



## **FACTUAL HISTORY**

On January 24, 2006 OWCP accepted that appellant, then a 47-year-old postal clerk, sustained acquired right trigger finger due to her performance of repetitive work duties over time.

Under a second case file, OWCP granted appellant a June 16, 2000 schedule award for a three percent permanent impairment of her right arm. The award ran for 9.36 weeks from April 2 to June 6, 2000.<sup>2</sup> It was based on an April 24, 2000 report of Dr. Ellen Pichey, a Board-certified occupational medicine physician serving as an OWCP medical adviser. Dr. Pichey had reviewed the examination findings obtained on March 2, 2000 by Dr. Yiyi Myint, an attending Board-certified physical medicine and rehabilitation physician.

Under a third case file, OWCP granted appellant a December 21, 2006 schedule award for the period May 8 to August 25, 2005. The award ran for 15.6 weeks from May 8 to August 25, 2005 (in the total amount of \$10,830.30) and appellant then had been compensated for eight percent right arm impairment.<sup>3</sup> It was based on a July 4, 2006 report of Dr. Pichey which incorporated the findings from a May 8, 2006 examination by Dr. Myint.<sup>4</sup> The date of maximum medical improvement identified by Dr. Myint was May 8, 2006, *i.e.*, the date of her examination. Dr. Pichey inadvertently listed the date of maximum improvement as May 8, 2005 and OWCP appears to have used this date to begin the running of the December 21, 2006 schedule award on May 6, 2005 (rather than May 8, 2006).

In a May 1, 2007 decision, OWCP granted appellant a schedule award for a five percent permanent impairment of her right arm in connection with the claim file for the accepted right trigger finger condition. The award ran for 15.6 weeks from May 8 to August 25, 2006 (in the total amount of \$11,076.62) and was also based on the July 4, 2006 report of Dr. Pichey which incorporated the findings from a May 8, 2006 examination by Dr. Myint. OWCP properly indicated that the date of maximum medical improvement was May 8, 2006 and the award began to run on this date.

In an October 3, 2013 decision, OWCP determined that appellant was not entitled to any additional schedule award compensation. It noted that the December 21, 2006 and May 1, 2007 schedule awards she received compensated her twice for the same five percent right arm impairment and that an overpayment existed with respect to the second, duplicative schedule award dated May 1, 2007.

In a November 6, 2013 letter, OWCP advised appellant of its preliminary determination that she received an \$11,076.62 overpayment of compensation because the December 21, 2006 and May 1, 2007 schedule awards she received compensated her twice for the same five percent

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<sup>2</sup> This case was accepted for right shoulder, upper arm sprain, and thoracic region sprains as well as right rotator cuff syndrome.

<sup>3</sup> This case was accepted for right wrist tenosynovitis.

<sup>4</sup> In an August 18, 2006 report, Dr. Pichey indicated that, considering the previous award of three percent, appellant's total right arm impairment was eight percent.

right arm impairment.<sup>5</sup> It also made a preliminary determination that she was not at fault in the creation of the overpayment. OWCP advised appellant that she could submit evidence challenging the fact, amount, or finding of fault and request waiver of the overpayment. It informed appellant that she could submit additional evidence in writing or at precoupment hearing, but that a precoupment hearing must be requested within 30 days of the date of the written notice of overpayment. OWCP requested that appellant complete and return an enclosed financial information questionnaire within 30 days even if she was not requesting waiver of the overpayment.

In a November 21, 2013 letter, appellant requested waiver of recovery of the claimed \$11,076.62 overpayment and requested a precoupment hearing with an OWCP hearing representative. She argued that the December 21, 2006 OWCP schedule award and the May 1, 2007 OWCP schedule award could not be duplicative in nature because each award covered a different period.

In a letter dated June 11, 2014, OWCP advised appellant of a scheduled telephonic precoupment hearing with an OWCP hearing representative at a specific time on July 16, 2014. It mailed the notice to appellant at her last known address. The evidence of record reveals that appellant did not request postponement, failed to appear for the scheduled hearing, and failed to provide any notification for such failure within 10 days of the scheduled date of the hearing.

In an August 5, 2014 decision, an OWCP hearing representative determined that appellant received an \$11,076.62 overpayment of compensation. OWCP found that appellant was not at fault in the creation of the overpayment, but that the overpayment was not subject to waiver because appellant failed to submit financial information and documentation supporting such waiver. It also determined that appellant had abandoned her request for a precoupment hearing regarding the overpayment.

### **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 his duty.<sup>6</sup> Section 8129(a) of FECA provides, in pertinent part:

“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.”<sup>7</sup>

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<sup>5</sup> OWCP indicated that the May 1, 2007 schedule award was slightly higher than the December 21, 2006 schedule award due to consumer price index increases. It noted that it was appropriate to declare an \$11,076.62 overpayment as this was the amount of the second, duplicate schedule award dated May 1, 2007. Appellant previously received a June 16, 2000 schedule award for a three percent permanent impairment of her right arm and she was entitled to receive schedule awards equaling an eight percent impairment of her right arm.

<sup>6</sup> 5 U.S.C. § 8102(a).

<sup>7</sup> *Id.* at § 8129(a).

Section 8116(a) of FECA provides that while an employee is receiving compensation or if he or she has been paid a lump sum in commutation of installment payments until the expiration of the period during which the installment payments would have continued, the employee may not receive salary, pay or remuneration of any type from the United States, except in limited specified instances.<sup>8</sup>

The schedule award provision of FECA<sup>9</sup> and its implementing regulations<sup>10</sup> 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. The American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6<sup>th</sup> ed. 2009) has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.<sup>11</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that OWCP properly determined that appellant received an \$11,076.62 overpayment of compensation. The overpayment occurred because the December 21, 2006 and May 1, 2007 schedule awards appellant received compensated her twice for the same five percent right arm impairment.<sup>12</sup> The second, duplicative schedule award dated May 1, 2007 granted her \$11,076.62 in compensation.<sup>13</sup> Before OWCP and on appeal, appellant alleged that the December 21, 2006 and May 1, 2007 schedule awards were not granted for the same five percent right arm impairment as the running dates of the two schedule awards were different. The Board notes however, that the December 21, 2006 and May 1, 2007 schedule awards were in fact granted for the same five percent right arm impairment as they were based on the same medical evidence, *i.e.*, a July 4, 2006 report of Dr. Pichey, a Board-certified occupational medicine physician serving as an OWCP medical adviser, and the findings from a May 8, 2006 examination by Dr. Myint, an attending Board-certified physical medicine and rehabilitation physician.<sup>14</sup> For these reasons, appellant received an \$11,076.62 overpayment of compensation.

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<sup>8</sup> *Id.* at § 8116(a).

<sup>9</sup> *Id.* at § 8107.

<sup>10</sup> 20 C.F.R. § 10.404 (1999).

<sup>11</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(a) (January 2010); and Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 (January 2010).

<sup>12</sup> *See* 20 C.F.R. § 10.404(d) (provides that the period of compensation payable for a schedule award shall be reduced by the period of compensation paid or payable under the schedule for an earlier injury if OWCP finds that compensation payable for the later impairment in whole or in part would duplicate the compensation payable for the preexisting impairment).

<sup>13</sup> The May 1, 2007 schedule award was slightly higher than the December 21, 2006 schedule award due to consumer price index increases. It was appropriate for OWCP to declare an \$11,076.62 overpayment as this was the amount of the second, duplicate schedule award dated May 1, 2007. Appellant previously received a June 16, 2000 schedule award for a three percent permanent impairment of her right arm and she was entitled to receive schedule awards equaling an eight percent impairment of her right arm.

<sup>14</sup> The running dates of the two schedule awards were different due to an inadvertent error in fixing the date of maximum medical improvement for the December 21, 2006 schedule award.

## **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.<sup>15</sup> These statutory guidelines are found in section 8129(b) of FECA which 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."<sup>16</sup> 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 the FECA or be against equity and good conscience. This information will also be used to determine the repayment schedule, if necessary.

"(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."<sup>17</sup>

## **ANALYSIS -- ISSUE 2**

OWCP properly determined that appellant did not establish entitlement to waiver of the overpayment under the relevant standards. Appellant failed to provide any financial information within the appropriate time period to show that she was entitled to waiver of the overpayment. She did not complete and submit the financial information questionnaire within 30 days of the November 6, 2013 preliminary overpayment notice as requested. Because appellant did not comply with section 10.438 of OWCP's regulations, she would not be entitled to waiver of recovery of the \$11,076.62 overpayment.

## **LEGAL PRECEDENT -- ISSUE 3**

With respect to abandonment of hearing requests, Chapter 2.1601.6(g) of OWCP's procedure manual provides in relevant part that failure of the claimant to appear at the scheduled hearing, failure to request a postponement and failure to request in writing within 10 days after the date set for the hearing that another hearing be scheduled shall constitute abandonment of the

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<sup>15</sup> See *Robert Atchison*, 41 ECAB 83, 87 (1989).

<sup>16</sup> 5 U.S.C. § 8129(b).

<sup>17</sup> 20 C.F.R. § 10.438.

request for a hearing. Under these circumstances, the Branch of Hearings and Review will issue a formal decision finding that the claimant has abandoned his or her request for a hearing and return the case to the district office. In cases involving prerecoumment hearings, the Branch of Hearings and Review will also issue a final decision on the overpayment, based on the available evidence, before returning the case to the district office.<sup>18</sup>

### **ANALYSIS -- ISSUE 3**

In a letter dated June 11, 2014, pursuant to appellant's request, OWCP advised appellant of a scheduled telephonic prerecoumment hearing with an OWCP hearing representative at a specific time on July 16, 2014. The evidence establishes that OWCP mailed appropriate notice to appellant at her last known address. The record also reveals that appellant did not request postponement, failed to appear for the scheduled hearing, and failed to provide any notification for such failure within 10 days of the scheduled date of the hearing. As this meets the conditions for abandonment of a hearing as specified by OWCP's regulations and procedure manual, the Board finds that OWCP properly found that she abandoned her request for a prerecoumment hearing before an OWCP hearing representative and properly issued a final decision on the overpayment of compensation. The Board finds that OWCP properly found that appellant abandoned her request for a prerecoumment hearing.

On appeal, appellant alleges that she never received the June 11, 2014 letter. The Board has found that a notice properly addressed and duly mailed to an individual in the ordinary course of business is presumed to have been received by that individual.<sup>19</sup> Thus, the Board finds that absent any evidence to the contrary appellant received proper notice of the scheduled telephonic hearing.

### **CONCLUSION**

The Board finds that OWCP properly determined that appellant received an \$11,076.62 overpayment of compensation and that OWCP did not abuse its discretion by refusing to waive recovery of the overpayment. The Board further finds that OWCP properly found that appellant abandoned her request for a prerecoumment hearing.

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<sup>18</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Review of the Written Record*, Chapter 2.1601.6(g) (October 2011); *see also* 20 C.F.R. § 10.622.

<sup>19</sup> *M.M.*, Docket No. 13-1932 (issued February 6, 2014); *J.R.*, Docket No. 13-313 (issued August 15, 2013); *Newton D. Lashmett*, 45 ECAB 181 (1993).

**ORDER**

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

Issued: January 22, 2015  
Washington, DC

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

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

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