

FACTUAL HISTORY

This is the second appeal in the present case.² In a July 19, 2004 decision, the Board set aside OWCP's October 14, 2003 decision, which affirmed a schedule award decision.³ The Board determined that in view of the disparity of evaluations of permanent impairment between an OWCP medical adviser and appellant's treating physician, Dr. David Weiss, OWCP should refer the claim to an OWCP referral physician to determine the ratable impairment of the right and left upper extremity. The facts of the case as set forth in the Board's prior decision are incorporated herein by reference.

The evidence relevant to the current appeal reveals that on September 27, 1999 appellant requested a schedule award. An OWCP medical adviser opined that she had five percent impairment of the right arm based on her accepted right carpal tunnel syndrome and tenosynovitis of the right hand. In a December 6, 1999 decision, OWCP issued appellant a schedule award for five percent impairment of the right upper extremity. On September 11, 2002 appellant requested an additional award. In a report dated October 26, 2002, the medical adviser opined that she had 10 percent impairment of the right arm for right carpal tunnel syndrome and tenosynovitis of the right hand and 9 percent impairment for the left arm for left carpal tunnel syndrome. Since appellant was previously granted five percent impairment of the right upper extremity, she was entitled to an additional award of five percent.

In a decision dated November 19, 2002, OWCP granted appellant schedule awards for 19 percent impairment of both upper extremities. The period of the award was from May 13, 2002 to March 14, 2003. In this decision, OWCP provided:

“Degree and Nature of Permanent Disability: 19 percent permanent partial loss of use or loss of right and left upper extremities. However, five percent was already paid to [appellant] for the right upper extremity on December 10, 1999. Therefore, [she is] entitled to 14 percent of this schedule award.”

On April 11, 2007 appellant requested an additional schedule award. She submitted a September 24, 2009 report from Dr. Weiss who noted 12 percent right arm impairment. Dr. Weiss noted 2 percent impairment of the right wrist for de Quervain's, 6 percent impairment for median nerve entrapment at the right wrist and 6 percent impairment for the ulnar nerve entrapment at the right elbow or a combined impairment of 12 percent for the right arm. The medical adviser concurred in this rating.

In a decision dated January 6, 2010, OWCP granted appellant 12 percent impairment for the right arm. The period of the award was from December 26, 2006 to September 14, 2007.

² On May 4, 1998 appellant, then a 29-year-old data transcriber, filed an occupational disease claim alleging that she developed acute tendinitis in both hands due to excessive keying at work. She became aware of her condition on March 6, 1998 and stopped work that time. OWCP accepted bilateral carpal tunnel syndrome, right wrist tenosynovitis and authorized right carpal tunnel release.

³ Docket 04-876 (issued July 19, 2004). The Board noted that OWCP decision dated November 19, 2003 granted appellant a schedule award for 19 percent permanent impairment of both upper extremities; however, OWCP did not indicate the percentage impairment for each extremity.

In a schedule award payment worksheet dated January 6, 2010, OWCP noted the gross amount of schedule award paid for 12 percent right upper extremity for the period December 26, 2006 to September 14, 2007 was \$23,374.89.

On January 13, 2010 appellant requested a review of the written record.

In a gross calculation report dated April 22, 2011, OWCP determined that the total schedule award paid pursuant to the January 6, 2010 decision was for 12 percent impairment of the right upper extremity in the amount of \$23,374.89. It determined, however, that appellant was previously paid for 10 percent impairment of the right upper extremity for the same condition and should only have been paid for an additional 2 percent impairment in the amount of \$3,826.37. As a result a \$19,548.52 overpayment was created.

In a decision dated February 14, 2012, an OWCP hearing representative affirmed the January 6, 2010 decision determining that appellant sustained 12 percent impairment of the right upper extremity. The hearing representative noted that OWCP failed to deduct the impairment rating previously granted for 10 percent impairment of the right upper extremity therefore appellant had only an additional 2 percent impairment. The hearing representative advised that an overpayment was created and the case would be remanded to OWCP to determine the amount of the overpayment.

On December 12, 2012 appellant requested reconsideration. In a decision dated March 5, 2013, OWCP denied modification of the February 14, 2012 decision.

In an August 30, 2013 overpayment calculation worksheet, OWCP noted that appellant was granted 12 percent impairment of the right upper extremity for the period December 26, 2006 to September 14, 2007, or a total award of \$23,374.89. However, appellant was previously paid 10 percent impairment of the right upper extremity for the same conditions and was therefore entitled to an additional 2 percent impairment of the right upper extremity. OWCP noted that she was entitled to pay for the schedule award for 43.68 days; however, she was paid for 262.08 days. It further noted that the schedule award began on December 26, 2006 and should have ended on February 7, 2007, but continued to September 14, 2007. OWCP indicated that appellant was entitled to a schedule award of \$3,826.37 but was incorrectly paid \$23,374.89 for an overpayment of \$19,548.52.

In an August 30, 2013 preliminary overpayment determination, OWCP found that appellant was paid a schedule award for 12 percent impairment of the right arm on January 6, 2010 for the period December 26, 2006 to September 14, 2007. However, appellant was previously granted a schedule award for 10 percent impairment of the right arm and OWCP erroneously failed to deduct the prior award. OWCP determined that she was entitled to an additional schedule award of two percent impairment for the right arm. It noted that the total amount of the schedule award for an additional 2 percent permanent impairment was \$3,826.37; however, OWCP erroneously issued a schedule award for 12 percent impairment in the amount of \$23,374.89, which resulted in a \$19,548.52 overpayment. OWCP found that appellant was at fault in creating the overpayment. It provided that “[She] was advised by letter, Form CA-181 of November 19, 2002, that she was entitled to an award for an impairment to both the right and left upper extremities, but that payment for such award must be reduced by monies previously paid

for another award to the right upper extremity (five percent, issued December 6, 1999). As such, [appellant] had immediate knowledge that any award issued must be reduced by any award previously paid.” OWCP also informed appellant that she had a right to a prereducement hearing before an OWCP hearing representative. It instructed her to complete an enclosed overpayment recovery form and submit supporting documentation.

On September 30, 2014 OWCP finalized the overpayment determination, finding that appellant received a \$19,548.52 overpayment of compensation, for the period December 26, 2006 to September 14, 2007, for which she was at fault. It advised that the overpayment occurred because she was paid a schedule award for impairment to the right arm without deducting for an award previously paid. The award was for 12 percent impairment to the right arm issued on January 6, 2010 for the period December 26, 2006 to September 14, 2007. OWCP determined that the award should have deducted 10 percent impairment for a previous award to the right arm and only run through February 7, 2007. It found that appellant was at fault in creating the overpayment. OWCP noted that she was “advised by letter, Form CA-181 of November 19, 2002, that you were entitled to an award for an impairment to both the right and left upper extremities, but that payment for such award must be reduced by monies previously paid for another award to the right upper extremity” and “as such, [appellant] had immediate knowledge that any award issued must be reduced by any award previously paid” but she “nevertheless retained the payment for the period December 26, 2006 through September 14, 2007.” It noted that appellant did not submit an overpayment questionnaire with supporting documentation and therefore she was instructed to repay the debt in full.

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.⁴ 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.⁵

It is well established that benefits payable under section 8107(c)⁶ 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.⁷

⁴ 5 U.S.C. § 8102(a).

⁵ *Id.* at § 8129(a).

⁶ *Id.* at § 8107(c).

⁷ *K.H.*, Docket No. 13-176 (issued March 25, 2013); 20 C.F.R. § 10.404(c).

ANALYSIS -- ISSUE 1

OWCP accepted appellant's condition for bilateral carpal tunnel syndrome, right wrist tenosynovitis and authorized right carpal tunnel release. On September 27, 1999 appellant requested a schedule award. An OWCP medical adviser found that she had five percent impairment of the right arm for her accepted right carpal tunnel syndrome and tenosynovitis of the right hand. On December 6, 1999 OWCP issued appellant a schedule award for five percent right arm impairment. After appellant requested an additional award, an OWCP medical adviser on October 26, 2002 opined that she had 10 percent impairment of the right upper extremity for right carpal tunnel syndrome and right hand tenosynovitis and 9 percent impairment for the left upper extremity for left carpal tunnel syndrome. As she previously received an award for five percent right arm impairment, she was entitled to an additional award of five percent for the right arm. On November 19, 2002 OWCP granted appellant a schedule award for 19 percent impairment of both upper extremities. It advised, however, that 5 percent was already paid for the right arm on December 10, 1999 such that she was entitled to 14 percent of the schedule award.

On April 11, 2007 appellant requested an additional schedule award. In a September 24, 2009 report, Dr. Weiss opined that she had 12 percent right arm impairment. He noted 2 percent impairment of the right wrist for de Quervain's, 6 percent impairment for median nerve entrapment at the right wrist and 6 percent impairment for the ulnar nerve entrapment at the right elbow for a combined impairment of 12 percent for the right upper extremity. The medical adviser concurred in this rating. In a January 6, 2010 decision, OWCP granted appellant 12 percent impairment for the right upper extremity.

By notice dated August 30, 2013 and finalized September 30, 2014, OWCP found a \$19,548.52 overpayment of compensation for the period December 26, 2006 to September 14, 2007. It found that the 12 percent awarded on January 6, 2010 duplicated the 19 percent awarded on November 19, 2002 for impairment of the right arm. OWCP found that appellant was only entitled to an additional two percent impairment. It advised that the January 6, 2010 award for 12 percent impairment to the right arm should have deducted 10 percent impairment for a previous award to the right arm. The Board finds that the evidence reveals that the January 6, 2010 schedule award was not totally duplicative of the prior awards. While an overpayment may exist, it is less than what OWCP calculated.

The Board finds that OWCP did not adequately explain why the January 6, 2010 award predicated on right wrist de Quervain's syndrome, median nerve entrapment and ulnar nerve entrapment for the elbow duplicated the November 19, 2002 award for right carpal tunnel syndrome and tenosynovitis of the right hand. 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 wrist and

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

elbow are two distinct regions of the upper extremity.⁹ In this instance, appellant did not receive a prior award for the ulnar nerve entrapment for the elbow, for which Dr. Weiss and the medical adviser both attributed six percent right arm impairment. In finding an overpayment of compensation, OWCP offered no reasoning for why this portion of the January 6, 2010 schedule award was duplicative the prior right arm schedule awards. While it appears that the portion of the January 6, 2010 schedule award attributable to the right wrist duplicated impairment from prior awards, there is no evidence establishing that impairment attributed to the right elbow duplicated any previous impairment for which appellant received schedule awards.

The Board finds that OWCP has established fact of overpayment but the amount of the overpayment must be recalculated to take into consideration the nonduplicative right ulnar nerve entrapment award for the elbow. The record does not support OWCP's finding that appellant received an overpayment of \$19,548.52 as a result of the January 6, 2010 schedule award. Therefore, the Board will set aside and remand OWCP's September 30, 2013 decision with regard to the amount of any overpayment of compensation.

LEGAL PRECEDENT -- ISSUE 2

An overpayment in compensation shall be recovered by OWCP unless 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 Conversely, a waiver of recovery is not possible if the claimant is at fault in the creation of the overpayment.¹¹

A claimant who has done any of the following will be found to be at fault with respect to creating an overpayment: (1) made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; (2) failed to provide information which he or she knew or should have known to be material; or (3) accepted a payment which he or she knew or should have known to be incorrect. Whether or not an individual was at fault depends on the circumstances surrounding the overpayment.¹²

ANALYSIS -- ISSUE 2

OWCP determined that appellant was at fault in the creation of the overpayment because she accepted payments that she knew or should have known to be incorrect. The Board finds, however, that she was without fault.

OWCP's procedures regarding fault determinations provide that, where an overpayment results from OWCP's error in calculating the length and/or percentages of a schedule award of compensation, it should always result in a finding of without fault unless it is shown that the

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

¹⁰ 5 U.S.C. § 8129(b); *Linda E. Padilla*, 45 ECAB 768 (1994).

¹¹ *Donald L. Overstreet*, 54 ECAB 678 (2003); *Gregg B. Manston*, 45 ECAB 344 (1994).

¹² 20 C.F.R. § 10.433.

individual had actual knowledge of the calculation error.¹³ Here, the evidence establishes that appellant was not aware of the calculation error by OWCP. OWCP has not established that she accepted a payment which she knew or should have known to be incorrect. Therefore, appellant is not at fault in creating an overpayment of compensation with regard to OWCP's erroneous payment of schedule award compensation. The finding of fault is set aside.

CONCLUSION

The Board finds that this case is not in posture for decision as to the amount of the overpayment of compensation. OWCP did not establish that appellant was at fault in creating an overpayment of compensation with regard to the erroneous payment of schedule award compensation. Upon return of the case record, it shall further develop the amount of the overpayment and evaluate whether she is entitled to waiver. Following this and such other development as it deems necessary, OWCP shall issue an appropriate decision.

ORDER

IT IS HEREBY ORDERED THAT the September 30, 2013 decision of the Office of Workers' Compensation Programs is hereby set aside and remanded for further development in accordance with this decision of the Board.

Issued: July 28, 2014
Washington, DC

Patricia Howard Fitzgerald, Acting Chief Judge
Employees' Compensation Appeals Board

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

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

¹³ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200(5)(b)(1)(b) (June 2009).