

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

A.S., Appellant)
and)
U.S. POSTAL SERVICE, POST OFFICE,) Docket No. 13-1102
Capitol Heights, MD, Employer) Issued: October 29, 2013
)
)

Appearances:
Paul Kalker, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 3, 2013 appellant, through his attorney, filed a timely appeal from a December 31, 2012 decision of the Office of Workers' Compensation Programs (OWCP) denying a prerecouplement hearing and a February 28, 2013 decision regarding an overpayment of compensation. 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 that appellant received a duplicate schedule award for the period June 8, 2009 to February 25, 2010, creating an \$18,350.40 overpayment of compensation; (2) whether it properly denied waiver of the overpayment; (3) whether OWCP properly denied appellant's request for a prerecouplement hearing as untimely.

¹ 5 U.S.C. § 8101 *et seq.*

On appeal, counsel contends that OWCP did not establish fact of overpayment. He also argues that appellant timely requested a prerecoupment hearing by October 31, 2012 letter received by OWCP on November 9, 2012. Counsel states that OWCP erroneously returned appellant's request on November 13, 2012 requesting information appellant had already submitted.

FACTUAL HISTORY

OWCP accepted that on August 19, 2004 appellant, then a 51-year-old maintenance operations supervisor, sustained a right elbow fracture, right rotator cuff strain, right rotator cuff tear when he tripped and fell on a chain barrier. It later accepted traumatic arthropathy of the right forearm. OWCP approved a right radial head resection with removal of a loose body in the right elbow, performed on July 7, 2005.

On February 6, 2006 appellant claimed a schedule award and submitted an impairment rating from his physician. OWCP's medical adviser reviewed the medical record on January 28, 2007 and opined that appellant had seven percent impairment of the right upper extremity due to impaired motion and chronic pain of the right elbow. He noted that the medical evidence did not support current complaints related to the accepted right rotator cuff tear.

By decision dated April 27, 2007, OWCP granted appellant a schedule award for seven percent permanent impairment of the right upper extremity, based on OWCP's medical adviser's January 28, 2007 impairment rating for the right elbow. The gross amount of the award was \$19,737.41, equal to 21.84 weeks of compensation based on a weekly pay rate of \$1,204.97 at the 75 percent augmented rate. The period of the award ran from October 4, 2006 to March 5, 2007.

Appellant underwent a right shoulder arthroscopy on October 11, 2007, approved by OWCP. He underwent a previous rotator cuff surgery in 2003.

On September 25, 2008 appellant claimed an augmented schedule award.² OWCP's medical adviser reviewed the medical record on September 24, 2009 and found a 12 percent impairment of the right upper extremity due to the accepted right shoulder condition and postsurgical status.

By decision dated October 2, 2009, OWCP granted appellant a schedule award for 12 percent impairment of the right upper extremity, based on OWCP's medical adviser's September 24, 2009 finding of 12 percent impairment of the right arm due to the accepted rotator cuff tear. The award ran from June 8, 2009 to February 25, 2010, 37.44 weeks, based on a weekly pay rate of \$1,196.96 at the 75 percent augmented rate or \$897.72 as week.

² OWCP initially denied the augment schedule award claim by November 7, 2008 decision on the grounds that appellant did not submit medical evidence demonstrating a greater percentage of impairment than the seven percent previously awarded. In April 29 and May 11, 2009 letters, appellant requested reconsideration, denied by OWCP on May 20, 2009. On August 19, 2009 he again requested reconsideration. OWCP obtained an impairment rating from an OWCP medical adviser on September 24, 2009, finding a 12 percent impairment of the right upper extremity.

On August 23, 2010 appellant underwent a repeat arthroscopy of the right shoulder with debridement of a rotator cuff tear and lysis of adhesions. He claimed an augmented schedule award on March 26, 2011 and January 5, 2012. OWCP's medical adviser reviewed the medical record on January 3, 2012 and opined that there was no evidence of increased right shoulder impairment beyond the 12 percent awarded on October 2, 2009.

By decision dated January 9, 2012, OWCP denied the augmented schedule award claim as the medical evidence did not establish that appellant sustained greater than the 12 percent impairment previously awarded for impairment of the right shoulder on October 2, 2009. In an August 15, 2012 letter, appellant requested reconsideration and submitted chart notes from a pain clinic. OWCP denied reconsideration by September 6, 2012 decision on the grounds that he did not submit any relevant evidence. It did not conduct additional medical development prior to October 10, 2012.

By decision dated October 10, 2012, OWCP amended its October 2, 2009 schedule award regarding the right shoulder. It found that as appellant previously received an April 27, 2007 schedule award for seven percent impairment of the right arm based on the elbow injury, he was "now eligible for schedule award compensation for an additional five percent impairment," for a total of 12 percent. OWCP based the award on the September 24, 2009 report from an OWCP medical adviser finding 12 percent impairment of the right upper extremity due to the accepted right shoulder injury. The 15.6 week period of the award ran from June 8 to September 25, 2009, based on a weekly pay rate of \$1,294.21 multiplied by the 75 percent augmented rate or \$970.66 a week, for a total of \$15,142.30.

By notice dated October 10, 2012, OWCP advised appellant of its preliminary determination that an \$18,350.40 overpayment of compensation was created in his case as he was paid "compensation benefits for a 12 percent impairment of the right upper extremity for the period June 8, 2009 to February 25, 2010 but should have been paid compensation for a five percent impairment of the right upper extremity since [he] previously received compensation for a seven percent impairment of the right upper extremity from October 4, 2006 to March 5, 2007." It calculated that, from June 8, 2009 to February 25, 2010, he received \$33,492.70, for 12 percent impairment of the right arm. However, appellant was only entitled to \$15,142.30 for the additional five percent impairment OWCP intended to award above the seven percent previously awarded. OWCP calculated that \$33,492.70 minus \$15,142.30 resulted in an overpayment amount of \$18,350.40. It found appellant without fault in creating the overpayment. OWCP afforded him 30 days in which to request a prerecougment hearing and submit an enclosed overpayment recovery questionnaire with current financial information regarding his income, assets and expenses.

In an Overpayment Action Request form dated October 31, 2012 and received on November 9, 2012, appellant checked lines indicating that he disagreed that the overpayment occurred and requested waiver. He stated that he had not received compensation October 4, 2006 to March 6, 2007. Appellant left blank the lines in Part 1 of the form for requesting a telephone conference, prerecougment hearing or a decision on the written record.

In a November 13, 2012 letter, OWCP returned the Overpayment Action Request form to appellant, requesting that he choose one of the actions in Part 1. Appellant modified the form to

request a prerecoumpt hearing. He mailed the form back to OWCP on November 20, 2012. OWCP received appellant's request on November 27, 2012.

By decision dated December 31, 2012, OWCP denied appellant's request for a prerecoumpt hearing on the grounds that it was not timely filed. It found that his request for a prerecoumpt hearing was postmarked on November 20, 2012, more than 30 days after OWCP's October 10, 2012 preliminary notice of overpayment.

By decision dated February 28, 2013, OWCP's hearing representative finalized the fact and amount of the preliminary overpayment determination. The hearing representative found that appellant was without fault in creation of the overpayment, but that waiver could not be granted as he failed to submit any financial information. 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

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 duty.³ 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."⁴

It is well established that benefits payable under section 8107(c)⁵ 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 would duplicate in whole or in part the compensation paid for the prior impairment.⁶

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained right shoulder and right elbow injuries on August 19, 2004. Appellant underwent a right radial head resection on July 7, 2005 and right shoulder arthroscopy on October 11, 2007. On January 28, 2007 OWCP's medical adviser found seven percent impairment of the right arm due to limited right elbow motion and chronic pain. Based on this rating, OWCP issued an April 27, 2007 schedule award for seven percent impairment of the right upper extremity, based only on impairment of the right elbow.

³ 5 U.S.C. § 8102(a).

⁴ *Id.* at § 8129(a).

⁵ *Id.* at § 8107(c).

⁶ K.H., Docket No. 13-176 (issued March 25, 2013); 20 C.F.R. § 10.404(c).

Following an October 11, 2007 right shoulder arthroscopy, appellant claimed an augmented schedule award. On September 24, 2009 OWCP's medical adviser reviewed the record and found 12 percent impairment of the right arm due to the right shoulder injury and surgery. Based on the September 24, 2009 rating, OWCP issued an October 2, 2009 schedule award for 12 percent impairment of the right upper extremity. The period of the award ran from June 8, 2009 to February 25, 2010.

Following an August 23, 2010 right shoulder arthroscopy, appellant claimed an augmented schedule award, denied by OWCP on January 9, 2012 with reconsideration denied on September 6, 2012. On October 10, 2012 OWCP amended its prior findings stating that he had additional right arm impairment of five percent, referring both to the April 27, 2007 award based on right elbow impairment and the October 2, 2009 award pertaining to right shoulder impairment.

By notice dated October 10, 2012 and finalized February 28, 2013, OWCP found an \$18,350.40 overpayment of compensation for the period June 8, 2009 to February 25, 2010.⁷ It found that the 12 percent awarded on October 2, 2009 based on the right shoulder injury duplicated the seven percent awarded on April 27, 2007 for impairment of the right elbow. OWCP reasoned that appellant was only entitled to an additional five percent impairment. However, the Board finds that the October 2, 2009 schedule award was not duplicative and that no overpayment occurred.

The Board finds that OWCP did not explain why the October 2, 2009 award predicated on right shoulder impairment duplicated the April 27, 2007 award for right elbow impairment. It is not enough simply to compare the final impairment ratings of the two schedule awards. OWCP must examine the basis of the impairment ratings and determine whether appellant has previously received compensation for the impairments found.⁸ The American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) contemplate that there may be impairments in different regions of the same extremity. Chapter 15 of the A.M.A., *Guides* specifies that the shoulder and elbow are two distinct regions of the upper extremity.⁹

Accordingly, the Board finds that OWCP has not established fact of overpayment. The record does not support OWCP's finding that appellant was not entitled to the entirety of the October 2, 2009 schedule award. Therefore, the Board will reverse OWCP's February 28, 2013 decision.

On appeal, counsel contends that OWCP did not establish fact of overpayment. As stated above, there is no overpayment of compensation in this case. The evidence demonstrates that appellant did not receive a duplicate schedule award for the period June 8, 2009 to February 25, 2010.

⁷ The Board notes that OWCP's February 28, 2013 overpayment determination does not address its October 10, 2012 schedule award, which appears to duplicate a portion of the October 2, 2009 award.

⁸ A.G., Docket No. 12-563 (issued September 10, 2012).

⁹ A.M.A., *Guides*, p. 384, Figure 15-1, "Upper Extremity Regions."

ISSUES 2 and 3

As there is no overpayment of compensation established in this case, Issue 2, regarding denial of waiver and Issue 3, regarding denial of a prerecoumpt hearing, are moot. Therefore, counsel's arguments on these issues need not be reviewed.

CONCLUSION

The Board finds that OWCP improperly found an \$18,350.40 overpayment of compensation for the period June 8, 2009 to February 25, 2010. OWCP did not establish that appellant received a duplicate schedule award for that period. As there is no overpayment, the second and third issues regarding waiver of the overpayment and denial of a prerecoumpt hearing are moot.

ORDER

IT IS HEREBY ORDERED THAT the February 28, 2013 decision of the Office of Workers' Compensation Programs finding an overpayment of compensation is reversed. The December 31, 2012 decision regarding the prerecoumpt hearing is moot.

Issued: October 29, 2013
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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