

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

R.W., Appellant

and

**U.S. POSTAL SERVICE, PROCESSING &
DISTRIBUTION CENTER, Carol Stream, IL,
Employer**

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**Docket No. 14-195
Issued: October 10, 2014**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 5, 2013 appellant, through his attorney, filed a timely appeal of a September 9, 2013 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 appellant received an overpayment of compensation in the amount of \$31,473.32 for the period November 17, 2011 through August 15, 2012, for which he was without fault; (2) whether OWCP properly denied waiver of recovery of the overpayment; and (3) whether OWCP properly found that the overpayment could be recovered by deducting \$400.00 from continuing compensation.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On September 8, 2003 appellant, then a 46-year-old mail handler, sustained cervical and head injuries due to a forklift accident in the performance of duty. OWCP accepted the claim for cervical strain, concussion and cervical spinal stenosis.² Appellant stopped work that day and returned to limited-duty work on January 21, 2004.

On May 29, 2005 and March 30, 2007 appellant filed claims for a schedule award.

By decision dated October 15, 2007, OWCP granted appellant schedule awards for a two percent right upper extremity impairment and a two percent left upper extremity impairment.

By decision dated June 25, 2009, OWCP granted appellant an additional 11 percent impairment for his right upper extremity, or a total 13 percent impairment and an additional 12 percent impairment for his left upper extremity, or a total 14 percent impairment.

On October 18, 2011 appellant filed a claim for an additional schedule award.

On December 8, 2011 OWCP received a September 30, 2011 report from Dr. William N. Grant, an examining Board-certified internist, who concluded that appellant had a 62 percent impairment to each upper extremity using the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). Dr. Grant rated a 19 percent upper extremity impairment using Table 15-34, page 475 due to appellant's combined limited shoulder range of motion (*i.e.*, 3 percent impairment for 90 degrees flexion, 1 percent impairment for 30 degrees extension, 6 percent impairment for 80 degrees abduction, 2 percent impairment for 30 degrees adduction, 4 percent impairment for 40 degrees internal rotation and 4 percent impairment for 40 degrees internal/external rotation). He rated a 24 percent bilateral upper extremity impairment due to sensory and motor deficits of the C5, 6, 7, 8 nerves using Table 15-7, page 406 and Table 15-8, page 408. Using Table 15-4, page 399, Dr. Grant found a two percent left upper extremity impairment for appellant's left arm epicondylitis. Using Table 15-21, page 449, he rated 17 percent bilateral upper extremity impairment due to his bilateral carpal tunnel syndrome. Dr. Grant combined appellant's upper extremity impairments to find a total 62 percent upper extremity impairment.

In a December 22, 2011 addendum, Dr. Grant reiterated his opinion that appellant had 62 percent bilateral upper extremity impairment.

On January 13, 2012 OWCP received a November 17, 2011 functional capacity addendum from Dr. Eugene Lopez, an examining Board-certified orthopedic surgeon, who concluded that appellant had a total six percent left upper extremity impairment and a six percent right upper extremity impairment. Using Table 15-5, page 402 Dr. Lopez determined that a class 1 or grade C was appropriate for both his right and left shoulder impingement. He assigned a

² OWCP assigned File No. xxxxxx464. On March 6, 2008 it combined File Nos. xxxxxx258 and xxxxxx464, which the latter as the master file number. Under File No. xxxxxx258 OWCP accepted the conditions of bilateral shoulder capsulitis, bilateral carpal tunnel syndrome and left medial epicondylitis due to a February 24, 2005 traumatic injury involving a bay door.

grade modifier 3 for functional history, a grade modifier 2 for physical examination and a grade modifier 2 for clinical studies which resulted in a net adjustment of 1 or impairment rating of grade D or two percent for the right shoulder. For the left shoulder and using Table 15-5, page 402 Dr. Lopez determined that a class 1 or grade C was appropriate for appellant's left shoulder impingement. He assigned a grade modifier 3 for functional history, a grade modifier 2 for physical examination and a grade modifier 2 for clinical studies which resulted in a net adjustment of 1 or impairment rating of grade D or two percent for the right shoulder and a two percent impairment for the left shoulder.

Using Table 15-23, page 449, Dr. Lopez found that appellant had a five percent impairment for left carpal tunnel syndrome and a five percent impairment for right carpal tunnel syndrome. Using Table 15-4, page 399, he classified appellant's lateral epicondylitis as a class 1 with a default impairment rating of one or grade C. Dr. Lopez assigned a grade modifier 1 for mild problems under functional history, a grade modifier 1 for physical examination findings of minimal palpatory findings without any observed abnormalities and a grade modifier 0 for clinical studies. Totaling the grade modifiers resulted in an adjustment value of -1 which moved the impairment rating from grade C to grade B or one percent impairment for left lateral epicondylitis. Dr. Lopez combined appellant's upper extremity impairment ratings to find a six percent impairment of both arms.

On March 19, 2012 Dr. Sanjai Shukla, an OWCP medical adviser, reviewed the medical evidence. He noted several discrepancies between the reports of Dr. Lopez and Dr. Grant. Dr. Shukla stated that in this type of situation, Dr. Grant's rating should be disregarded in favor of the impairment rating by Dr. Lopez. He concurred with Dr. Lopez that appellant had a five percent impairment for the diagnosis of left carpal tunnel syndrome, a one percent impairment for left lateral epicondylitis and two percent impairment for left shoulder impingement, resulting in a total six percent left upper extremity impairment. With respect to the right upper extremity, Dr. Shukla determined that there was a five percent impairment for the diagnosis of carpal tunnel syndrome, a two percent impairment for right shoulder impingement, resulting in a total six percent left upper extremity impairment.

By decision dated April 16, 2012, OWCP granted appellant schedule awards for six percent impairment of the right and left upper extremities. The period of the awards ran from November 17, 2011 to August 5, 2012.

On May 7, 2012 appellant requested a telephonic hearing before an OWCP hearing representative, which was held on August 6, 2012.

By decision dated October 16, 2012, the hearing representative set aside the April 16, 2012 decision and remanded the case for further development as he found no analysis supporting a 19 percent right upper extremity permanent impairment or a 20 percent left upper extremity permanent impairment. OWCP was instructed to obtain clarification from the medical adviser explaining whether appellant had an additional six percent impairment to each upper extremity, given that the previous schedule awards were for 13 percent right upper extremity impairment and a 14 percent left upper extremity impairment.

In a January 5, 2013 report, Dr. Christopher Gross, an OWCP medical adviser, noted that appellant previously received schedule awards for a 13 percent right upper extremity impairment and a 14 percent left upper extremity impairment. He stated that, as the prior schedule award incorporated the diagnoses of shoulder impingement and carpal tunnel syndrome, the conditions had been incorporated in the prior awards. Therefore, no additional schedule award was in order.

By notice dated February 1, 2013, OWCP advised appellant of its preliminary determination that he received an overpayment of \$31,473.32. Appellant received a schedule award for an additional 6 percent impairment to each upper extremity but had previously been paid for a 13 percent right upper extremity impairment and a 14 percent left upper extremity impairment for the same medical conditions. The compensation received for the additional schedule award constituted an overpayment. OWCP made the preliminary finding that appellant was not at fault in creation of the overpayment. It provided him an overpayment recovery questionnaire (Form OWCP-20) and afforded 30 days to submit financial information about his income, assets and expenses. OWCP explained that this information was required to consider waiver of recovery of the overpayment.

On February 25, 2013 appellant requested a telephonic prereoupment hearing with an OWCP hearing representative.

Appellant submitted an overpayment recovery questionnaire stating that he had a total monthly income of \$918.72 and monthly expenses of \$3,700.00. He had \$50.00 cash on hand and \$573.57 in a checking account and a total of \$50.00 under other funds. Under expenses, appellant listed \$500.00 for rent, \$400.00 for food, \$100.00 for clothing, \$400.00 for utilities, \$100.00 for other expenses and \$2,200.00 for bankruptcy.

At the hearing, appellant testified that he received approximately \$3,290.00 a month from OWCP and about \$110.00 from social security. He testified that his retirement income of \$815.72 was supposed to start in a few months.

Subsequent to the hearing appellant submitted a more detailed accounting of his expenses and income. He listed monthly expenses of \$900.00 for rent; \$200.00 for gas; \$90.00 for light/electricity; \$60.00 for water; \$200.00 for food; \$2,200.00 for bankruptcy payments; \$100.00 for cleaner; \$100.00 for miscellaneous; and \$300.00 for automobile insurance. Appellant submitted evidence showing that he had \$869.65 in his Chase bank account and \$5.00 in his Credit Union 1 account. He included a copy of his lease and a one-page telephone bill from AT&T. The AT&T statement showed a total amount due of \$241.52, but did not list the monthly charges.

By decision dated September 9, 2013, OWCP's hearing representative found that an \$31,473.32 overpayment was created. He found that appellant was erroneously paid for an additional six percent permanent impairment to each upper extremity. The hearing representative noted that appellant's income exceeded his expenses by approximately \$473.72. He denied waiver and found that the overpayment could be recovered by deducting \$400.00 from continuing compensation.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of FECA³ and its implementing regulations⁴ 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 to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants.⁵ The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.⁶ Effective May 1, 2009, OWCP adopted the sixth edition of the A.M.A., *Guides* as the appropriate edition for all awards issued after that date.⁷

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.⁸

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained cervical strain, concussion, cervical spinal stenosis bilateral shoulder capsulitis, bilateral carpal tunnel syndrome and left medial epicondylitis as the result of his September 8, 2003 and February 24, 2005 employment injuries. On October 15, 2007 it granted schedule awards for a two percent permanent impairment to each upper extremity. By decision date June 25, 2009, OWCP granted appellant additional schedule awards for a total 13 percent right upper extremity impairment and a 14 percent left upper extremity impairment.

On December 7 and 18, 2011 appellant filed claims for an additional schedule award based on the December 8 and 22, 2011 reports from Dr. Grant, who rated a 62 percent bilateral upper extremity impairment. By decision dated April 16, 2012, OWCP granted him awards for an additional six percent impairment to each upper extremity based on Dr. Shukla's opinion which relied on the November 17, 2011 functional capacity evaluation schedule award addendum by Dr. Lopez. By decision dated October 16, 2012, the hearing representative

³ 5 U.S.C. § 8107.

⁴ 20 C.F.R. § 10.404.

⁵ See *D.K.*, Docket No. 10-174 (issued July 2, 2010); *Michael S. Mina*, 57 ECAB 379 (2006).

⁶ 20 C.F.R. § 10.404; see *F.D.*, Docket No. 09-1346 (issued July 19, 2010); *Billy B. Scoles*, 57 ECAB 258 (2005).

⁷ See *P.B.*, Docket No. 10-103 (issued July 23, 2010). Federal (FECA) Procedure Manual, Part 3 -- Claims, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 9, 2010).

⁸ *W.M.*, Docket No. 13-291 (issued June 12, 2013). Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards Claims for Increased Schedule Award*, Chapter 2.809.9(e) (February 2013). See *Richard Saldibar*, 51 ECAB 585 (2000).

remanded for clarification as to whether the prior awards incorporated the medical conditions for which the most recent awards were based. On remand, Dr. Gross determined that appellant was not entitled to additional schedule awards as the prior schedule awards incorporated the diagnoses of shoulder impingement and carpal tunnel syndrome.

The Board finds that the schedule award issue has been properly resolved.⁹ OWCP appropriately developed the medical evidence to determine that appellant was not entitled to an additional six percent impairment of each upper extremity. Appellant previously received schedule awards of 14 percent for the left upper extremity and 13 percent for the right upper extremity. The most recent impairment ratings were performed under the same edition of the A.M.A., *Guides* and incorporated the same medical conditions. OWCP determined that appellant was overpaid in the amount of \$31,473.32 based upon receipt of an additional six percent impairment of each upper extremity. The Board notes that appellant did not contest the amount of the overpayment. The Board will affirm the fact and amount of the overpayment in this case.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of FECA¹⁰ provides: Adjustment or recovery 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.¹¹

OWCP may consider waiving an overpayment of compensation only if the individual to whom it was made was not at fault in accepting or creating the overpayment. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she received from OWCP are proper. The recipient must show good faith and exercise a high degree of care in reporting events, which may affect entitlement to or the amount of benefits. A recipient 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 (this provision applies only to the overpaid individual).¹²

Whether or not OWCP determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The

⁹ *W.M. and Richard Saldibar, id.*

¹⁰ 5 U.S.C. § 8129(b).

¹¹ *J.K.*, Docket No. 08-1761 (issued January 8, 2009); *Joan Ross*, 57 ECAB 694 (2006); *Desiderio Martinez*, 55 ECAB 245 (2004).

¹² 20 C.F.R. § 10.433(a),

degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid.¹³

ANALYSIS -- ISSUE 2

OWCP found appellant was without fault in the creation of the overpayment. The issue of whether he is entitled to waiver of recovery of the overpayment is not in posture for a decision. OWCP denied waiver without providing a clear explanation for its determination.¹⁴ The September 9, 2013 decision noted only that appellant's income exceeded his expenses. The fact that his income exceeds his expenses is just one factor in considering whether waiver of recovery of the overpayment is appropriate. As noted above, OWCP must also consider whether recovery of the overpayment would defeat the purpose of FECA or be considered against equity and good conscience.¹⁵ The decision by OWCP's hearing representative provides insufficient discussion or analysis as to whether waiver would be against equity and good conscience or defeat the purpose of FECA when denying waiver of recovery of the overpayment. The decision of whether OWCP shall waive recovery of an overpayment is a matter that rests in its discretion to be exercised pursuant to regulatory guidelines. The Board will not substitute its own discretion to decide the matter.¹⁶

The case will be remanded to OWCP for further clarification, including the provision of additional detailed findings, regarding the issue of waiver of recovery of the \$31,473.32 overpayment. After such development as it deems necessary, OWCP should issue an appropriate decision regarding this matter.¹⁷

CONCLUSION

The Board finds that OWCP properly found that an overpayment of \$31,473.22 was created, for which appellant was without fault, due to his receipt of an additional schedule award that he was not entitled to. The Board further finds that the case is not in posture for decision regarding the issue of waiver of recovery of the overpayment.

¹³ *Id.* at § 10.433(b).

¹⁴ An OWCP decision shall contain findings of fact and a statement of reasons. 20 C.F.R. § 10.126; *see also O.R.*, 59 ECAB 432 (2008); *Paul M. Colosi*, 56 ECAB 294 (2005).

¹⁵ 20 C.F.R. § 10.437 (a), (b); *see J.K., Joan Ross and Desiderio Martinez, supra* note 11.

¹⁶ *See John M. Dunn*, Docket No. 92-2096 (issued February 18, 1994).

¹⁷ Given the Board's finding regarding the issue of waiver of recovery of the overpayment, it is premature to consider the issue of the method of repayment of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 9, 2013 is affirmed with respect to the fact and amount of the overpayment. The September 9, 2013 decision is set aside with respect to the issue of waiver of recovery of the overpayment. The case is remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: October 10, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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