

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

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**P.A., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Des Moines, IA, Employer**

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**Docket No. 17-0075**  
**Issued: April 10, 2017**

*Appearances:*

*Stephanie Reynolds*, for the appellant<sup>1</sup>  
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Judge  
ALEC J. KOROMILAS, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On October 17, 2016 appellant, through her representative, filed a timely appeal from a June 17, 2016 merit decision of the Office of Workers' Compensation Programs. Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (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 a \$2,138.26 overpayment of compensation for the period January 30 through February 18, 2015 because OWCP overpaid her compensation for a schedule award; and (2) whether she was at fault in the creation of the overpayment.

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<sup>1</sup> In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; see also 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On May 14, 2013 appellant, then a 56-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that on May 7, 2013 she fractured her left foot in the performance of duty. OWCP accepted the claim, assigned File No. xxxxxx301, for a left closed fibula fracture and a left closed fracture of the lateral malleolus of the ankle. It paid wage-loss compensation from June 22 until September 21, 2013, when she resumed modified employment.

OWCP had previously accepted distal tip ulceration and distal tip osteomyelitis of the right second toe due to a September 7, 2007 employment injury, assigned File No. xxxxxx788. Appellant underwent an amputation at the middle phalanx of the right second toe on January 24, 2008. In a decision dated July 21, 2009, OWCP had awarded 95 percent permanent impairment of the right second toe under File No. xxxxxx788.

OWCP had also previously accepted an ulceration of the left second toe, left adhesive capsulitis, and left rotator cuff strain due to an April 9, 2011 employment injury, assigned File No. xxxxxx303. On April 25, 2011 appellant underwent an amputation at the metatarsophalangeal (MP) joint of the left second toe. By decision dated January 13, 2014, OWCP awarded 100 percent permanent impairment of the left second toe and one percent permanent impairment of the left arm under File No. xxxxxx303.

OWCP combined the case records for these injuries under File No. xxxxxx303, the Master File No.

On April 19, 2014 appellant filed a claim for compensation (Form CA-7) requesting a schedule award under the current File No. xxxxxx301 for the left ankle.<sup>3</sup> OWCP, by letter dated May 5, 2014, requested that she submit an impairment evaluation from her attending physician addressing the extent of any permanent impairment in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).

Appellant subsequently sustained a crush injury to her left third toe as the result of a September 9, 2014 work injury under File No. xxxxxx563. She stopped work on September 9, 2014.

On September 15, 2014 OWCP referred appellant to Dr. Anandeep Kumar, a Board-certified physiatrist, for a second opinion impairment evaluation of the left ankle. In an undated report received December 1, 2014, Dr. Kumar reviewed her history of work injuries, including a closed fibular and distal fibular fracture on May 7, 2013. On examination he found an absent left second toe and noted that appellant was wearing a controlled ankle movement (CAM) walker boot. Dr. Kumar related that x-rays showed a well-healed distal fibular fracture and normal strength of the legs, including the left ankle and foot. Referencing the A.M.A., *Guides*, he identified the diagnosis as a class 1 nondisplaced fibular fracture using Table 16-2 on page 502.

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<sup>3</sup> On August 26, 2014 OWCP requested that an OWCP medical adviser review the record and provide an opinion on the extent of any left lower extremity impairment. On August 26, 2014 the medical adviser asserted that there was insufficient evidence to reach an impairment rating.

Dr. Kumar applied grade modifiers of 2 for functional history, 1 for physical examination, and 1 for clinical studies, to find six percent permanent impairment of the left leg.

Appellant ultimately underwent an amputation of her left third toe on October 8, 2014, authorized under File No. xxxxxx563. She returned to work with restrictions on November 14, 2014 and without restrictions on December 4, 2014.

On November 30, 2014 Dr. David D. Zimmerman, a Board-certified internist and an OWCP medical adviser, reviewed Dr. Kumar's undated report, noting that the examination occurred September 30, 2014. He disagreed with the physician's use of clinical studies as a grade modifier given that objective studies were used to render the diagnosis. Dr. Zimmerman identified the diagnosis as a class 1 nondisplaced fibular, or ankle fracture, which yielded a default value of five percent. He applied grade modifiers of 2 for functional history due to appellant's antalgic gait and use of the CAM walker boot and 1 for physical examination findings. Dr. Zimmerman found no grade modifier for clinical studies. He continued to find six percent impairment after application of the net adjustment formula.

By letter dated February 13, 2015, OWCP notified appellant that it appeared that she had not reached maximum medical improvement from her left leg condition as she was using a CAM walker boot and had not yet returned to work due to an injury at the time of the September 30, 2014 examination.

Under File No. xxxxxx563, OWCP referred appellant to Dr. Todd C. Troll, a Board-certified physiatrist, for a second opinion impairment evaluation of the left toe. In a report dated April 6, 2015, Dr. Troll diagnosed status post amputation of the third toe. Applying Table 16-16 on page 542 of the A.M.A., *Guides*, he found that no adjustment after applying grade modifiers and rated her permanent impairment of the left lower extremity due to her third toe amputation at the MP joint as two percent.

On April 24, 2015 Dr. Zimmerman found that appellant had six percent permanent impairment due to her fibular fracture and two percent permanent impairment due to her toe amputation. He determined, however, that appellant should receive 100 percent impairment of the left third toe rather than 2 percent for the left lower extremity as that yielded a greater award.<sup>4</sup>

On July 22, 2015 Dr. Zimmerman reviewed the evidence to determine the extent of any left lower extremity impairment. He related that, as he previously determined in November 30, 2014, appellant's use of the CAM walker boot was the reason for a grade one modifier, and did not prevent an impairment rating or alter the date she reached maximum medical improvement. Dr. Zimmerman reiterated his prior impairment rating of six percent of the left lower extremity due to the fractured fibula.

By a July 27, 2015 decision, OWCP granted appellant a schedule award for 100 percent permanent impairment of the left third toe under File No. xxxxxx563.

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<sup>4</sup> A loss of a toe other than the greater toe yields 16 weeks of compensation, while two percent permanent impairment of the left leg yields 5.76 weeks of compensation. 5 U.S.C. § 8107(c).

In a decision dated November 18, 2015, OWCP granted appellant six percent permanent impairment of the left leg due to the accepted ankle condition under File No. xxxxxx301. It calculated the period of the award as 20.16 weeks from September 30, 2014 to February 18, 2015 and the total amount owed as \$14,967.28. OWCP paid appellant \$14,967.28 in schedule award compensation.

On November 25, 2015 OWCP found, under File No. xxxxxx301, that it had calculated the amount owed to appellant for her schedule award based on seven percent permanent impairment rather than the proper amount of six percent permanent impairment. It indicated that it paid appellant \$106.06 per day for 141.12 days, or \$14,967.28, instead of \$106.06 per day for 120.96 days, or \$12,829.02, which yielded an overpayment of \$2,138.26.

By letter dated November 30, 2015, OWCP advised appellant of its preliminary determination that she received an overpayment of compensation in the amount of \$2,138.26 because it had incorrectly processed her schedule award payment as seven percent rather than six percent impairment. It further advised that she was without fault in the creation of the overpayment. OWCP requested that appellant complete the enclosed overpayment recovery questionnaire and submit supporting financial documents. Additionally, it notified her that, within 30 days of the date of the letter, she could request a telephone conference, a final decision based on the written evidence, or a prerecoupement hearing. No further requests were submitted.

In a decision dated June 17, 2016, OWCP found an overpayment in the amount of \$2,138.26 for the period January 30 through February 18, 2015 because it overpaid her schedule award compensation. It determined that she was at fault in creating the overpayment because she knew or accepted a payment that she knew or should have known was incorrect. OWCP noted that appellant had not responded to its preliminary determination of overpayment. It directed appellant to forward payment of the entire amount within 30 days as repayment or to contact it to make arrangements for repayment.

On appeal appellant, through her representative, advises that she had a stroke contemporaneous with the initial overpayment notice. She challenges OWCP's finding that she was at fault, noting that the initial notice indicated that she was not at fault. Appellant's representative questions how appellant could be at fault when it was a processing error. She asserts that appellant is unable to repay the overpayment.

#### **LEGAL PRECEDENT -- ISSUE 1**

The schedule award provision of FECA,<sup>5</sup> and its implementing federal regulation,<sup>6</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. 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

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<sup>5</sup> 5 U.S.C. § 8107.

<sup>6</sup> 20 C.F.R. § 10.404.

the A.M.A., *Guides* as the uniform standard applicable to all claimants.<sup>7</sup> As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.<sup>8</sup>

The sixth edition requires identifying the impairment Class of Diagnosis (CDX) condition, which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE), and Clinical Studies (GMCS).<sup>9</sup> The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).

If a claimant receives a schedule award and the medical evidence does not support the degree of permanent impairment awarded, an overpayment of compensation may be created.<sup>10</sup>

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

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$2,138.26 because OWCP paid her schedule award compensation to which she was not fully entitled.

OWCP accepted that appellant sustained a left closed fibula fracture and a left closed fracture of the lateral malleolus of the ankle due to a May 7, 2013 employment injury under File No. xxxxxx301.<sup>11</sup>

In an undated report based on a September 30, 2014 examination, Dr. Kumar reviewed appellant's history of a closed fibular and distal fibular fracture as a result of a May 7, 2013 work injury. On examination he noted that she had an amputation of the left second toe and ambulated using a CAM walker boot. Dr. Kumar found that diagnostic studies showed a healed fracture without complications. He measured full strength of the left foot and ankle. Dr. Kumar identified the diagnosis as a class 1 nondisplaced fibular fracture using Table 16-2 on page 502 of the A.M.A., *Guides*. He applied grade modifiers of 2 for functional history, 1 for physical

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<sup>7</sup> *Id.* at § 10.404(a).

<sup>8</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (February 2013); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

<sup>9</sup> A.M.A., *Guides* 494-531.

<sup>10</sup> *See T.W.*, Docket No. 15-0636 (issued September 26, 2016); *see also Richard Saldibar*, 51 ECAB 585 (2000) (the Board found that the overpayment issue was not in posture because OWCP had not properly resolved the schedule award issue).

<sup>11</sup> OWCP further accepted that appellant sustained a right second toe distal tip ulceration and right second toe osteomyelitis of the distal tip due to a September 7, 2007 employment injury, assigned File No. xxxxxx788. Appellant underwent an amputation of the right second toe on January 24, 2008. OWCP paid her a schedule award for 95 percent permanent impairment of the right second toe. Appellant had a prior history of an ulceration of the left second toe resulting in an amputation, left adhesive capsulitis, and left rotator cuff strain due to an April 9, 2011 work injury under File No. xxxxxx303. On January 13, 2014 OWCP granted her a schedule award for 100 percent permanent impairment of the left second toe and one percent permanent impairment of the left arm under File No. xxxxxx303.

Appellant subsequently sustained a crushing injury of the left third toe and a traumatic amputation of the left third toe as the result of a September 9, 2014 work injury under File No. xxxxxx563.

examination, and 1 for clinical studies, to find six percent permanent impairment of the left lower extremity.<sup>12</sup>

Dr. Zimmerman, an OWCP medical adviser, reviewed Dr. Kumar's report on November 30, 2014. He utilized the diagnosis of a class 1 nondisplaced fibular fracture which had a default value of five percent under Table 16-2 on page 502. Dr. Zimmerman applied grade modifiers of 2 for functional history and 1 for physical examination, noting that clinical studies were inapplicable as they were used to identify the diagnosis.<sup>13</sup> Applying the net adjustment formula yielded an adjustment of one or six percent permanent impairment of the left lower extremity.<sup>14</sup>

Dr. Troll, an OWCP medical adviser, evaluated the extent of appellant's left lower extremity impairment due to the amputation of her third toe under File No. xxxxxx363. He found that she had two percent left lower extremity permanent impairment due to the amputation of her third toe at the MP joint.

Dr. Zimmerman, on April 24, 2015, opined that appellant should receive a schedule award for 100 percent permanent impairment of the left third toe rather than combining it with the 6 percent permanent impairment due to her fibular fracture as it yielded a greater award. On July 22, 2015 the medical adviser opined that appellant's use of the CAM walker at the time of Dr. Kumar's examination did not preclude a finding that she was at MMI. Dr. Zimmerman again advised that she had six percent left lower extremity permanent impairment due to her fibula fracture. Appellant has not submitted any evidence showing greater left lower extremity permanent impairment.

OWCP, in a decision dated November 18, 2015, granted appellant a schedule award for six percent permanent impairment of the left leg. It calculated the period of the award as 20.16 weeks, from September 30, 2014 to February 18, 2015. Six percent of the total compensation provided under FECA for the loss of a leg, however, is 288 weeks multiplied by six percent, or 17.28 weeks of compensation.<sup>15</sup> As OWCP paid appellant compensation for 20.16 weeks, she received an overpayment of compensation.

OWCP calculated the overpayment by determining the amount that it paid appellant per day, \$106.06 and multiplying it by the 141.12 days to find \$14,967.28.<sup>16</sup> It should have paid her \$106.06 per day for 120.96 days, or \$12,829.02, which it subtracted from \$14,967.28 to find an overpayment of compensation in the amount of \$2,138.26. The Board finds that OWCP properly determined the amount of this overpayment.

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<sup>12</sup> Utilizing the net adjustment formula  $(GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX)$ , or  $(2-1) + (1-1) + (1-1) = 1$ , yielded an adjustment of one.

<sup>13</sup> A.M.A., *Guides* 500.

<sup>14</sup> Utilizing the net adjustment formula discussed above,  $(GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX)$ , or  $(2-1) + (1-1) = 1$ , yielded an adjustment of one.

<sup>15</sup> For a total, or 100 percent loss of use of a leg, an employee shall receive 288 weeks of compensation. 5 U.S.C. § 8107(c).

<sup>16</sup> 17.28 weeks equals 120.96 days, and 20.16 weeks equals 141.12 days.

## **LEGAL PRECEDENT -- ISSUE 2**

Section 10.431 of the implementing regulations provides 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.<sup>17</sup> The written notification must also include a preliminary finding regarding whether the individual was at fault in the creation of the overpayment.<sup>18</sup> Additionally, OWCP is obliged to advise the individual of her right to inspect and copy the government records relating to the overpayment.<sup>19</sup> Finally, the preliminary notice must inform the individual of 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.<sup>20</sup> The recipient of the alleged overpayment may present evidence in response to OWCP's preliminary notice either in writing or at a prerecoupment hearing.<sup>21</sup> The evidence must be presented or the hearing requested within 30 days of the date of the written notice of overpayment.<sup>22</sup> Failure to request the hearing within this 30-day time period shall constitute waiver of that right.<sup>23</sup>

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, OWCP is responsible for issuing a final decision.<sup>24</sup> These procedures note that, if the claimant is determined to be with fault, Form CA-2201 (preliminary finding notice) must be released within 30 days of the date the overpayment is identified. Form CA-2201 informs the claimant of the right to submit evidence and the right to a prerecoupment hearing on the issues of (a) fact and amount of overpayment; (b) fault and (c) waiver. Along with Form CA-2201, OWCP should provide a clearly written statement explaining how the overpayment was calculated.<sup>25</sup>

## **ANALYSIS -- ISSUE 2**

On November 30, 2015 OWCP notified appellant of its preliminary finding that she was without fault in creating the overpayment. In its June 17, 2016 decision, however, it found that she was at fault in creating the overpayment as she knew or should have known that she received an incorrect payment.

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<sup>17</sup> 20 C.F.R. § 10.431(a).

<sup>18</sup> *Id.* at § 10.431(b).

<sup>19</sup> *Id.* at § 10.431(c).

<sup>20</sup> *Id.* at § 10.431(d).

<sup>21</sup> *Id.* at § 10.432.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.4 (June 2009); *see also* B.T., Docket No. 14-1909 (issued May 19, 2015).

<sup>25</sup> *Id.* at Chapter 2.600.4(a)(1).

As discussed, OWCP's 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 the overpayment.<sup>26</sup> The written notification must also include a preliminary finding regarding whether the individual was at fault in the creation of the overpayment.<sup>27</sup> OWCP must inform the individual of 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.<sup>28</sup> Its procedures further provide that a preliminary finding of overpayment must be provided within 30 days and must clearly identify the reason that the overpayment occurred and the basis for any fault finding.<sup>29</sup>

OWCP issued a final decision which changed the preliminary finding that appellant was without fault to a finding of fault in creating the overpayment. According to its implementing regulations and its procedures, it should have reissued a preliminary determination if it was changing its determination of fault before finalizing a fault finding.<sup>30</sup> Consequently, the Board finds that OWCP failed to follow its regulations in changing the fault determination. The case is remanded for OWCP to issue a preliminary determination on the issue of fault and waiver.<sup>31</sup>

### **CONCLUSION**

The Board finds that appellant received a \$2,138.26 overpayment of compensation for the period January 30 through February 18, 2015 because appellant incorrectly granted a schedule award for seven percent permanent impairment rather than six percent. The Board further finds that the case is not in posture for decision on the issue of whether appellant was at fault in creating the overpayment as OWCP found that she was at fault in its overpayment decision without providing her with proper notice.

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<sup>26</sup> *Supra* note 16.

<sup>27</sup> *Supra* note 17.

<sup>28</sup> *Supra* note 19.

<sup>29</sup> Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.4(a)(1) (June 2009).

<sup>30</sup> The Board notes that OWCP provided no evidence that appellant knew or should have known that she had received an overpayment of compensation due to a keying error by OWCP.

<sup>31</sup> See *T.H.*, Docket No. 07-1415 (issued October 24, 2007).

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 17, 2016 merit decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: April 10, 2017  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board