

FACTUAL HISTORY

This case has previously been before the Board. In a decision dated April 7, 2010, the Board set aside a July 23, 2008 decision denying appellant's claim for a schedule award for the lungs.² The Board remanded the case for OWCP to refer the case record to an OWCP medical adviser to determine whether appellant had reached maximum medical improvement and, if so, to evaluate the extent of any pulmonary impairment due to his accepted employment injury. The facts and the circumstances as set forth in the prior decision are hereby incorporated by reference.

On May 7, 2010 OWCP's medical adviser reviewed the report of Dr. Gary A. Agia, an attending osteopath, and his finding that appellant had a 15 to 20 percent permanent impairment of the lungs due to asbestos-related pleural disease. He applied the tables and pages of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009) (A.M.A., *Guides*), and concluded that appellant had a 20 percent permanent impairment of the lungs.

By decision dated June 18, 2010, OWCP granted appellant a schedule award for a 20 percent permanent impairment of the lung. The period of the award ran for 31.2 weeks from April 9 to November 13, 2008. On June 28, 2010 appellant, through his attorney, requested an oral hearing before an OWCP hearing representative.

In a report dated October 12, 2010, Dr. Leon H. Waller, an osteopath and Board-certified internist, discussed appellant's history of asbestos exposure and current complaints of dyspnea with exertion, a chronic cough and intermittent wheezing. He reviewed the results of a March 5, 2010 computerized tomography (CT) scan showing pleural thickening and plaques indicative of pulmonary asbestosis and a May 19, 2010 pulmonary function study showing both obstructive and restrictive lung disease. Dr. Waller diagnosed chronic rhinopharyngosinusitis with bronchitis and pulmonary asbestosis with fibrosis due to asbestos exposure at work. He noted that appellant smoked one pack a day for 10 years and stopped in 1955. Citing the sixth edition of the A.M.A., *Guides*, Dr. Waller found that appellant had a 23 percent whole person impairment due to his lung impairment.

In a decision dated January 6, 2011, an OWCP hearing representative vacated the June 18, 2010 decision. She found that OWCP should have paid appellant schedule award compensation for 62.4 weeks instead of 31.2 weeks. The hearing representative further determined that an OWCP medical adviser should review the May 19, 2010 pulmonary function study and the October 12, 2010 report from Dr. Waller.

By decision dated February 3, 2011, OWCP granted appellant a schedule award for a 20 percent impairment of the second lung. It noted that it had previously issued a schedule award for a 20 percent impairment of the first lung. The period of the award ran for 31.20 weeks from November 14, 2008 to June 20, 2009.

² Docket No. 09-1714 (issued April 7, 2010). On September 21, 1988 appellant, then a 61-year-old inspector, filed an occupational disease claim alleging that he sustained a pulmonary condition due to his federal employment. OWCP accepted the claim for asbestos exposure resulting in pleural thickening.

On February 8, 2011 appellant, through his attorney, requested an oral hearing regarding OWCP's February 3, 2011 decision.

In a report dated February 22, 2011, an OWCP medical adviser questioned whether appellant was at maximum medical improvement and recommended further evaluation and testing.

On May 19, 2011 OWCP referred appellant to Dr. Jonathan Gelfand, a Board-certified internist and pulmonologist, for a second opinion examination. In a report dated May 25, 2011, Dr. Gelfand discussed appellant's complaints of fatigue and shortness of breath. He stated:

"Pulmonary function testing done on the day of this evaluation revealed mildly reduced diffusing capacity which corrected for volume adjustment. There was evidence of air trapping in the lung volume determination. There was mild obstruction on spirometry with nonsignificant improvement following inhaled bronchodilator. These results were consistent with mild chronic obstructive lung disease. This is in comparison to a pulmonary function test done on December 19, 2006 with age appropriate deterioration in lung function with otherwise very similar results."

Dr. Gelfand diagnosed mild chronic obstructive lung disease and pleural plaques due to asbestos exposure. He found that appellant had reached maximum medical exposure. Dr. Gelfand related, "In my opinion, complaints of mild dyspnea on exertion are related to mild chronic obstructive lung disease supported by the presence of an obstructive defect with air trapping on pulmonary function testing and the presence of wheezing. These problems are not related to exposure to asbestos." He further found that appellant's reduced lung function was unrelated to asbestos exposure. Dr. Gelfand opined that the spirometry showed "moderately severe increase in residual volume characteristic of air trapping typical of chronic obstructive lung disease. The spirometry reveals mild reduction of the forced vital capacity and FEV₁ and FEV₁ [percent] characteristic of mild obstructive lung disease. In the absence of significant improvement following inhaled bronchodilator this should be characterized as fixed obstruction." Applying the sixth edition of the A.M.A., *Guides*, he opined that appellant had a six percent impairment of the lungs. Dr. Gelfand concluded that the pleural plaques from asbestos were "not contributing to his disability" as no evidence of "pulmonary parenchymal asbestosis separate from the pleural plaques."

A hearing was held on June 21, 2011 regarding the February 3, 2011 schedule award decision.

An OWCP medical adviser reviewed the evidence on July 25, 2011 and opined that appellant had a four percent permanent impairment of the lungs. He concurred with Dr. Gelfand's opinion that any impairment was not related to the accepted condition of asbestos-related pleural thickening.

By decision dated July 27, 2011, OWCP denied appellant's claim for an increased schedule award. It found that Dr. Gelfand and OWCP's medical adviser determined that his

pulmonary impairment was not due to asbestos exposure and thus he had no work-related impairment.

On August 1, 2011 appellant, through his attorney, requested an oral hearing on the July 27, 2011 decision.

By decision dated September 2, 2011, an OWCP hearing representative affirmed the February 3, 2011 decision. She found that the medical adviser properly applied the A.M.A., *Guides* to Dr. Agia's finding that appellant had a 20 percent permanent impairment of each lung. The hearing representative noted that OWCP initially awarded him a 20 percent impairment for only one lung and thus properly issued him a second 20 percent impairment rating for the other lung.

A video hearing was held on November 16, 2011 regarding the July 27, 2011 decision. By decision dated January 18, 2012, an OWCP hearing representative affirmed the July 27, 2011 decision. She found that Dr. Gelfand's report represented the weight of the evidence due to his expertise in pulmonary medicine and established that OWCP erred in paying appellant schedule awards for a 20 percent impairment to each lung as the impairment was not due to the accepted condition.

In a decision dated May 2, 2012, OWCP vacated its June 18, 2010 and February 3, 2011 schedule award decisions and denied his claim for a permanent impairment of the lungs. It determined that the weight of the evidence established that his decreased lung function did not result from the accepted condition of asbestos exposure resulting in pleural thickening.

On May 18, 2012 OWCP notified appellant of its preliminary determination that he received an overpayment of \$22,539.71 because it erroneously paid him a schedule award. It found that he was without fault in creating the overpayment. OWCP requested that appellant complete the enclosed overpayment recovery questionnaire and submit supporting financial documents. Additionally, it notified him that, within 30 days of the date of the letter, he could request a telephone conference, a final decision based on the written evidence or a precoupment hearing.

On June 14, 2012 appellant requested a telephonic precoupment hearing. He submitted an overpayment recovery questionnaire and supporting financial documents. In an accompanying statement, appellant asserted that the medical evidence from Dr. Agia and Dr. Waller supported that he had an impairment due to his asbestos exposure. He requested waiver of any overpayment.

At the telephone precoupment hearing, held on February 19, 2013, appellant argued that he was entitled to a schedule award for his lungs. He provided information about his income and expenses to the hearing representative. The hearing representative advised appellant that she would send him a letter within 10 days requesting current financial information.

On April 17, 2013 appellant completed another overpayment recovery questionnaire. He listed income of \$1,924.02 and expenses of \$1,401.00.

In a decision dated May 7, 2013, an OWCP hearing representative found that appellant received an overpayment of \$22,531.71 for the period April 9, 2008 to June 20, 2009 because OWCP incorrectly paid him a schedule award. She declined to address the merits of the schedule award decision as he had not requested a hearing on that decision. The hearing representative determined that appellant was without fault in creating the overpayment but denied waiver as he had not submitted sufficient updated financial information. Based on her review of the record this found that he could repay the overpayment by submitting \$310.00 per month.

On appeal appellant's attorney argues that he erred in listing his expenses as \$1,401.00 per month and requested a reduced repayment schedule.

LEGAL PRECEDENT -- ISSUE 1

Section 8128 of FECA provides that the Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or application.³ The Board has upheld OWCP's authority to set aside or modify a prior decision and issue a new decision under section 8128 of FECA.⁴ The power to annul an award, however, is not an arbitrary one and an award for compensation can only be set aside in the manner provided by the compensation statute.⁵

Workers' compensation authorities generally recognize that compensation awards may be corrected, in the discretion of the compensation agency and in conformity with statutory provision, where there is good cause for so doing, such as mistake or fraud.⁶ It is well established that, once OWCP accepts the claim, it has the burden of justifying the termination or modification of compensation benefits.⁷ Its burden of justifying termination or modification of compensation holds true where it later decides that it has erroneously accepted a claim of compensation. In establishing that its prior acceptance was erroneous, OWCP is required to provide a clear explanation of its rationale for rescission.⁸

³ 5 U.S.C. § 8128; *see also M.E.*, 58 ECAB 694 (2007).

⁴ *John W. Graves*, 52 ECAB 160 (2000).

⁵ *See* 20 C.F.R. § 10.610; *Cary S. Brenner*, 55 ECAB 739 (2004); *Stephen N. Elliott*, 53 ECAB 659 (2002).

⁶ *L.C.*, 58 ECAB 493 (2007).

⁷ *Andrew Wolfgang-Masters*, 56 ECAB 411 (2005).

⁸ *See Amelia S. Jefferson*, 57 ECAB 183 (2005); *Delphia Y. Jackson*, 55 ECAB 373 (2004).

The schedule award provision of FECA,⁹ and its implementing federal regulations,¹⁰ 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.¹¹ As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.¹²

The sixth edition requires identifying the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE) and Clinical Studies (GMCS).¹³ The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).

ANALYSIS -- ISSUE 1

OWCP paid appellant schedule awards for a 20 percent impairment of each lung. It subsequently determined that he had received an overpayment of compensation as the medical evidence did not establish that the permanent impairment of the lungs was due to his accepted employment injury. The Board must review the underlying decision to determine if the overpayment was properly established.¹⁴ While OWCP did not specifically indicate that it was rescinding its prior schedule award, as it had previously awarded appellant a schedule award for a 20 percent permanent impairment of each lung, it has the burden of proof to establish that he was not entitled to a schedule award.¹⁵

OWCP based its rescission of the schedule award on the May 25, 2011 second opinion report of Dr. Gelfand.

The Board finds Dr. Gelfand's opinion is sufficiently rationalized to establish that any permanent impairment of the lungs is not due to the accepted condition. He based his opinion on a complete and factual history of the appellant's employment dates, duties and exposures.

On May 25, 2011 he diagnosed mild chronic obstructive lung disease and pleural plaques caused by asbestos exposure. Dr. Gelfand found that appellant's reduced lung capacity as seen on spirometry and mild dyspnea on exertion were not related to asbestos-related pleural plaques

⁹ 5 U.S.C. § 8107.

¹⁰ 20 C.F.R. § 10.404.

¹¹ *Id.* at § 10.404(a).

¹² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5 (February 2013); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

¹³ A.M.A., *Guides* 494-531.

¹⁴ *See Russell E. Wageneck*, 46 ECAB 653 (1995); *see also J.F.*, Docket No. 08-2396 (issued March 19, 2006).

¹⁵ *See M.G.*, Docket No. 11-806 (issued January 25, 2012); *Vernon E. Gaskins*, 39 ECAB 746 (1988).

but instead due to chronic obstructive lung disease. Further, he indicated that appellant's mild dyspnea on exertion was related to chronic obstructive lung disease supported by the presence of obstructive defect with air trapping on pulmonary function testing and the presence of wheezing.

Dr. Gelfand related that pulmonary function tests showed findings of chronic obstructive lung disease. He explained that the moderately severe increase in residual volume characteristic of air trapping, is typical of chronic obstructive disease. As well, he indicated that the spirometry revealed a mild reduction of the forced vital capacity and FEV₁ and FEV₁ percent also characteristic of mild obstructive lung disease. He concluded that there was no evidence of parenchymal asbestosis separate from the pleural plaques.

The Board finds that the medical evidence of record is sufficient to meet OWCP's burden of proof. Dr. Gelfand's report was based on an accurate history of the case, on recent diagnostic testing and physical examination provided sufficient reasoning to establish its rationale for rescission.

The Board further finds that \$22,539.71 was the total amount of the schedule award payments and is the correct amount of overpayment.

LEGAL PRECEDENT -- ISSUE 2

The waiver or refusal to waive an overpayment of compensation by OWCP is a matter that rests within OWCP's discretion pursuant to statutory guidelines.¹⁶ These statutory guidelines are found in section 8129(b) of FECA and states: Adjustment or recovery of an overpayment 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 this subchapter or would be against equity and good conscience.¹⁷ When a claimant is found to be without fault in the matter of the overpayment, then, in accordance with section 8129(b), OWCP may only recover the overpayment if it determined that recovery of the overpayment would neither defeat the purpose of FECA nor be against equity and good conscience.

Section 10.438 of OWCP's regulations provide:

“(a) 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. This information will also be used to determine the repayment schedule, if necessary.

¹⁶ See *Robert Atchison*, 41 ECAB 83, 87 (1989).

¹⁷ 5 U.S.C. § 8129(b).

“(b) Failure to submit the requested information within 30 days of the request shall result in denial of waiver, and no further request for waiver shall be considered until the requested information is furnished.”¹⁸

ANALYSIS -- ISSUE 2

OWCP properly determined that appellant had not established entitlement to waiver of recovery of the \$22,531.71 overpayment of compensation under the relevant standards. It found that appellant was not at fault in the creation of the \$22,531.71 overpayment.¹⁹ However, citing 20 C.F.R. § 10.438 in her May 7, 2013 decision,²⁰ OWCP’s hearing representative denied his request for waiver of recovery of the overpayment by finding that he was not entitled to such waiver because he had not provided adequate documentation of his financial information.

The Board finds that appellant did not provide sufficient financial information within the appropriate time period to show that he was entitled to determine whether waiver of the \$22,531.71 overpayment was appropriate. As such, OWCP’s hearing representative properly exercised her discretion to deny waiver of recovery of the overpayment. Appellant submitted an April 17, 2013 OWCP-20 listing income of \$1,924.02 and expenses of \$1,401.00, however, failed to provide any financial documents supporting his stated monthly income and expenses

As such and pursuant to section 10.438 of its regulations, OWCP properly denied his request for waiver of recovery of the \$22,531.71 overpayment of compensation.

The Board further finds that it does not have jurisdiction to review OWCP’s determination that the overpayment of compensation would be recovered through payments of \$310.00 a month. It does not appear from the record that appellant is receiving continuing compensation benefits. The Board’s jurisdiction to review recovery of an overpayment is limited to the situation where recovery is made from continuing FECA benefits.²¹

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$22,531.71 for the period April 9, 2008 to July 20, 2009 because he incorrectly received compensation for a schedule award. The Board also finds that OWCP did not abuse its discretion in denying waiver of the overpayment.

¹⁸ 20 C.F.R. § 10.438.

¹⁹ If OWCP finds a claimant to be without fault in the matter of an overpayment, then, in accordance with section 8129(b) of FECA, OWCP may only recover the overpayment if it determined that recovery of the overpayment would neither defeat the purpose of FECA nor be against equity and good conscience. *See supra* note 16.

²⁰ *See supra* note 18.

²¹ *See Rose Carye*, 50 ECAB 482, (1999); *Lewis George*, 45 ECAB 144 (1993); *Levon H. Knight*, 40 ECAB 658 (1989); *Edward O. Hamilton*, 39 ECAB 1131 (1988).

ORDER

IT IS HEREBY ORDERED THAT the May 7, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 11, 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