

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

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| N.A., Appellant |) | |
| |) | |
| and |) | Docket No. 17-0794 |
| |) | Issued: July 3, 2018 |
| U.S. POSTAL SERVICE, POST OFFICE, |) | |
| Syracuse, NY, Employer |) | |
| |) | |

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On February 28, 2017 appellant filed a timely appeal from a February 2, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$10,565.06, for which he was without fault; and (2) whether OWCP properly denied waiver of recovery of the overpayment.

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that appellant submitted additional evidence on appeal after the February 2, 2017 decision was issued. The Board's jurisdiction is limited to the evidence that was before OWCP at the time of its final decision. Therefore, the Board is precluded from reviewing this additional evidence for the first time on appeal. 20 C.F.R. § 501.2(c)(1).

FACTUAL HISTORY

On May 8, 2009 appellant, a 35-year-old mail processing clerk, filed an occupational disease claim (Form CA-2) alleging that he sustained carpal tunnel syndrome due to factors of his federal employment, including repetitive motions.³ OWCP initially denied the claim by decision dated August 6, 2009, but on December 15, 2009 it vacated the August 6, 2009 decision and accepted his claim for bilateral carpal tunnel syndrome. It authorized a right carpal tunnel release surgery on May 4, 2010. OWCP later accepted a recurrence of total disability on June 22, 2010 due to a left carpal tunnel release which appellant underwent on June 21, 2010. Appellant returned to full duty work on August 3, 2010.

On November 6, 2011 appellant filed a claim for a schedule award (Form CA-7).

In an August 24, 2011 report, Dr. Walter Short, a Board-certified orthopedic hand surgeon, opined that appellant had two percent permanent impairment of the right upper extremity and two percent permanent impairment of the left upper extremity due to his accepted bilateral carpal tunnel syndrome.

On April 24, 2012 an OWCP district medical adviser (DMA) concurred with Dr. Short and determined that appellant had two percent permanent impairment of the right upper extremity and two percent permanent impairment of the left upper extremity.

By decision dated May 8, 2012, OWCP issued a schedule award for two percent permanent impairment of the right upper extremity and two percent permanent impairment of the left upper extremity. It noted that appellant had another case pending under File No. xxxxxx054. The period of the award ran for 12.48 weeks from August 23 to November 19, 2011.

In letters dated January 17, and April 16, 2013, June 5, 2014, and January 19, 2016, the employing establishment advised OWCP that appellant had previously received schedule awards for the right upper extremity.

In a March 16, 2016 preliminary determination, OWCP found that appellant received an overpayment of compensation in the amount of \$10,565.06 due to schedule award payments that were made in error. It explained that on June 4, 2008, under File No. xxxxxx272, he was awarded a schedule award for five percent permanent impairment of the right upper extremity under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*⁴ (A.M.A., *Guides*). Accordingly appellant was paid an award in the amount of

³ The claim was adjudicated under File No. xxxxxx802. The record indicates that appellant previously filed a traumatic injury claim, assigned File No. xxxxxx272, in which OWCP accepted an August 5, 2006 right wrist sprain. OWCP issued a schedule award under that claim for five percent permanent impairment of the right upper extremity by a June 4, 2008 decision. Appellant also filed an occupational disease claim, assigned File No. xxxxxx054, which OWCP accepted for right carpal tunnel syndrome which he first became aware of on March 21, 2005. OWCP issued a schedule award in a January 4, 2013 decision under that claim for two percent permanent impairment of the right upper extremity. File Nos. xxxxxx802, xxxxxx272, and xxxxxx054 have been administratively combined, with File No. xxxxxx802 serving as the master file.

⁴ A.M.A., *Guides* (5th ed. 2001).

\$11,490.58 for the period February 15 to June 3, 2008. Subsequently, on May 8, 2012, under File No. xxxxxx802, OWCP issued appellant a schedule award for an additional two percent permanent impairment of the right upper extremity under the sixth edition of the A.M.A., *Guides*.⁵ Accordingly, appellant was paid an award in the amount of \$4,892.90 for the period August 24 to November 19, 2011. In addition, on January 4, 2013, under File No. xxxxxx054, OWCP issued appellant a schedule award for another two percent permanent impairment of the right upper extremity under the sixth edition of the A.M.A., *Guides*. Accordingly, appellant was paid an award in the amount of \$5,672.16 for the period July 19 to August 31, 2012. OWCP found that he was not due any increases in permanent impairment according to the sixth edition of the A.M.A., *Guides* and, thus, received an overpayment of compensation because payments for scheduled loss of use were not additive, but cumulative for all cases combined. According to OWCP calculations, appellant was not entitled to receive the schedule awards under File Nos. xxxxxx802 and xxxxxx054, resulting in an overpayment of compensation in the amount of \$10,565.06.⁶ OWCP further found that he was without fault in the creation of the overpayment of compensation. It asked appellant to submit an attached overpayment recovery questionnaire, which would allow it to consider waiving the recovery of the overpayment and determine, if necessary, a reasonable method for collection. OWCP notified him that failure to submit the requested financial information within 30 days would result in a denial of waiver of recovery of the overpayment.

On March 28, 2016 appellant requested a prerecoupment hearing by a representative of OWCP's Branch of Hearings and Review.

On April 5, 2016 appellant submitted an overpayment recovery questionnaire (Form OWCP-20) indicating that he had a spouse and four children, a monthly income of \$4,800.00, and monthly expenses of \$4,300.00 which included a \$1,500.00 mortgage, food, clothing, utilities, and other expenses. He further indicated that he had \$20.00 cash on hand, \$6,500.00 in a checking account, \$12,000.00 in savings, \$0.00 in stocks and bonds, and \$0.00 in other personal property and funds.

A telephonic prerecoupment hearing was held before an OWCP hearing representative on November 18, 2016.

Subsequently, appellant submitted a revised overpayment recovery questionnaire (Form OWCP-20) indicating that he had a spouse and four children, a monthly income of \$4,800.00, and monthly expenses of \$6,580.00, which included a \$1,500.00 mortgage, food, clothing, utilities, and other expenses. He further indicated that he had \$20.00 cash on hand, \$6,000.00 in a checking account, \$1,000.00 in savings, \$0.00 in stocks and bonds, and \$0.00 in other personal property and funds. Appellant also submitted copies of credit card bills which demonstrated credit card minimum payments of \$175.00 per month, cable expenses of \$200.00 per month, cellular phone expenses of \$80.00 per month, automotive expenses of \$342.00 per month, food expenses of \$620.00 per month, medical expenses of \$175.00 per month, insurance payments of \$283.00 per

⁵ A.M.A., *Guides* (6th ed. 2009).

⁶ \$4,892.90 + \$5,672.16 = \$10,565.06.

month, clothing expenses of \$150.00 per month, and a combination of food, clothing, and medical expenses of \$200.00 per month, equaling a total of \$3,725.00 in monthly expenses.

By decision dated February 2, 2017, OWCP finalized its preliminary determination that an overpayment of compensation in the amount of \$10,565.06 was created. It found appellant without fault in the creation of the overpayment, but denied waiver of recovery of the overpayment because appellant failed to establish that he needed substantially all of his monthly income to meet current ordinary and necessary living expenses as his monthly income of \$4,800.00 and monthly expenses of \$3,725.00 provided him with a discretionary income of \$1,075.00 per month.⁷

LEGAL PRECEDENT -- ISSUE 1

5 U.S.C. § 8107 provides that, if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.⁸ Neither FECA nor the regulations specify the manner in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal justice for all claimants OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.⁹

According to 5 U.S.C. § 8108, the period of compensation payable for a schedule award is reduced by the period of compensation paid for an earlier injury if it is for the same member or function and the current impairment in whole or in part duplicates the preexisting impairment. 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.¹⁰

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly found a \$10,565.06 overpayment of compensation in this case.

OWCP found that an overpayment occurred due to a duplicate payment for permanent impairment. By decision dated May 8, 2012, OWCP issued a schedule award for two percent permanent impairment of the right upper extremity and two percent permanent impairment of the left upper extremity based on an August 24, 2011 report from appellant's attending physician, Dr. Short, and an April 24, 2012 report from its DMA. The period of the award ran for 12.48 weeks from August 23 to November 19, 2011.

⁷ \$4,800.00 - \$3,725.00 = \$1,075.00.

⁸ 5 U.S.C. § 8107. This section enumerates specific members or functions of the body for which a schedule award is payable and the maximum number of weeks of compensation to be paid; additional members of the body are found at 20 C.F.R. § 10.404(a).

⁹ A. *George Lampo*, 45 ECAB 441 (1994).

¹⁰ *Id.*

The record establishes, however, that appellant had previously received a schedule award under OWCP File No. xxxxxx272 on June 4, 2008 for five percent permanent impairment of the right upper extremity in the amount of \$11,490.58 for the period February 15 to June 3, 2008. Subsequently, appellant received a schedule award under that claim in the amount of \$4,892.90 for the period August 24 to November 19, 2011. In addition, OWCP awarded him a another two percent permanent impairment of the right upper extremity on January 4, 2013 under OWCP File No. xxxxxx054 in the amount of \$5,672.16 for the period July 19 to August 31, 2012. It found that appellant was not due any increases in the schedule loss of use according to the sixth edition of the A.M.A., *Guides* and, thus, received an overpayment of compensation because payments for scheduled loss of use were not additive, but cumulative for all cases combined.

According to OWCP calculations, appellant was not entitled to receive schedule awards in the amount of \$4,892.90 on May 8, 2012 (under File No. xxxxxx802) and \$5,672.16 on January 4, 2013 (under File No. xxxxxx054), which resulted in an overpayment of compensation in the amount of \$10,565.06. No contrary evidence or argument was provided. The Board accordingly finds the evidence of record establishes a \$10,565.06 overpayment of compensation in this case.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of FECA provides that adjustment or recovery 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 FECA or would be against equity and good conscience.¹¹ Since OWCP found appellant to be without fault in the creation of the overpayment, OWCP may only recover the overpayment if recovery would neither defeat the purpose of FECA nor be against equity and good conscience. The guidelines for determining whether recovery of an overpayment would defeat the purpose of FECA or would be against equity and good conscience are set forth in sections 10.434 to 10.437 of Title 20 of the Code of Federal Regulations.

According to 20 C.F.R. § 10.436, recovery of an overpayment would defeat the purpose of FECA if recovery would cause hardship because the beneficiary needs substantially all of his or her current income (including compensation benefits) to meet current ordinary and necessary living expenses, and, also, if the beneficiary's assets do not exceed a specified amount as determined by OWCP from data provided by the Bureau of Labor Statistics.¹² For waiver under the defeat the purpose of FECA standard, appellant must show that he needs substantially all of

¹¹ 5 U.S.C. § 8129(b).

¹² OWCP procedures provide that the assets must not exceed a resource base of \$4,800.00 for an individual or \$8,000.00 for an individual with a spouse or dependent plus \$960.00 for each additional dependent. An individual is deemed to need substantially all of his or her current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. In other words, the amount of monthly funds available for debt repayment is the difference between current income and adjusted living expenses (*i.e.*, ordinary and necessary living expenses plus \$50.00). Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a) (June 2009).

his current income to meet current ordinary and necessary living expenses, and that his assets do not exceed the resource base.¹³

20 C.F.R. § 10.437 provides that recovery of an overpayment would be against equity and good conscience if: (a) the overpaid individual would experience severe financial hardship in attempting to repay the debt; (b) the individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his position for the worse.

With respect to the submission of financial evidence, OWCP regulations at 20 C.F.R. § 10.438 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.

(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.

ANALYSIS -- ISSUE 2

OWCP found that appellant was not at fault in creating the overpayment. Appellant may seek waiver of the overpayment, but he must submit the relevant financial evidence in order for OWCP to properly make a determination on the issue. He submitted two overpayment recovery questionnaires (Form OWCP-20) indicating that he had a spouse and four children, a monthly income of \$4,800.00, and a mortgage of \$1,500.00 per month. Appellant initially indicated that his monthly expenses totaled \$4,300.00, but later revised it to \$6,580.00. He did not provide evidence of monthly expenses totaling \$6,580.00. However, appellant consistently reported a monthly mortgage of \$1,500.00 and submitted copies of credit card bills which demonstrated credit card minimum payments of \$175.00 per month, cable expenses of \$200.00 per month, cellular phone expenses of \$80.00 per month, automotive expenses of \$342.00 per month, food expenses of \$620.00 per month, medical expenses of \$175.00 per month, insurance payments of \$283.00 per month, clothing expenses of \$150.00 per month, and a combination of food, clothing, and medical expenses of \$200.00 per month, equaling a total of \$3,725.00 in monthly expenses.

Regarding the \$10,565.06 overpayment of compensation, OWCP found that appellant was not with fault in the creation of the overpayment, but denied waiver of recovery finding that he had not provided sufficient evidence to establish that he needed substantially all of his monthly income to meet current ordinary and necessary living expenses. Although OWCP found that appellant was without fault in the matter of the overpayment, repayment is still required unless adjustment or recovery of the overpayment would defeat the purpose of FECA or be against equity

¹³ See *Robert E. Wenholz*, 38 ECAB 311 (1986).

and good conscience.¹⁴ The record reflects that appellant has a monthly income of \$4,800.00 and monthly expenses of \$3,725.00. In its February 2, 2017 decision, OWCP denied waiver of recovery of the overpayment because appellant's monthly expenses did not exceed his income and his discretionary income of \$1,075.00 per month was above the guideline of \$50.00 provided by FECA procedures when considering a waiver of recovery.¹⁵ OWCP properly concluded that recovery of the overpayment would not defeat the purpose of FECA, be against equity and good conscience, or cause hardship to appellant. Thus, the Board finds that OWCP properly denied waiver of recovery of the overpayment in the amount of \$10,565.06.

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$10,565.06, for which he was without fault. The Board further finds that OWCP properly denied waiver of recovery of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the February 2, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 3, 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

¹⁴ See *Wade Baker*, 54 ECAB 198 (2002).

¹⁵ See *supra* note 12.