

FACTUAL HISTORY

This case has previously been before the Board. In a June 1, 2011 decision, the Board modified a June 7, 2010 OWCP schedule award decision to find that appellant was entitled to an additional one percent left upper extremity impairment, for a total impairment of 20 percent.² The law and facts of the previous Board decision are incorporated herein by reference.

On September 7, 2011 OWCP granted appellant a schedule award for the additional one percent impairment of the left upper extremity, for 3.12 weeks, to run from July 26 to August 16, 2011.

On October 1, 2012 appellant filed a new schedule award claim. On October 22, 2012 OWCP asked the attending physician Dr. Raymond Tesner, a Board-certified osteopath specializing in orthopedic surgery, to provide an impairment rating in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).³ This was to include whether maximum medical improvement had been reached and a detailed description of all objective findings and subjective complaints in support of his impairment rating. Dr. Tesner was asked to respond within 30 days. In a treatment note dated October 29, 2012, he indicated that appellant had full left shoulder range of motion with a significant amount of subacromial crepitus, popping, and discomfort. Strength was mildly diminished. Dr. Tesner recommended more surgery. The surgery was approved on October 31, 2012 but on December 3, 2012 stated that appellant wished to postpone surgery.

In January 2013, OWCP referred appellant to Dr. Manhal A. Ghanma, a Board-certified orthopedic surgeon, for a second opinion. In a February 19, 2013 report, Dr. Ghanma noted accepted conditions of low back and left shoulder strains. He reviewed the statement of accepted facts and medical record and provided physical examination findings. Dr. Ghanma indicated that appellant had no upper or lower extremity impairment.

Appellant telephoned OWCP on March 6, 2013 and maintained that the statement of accepted facts provided Dr. Ghanma was incorrect. OWCP prepared an updated statement of accepted facts that indicated that left shoulder impingement syndrome was accepted and that she had authorized left shoulder surgery on December 3, 1990 and October 2, 1999. It forwarded the updated statement of accepted facts to Dr. Ghanma and in a May 12, 2013 report, he

² Docket No. 10-1927 (issued June 1, 2011). On September 16, 1989 appellant, a payroll supervisor, had back pain while bending over to lift boxes. The claim was accepted for low back and left shoulder strains. Appellant worked intermittently until October 26, 1989 and was placed on the periodic compensation rolls. OWCP additionally accepted left shoulder impingement syndrome and on December 3, 1990 she had left shoulder acromioplasty and had a second procedure with resection of the distal clavicle on October 2, 1999. On April 24, 2008 it waived a \$5,598.88 overpayment of compensation that was created because appellant's life insurance premiums had not been deducted from her compensation. Appellant returned to a full-time accounting technician position at the employing establishment on September 29, 2008. On October 8, 2008 she filed a schedule award claim. By decision dated December 15, 2008, OWCP found that appellant's actual earnings fairly and reasonably represented her wage-earning capacity and reduced her compensation accordingly. Appellant retired in 2010. By decision dated June 7, 2010, she was granted a schedule award for a 19 percent impairment of the left upper extremity.

³ A.M.A., *Guides* (6th ed. 2008).

acknowledged the accepted conditions as low back strain, left shoulder strain and impingement syndrome of the left shoulder. Dr. Ghanma found a class 1 impairment under Table 15-5, Shoulder Regional Grid, with a functional history modifier of 2 and modifiers of 1 for clinical studies and physical examination. After applying the net adjustment formula, he concluded that appellant had 11 percent left upper extremity impairment. Dr. Ghanma also used the alternative range of motion method. He found that, under Table 15-34, appellant had three percent impairment for loss of flexion, three percent impairment for loss of abduction, one percent impairment for loss of adduction and two percent impairment for loss of external rotation and no impairments for loss of extension and loss of internal rotation, for a total nine percent left arm impairment under the range of motion method. As this was less than the impairment found under the diagnosis-based estimate, Dr. Ghanma concluded that, under Table 15-5, for a primary diagnosis of shoulder impingement with a distal clavicle resection, appellant had 11 percent left upper extremity impairment, with maximum medical improvement reached on February 2, 2000.

In a May 7, 2013 report, Dr. James H. Rutherford, Board-certified in orthopedic surgery, advised that he had examined appellant that day. He reviewed medical records and noted that he had also examined her for OWCP in June 2007. Dr. Rutherford provided examination findings. He concluded that appellant had reached maximum medical improvement and, based on left upper extremity range of motion, under Table 15-34, she had a total nine percent impairment of the left upper extremity, which was less than the schedule award previously received.

By report dated December 13, 2013, Dr. Morley Slutsky, an OWCP medical adviser Board-certified in occupational medicine, noted his review of the medical record, including Dr. Ghanma's reports. He agreed with Dr. Ghanma's analysis and conclusion that appellant had 11 percent left upper extremity impairment with maximum medical improvement reached February 19, 2013, the date of Dr. Ghanma's examination.

In a March 5, 2014 decision, OWCP found that appellant was not entitled to an increased left arm schedule award as the medical evidence demonstrated that her current impairment of 11 percent was less than the 20 percent previously awarded.

On March 10, 2014 OWCP issued a preliminary determination that an overpayment of compensation in the amount of \$16,757.66 was created because appellant received a schedule award for a 20 percent left upper extremity impairment, totaling \$37,006.46 for the period June 6, 2010 to August 16, 2011. As subsequent medical evidence demonstrated only an 11 percent left upper extremity impairment, appellant would only be entitled to 240 days of compensation or \$20,248.80. This yielded an overpayment of compensation in the amount of \$16,757.66. Appellant was found without fault and OWCP provided her an overpayment action request form and an overpayment recovery questionnaire (OWCP Form 20). She was informed that, to consider waiver, she must complete the overpayment questionnaire and attach supporting documents, including copies of income tax returns, bank statements, bills and canceled checks, pay slips, and any other records which supported the income and expenses listed.

Computer print-outs and an overpayment worksheet indicate that appellant was paid \$37,006.46 for the period June 6, 2010 to August 16, 2011 for 20 percent left upper extremity impairment, when she should have received \$20,248.80 for 240 days, from June 6, 2010 to

February 1, 2011, for an 11 percent impairment. This yielded an overpayment of compensation of \$16,757.66.

Appellant requested a decision on the written record by the Branch of Hearings and Reviews. She submitted an overpayment recovery questionnaire in which she indicated that she and her husband received social security and other benefits totaling \$2,880.00 each month and had monthly expenses of \$2,693.00.⁴ Appellant did not furnish supportive documentation.

By decision dated June 5, 2014, OWCP finalized the preliminary overpayment decision. It found that appellant was not at fault in creating the overpayment and that repayment was due in full. OWCP noted that she had not furnished requested financial information but, nonetheless, her reported income exceeded her reported expenses by \$187.00 per month.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of FECA⁵ and its implementing federal regulations,⁶ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members or functions of the body. However, FECA does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.⁷ For decisions issued after May 1, 2009, the sixth edition of the A.M.A., *Guides* is to be used.⁸

If a claimant received a schedule award and the medical evidence does not support the degree of permanent impairment awarded, an overpayment of compensation may be created. Claims for an increased schedule award based on the same edition of the A.M.A., *Guides* are subject to overpayment.⁹

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained low back and left shoulder strains and left shoulder impingement syndrome. She filed a schedule award claim on October 8, 2008 and in a June 7, 2010 decision, OWCP granted her a schedule award for 19 percent impairment of the left arm. By decision dated June 1, 2011, the Board modified the June 7, 2010 decision to reflect

⁴ In addition to listing monthly expenses for rent or mortgage, food, clothing and utilities, appellant listed \$400.00 each month for tithes, \$450.00 for vehicle gas and insurance, \$401.00 for a car loan, and \$25.00 payment on credit card debt.

⁵ 5 U.S.C. § 8107.

⁶ 20 C.F.R. § 10.404.

⁷ *Id.* at § 10.404(a).

⁸ FECA Bulletin No. 09-03 (issued March 15, 2009).

⁹ *E.M.*, Docket No. 13-1378 (issued February 12, 2014); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.9.e (February 2013).

that appellant was entitled to an additional one percent left upper extremity impairment.¹⁰ On September 7, 2011 OWCP awarded an additional 1 percent, for a total 20 percent left upper extremity impairment.

Appellant requested an additional schedule award on October 1, 2012. In February 19 and May 12, 2013 reports, Dr. Ghanma, an OWCP referral physician, provided detailed clinical findings and, in accordance with the sixth edition of the A.M.A., *Guides*, determined that she had an 11 percent impairment of the left upper extremity. Dr. Slutsky, an OWCP medical adviser, agreed with Dr. Ghanma's impairment rating. By decision dated June 5, 2014, OWCP denied appellant's claim for an additional schedule award and thereafter developed the overpayment of compensation.

The Board finds that the schedule award issue has been properly resolved. OWCP appropriately developed the medical evidence in determining that appellant's left upper extremity impairment had improved and her permanent impairment was only 11 percent. Both impairment ratings were performed under the same edition of the A.M.A., *Guides* and there is no medical evidence indicating a greater percentage of impairment. OWCP calculated that appellant had received compensation of \$37,006.46, based on a 20 percent impairment, for the period June 6, 2010 to August 16, 2011, when she should have received compensation of only \$20,248.80. This yielded an overpayment of compensation of \$16,757.66.

As noted above, if a claimant has received a schedule award and the medical evidence does not support the degree of permanent impairment awarded, an overpayment of compensation may be created. If, as in this case, the claim for an increased schedule award is based on the same edition of the A.M.A., *Guides*, the schedule award is subject to overpayment.¹¹ Therefore, OWCP's June 5, 2014 decision finding a \$16,757.66 overpayment of compensation was proper under the law and facts of this case.¹²

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA provides that 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."¹³ Section 10.438 of OWCP regulations provide that the individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by OWCP. This information is needed to determine whether or not recovery on an overpayment would defeat the purpose of FECA or be against equity and good

¹⁰ *Supra* note 2.

¹¹ *Supra* note 9.

¹² *E.M.*, *supra* note 9.

¹³ 5 U.S.C. § 8129.

conscience.¹⁴ Failure to submit the requested information within 30 days of the request shall result in denial of waiver.¹⁵

Section 10.438 of FECA's implementing regulations provide that the individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by OWCP. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of FECA or be against equity and good conscience. Failure to submit the requested information within 30 days of the request shall result in the denial of waiver and no further request for waiver shall be considered until the requested information is furnished.¹⁶ OWCP procedures further indicate that an individual is deemed to need substantially all of his or her current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.¹⁷

ANALYSIS -- ISSUE 2

OWCP advised appellant in the March 10, 2014 preliminary overpayment determination of the \$16,757.66 overpayment and that she was not at fault. It advised her to submit information regarding her income, assets and expenses by completing an attached overpayment questionnaire and to provide documentation of her income and expenses. While appellant provided the overpayment questionnaire, she did not provide the requested supportive financial information or documentation. Moreover, she reported on the overpayment questionnaire that her monthly income totaled \$2,880.00 and her monthly expenses totaled \$2,693.00, which rendered an excess of \$187.00 per month. OWCP procedures provide that an individual is deemed to need substantially all of his or her current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00,¹⁸ which is not the case here.

In the absence of the information requested, OWCP properly denied waiver of recovery.¹⁹

¹⁴ Recovery of an overpayment will defeat the purpose of FECA if such 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 or 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. 20 C.F.R. § 10.436. 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 attempting to repay the debt; and when an 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. *Id.* at § 10.437.

¹⁵ 20 C.F.R. § 10.438.

¹⁶ *Id.* See *Linda Hilton*, 52 ECAB 476 (2001).

¹⁷ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(b) (June 2009).

¹⁸ *Id.*

¹⁹ *E.M.*, *supra* note 9.

CONCLUSION

The Board finds that OWCP properly determined that an overpayment of compensation in the amount of \$16,757.66 was created and that it properly denied waiver of recovery.²⁰

ORDER

IT IS HEREBY ORDERED THAT the June 5, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 25, 2014
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

²⁰ The Board notes that appellant did not file an appeal from the March 5, 2014 schedule award decision.