

received an overpayment of compensation in the amount of \$4,244.78 for the period September 15, 2014 through January 24, 2015; and (3) whether OWCP properly denied waiver of recovery of the overpayment.

FACTUAL HISTORY

On November 5, 2012 appellant, then a 36-year-old correctional officer, filed a traumatic injury claim (Form CA-1) alleging that, on that same date, he sustained a left ring finger injury during a self-defense training course while in the performance of duty. By decision dated August 20, 2013, OWCP accepted the claim for left interphalangeal closed dislocation of finger, left closed fracture of phalanx, and left median nerve lesions.

Following his injury, appellant sought treatment with Dr. Stephen Umansky, a Board-certified orthopedic surgeon. OWCP approved left ring finger surgeries by Dr. Umansky in November 2012 and October 2013. On November 16, 2012 appellant underwent left ring finger proximal interphalangeal (PIP) joint procedure for fracture/dislocation. On October 3, 2013 he underwent PIP capsular contracture. Appellant stopped work and received wage-loss compensation following each surgery. He subsequently returned to work.

On July 14, 2014 appellant filed a claim for a schedule award (Form CA-7).

OWCP routed a statement of accepted facts (SOAF) and the case file to Dr. James Dyer, Board-certified in orthopedic surgery serving as an OWCP district medical adviser (DMA), for review and determination regarding whether appellant sustained permanent impairment of the left upper extremity and date of maximum medical improvement (MMI).

In a July 31, 2014 report, Dr. Dyer reported that appellant had reached MMI, but that he still had weakness and motion deficit in flexion of the 4th and 5th digits on the left which affected his dexterity. He reported that he needed range of motion (ROM) findings for the left 4th and 5th digits and median nerve impairment to calculate appellant's impairment rating. Dr. Dyer requested that the case be sent back to him upon receipt of the clinical data.

By letter dated August 4, 2014, OWCP requested that appellant submit an impairment evaluation from his attending physician in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).³

Per the recommendation of Dr. Umansky, appellant underwent a functional capacity evaluation (FCE) on September 15, 2014. The FCE was performed by a physical therapist who calculated seven percent permanent impairment of the left hand or six percent permanent impairment of the left upper extremity based on the sixth edition of the A.M.A., *Guides*.⁴

In a September 19, 2014 medical report, Dr. Umansky reported that he reviewed the September 15, 2014 FCE and believed the measurements obtained by the hand therapist were

³ A.M.A., *Guides* (6th ed. 2009).

⁴ *Id.*

likely accurate. He further noted that he had no experience with the A.M.A., *Guides* and was unable to assess the accuracy of the impairment rating.

On September 29, 2014 OWCP routed the September 15, 2014 FCE and Dr. Umansky's September 19, 2014 report to Dr. Dyer and requested that he provide an impairment rating in accordance with the A.M.A., *Guides*.

In an October 3, 2014 report, Dr. Dyer reported that the FCE incorrectly utilized the ROM deficit per the A.M.A., *Guides* and the case required a second opinion evaluation from an upper extremity surgeon who had intimate knowledge of the A.M.A., *Guides* as well as hand and median nerve injuries with motion deficits.

By letter dated November 20, 2014, OWCP requested that the DMA explain what objective evidence was missing from the FCE and why the findings could not be used to calculate impairment. It noted that, if the findings could be used, then the DMA should provide an impairment rating in accordance with the A.M.A., *Guides*.

In a November 25, 2014 report, Dr. Dyer responded to OWCP that a second opinion evaluation was not necessary and that the FCE could be used to calculate appellant's impairment rating. He determined that appellant sustained six percent permanent impairment of the left upper extremity in accordance with Table 15-12 of the A.M.A., *Guides* for digit impairment of the ring finger.⁵

By decision dated January 6, 2015, OWCP granted appellant a schedule award for six percent permanent impairment of his left upper extremity. The date of MMI was noted as September 15, 2014. The award covered a period of 18.72 weeks from September 15, 2014 through January 24, 2015. OWCP reported that the impairment rating was based on the findings of the September 15, 2014 FCE and the DMA's November 25, 2014 report.

On January 23, 2015 appellant requested a hearing before an OWCP hearing representative.

By decision dated July 28, 2015, OWCP's hearing representative set aside the January 6, 2015 schedule award decision and remanded the case for further medical development. She explained that OWCP failed to follow the DMA's initial instructions to seek a second opinion examination. The hearing representative noted that the six percent permanent impairment rating was not based on an examining physician's assessment, but rather testing performed by a physical therapist. She instructed OWCP to refer appellant for a second opinion evaluation to be forwarded to an OWCP DMA for consideration of an impairment rating.

On March 23, 2016 OWCP referred appellant, a SOAF, and the case file to Dr. Ellen Ballard, Board-certified in physical medicine and rehabilitation, for a second opinion evaluation and opinion on permanent impairment of the left upper extremity.

⁵ *Id.* at 421, Table 15-12.

In her March 23, 2016 report, Dr. Ballard discussed appellant's medical history and provided physical examination findings. She opined that appellant reached MMI on May 15, 2014. Utilizing Table 15-31, Finger Range of Motion, of the A.M.A., *Guides*, Dr. Ballard reported that appellant had grade 1 impairment of the distal interphalangeal (DIP) joint which resulted in 10 percent DIP flexion and 2 percent DIP extension, totaling 12 percent impairment.⁶ She reported grade 2 impairment for the PIP joint resulting in 42 percent PIP flexion and 14 percent PIP extension, totaling 56 percent impairment. Dr. Ballard reported that 12 percent DIP fourth digit impairment resulted in 1 percent permanent impairment of the hand or 1 percent permanent impairment of the left upper extremity.⁷ She further explained that 56 percent PIP fourth digit impairment resulted in 6 percent permanent impairment of the hand or 5 percent permanent impairment of the left upper extremity. Dr. Ballard did not provide a rating of impairment based upon the diagnoses accepted by OWCP under the diagnosis-based impairment (DBI) methodology.⁸

OWCP routed the case file and Dr. Ballard's report to Dr. Arthur S. Harris, a Board-certified orthopedic surgeon serving as an OWCP DMA, for review and determination regarding whether appellant sustained permanent impairment of the left upper extremity.

In an April 8, 2016 report, Dr. Harris disagreed with Dr. Ballard's impairment rating and determined that appellant sustained four percent permanent impairment of the left upper extremity. The DMA reported that appellant had 14 percent ring digit impairment for loss of PIP joint flexion and 6 percent ring digit impairment for loss of PIP joint extension, totaling 20 percent ring digit impairment for loss of PIP joint motion. He further determined that appellant had 25 percent ring digit impairment for loss of DIP joint flexion.⁹ Dr. Harris stated that utilizing the Combined Values Chart resulted in 40 percent impairment of the ring digit which was equivalent to 4 percent permanent impairment of the left upper extremity.

By decision dated May 5, 2016, OWCP explained that the weight of medical evidence established that appellant had four percent permanent impairment of the left upper extremity (arm). The date of MMI was found to be March 23, 2016. OWCP reported that Dr. Ballard's March 23, 2016 report indicated five percent permanent impairment of the left upper extremity. However, the schedule award determination was based on the DMA's April 8, 2016 report in which he found four percent permanent impairment of the left upper extremity. It found that the weight of the medical evidence rested with the DMA because he was considered to be the expert on the A.M.A., *Guides*. It further noted that although there was disagreement in percentages, both physicians determined a permanent impairment rating lower than previously determined.

By notice dated May 16, 2016, OWCP made a preliminary determination that an overpayment of compensation in the amount of \$4,244.78 had been created for the period September 15, 2014 through January 24, 2015 because appellant was overpaid for his schedule

⁶ *Id.* at 470, Table 15-31.

⁷ *Supra* note 5.

⁸ A.M.A., *Guides* 393, Table 15-2.

⁹ *Id.*

award. It explained that he was awarded \$12,915.25 for six percent permanent impairment of the left upper extremity when he was only entitled to \$8,670.48 for four percent permanent impairment for the period March 23 through June 18, 2016. OWCP found appellant without fault in the creation of the overpayment.

As OWCP determined that appellant was without fault in the creation of the overpayment, it requested that he submit financial information pursuant to the enclosed overpayment recovery questionnaire (OWCP-20) within 30 days if he was requesting waiver of recovery of the overpayment.

On May 30, 2016 appellant requested an oral hearing before an OWCP hearing representative contesting the May 5, 2016 schedule award decision.

On June 13, 2016 appellant requested a prerecoupment hearing before an OWCP hearing representative. He disagreed with the fact and amount of overpayment and requested a waiver of recovery. Appellant argued that the initial six percent permanent impairment of his left upper extremity should stand and that the DMA never evaluated him to provide an opinion on impairment.

A hearing was held on February 13, 2017 addressing both the schedule award determination and preliminary overpayment determination. Appellant argued that he was entitled to six percent permanent impairment of his left upper extremity based on his 2014 FCE. He argued that he was penalized for working to improve his condition from the time of his FCE to the date of Dr. Ballard's examination. Appellant further testified regarding his monthly expenses, explaining that he had a mortgage and line of credit and that repayment would cause him financial hardship. The record was held open for 30 days.

In support of his claim, appellant submitted a Form OWCP-20 overpayment recovery questionnaire and supporting financial documentation.

By decision dated May 1, 2017, OWCP's hearing representative affirmed the May 5, 2016 schedule award decision, finding that appellant was entitled to no more than the four percent permanent impairment of the left upper extremity previously awarded. She noted that the schedule award was based on the report of the DMA who provided four percent impairment rating and that appellant had failed to submit medical evidence establishing entitlement to six percent permanent impairment.

OWCP's hearing representative also finalized the preliminary overpayment determination, finding that appellant was overpaid in the amount of \$4,244.78 for the period September 15, 2014 through January 24, 2015 because he was overpaid for his schedule award. She explained that appellant was awarded \$12,915.25 for six percent permanent impairment of the left upper extremity when he was only entitled to \$8,670.48 for four percent permanent impairment for the period March 23 through June 18, 2016. The hearing representative also found appellant without fault in the creation of the overpayment. She determined that the overpayment was not subject to waiver, after evaluating his income and expenses, and that the overpayment could be recovered through a repayment schedule of \$150.00 per month.

LEGAL PRECEDENT -- ISSUE 1

Section 8149 of FECA delegates to the Secretary of Labor the authority to prescribe rules and regulations for the administration and enforcement of FECA. The Secretary of Labor has vested the authority to implement the FECA program with the Director of OWCP.¹⁰ Section 8107 of FECA sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions, and organs of the body.¹¹ FECA, however, does not specify the manner by which the percentage loss of a member, function, or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. Through its implementing regulations, OWCP adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.¹²

The sixth edition of the A.M.A., *Guides* was first printed in 2008. Within months of the initial printing, the A.M.A. issued a 52-page document entitled “Clarifications and Corrections, Sixth Edition, *Guides to the Evaluation of Permanent Impairment.*” The document included various changes to the original text, intended to serve as an *erratum*/supplement to the first printing of the A.M.A., *Guides*. In April 2009, these changes were formally incorporated into the second printing of the sixth edition.

As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).¹³ The Board has approved the use by OWCP of the A.M.A., *Guides* for the purpose of determining the percentage loss of use of a member of the body for schedule award purposes.¹⁴

ANALYSIS -- ISSUE 1

The Board finds this case is not in posture for decision.

The Board has found that OWCP has inconsistently applied Chapter 15 of the sixth edition of the A.M.A., *Guides* when granting schedule awards for upper extremity claims. No consistent interpretation had been followed regarding the proper use of the DBI or the ROM methodology when assessing the extent of permanent impairment for schedule award purposes.¹⁵ The purpose of the use of uniform standards is to ensure consistent results and to ensure equal justice under the

¹⁰ See 20 C.F.R. §§ 1.1-1.4.

¹¹ For a complete loss of use of an arm, an employee shall receive 312 weeks’ compensation. 5 U.S.C. § 8107(c)(1).

¹² 20 C.F.R. § 10.404. See also *Ronald R. Kraynak*, 53 ECAB 130 (2001).

¹³ See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (February 2013).

¹⁴ *Isidoro Rivera*, 12 ECAB 348 (1961).

¹⁵ *T.H.*, Docket No. 14-0943 (issued November 25, 2016).

law to all claimants.¹⁶ In *T.H.*, the Board concluded that OWCP physicians were at odds over the proper methodology for rating upper extremity impairment, having observed attending physicians, evaluating physicians, second opinion physicians, impartial medical examiners, and district medical advisers use both DBI and ROM methodologies interchangeably without any consistent basis. Furthermore, the Board has observed that physicians interchangeably cited to language in the first printing or the second printing when justifying use of either ROM or DBI methodology. Because OWCP's own physicians were inconsistent in the application of the A.M.A., *Guides*, the Board found that OWCP could no longer ensure consistent results and equal justice under the law for all claimants.¹⁷

In order to ensure consistent results and equal justice under the law for cases involving upper extremity impairment, the Board will set aside the May 1, 2017 decision.¹⁸ Utilizing a consistent method for calculating permanent impairment for upper extremities to be applied uniformly,¹⁹ and such other development as may be deemed necessary, OWCP shall issue a *de novo* decision on appellant's claim for an upper extremity schedule award.²⁰

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of FECA provides that when an overpayment has been made to an individual because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor.²¹ When OWCP makes a determination that an overpayment of compensation has occurred because the claimant received an erroneous schedule award, it must properly resolve the schedule award issue. Before the amount of the overpayment can be determined, the evidence must establish the degree of permanent impairment.²²

ANALYSIS -- ISSUES 2 & 3

The Board finds that this case is not in posture for decision regarding fact and amount of overpayment.²³

In its May 1, 2017 decision, OWCP finalized the \$4,244.78 preliminary determination finding that an overpayment of compensation occurred because appellant was incorrectly paid \$12,915.25 for six percent permanent impairment of the left upper extremity when he was only entitled to \$8,670.48 for four percent permanent impairment of the left upper extremity. When

¹⁶ *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

¹⁷ *Supra* note 14.

¹⁸ *See E.S.*, Docket No. 17-0869 (issued August 14, 2017).

¹⁹ *See* FECA Bulletin No. 17-06 (issued May 8, 2017).

²⁰ *R.S.*, Docket No. 17-1783 (issued January 12, 2018).

²¹ 5 U.S.C. § 8129(a).

²² *See L.S.*, Docket No. 08-1247 (issued December 12, 2008); *Richard Saldibar*, 51 ECAB 585 (2000).

²³ *See generally R.W.*, Docket No. 14-0195 (issued October 10, 2014).

OWCP makes a determination that an overpayment of compensation has occurred because the claimant received an erroneous schedule award, it must first properly calculate the schedule award.²⁴ The Board finds that the overpayment issue is not in posture for decision as OWCP has not properly resolved the underlying issue of appellant's entitlement to a schedule award.²⁵ The issue of recovery of the overpayment is therefore moot.

CONCLUSION

The Board finds that this case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the May 1, 2017 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: April 19, 2018
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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

²⁴ See *W.M.*, Docket No. 13-0291 (issued June 12, 2013); see Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.9(e) (February 2013).

²⁵ *M.F.*, Docket No. 16-1089 (issued December 14, 2016).