § 10.404(a).

⁵ A. *George Lampo*, 45 ECAB 441 (1994).

⁶ FECA Bulletin No. 09-03 (March 15, 2009); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700 (January 2010).

⁷ See *Richard Saldibar*, 51 ECAB 585 (2000) (the Board found that the overpayment issue was not in posture because OWCP had not properly resolved the schedule award issue).

⁸ *James A. Earle*, 51 ECAB 567 (2000).

On appeal, appellant disagreed contending that his physicians had found 15 percent impairment and this should be accepted by OWCP. The issue of the percentage of permanent impairment was addressed by the Board on the prior appeal. The Board found that his leg impairment under the sixth edition was one percent and explained its determination based on the relevant medical evidence of record.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of FECA⁹ provides: “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 FECA or would be against equity and good conscience.”¹⁰ Since OWCP found appellant to be without fault in the creation of the overpayment, OWCP may only recover the overpayment if recovery would neither defeat the purpose of FECA nor be against equity and good conscience. The guidelines for determining whether recovery of an overpayment would defeat the purpose of FECA or would be against equity and good conscience are set forth in sections 10.434 to 10.437 of Title 20 of the Code of Federal Regulations.

According to 20 C.F.R. § 10.436, recovery of an overpayment would defeat the purpose of FECA if recovery would cause hardship because the beneficiary “needs substantially all of his or her current income (including compensation benefits) to meet current ordinary and necessary living expenses,” and, also, if the beneficiary’s assets do not exceed a specified amount as determined by OWCP from data provided by the Bureau of Labor Statistics.¹¹ For waiver under the “defeat the purpose” of FECA standard, appellant must show that he needs substantially all of his current income to meet current ordinary and necessary living expenses and that his assets do not exceed the resource base.¹²

Section 10.437 of Title 20 of the Code of Federal Regulations provide that recovery of an overpayment would be against equity and good conscience if: (a) the overpaid individual would experience severe financial hardship in attempting to repay the debt; (b) the individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.

ANALYSIS -- ISSUE 2

In determining whether recovery of the overpayment would defeat the purpose of FECA; if a claimant does not need substantially all his current income (including compensation benefits) to meet current ordinary and necessary living expenses, then recovery would not defeat the purpose of FECA. An individual is deemed to need substantially all of his current income to

⁹ 5 U.S.C. § 8101 *et seq.*

¹⁰ *Id.* at § 8129(b).

¹¹ OWCP procedures provide that the assets must not exceed a resource base of \$4,800.00 for an individual or \$8,000.00 for an individual with a spouse or dependent plus \$960.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a) (June 2009).

¹² *See Robert E. Wenholz*, 38 ECAB 311 (1986).

meet ordinary and necessary living expenses if monthly income does not exceed expenses by more than \$50.00.¹³

Appellant submitted an OWCP-20 form regarding his financial situation. Although he reported no income, the record reveals that he is receiving \$2,788.16 in compensation every 28 days. The monthly expenses reported on the OWCP-20, without any supporting documentation, were \$1,835.20. Appellant had more than \$50.00 in income over expenses and therefore the record does not establish that recovery would defeat the purpose of FECA.

As to the “against equity and good conscience” standard, the evidence establishes that appellant would not experience severe financial hardship in attempting to repay the debt. In addition, there is no evidence that he gave up a valuable right or changed his position for the worse in reliance on the overpayment. Based on the evidence of record, the Board finds that OWCP properly denied waiver of the overpayment.

LEGAL PRECEDENT -- ISSUE 3

OWCP regulations provide:

“When an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to OWCP the amount of the overpayment as soon as the error is discovered or his or her attention is called to the same. If no refund is made, OWCP shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize hardship.”¹⁴

ANALYSIS -- ISSUE 3

Appellant receives continuing compensation benefits every 28 days pursuant to the 2004 occupational claim. OWCP determined the overpayment could be recovered by deducting \$1,000.00 from his continuing compensation payments. The Board notes that a claimant is responsible for submitting necessary information with respect to income, expenses and assets as required by OWCP.¹⁵ In this case, appellant submitted limited information regarding his financial circumstances and no supporting documentation.

The hearing representative noted that appellant was receiving approximately \$2,788.00 every 28 days in wage-loss compensation. The undocumented monthly expenses of \$1,835.20 were equivalent to \$1,694.03 every 28 days, leaving approximately \$1,094.00 in excess income. The evidence indicates that the hearing representative did consider the financial circumstances of the claimant and other factors to minimize the hardship in accord with 20 C.F.R. § 10.441. As noted, appellant provided limited information but the hearing representative did consider the

¹³ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a) (June 2009). See also *Jorge O. Diaz*, 51 ECAB 124, 128 (1999).

¹⁴ 20 C.F.R. § 10.441.

¹⁵ *Id.* at § 10.438.

evidence of record and support his findings.¹⁶ The Board finds that OWCP properly determined the overpayment should be recovered by deducting \$1,000.00 from continuing compensation.

CONCLUSION

The Board finds that OWCP properly found that an overpayment of \$18,940.70 was created. The Board further finds that OWCP properly denied waiver and found that the overpayment should be recovered by deducting \$1,000.00 from continuing compensation.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 22, 2012 is affirmed.

Issued: June 12, 2013
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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

¹⁶ See S.C., Docket No. 12-1871 (issued February 26, 2013).