

(2) whether appellant received an overpayment of compensation in the amount \$11,142.23; and
(3) whether OWCP properly found him at fault and thus not entitled to waiver of recovery of the overpayment.

On appeal counsel asserts that appellant did not receive an October 30, 2006 letter with an OWCP Form CA-1044 attached in which OWCP explained the consequences of receipt of a third-party surplus. He maintains that appellant should not be held at fault and requests waiver of recovery of the overpayment.

FACTUAL HISTORY

On December 18, 2004 appellant, then a 55-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that he was injured that day when he was bit by a dog while delivering mail and fell backward. He stopped work that day. On February 16, 2005 the employing establishment noted that a third-party claim had been filed. OWCP accepted left lower leg dog bite and cervical, left shoulder, and lumbar strains. Appellant returned to modified duty on March 29, 2005.

On July 20, 2005 Dr. Michael J. Smith, an attending Board-certified orthopedic surgeon, performed an authorized left shoulder arthroscopic rotator cuff repair. Following surgery, appellant returned to modified duty on August 2, 2005. He received wage-loss compensation and medical benefits following his return to work. Dr. Smith provided his follow-up care. Based on Dr. Smith's February 22, 2006 report, appellant returned to full duty on February 22, 2006.

By letter dated September 28, 2006, the employing establishment forwarded to OWCP a check it had received in the amount of \$19,440.57, which represented a third-party recovery in this case. It noted that a surplus of \$11,142.23 existed and attached a Long Form Statement of Recovery (Form EN1108) documenting the third-party recovery.³ The Form EN1108 reported a gross recovery of \$101,000.00. After deducting loss of consortium (\$25,000.00), attorney's fees (\$25,333.08), court costs (\$288.24), and an additional 20 percent (\$10,075.74), the balance remaining was \$40,302.94. After deducting OWCP disbursements of \$29,160.71 and additional attorney's fees of \$9,720.14, a refund of \$19,440.57 was created, and this was forwarded to OWCP. A surplus of \$11,142.23 was created by deducting disbursements paid (\$29,160.71) from the remaining balance (\$40,302.94).

On October 10, 2006 appellant filed a claim for a schedule award (Form CA-7).

In correspondence dated October 30, 2006, OWCP informed appellant of the third-party surplus calculations. It indicated that any additional compensation due in his case would be credited against the remaining surplus upon submission of appropriate claim forms, and that additional medical expenses would be credited upon presentation of itemized receipted bills related to treatment for the accepted condition. An OWCP Form CA-1044 was attached. This clearly explained that funds in the remainder, which appellant would keep, were to be applied to

³ A copy of the check, issued by appellant's third-party attorney, is found in the record.

future payments of compensation or to medical expenses due to the same injury. The letter was mailed to appellant's address of record in Parrish, Florida.

In a November 8, 2006 report, Dr. Smith noted that appellant still had pain and loss of left shoulder motion. Left shoulder examination demonstrated no swelling, spasm, masses, or tenderness with normal stability and normal muscle strength. Sensation to light touch was normal. Left shoulder range of motion was diminished with internal rotation to 30 degrees, external rotation to 60 degrees, forward elevation to 150 degrees, backward elevation to 50 degrees, abduction to 170 degrees, and adduction to 70 degrees, which yielded six percent permanent impairment of the left arm. Dr. Smith advised that maximum medical improvement (MMI) was reached on February 22, 2006 and that appellant was entitled to an additional four percent permanent impairment due to left shoulder weakness, atrophy, pain, and loss of sensation.

Dr. H.P. Hogshead, a Board-certified orthopedic surgeon and OWCP medical adviser, reviewed Dr. Smith's report. He advised that Dr. Smith did not properly apply the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*)⁴ which indicated that weakness and pain could not be used in the presence of decreased range of motion. Dr. Hogshead found that, under Figure 16-40, Figure 16-43, and Figure 16-46, appellant had six percent permanent left upper extremity impairment due to loss of left shoulder motion, with February 22, 2006 the date of MMI.

OWCP forwarded a copy of OWCP's medical adviser's report to Dr. Smith and asked for his comments. Dr. Smith was instructed to include reference to the fifth edition of the A.M.A., *Guides* if he disagreed with the rating of Dr. Hogshead. He merely replied "don't agree."

By decision dated February 8, 2007, appellant was granted a schedule award for six percent permanent impairment of the left shoulder, for a total of 18.72 weeks, to run from February 23 through July 4, 2006. He received a lump-sum payment of \$12,418.09.

On June 11, 2010 appellant notified OWCP that he had moved from Parrish, Florida, to St. Petersburg, Florida.

On November 16, 2016 appellant called OWCP requesting that his claim be reopened to obtain medical treatment. OWCP indicated that, upon review of the record, it was noted that appellant had a third-party surplus of \$11,142.23, and there was no indication in the case file that this amount had been absorbed by either medical expense or compensation and that he had received a schedule award that was not applied to the third-party surplus.

In a letter dated November 17, 2016, OWCP again notified appellant that his claim could not be reopened for medical treatment because the case had a third-party surplus of \$11,142.33. It noted that on October 30, 2006 he had been informed that future compensation or medical expenses, due to the same injury, would be credited to the surplus, but that the record contained no documentation to show that he had paid for any medical expense casually related to the December 18, 2004 employment injury after October 30, 2006. OWCP further informed him

⁴ A.M.A., *Guides* (5th ed. 2001).

that the third-party surplus of \$11,142.23 had not been deducted from the February 8, 2007 schedule award. An overpayment worksheet noted that appellant's third-party surplus of \$11,142.23 had not been applied to his schedule award of \$12,418.09, which yielded an overpayment of compensation in the amount of \$11,142.23.

On December 13, 2016 OWCP issued a preliminary determination that appellant received an \$11,142.23 overpayment of compensation. It explained that the overpayment was created because appellant was paid a schedule award in the amount of \$12,418.09 when it should have been offset by a third-party surplus in the amount of \$11,142.23. OWCP found him at fault because he knowingly accepted compensation to which he knew or should have known he was not entitled to receive. Appellant was provided an overpayment action request and an overpayment recovery questionnaire (Form OWCP-20) and was asked to attach supporting documentation including copies of income tax returns, bank account statements, bills, cancelled checks, pay slips, and any other records which supported the income and expenses listed. He was informed of the actions he could take and was afforded 30 days to respond.

Appellant requested a telephone conference, noting that he disagreed that an overpayment occurred or that he was at fault. He maintained that he did not receive OWCP's October 30, 2006 letter. In an attached overpayment questionnaire, appellant noted family monthly income of \$10,568.81, monthly expenses of \$8,794.26, and assets totaling \$483,028.60 plus unimproved land valued at \$82,000.00.⁵ In an attached statement, he maintained that he was without fault, reiterating that he did not receive the October 2006 letter regarding the third-party surplus. Appellant noted that he had additional OWCP cases and kept excellent records. He claimed medical expenses for a new king bed mattress set, two pieces of exercise equipment, pillows, ice packs, a transcutaneous electrical nerve stimulator unit, massage therapy, chiropractic services, and medications, plus yard care and lawn pest control services for an approximate total of \$23,377.36. Appellant forwarded copies of invoices for chiropractor services in 2015, a list of massage treatment visits from 2006 to 2016, and copies of bank statements and loan information.⁶

A telephone conference was held on February 2, 2017. Appellant again maintained that he did not receive the October 30, 2006 letter and was therefore unaware of the third-party surplus. The claims examiner informed appellant that he should submit receipts of all bills regarding treatment for the December 18, 2004 injury, some of which would require a physician's explanation regarding how these were necessary for treatment of the employment injury. Appellant indicated that he had no receipts for the purchases claimed. The claims examiner explained that yard maintenance was not compensable. Appellant submitted nothing further.

⁵ Appellant noted that both he and his wife received periodic FECA compensation and Social Security Administration (SSA) compensation, and that he also received Veterans Affairs (VA) disability and United States Air Force retirement compensation. He also listed an additional OWCP debt of \$26,025.56, indicating that it was pending review.

⁶ On January 24, 2017 appellant authorized Capp P. Taylor, Esq., to represent him.

By decision dated February 6, 2017, OWCP finalized the preliminary determination that appellant was at fault in the creation of an overpayment of compensation in the amount of \$11,142.23. It found him at fault because he accepted a schedule award payment when a third-party surplus was outstanding. OWCP requested that appellant repay the overpayment at the rate of \$150.00 per month or contact it within 30 days regarding repayment.

LEGAL PRECEDENT -- ISSUE 1

It is the claimant's burden of proof to establish permanent impairment of a scheduled member or function as a result of any employment injury.⁷

The schedule award provisions of FECA⁸ and its implementing federal regulations⁹ 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.¹⁰ For decisions issued between February 1, 2001 and May 1, 2009, the fifth edition of the A.M.A., *Guides* was used to calculate schedule awards.¹¹

ANALYSIS -- ISSUE 1

The Board finds that appellant has not established greater than six percent permanent impairment of his left upper extremity for which he previously received a schedule award.

The medical evidence of record relevant to left upper extremity impairment includes Dr. Smith's November 8, 2006 report, in which he advised that appellant still had pain and loss of left shoulder motion. Left shoulder examination demonstrated no swelling, spasm, masses, or tenderness with normal stability and normal muscle strength. Sensation to light touch was normal. Dr. Smith advised that MMI had been reached on February 22, 2006. He described left shoulder range of motion measurements with internal rotation to 30 degrees, external rotation to 60 degrees, forward elevation to 150 degrees, backward elevation to 50 degrees, abduction to 170 degrees, and adduction to 70 degrees. Dr. Smith indicated that appellant's loss of shoulder motion yielded six percent permanent impairment of the left arm. He also indicated that appellant was entitled to an additional four percent impairment due to left shoulder weakness, atrophy, pain, or loss of sensation. Dr. Smith, however, did not reference the A.M.A., *Guides* in

⁷ See *Tammy L. Meehan*, 53 ECAB 229 (2001).

⁸ 5 U.S.C. § 8107.

⁹ 20 C.F.R. § 10.404.

¹⁰ *Id.* at § 10.404(a).

¹¹ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

his report. Moreover, his examination demonstrated normal muscle strength and sensation to light touch.

On November 22, 2006 Dr. Hogshead, OWCP's medical adviser, reviewed Dr. Smith's report and applied his range of motion findings to appropriate figures found in the fifth edition of the A.M.A., *Guides*, the edition in effect at the time of the February 8, 2007 schedule award.¹² He advised that Dr. Smith had not properly applied the fifth edition which indicated that weakness and pain could not be used in the presence of decreased range of motion.¹³ Dr. Hogshead found that, in accordance with Figure 16-40, Figure 16-43, and Figure 16-46,¹⁴ appellant had six percent left upper extremity impairment due to loss of left shoulder motion, with February 22, 2006 the date of MMI. Even though OWCP asked Dr. Smith to comment on the medical adviser's report, with reference to the A.M.A., *Guides* if he disagreed with Dr. Hogshead, Dr. Smith merely replied "don't agree."

The Board has long held that an estimate of permanent impairment is irrelevant and of diminished probative value where it is not based on the A.M.A., *Guides*.¹⁵ An attending physician's report, such as that of Dr. Smith, is of little probative value where the A.M.A., *Guides* are not properly followed.¹⁶ When the examining physician does not provide an estimate of impairment confirming to the A.M.A., *Guides*, OWCP may rely on the impairment rating provided by its medical adviser.¹⁷ Thus, there is no evidence of record to show that the February 8, 2007 schedule award was incorrect.

Appellant may request a schedule award or increased schedule award at any time based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

LEGAL PRECEDENT -- ISSUE 2

FECA provides that where an injury or death for which compensation is payable is caused under circumstances creating a legal liability in a person other than the United States to pay damages and a beneficiary entitled to compensation from the United States for that injury or death receives money or other property in satisfaction of that liability as a result of suit or settlement by him or in his behalf, the beneficiary, after deducting therefrom the costs of suit and a reasonable attorney's fee, shall refund to the United States the amount of compensation paid by

¹² *Id.*

¹³ *Supra* note 4 at 508.

¹⁴ *Id.* at 476, 477, 479.

¹⁵ *James R. Hill*, 57 ECAB 583 (2006).

¹⁶ *Richard A. Neidert*, 57 ECAB 474 (2006).

¹⁷ *J.Q.*, 59 ECAB 366 (2008).

the United States and credit any surplus on future payments of compensation payable to him for the same injury.¹⁸

The applicable regulations reiterate that after the refund owed to the United States is calculated, the FECA beneficiary retains any surplus remaining and this amount is credited, dollar for dollar, against future compensation for the same injury.¹⁹ OWCP will resume the payment of compensation only after the FECA beneficiary has been awarded compensation which exceeds the amount of the surplus.²⁰

OWCP procedures further explain that where a beneficiary has received a third-party recovery resulting in a surplus, compensation payments are calculated and continue to be charged against the surplus, as are medical expenses that have been paid by the claimant and submitted for reimbursement.²¹ Where a beneficiary, who has received a third-party recovery, has made the required refund, but subsequent events result in payment of compensation benefits, including medical benefits, for a period of time during which a third-party surplus was in the process of being absorbed from continuing compensation entitlement, this results in an overpayment of compensation.²² Such an overpayment of compensation should be adjudicated and processed by OWCP according to the usual overpayment procedures.²³

ANALYSIS -- ISSUE 2

The record reflects that appellant received a third-party recovery of \$101,000.00. After appropriate deductions for the costs of the suit and attorney fees, a surplus against future compensation of \$11,142.23 was determined. As noted, future compensation payments are charged against the surplus until it has been exhausted.²⁴

On February 8, 2007 appellant was granted a schedule award for six percent permanent impairment of the left shoulder, to run from February 23 through July 4, 2006. He received a lump-sum payment of \$12,418.09. At the time, appellant had a third-party surplus in the amount of \$11,142.23 for the December 18, 2004 employment injury. As this was not deducted from the schedule award as required under section 8132 of FECA, the Board finds that an overpayment of compensation in the amount of \$11,142.23 was created.²⁵

¹⁸ 5 U.S.C. § 8132; *see P.C.*, 59 ECAB 587 (2008).

¹⁹ 20 C.F.R. § 10.712.

²⁰ *Id.*

²¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *FECA Third-Party Subrogation Guidelines*, Chapter 2.11.10b(3) (March 2006).

²² *Id.* at Chapter 2.1100.10b(2).

²³ *Id.*

²⁴ 20 C.F.R. § 10.712.

²⁵ *See B.G.*, Docket No. 14-850 (issued September 17, 2014).

LEGAL PRECEDENT -- ISSUE 3

Section 8129 of FECA provides that an overpayment in compensation shall be recovered by OWCP unless “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.”²⁶

Section 10.433(a) of OWCP regulations provides that OWCP:

“[M]ay consider waiving an overpayment 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 receives 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 in 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; or
- (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).”²⁷

To determine if an individual was at fault with respect to the creation of an overpayment, OWCP examines the circumstances surrounding the overpayment. The 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.²⁸

Even if an overpayment resulted from negligence by OWCP, this does not excuse the employee from accepting payment, which the employee knew or should have been expected to know she was not entitled.²⁹

ANALYSIS -- ISSUE 3

OWCP found appellant at fault because he accepted a schedule award payment he knew or should have known he was not entitled to receive. In its October 30, 2006 letter, it informed him of his rights and responsibilities regarding the third-party recovery surplus in the instant

²⁶ 5 U.S.C. § 8129.

²⁷ 20 C.F.R. § 10.433(a); *see Sinclair L. Taylor*, 52 ECAB 227 (2001); *see also* 20 C.F.R. § 10.430.

²⁸ *Id.* at 10.433(b); *Neill D. Dewald*, 57 ECAB 451 (2006).

²⁹ *Diana L. Booth*, 52 ECAB 370 (2001).

claim. Although appellant maintains that he did not receive this letter, it is presumed, in the absence of evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by that individual. This presumption arises when it appears from the record that the notice was properly addressed and duly mailed.³⁰ The mailbox rule provides that proper and timely mailing of a document raises a rebuttable presumption of receipt by the addressee. The Board has applied the mailbox rule to claimants under FECA and to OWCP when it is established that the mailing was in the ordinary course of the sender's business practices. It serves as a tool for determining in the face of inconclusive evidence, whether or not receipt has actually been accomplished. The mailbox rule is to facilitate the fact finder in determining whether receipt of a document has occurred. However, as a rebuttable presumption, receipt will not be assumed when there is evidence of nondelivery.³¹ In the present case, OWCP's October 30, 2006 letter was mailed to appellant's address of record in Parrish, Florida, and there is no evidence of record that the mailing was undeliverable. As such, the Board finds that the October 30, 2006 correspondence was received by appellant.³²

Although OWCP may have erred in not applying the third-party surplus when issuing the schedule award payments, this does not relieve appellant from his obligation to repay the overpayment. Fault can be established if the circumstances show that the claimant accepted a payment he or she should have known was incorrect.³³ As discussed above, in the October 30, 2006 letter, OWCP provided a specific explanation regarding the nature of the surplus and appellant's entitlement to compensation. Based on this evidence, appellant should have known that the February 8, 2007 schedule award payment was incorrect.³⁴ Thus, OWCP properly found appellant at fault in creating the overpayment.³⁵

CONCLUSION

The Board finds that appellant has not established more than six percent permanent impairment of his left upper extremity for which he previously received a schedule award. The Board also finds that OWCP properly determined that appellant received of an overpayment of compensation in the amount of \$11,142.23, for which he was at fault, and thus not entitled to waiver of recovery of the overpayment.

³⁰ *Cresenciano Martinez*, 51 ECAB 322 (2000).

³¹ *M.U.*, Docket No. 09-526 (issued September 14, 2009).

³² *C.B.*, Docket No. 16-1562 (issued December 22, 2016).

³³ *See B.G.*, *supra* note 25.

³⁴ *Id.*

³⁵ The Board does not have jurisdiction over recovery of the overpayment as OWCP has not issued a final decision directing recovery from continuing compensation benefits. *See* 20 C.F.R. § 501.2(c); *see D.R.*, 59 ECAB 148 (2007); *V.D.*, Docket No. 13-1101 (issued September 8, 2014).

ORDER

IT IS HEREBY ORDERED THAT the February 6, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 2, 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