

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

R.B., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Austin, TX, Employer**

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**Docket No. 12-1881
Issued: March 11, 2013**

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 September 13, 2012 appellant, through her attorney, filed a timely appeal from an August 14, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP). 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.

ISSUES

The issues are: (1) whether OWCP properly found an overpayment of compensation in the amount of \$15,955.70 was created; and (2) whether OWCP properly denied waiver of the overpayment.

FACTUAL HISTORY

On December 7, 2011 appellant, then a 38-year-old mail carrier, filed an occupational claim (Form CA-2) alleging that she sustained injuries causally related to her job duties. OWCP

¹ 5 U.S.C. § 8101 *et seq.*

accepted her claim for left shoulder sprain, thoracic or lumbosacral neuritis and/or radiculitis. Appellant also filed a traumatic injury claim for an injury on November 10, 2004, which was accepted for left ganglion and cyst of synovium, left wrist sprain and left radial styloid tenosynovitis.

In a report dated March 15, 2007, Dr. John Ellis, a Board-certified family practitioner, reviewed a history of medical treatment and results on examination. With respect to range of motion of the left shoulder, he reported: 98 degrees flexion; 14 degrees extension; 70 degrees abduction; 15 degrees adduction; 26 degrees external rotation and 20 degrees internal rotation. Dr. Ellis opined that appellant had a 19 percent permanent impairment for loss of range of motion under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*). He also provided an impairment rating for the right and left legs.

By report dated May 22, 2007, an OWCP medical adviser opined that, under the A.M.A., *Guides*, the range of motion results reported by Dr. Ellis established 18 percent left arm impairment. OWCP's medical adviser applied Figure 16-40, Figure 16-43 and Figure 16-46.²

In a decision dated June 4, 2007, OWCP issued a schedule award for an 18 percent permanent impairment to the left arm. The period of the award was 56.16 weeks commencing March 15, 2007.

OWCP continued to develop the medical evidence with respect to any bilateral leg impairment. Appellant was referred to Dr. Jonathan Race, a Board-certified orthopedic surgeon. In a report dated December 11, 2007, Dr. Race included range of motion results for the left shoulder. He opined that appellant had a seven percent left arm impairment due to shoulder loss of range of motion. In a report dated February 12, 2008, OWCP's medical adviser concurred that the left arm impairment was seven percent for loss of range of motion in the left shoulder.

By decision dated July 29, 2008, OWCP issued an additional schedule award for a seven percent permanent impairment to the left arm. The period of the award was 21.84 weeks commencing April 12, 2008.³

On October 30, 2009 appellant submitted a claim (Form CA-7) for a schedule award. In a report dated November 16, 2009, OWCP's medical adviser noted that Dr. Race and Dr. Ellis had provided different opinions as to the left shoulder range of motion impairment and stated that this created a conflict.

Appellant was referred to Dr. John Anderson, a Board-certified orthopedic surgeon, who provided a May 25, 2010 report. Dr. Anderson found that appellant had a one percent arm impairment under the sixth edition of the A.M.A., *Guides*. In a report dated July 30, 2010, OWCP's medical adviser agreed that appellant had a one percent left arm impairment under the sixth edition.

² A.M.A., *Guides* 476-79 (fifth edition).

³ The prior schedule award ended on April 11, 2008.

By decision dated September 13, 2010, OWCP determined that appellant was not entitled to an additional schedule award for the left arm. In a decision dated April 29, 2011, a hearing representative affirmed the determination that appellant was not entitled to an additional schedule award for the left arm. The case was remanded for additional development as to the lower extremities. OWCP found appellant was not entitled to a schedule award for the legs in a decision dated September 23, 2011.⁴

In a report dated January 23, 2012, OWCP's medical adviser reviewed the evidence as to the left arm impairment and stated that the schedule award for seven percent in 2008 should not have been issued. The medical adviser indicated that the initial 18 percent award was for loss of shoulder motion, as was the 7 percent schedule award.

In a letter dated February 21, 2012, OWCP advised appellant of a preliminary determination that an overpayment of \$15,955.70 had occurred because she was erroneously paid an additional seven percent schedule award.⁵ It found she was not at fault in creating the overpayment and enclosed an OWCP-20 overpayment questionnaire.

Appellant submitted an OWCP-20 on April 3, 2012. With respect to household income, she reported \$2,976.00 in monthly earnings and \$1,277.23 in other benefits, for a total of \$4,253.23. The form requested that appellant specify the type of earnings and benefits, but she did not respond. Appellant reported \$2,436.00 in monthly expenses and \$184.00 in credit card debt.⁶ As to assets, she reported \$7,999.00 in bank accounts and \$20,000.00 in personal property.

A prerecoupment hearing was held on June 15, 2012. At the hearing appellant indicated that her spouse also had income, but she did not have detailed information as they generally kept their finances separate. She thought her spouse's income was approximately \$3,200.00 a month from OWCP and Veterans Administration benefits, and the hearing representative requested that she submit further information. Appellant also testified as to additional monthly expenses.

By decision dated August 14, 2012, the hearing representative finalized the determination that an overpayment of \$15,955.70 had occurred. The hearing representative denied waiver on the grounds that the available financial information established that recovery would not defeat the purpose of FECA or be against equity and good conscience.

⁴ OWCP denied modification of the September 23, 2011 decision by decision dated March 28, 2012. The record indicates that appellant requested a hearing before an OWCP hearing representative and she did not request review of the March 28, 2012 decision.

⁵ The actual overpayment as calculated in a payment worksheet was \$15,955.71, representing the compensation paid from April 12 to September 11, 2008. The February 12, 2012 letter states that the overpayment was \$15,955.7, which was interpreted as \$15,955.70 by OWCP's hearing representative.

⁶ The expenses for rent or mortgage, food, clothing and utilities totaled \$2,436.00. Appellant wrote the total of \$2,436.00 under "other expenses" but presumably she was adding the previously identified expenses.

LEGAL PRECEDENT -- ISSUE 1

According to 5 U.S.C. § 8107, 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 the permanent impairment of the scheduled member or function.⁷ 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 A.M.A., *Guides* as the uniform standard applicable to all claimants.⁸ For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition.⁹

It is well established that benefits payable under 5 U.S.C. § 8107(c) are reduced by the period of compensation paid under the schedule for an earlier injury if: (1) compensation in both cases is for impairment of the same member or function or different parts of the same member or function; and (2) the latter impairment in whole or in part would duplicate the compensation payable for the preexisting impairment.¹⁰ 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.¹¹

ANALYSIS -- ISSUE 1

The record establishes that OWCP issued a schedule award for an 18 percent permanent impairment to the left arm on June 4, 2007. The award was based on loss of left shoulder range of motion as reported by Dr. Ellis. Under the fifth edition of the A.M.A., *Guides*, impairments due to loss of shoulder motion are determined under Figure 16-40 (flexion/extension), Figure 16-43 (abduction adduction) and Figure 16-46 (external and internal rotation).¹² Applying the results reported by Dr. Ellis to these figures, the arm impairments were calculated as follows: five percent for flexion, two percent for extension, five percent for abduction, one percent for adduction, four percent for internal rotation and one percent for external rotation. Adding the impairments results in an 18 percent left arm impairment.

OWCP issued a schedule award for an 18 percent left arm impairment on June 4, 2007. Appellant requested an additional schedule award and she was seen by Dr. Race, who also provided left shoulder range of motion measurements. Dr. Race and OWCP's medical adviser concurred that the range of motion impairment was seven percent.

⁷ 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).

⁸ A. *George Lampo*, 45 ECAB 441 (1994).

⁹ FECA Bulletin No. 09-03 (issued March 15, 2009).

¹⁰ T.S., Docket No. 09-1308 (issued December 22, 2009); 20 C.F.R. § 10.404(c).

¹¹ 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).

¹² *Supra* note 2.

The July 29, 2008 schedule award for a seven percent left arm impairment was issued in error. As noted, when the current impairment is to the same member of the body and duplicates the prior impairment, there is no basis for a new schedule award. The Board accordingly finds that the July 29, 2008 schedule award represented an overpayment of compensation. OWCP provided evidence that the amount of compensation received was \$15,955.70 and there is no contrary evidence. The Board accordingly finds that an overpayment of \$15,955.70 was created in this case.

LEGAL PRECEDENT -- ISSUE 2

The waiver or refusal to waive an overpayment of compensation by OWCP is a matter that rests within OWCP's discretion pursuant to statutory guidelines.¹³ These statutory guidelines are found in section 8129(b) of FECA which states: "Adjustment or recovery [of an overpayment] 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."¹⁴ Since OWCP found the recipient to be without fault in the creation of the overpayment, then, in accordance with section 8129(b), it may only recover the overpayment if it determined that recovery of the overpayment would neither defeat the purpose of FECA nor be against equity and good conscience.

Section 10.436 of the implementing regulations¹⁵ provide that recovery of an overpayment will defeat the purpose of FECA if recovery would cause hardship to a currently or formerly entitled beneficiary because: (a) the beneficiary from whom OWCP seeks recovery needs substantially all of his or her current income (including compensation benefits) to meet current ordinary and necessary living expenses; and (b) the beneficiary's assets do not exceed a specified amount as determined by OWCP from data furnished by the Bureau of Labor Statistics.¹⁶ An individual is deemed to need substantially all of his or her income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.¹⁷

Section 10.437 provides that recovery of an overpayment is considered to be against equity and good conscience when an individual who received an overpayment would experience severe financial hardship in attempting to repay the debt; and when an individual, in reliance on

¹³ *Robert Atchison*, 41 ECAB 83 (1989).

¹⁴ *See* 5 U.S.C. § 8129(b); *Carroll R. Davis*, 46 ECAB 361 (1994).

¹⁵ 20 C.F.R. § 10.436 (1999).

¹⁶ An individual's assets must exceed a resource base of \$4,800.00 for an individual or \$8,000.00 for an individual with a spouse or one dependent plus \$960.00 for each additional dependent. This base includes all of the individual's assets not exempt from recoupment; *see* Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6 (October 2004).

¹⁷ *Sherry A. Hunt*, 49 ECAB 467 (1998).

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.¹⁸

ANALYSIS -- ISSUE 2

Having been found without fault, appellant completed an OWCP-20 form and testified with respect to her income and expenses at a hearing before an OWCP hearing representative. Despite a request for additional financial documents and an opportunity to submit such evidence, she did not submit other financial documentation. Appellant is responsible for the submission of information regarding income, expenses and assets.¹⁹

The hearing representative made a determination as to waiver based on the available evidence of record. With respect to whether recovery of the overpayment would defeat the purpose of FECA, the Board finds the evidence does not establish that appellant needs substantially all of her current income to meet current ordinary and necessary living expenses. On an OWCP-20 form she had reported \$4,253.23 in income, although she did not list the source of \$1,277.23 in “other benefits.” The hearing representative concluded that appellant’s household income was over \$6,700.00, based on appellant’s statements as to her income and that of her spouse.

As to expenses, appellant had reported \$2,436.00 in expenses on the OWCP-20. The hearing representative found, based on additional testimony at the hearing, that she had \$3,651.00 in total monthly ordinary and necessary living expenses.²⁰ This finding was reasonable based on the available evidence and the Board notes that appellant had an opportunity to submit clarifying evidence. The evidence of record supports a finding that appellant did not need substantially all of her current income to meet ordinary and necessary living expenses. The Board finds that OWCP properly concluded that recovery of the overpayment would not defeat the purpose of FECA.

In addition, there was no evidence that recovery would be against equity and good conscience. The financial evidence, as noted above, does not indicate that appellant would experience severe financial hardship in repaying the debt.²¹ Moreover, no evidence was presented that she had given up a valuable right or changed her position for the worse in reliance on the overpayment. The Board finds that the evidence does not establish that recovery of the overpayment would be against equity and good conscience. Based on a review of the evidence of record, the Board finds that OWCP properly denied waiver of the overpayment.

¹⁸ 20 C.F.R. § 10.437 (1999).

¹⁹ *Id.* at § 10.438(a).

²⁰ The hearing representative allowed \$36.00 for debt payments as monthly expenses, finding the remainder was duplicative of previously enumerated ordinary and necessary living expenses. OWCP procedures provide that the hearing representative should not include duplicative credit card payments. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6 (June 2009).

²¹ The factors considered for financial hardship are the same as those under the defeat the purpose of FECA. *Id.*

CONCLUSION

The Board finds that an overpayment of \$15,995.70 was created and OWCP properly denied waiver of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 14, 2012 is affirmed.

Issued: March 11, 2013
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