

ISSUE

The issue is whether OWCP properly issued its December 19, 2013 overpayment decision.

FACTUAL HISTORY

This case has previously been before the Board. In a decision dated August 14, 2013, the Board set aside an October 10, 2012 decision finding that appellant had no more than a 7 percent permanent impairment of the left upper extremity and a 20 percent permanent impairment of the right upper extremity.³ The Board determined that the opinion of the impartial medical examiner, Dr. Ian Fries, a Board-certified orthopedic surgeon, was insufficient to establish the extent of the right or left upper extremity impairment and instructed OWCP to refer appellant for a new impartial medical specialist for an impairment evaluation. The Board further set aside an October 10, 2012 decision finding that appellant received an overpayment of compensation because he received excess compensation for a schedule award. It determined that it was premature to address the overpayment issue as the case was not in posture for determination regarding the extent of permanent impairment. The facts as set forth in the prior decision are hereby incorporated by reference.

Following further development of the medical evidence, in a decision dated December 9, 2013, OWCP found that appellant had no more than the previously awarded 20 percent impairment of the right upper extremity and 6 percent impairment of the left upper extremity. It noted that he would receive separate notification “regarding any potential overpayment of compensation.”

On December 17, 2013 appellant, through his attorney, requested an oral hearing before an OWCP hearing representative on the December 9, 2013 decision.

By decision dated December 19, 2013, OWCP reissued its October 12, 2012 overpayment decision, finding that appellant received an overpayment of compensation in the amount of \$20,227.47 because it failed to deduct a previously paid schedule award from his compensation for an additional impairment of the right upper extremity. It further denied waiver of recovery of the overpayment.

On appeal appellant’s attorney argues that the Board should vacate the December 19, 2013 decision and remand the case in accordance with its August 14, 2013 decision.

³ Docket No. 13-798 (issued August 14, 2013). OWCP accepted that on September 11, 2001 appellant, then a 43-year-old special agent, sustained bronchitis, bilateral shoulder tendinitis and instability, a right labral tear, a cervical disc herniation at C4-5, cervical radiculopathy and cervical spondylosis in the performance of duty. It had previously accepted a right rotator cuff strain and right shoulder subluxation causally related to a December 17, 1991 work injury under file number xxxxxx765. By decision dated April 17, 1995, OWCP granted appellant a schedule award for an 11 percent impairment of the right upper extremity under file number xxxxxx765.

LEGAL PRECEDENT -- ISSUE 1

Section 10.431 of OWCP's implementing regulations provide that, before seeking to recover an overpayment or adjust benefits, OWCP will advise the individual in writing that the overpayment exists and the amount of the overpayment.⁴ The written notification must also include a preliminary finding regarding whether the individual was at fault in the creation of the overpayment.⁵ Additionally, OWCP is obliged to advise the individual of his or her right to inspect and copy the government records relating to the overpayment.⁶ Lastly, the preliminary notice must inform the individual of his or her right to challenge the fact or amount of the overpayment, the right to contest the preliminary finding of fault in the creation of the overpayment, if applicable, and the right to request a waiver of recovery of the overpayment.⁷ The recipient of the alleged overpayment may present evidence in response to OWCP's preliminary notice either in writing or at a prerecoupment hearing.⁸ The evidence must be presented or the hearing requested within 30 days of the date of the written notice of overpayment.⁹ Failure to request the hearing within this 30-day time period shall constitute waiver of that right.¹⁰

OWCP procedures provide that, once an overpayment is identified and calculated, it is responsible for determining whether the claimant was with fault or without fault, issuing a preliminary finding, and unless a hearing is requested, it is responsible for issuing a final decision.¹¹ It indicates that any new determination which results in an overpayment, such as an amended schedule award, warrants a separate formal decision and preliminary overpayment finding.¹² OWCP procedures further note that, if the claimant is determined to be without fault, Form CA-2202 (preliminary finding notice) must be released within 30 days of the date the overpayment is identified. It must clearly state the reason that the overpayment occurred and provide the preliminary finding that the claimant is without fault. Form CA-2202 informs the claimant of the right to submit evidence and the right to a prerecoupment hearing on the issues of fact and amount of overpayment and waiver.¹³

⁴ 20 C.F.R. § 10.431(a).

⁵ *Id.* at § 10.431(b).

⁶ *Id.* at § 10.431(c).

⁷ *Id.* at § 10.431(d).

⁸ *Id.* at § 10.432.

⁹ *Id.*

¹⁰ *Id.*

¹¹ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.4 (June 2009).

¹² *Id.*

¹³ *Id.* at Chapter 2.600.4(a)(2) (June 2009).

ANALYSIS

By decision dated August 14, 2013, the Board set aside an October 10, 2012 OWCP decision finding that appellant received an overpayment of compensation because OWCP overpaid him for a schedule award. The Board found that the case was not in posture for determination regarding the extent of his permanent impairment and that it was consequently premature to address the issue of the overpayment.

On remand, in a decision dated December 19, 2013, OWCP again found that appellant received an overpayment of compensation because he received schedule award compensation in excess of his permanent impairment. The Board finds, however, that OWCP failed to follow its procedures in issuing the December 19, 2013 overpayment decision. OWCP regulations provide that before seeking to recover an overpayment or adjust benefits, it will advise the individual in writing that the overpayment exists and the amount of overpayment.¹⁴ It must inform the individual of his or her right to challenge the fact or amount of the overpayment, the right to contest any preliminary finding of fault in the creation of the overpayment and the right to request a waiver of recovery of the overpayment.¹⁵ OWCP procedures further provide that a preliminary finding of overpayment must be provided within 30 days and clearly identify the reason that the overpayment occurred.¹⁶

In this case, following its development of the schedule award issue on remand, OWCP did not issue a new preliminary determination notifying appellant of its findings, providing him with the right to challenge the fact or amount of overpayment or allowing him to submit new information regarding waiver of recovery of the overpayment. Consequently, it did not comply with the procedural rights afforded to appellant under its regulations.¹⁷ The Board, therefore, finds that the case must be remanded for OWCP. Upon remand OWCP shall issue a preliminary determination to appellant regarding any overpayment in accordance with its procedures, prior to making any final overpayment determination.

CONCLUSION

The Board finds that OWCP improperly issued its December 19, 2013 overpayment decision.

¹⁴ 20 C.F.R. § 10.431(a).

¹⁵ *Id.* at § 10.431(d).

¹⁶ *See supra* note 11.

¹⁷ *Id.* at §§ 10.431, 10.432; *see also* *K.H.*, Docket No. 11-603 (issued September 27, 2011); *K.G.*, Docket No. 08-2135 (issued April 16, 2009).

ORDER

IT IS HEREBY ORDERED THAT the December 19, 2013 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision.

Issued: November 14, 2014
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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