

§ 8128(a); (3) whether appellant received an overpayment of compensation in the amount of \$33,929.78 for the period April 22, 2010 through September 28, 2011; and (4) whether OWCP properly denied waiver of recovery of the overpayment.

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances outlined in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On June 21, 2002 appellant, then a 55-year-old machinist, filed an occupational disease claim (Form CA-2) alleging injury due to factors of his federal employment. OWCP accepted the claim for coal workers' pneumoconiosis.⁴ In April 2003, it granted appellant a schedule award for 26 percent permanent impairment of both lungs. The award covered an 81.12-week period from March 4, 2003 through September 21, 2004.⁵ In May 2010, OWCP granted appellant a schedule award for 24 percent whole person impairment due to his accepted lung condition. This award was calculated under the sixth edition of the A.M.A., *Guides*.⁶ It covered a 74.88-week period from April 22, 2010 through September 28, 2011. In a November 28, 2012 decision, OWCP denied appellant an additional schedule award, noting that the medical evidence of record demonstrated that he had only 23 percent permanent impairment of both lungs under the sixth edition of the A.M.A. *Guides*. It also noted that the May 28, 2010 schedule award for 24 percent whole person impairment appeared to have been issued in error.

OWCP subsequently denied reconsideration of the merits of the claim. Appellant appealed to the Board and, by decision dated July 22, 2013, the Board affirmed OWCP's November 28, 2012 merit decision and its January 11, 2013 nonmerit decision.⁷

In January 2014, appellant filed a claim for wage-loss compensation (Form CA-7) for the period April 11, 2011 through December 31, 2013, which OWCP denied by decision dated March 11, 2014. He requested reconsideration on October 21, 2014, and OWCP denied his request by an October 28, 2014 nonmerit decision. Appellant again appealed to the Board. By decision dated June 4, 2015, the Board affirmed OWCP's October 28, 2014 nonmerit decision.⁸

³ Docket No. 15-0641 (issued June 4, 2015); Docket No. 13-0657 (issued July 22, 2013).

⁴ Appellant retired effective October 2, 1989. He first learned of his lung disease and its relationship to factors of his federal employment on April 26, 2002.

⁵ The April 18, 2003 schedule award was based on the then-applicable fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (5th ed. 2001).

⁶ A.M.A., *Guides* (6th ed. 2009).

⁷ Docket No. 13-0657 (issued July 22, 2013).

⁸ The appeal was filed on January 29, 2015, therefore, the Board no longer had jurisdiction over OWCP's March 11, 2014 merit decision regarding entitlement to wage-loss compensation. Docket No. 15-0641 (issued June 4, 2015).

In September 2014, appellant filed a claim for an increased schedule award (Form CA-7). He did not submit any additional medical evidence to support increased impairment. On October 15, 2014 OWCP advised appellant of the need for additional medical evidence regarding permanent impairment under the sixth edition of the A.M.A., *Guides*. Based on the recommendation of its district medical adviser, it subsequently referred him for a second opinion evaluation.

In a March 16, 2015 report, Dr. Sanjay Chavda, a Board-certified pulmonary disease specialist and OWCP referral physician, reviewed a statement of accepted facts (SOAF) and the medical record, and provided examination findings. He ordered diagnostic tests, which were performed on May 19, 2015. Citing Table 5-4 on page 88 of the A.M.A., *Guides*, Dr. Chavda assigned a class 2 impairment, which represented between 11 to 23 percent whole person impairment. He further noted that appellant's impairment was due to reduced FEV₁ at 62 percent of predicted.

On October 5, 2015 an OWCP medical adviser reviewed Dr. Chavda's reports and diagnostic testing and opined that appellant had reached maximum medical improvement on March 16, 2015 and that he had 10 percent whole person permanent impairment. The diagnostic testing revealed that appellant had FVC 98 percent; FEV₁ 70 percent; FEV₁/FVC 49 percent; and DLCO 114 percent. Under Table 5-4, page 88 of the sixth edition of the A.M.A., *Guides*, the medical adviser opined that appellant had class 1 pulmonary dysfunction with default value 6 percent. He found that the nonkey factor of functional history was class 2 or +1 and nonkey factor of physical examination was class 2 or +1. Applying the modifications for functional history and physical examination, the medical adviser opined that appellant had class 1 E or 10 percent permanent impairment of the whole person. In an October 9, 2015 supplemental report, he indicated that the study was significantly improved from the testing used in earlier awards. The medical adviser also indicated that the 10 percent permanent impairment was not in addition to the previous schedule awards.

By decision dated October 13, 2015, OWCP denied appellant's claim for an additional schedule award as the evidence of record was insufficient to establish greater permanent impairment than that which was previously awarded.

On October 19, 2015 appellant requested a review of the written record before a representative of OWCP's Branch of Hearings and Review. In an October 18, 2015 statement, he noted that he was on oxygen therapy. Appellant alleged that Dr. Chavda was not very nice and stated that he suffered a panic attack and had to leave. He also alleged that Dr. Chavda insulted him in front of his wife. Appellant felt that he was more impaired than what Dr. Chavda reported and asked that the file be reviewed. A September 2, 2015 oximetry test was submitted, as well as equipment requests.

By decision dated February 26, 2016, an OWCP hearing representative affirmed OWCP's October 13, 2015 decision as the medical evidence of record did not support that appellant was entitled to an additional schedule award. He noted that the weight of the medical opinion evidence rested with OWCP's medical adviser and appellant's current impairment under the sixth edition of the A.M.A., *Guides* equaled 10 percent permanent impairment of the whole person. The hearing representative also noted that several examiners, as well as the Board, have

identified an incorrect payment of the second schedule award of 24 percent impairment and no action had been taken to declare that compensation as overpaid.

On March 10, 2016 appellant requested reconsideration. In a March 8, 2016 statement, he indicated that he disagreed with OWCP's decision. Appellant indicated that Black Lung does not resolve and he was now on oxygen and new inhalers. A February 18, 2016 After Visit Summary from One Health Pulmonology provided a general summary of his office visit.

By decision dated March 22, 2016, OWCP denied appellant's request for reconsideration of the merits of his claim.

In a manual adjustment form 1 and fiscal worksheet, OWCP noted each schedule award check appellant received for the period April 22, 2010 through September 28, 2011 and listed the amount received. It calculated that he received a total amount of \$33,929.78 for the applicable period.

On March 30, 2016 OWCP informed appellant of its preliminary determination that he had received an overpayment of compensation in the amount of \$33,929.78 for the period April 22, 2010 through September 28, 2011 as he was incorrectly paid schedule award benefits to which he was not entitled. It noted that it had erroneously issued the second schedule award covering the period April 22, 2010 to September 28, 2011, as a finding should have been made that he had no more than the percentage of impairment initially awarded. OWCP listed each check date and the amount that appellant received for the period April 22, 2010 through September 28, 2011 and noted the sum of the schedule award payments was \$33,929.78. It found that he was without fault in the creation of the overpayment. OWCP requested that appellant complete an overpayment recovery questionnaire and submit supporting financial documentation to assist OWCP in its evaluation of his eligibility for waiver of recovery of the overpayment. Additionally, it notified him that, within 30 days of the date of the letter, he could request a telephone conference, a final decision based on the written evidence, or a prerecoupment hearing.

On April 11, 2016 appellant requested waiver of recovery. He indicated that his lungs were bad and had worsened. Appellant also stated that he did not believe that he owed any money and that he could not afford to pay money back to OWCP. He partially completed the overpayment recovery questionnaire, noting that his total monthly income was comprised of \$1,243.00 from social security benefits. Appellant indicated that he supported his wife and listed monthly household expenses as \$200.00 rent, \$500.00 food, \$300.00 utilities, and \$133.00 miscellaneous expenses, for total expenses of \$1,133.00. No supporting financial documentation was submitted.

By decision dated July 1, 2016, OWCP finalized its preliminary determination that appellant had received an overpayment of compensation in the amount of \$33,929.78 for the period April 22, 2010 through September 28, 2011 as he was incorrectly paid schedule award compensation benefits. It found that he was not at fault in the creation of the overpayment, but denied waiver of recovery of the overpayment.

LEGAL PRECEDENT -- ISSUE 1

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.⁹ It, 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. The implementing regulations have adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.¹⁰ Effective May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).¹¹

No schedule award is payable for a member, function, or organ of the body that is not specified in FECA or in the implementing regulations.¹² The list of schedule members includes the eye, arm, hand, fingers, leg, foot, and toes.¹³ Additionally, FECA specifically provides for compensation for loss of hearing and loss of vision.¹⁴ By authority granted under FECA, the Secretary of Labor expanded the list of schedule members to include the breast, kidney, larynx, lung, penis, testicle, tongue, ovary, uterus/cervix and vulva/vagina, and skin.¹⁵ Neither FECA nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back or the body as a whole.¹⁶ Compensation for total loss of use of a single lung is 156 weeks.¹⁷

Although FECA does not specifically provide for compensation for whole person impairment, the measurement of lung function warrants special consideration. Table 5-4, Pulmonary Dysfunction, A.M.A., *Guides* 88, provides whole person impairment ratings based on a designated class (0-4) of impairment. Depending on the assigned class, the range of whole person impairment due to pulmonary dysfunction is 0 to 65 percent. The procedure manual provides that lung impairment should be evaluated in accordance with the A.M.A., *Guides* insofar as possible. It further provides that schedule awards are based on the loss of use of both lungs, and the percentage for the particular class of whole person respiratory impairment will be

⁹ 5 U.S.C. § 8107(c).

¹⁰ 20 C.F.R. § 10.404.

¹¹ See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); *it.* Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (February 2013).

¹² *W.C.*, 59 ECAB 372, 374-75 (2008); *Anna V. Burke*, 57 ECAB 521, 523-24 (2006).

¹³ 5 U.S.C. § 8107(c).

¹⁴ *Id.* at § 8107(c)(13) and (14).

¹⁵ *Id.* at § 8107(c)(22); 20 C.F.R. § 10.404(b).

¹⁶ *Id.* at § 8107(c); *Id.* at § 10.404(a); see *Jay K. Tomokiyo*, 51 ECAB 361, 367 (2000).

¹⁷ *Id.* at § 10.404(b).

multiplied by 312 weeks (twice the award for loss of function of one lung) to obtain the number of weeks payable.¹⁸

ANALYSIS -- ISSUE 1

OWCP accepted appellant's occupational disease claim for the condition of coal workers' pneumoconiosis. On April 18, 2003 appellant received a schedule award for 26 percent impairment of each lung (81.12 weeks). On May 2, 2010 OWCP awarded him 24 percent whole person impairment (74.88 weeks). By decision dated July 22, 2013, the Board found that appellant had not established that he had more than 26 percent permanent impairment of his lungs. Appellant filed a claim for an increased schedule award, which OWCP denied on October 13, 2015. An OWCP hearing representative affirmed the denial of appellant's increased schedule award claim on February 26, 2016. The Board finds that the medical evidence of record does not support permanent impairment greater than 26 percent bilateral lung impairment.

OWCP referred appellant to Dr. Chavda for a second opinion examination. In a March 16, 2015 report, Dr. Chavda reviewed a SOAF and the medical record, and provided examination findings. Diagnostic testing was conducted on May 19, 2015. Dr. Chavda cited to Table 5-4 on page 88 of the A.M.A., *Guides* and opined that appellant had class 2 impairment, which ranged from 11 to 23 percent whole person impairment secondary to reduced lung function. However, his report is of diminished probative value as he did not provide a detailed description of the impairment or describe the basis for an impairment rating under the A.M.A., *Guides*.¹⁹

When an examining physician does not apply the A.M.A., *Guides* to determine an impairment rating, OWCP may rely on the opinion of its medical adviser to apply the A.M.A., *Guides* to the physical findings reported by the attending physician.²⁰ In October 6 and 9, 2015 reports, an OWCP medical adviser applied the A.M.A., *Guides* to the diagnostic testing Dr. Chavda provided. He referenced Table 5-4 of the A.M.A., *Guides* and found that appellant had 10 percent permanent impairment for both lungs, which was significantly improved from the testing used in the earlier awards. The medical adviser found that the results of the pulmonary function tests placed appellant in class 1 impairment with a ratable impairment from 2 to 10 percent and a default value of 6 percent. He also noted that appellant's functional history placed him in class 2 and his physical examination findings placed him in class 2. Table 5-4 of A.M.A., *Guides* indicates that, in finding class 1 impairment, the FVC value should be between 70 percent and 79 percent of the predicted value or the FEV₁ between 65 percent and 79 percent of the predicted value. Appellant's values for these tests as recorded by Dr. Chavda were 98 percent and 70 percent of the predicted value respectively. The Board finds that OWCP's medical adviser properly applied the A.M.A., *Guides* in calculating 10 percent permanent

¹⁸ *Supra* note 11 at Chapter 2.808.5(c)(1); *supra* note 11 at Chapter 3.700.4d(1)(c).

¹⁹ *Id.*

²⁰ *See J.G.*, Docket No. 09-1714 (issued April 7, 2010).

bilateral lung impairment.²¹ No other relevant evidence supporting greater impairment than that previously awarded was submitted.

Thus, OWCP's medical adviser's finding of 10 percent permanent impairment of both lungs constitutes the weight of the medical evidence.²² Appellant has not met his burden of proof to establish greater permanent impairment than the 26 percent previously awarded.

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

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.²³ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.²⁴ One such limitation is that the request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.²⁵ A timely application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.²⁶ When a timely application for reconsideration does not meet at least one of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.²⁷

ANALYSIS -- ISSUE 2

Appellant disagreed with the denial of his claim for an increased schedule award and requested reconsideration on March 8, 2016, which OWCP received on March 10, 2016.

²¹ See A.M.A., *Guides* 87.

²² See also *H.B.*, Docket No. 09-2240 (issued June 18, 2010); *E.V.*, Docket No. 06-1989 (issued May 21, 2007); *Bobby L. Jackson*, 40 ECAB 593, 601 (1989).

²³ This section provides in pertinent part: “[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.” 5 U.S.C. § 8128(a).

²⁴ 20 C.F.R. § 10.607.

²⁵ *Id.* at § 10.607(a). For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of OWCP's decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the Integrated Federal Employees' Compensation System (iFECS). *Id.* at Chapter 2.1602.4b.

²⁶ *Id.* at § 10.606(b)(3).

²⁷ *Id.* at § 10.608(a), (b).

Appellant did not argue that OWCP erroneously applied or interpreted a specific point of law, nor did he advance a relevant legal argument not previously considered by OWCP. Rather, he argued that his accepted condition had worsened and that he was now on oxygen and new inhalers. Appellant's statement, however, does not provide any new medical evidence to support increased impairment²⁸ and it is immaterial to the issue of whether he sustained permanent impairment greater than that previously awarded.²⁹ He also did not submit any new medical evidence to support that he sustained permanent impairment greater than that previously awarded. While appellant submitted a February 18, 2016 After Visit Summary from One Health Pulmonology, this evidence failed to provide any specific details in support of an increase in impairment previously awarded.

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP, or submit relevant and pertinent new evidence not previously considered by OWCP. OWCP, therefore, properly denied his request for reconsideration.

LEGAL PRECEDENT -- ISSUE 3

When determining entitlement to a schedule award, preexisting impairment to the schedule member should be included.³⁰ Impairment ratings for schedule awards include those conditions accepted by OWCP as employment related, and any preexisting permanent impairment of the same member or function.³¹ If the work-related injury has affected any residual usefulness in whole or in part, a schedule award may be appropriate.³² There are no provisions for apportionment under FECA.³³ When the prior impairment is due to a previous work-related injury and a schedule award has been granted for such prior impairment, the percentage already paid is subtracted from the total percentage of impairment.³⁴

If a claimant who has received a schedule award calculated under a previous edition of the A.M.A., *Guides* is entitled to additional benefits, the increased award will be calculated according to the sixth edition.³⁵ Should the subsequent calculation result in a percentage of

²⁸ Appellant's own factual interpretation of the medical evidence does not constitute relevant medical evidence, as lay persons are not competent to render medical opinion. *See B.R.*, Docket No. 17-1661 (issued January 4, 2018); *James A. Long*, 40 ECAB 538 (1989).

²⁹ The submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case. *See G.W.*, Docket No. 16-0517 (issued April 27, 2016); *Edward Matthew Diekemper*, 31 ECAB 224-25 (1979).

³⁰ *Carol A. Smart*, 57 ECAB 340, 343 (2006); *Michael C. Milner*, 53 ECAB 446, 450 (2002).

³¹ *Supra* note 11 at Chapter 2.808.5d.

³² *Id.*

³³ *Id.*

³⁴ *Id.* at Chapter 2.808.7a(1); 20 C.F.R. § 10.404(c).

³⁵ *Supra* note 11 at Chapter 2.808.9d.

impairment lower than the original award, as sometimes occurs, a finding should be made that the claimant has no more than the percentage of impairment originally awarded, that the evidence does not establish an increased impairment, and that OWCP has no basis for declaring an overpayment.³⁶ However, where both the prior and subsequent awards were calculated under sixth edition of the A.M.A., *Guides*, a subsequent determination that there is a lesser degree of impairment than previously awarded may support a finding of overpayment.³⁷

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly determined that appellant had received an overpayment of compensation in the amount of \$33,929.78, which represented the schedule award paid for the period April 22, 2010 to September 28, 2011, for which he was not entitled. The record supports that on May 28, 2010, he received a schedule award of 24 percent for both lungs in the amount \$33,929.78 for the period April 22, 2010 to September 28, 2011. In analyzing appellant's claims for increased schedule awards, OWCP found that he had no more than the 26 percent previously awarded. The record also supports that the Board, in its July 22, 2013 decision and in the current decision, found that the medical evidence of record did not support that appellant was entitled to a schedule award greater than the 26 percent of both lungs previously awarded. As appellant's requests for an increased schedule award did not result in an impairment greater than the 26 percent of both lungs previously awarded, he was not entitled to the second schedule award of 24 percent for both lungs, issued on May 28, 2010, for the period from April 22, 2010 through September 28, 2011.

OWCP properly found the fact and amount of overpayment as the overpayment was the entire amount of schedule award that appellant received but was not entitled to. Appellant has not challenged the amount and period of the overpayment. OWCP thus properly found that an overpayment of compensation in the amount of \$33,929.78 had been created.³⁸

LEGAL PRECEDENT -- ISSUE 4

OWCP may consider waving an overpayment only if the individual to whom it was made was not at fault in either accepting or creating the overpayment.³⁹ An individual who is without fault in creating or accepting an overpayment is nonetheless subject to recovery of the overpayment unless adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.⁴⁰ Recovery of an overpayment will defeat the purpose of FECA if such recovery would cause hardship to a current or former beneficiary because the beneficiary from whom OWCP seeks recovery needs substantially all of his current income, including compensation benefits, to meet current ordinary and necessary living expenses, and the

³⁶ *Id.*

³⁷ *Id.* at Chapter 2.808.9e.

³⁸ *See A.W.*, Docket No. 15-0190 (issued August 10, 2016).

³⁹ 20 C.F.R. § 10.433(a).

⁴⁰ 5 U.S.C. § 8129(b); 20 C.F.R. §§ 10.433, 10.434, 10.436, 10.437.

beneficiary's assets do not exceed a specified amount as determined by OWCP.⁴¹ Additionally, recovery of an overpayment is considered to be against equity and good conscience when an individual who received an overpayment would experience severe financial hardship in attempting to repay the debt or when an individual, in reliance on such payment or on notice that such payments would be made, relinquished a valuable right or changed his position for the worse.⁴²

An individual is deemed to need substantially all of his current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.⁴³

The individual who received the overpayment is responsible for providing information about income, expenses, and assets as specified by OWCP.⁴⁴ This information is necessary for determining whether waiver of recovery of the overpayment is warranted.⁴⁵ The information is also used to determine an appropriate repayment schedule, if necessary.⁴⁶ Failure to submit the requested information within 30 days of the request shall result in denial of waiver.⁴⁷

ANALYSIS -- ISSUE 4

OWCP determined that appellant was without fault in the creation of the overpayment of \$33,929.78 for the period of April 22, 2010 through September 28, 2011 as he did not know, nor should he have known, that he was not entitled to the payments received. As it found him without fault in the creation of the overpayment of compensation, waiver must be considered and repayment is still required unless adjustment or recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.⁴⁸

OWCP requested in its preliminary determination of overpayment dated March 30, 2016 that appellant provide a completed overpayment recovery questionnaire and supporting financial documentation. Appellant partially completed the overpayment recovery questionnaire, but failed to provide any financial documentation or financial information on his spouse for OWCP to determine whether waiver was appropriate.

⁴¹ 20 C.F.R. § 10.436(a), (b). For an individual with no eligible dependents the asset base is \$4,800.00. The base increases to \$8,000.00 for an individual with a spouse or one dependent, plus \$960.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6a(1)(b) (June 2009).

⁴² *Id.* at § 10.437(a), (b).

⁴³ *Supra* note 41 at Chapter 6.200.6a (1)(b).

⁴⁴ 20 C.F.R. § 10.438(a).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* § 10.438(b).

⁴⁸ 20 C.F.R. §§ 10.436, 10.437.

The Board finds that OWCP properly exercised its discretion in finding that recovery of the overpayment would not be against equity and good conscience. OWCP reviewed the claimed income, expenses, and assets listed on his April 11, 2016 Form OWCP-20 and found that appellant met the first prong of the two-prong test of whether recovery of the overpayment would defeat the purpose of FECA, *i.e.*, whether his monthly income exceeded his monthly ordinary and necessary living expenses by more than \$50.00. While appellant acknowledged that he was married, he claimed \$1,243.00 in total monthly income and \$1,133.00 in total monthly expenses. This amounts to \$110.00 of income over his monthly ordinary and necessary living expenses, which is more than the \$50.00 statutory amount.⁴⁹ Thus, it was unnecessary for OWCP to consider the second prong of the test, *i.e.*, whether appellant's assets exceed the statutory resource base.⁵⁰

The Board has held that OWCP must rely on a claimant's current financial situation at the time of the waiver determination.⁵¹ Past circumstances or assumed future conditions are not a proper basis on which to decide a claimant's eligibility for waiver.⁵² Further, there is no evidence of record in this case, nor did appellant allege, that he relinquished a valuable right or changed his position for the worse in reliance on the excess compensation he received for the period April 22, 2010 to September 28, 2011. Therefore, OWCP acted properly in denying appellant's request for waiver, as he did not meet the qualifications for waiver of the recovery of the overpayment.⁵³ Pursuant to its regulations, it did not abuse its discretion in issuing its July 1, 2016 final decision denying waiver of recovery of the overpayment of compensation in the amount of \$33,929.78.

CONCLUSION

The Board finds that appellant has not established greater than the 26 percent impairment of the lungs previously awarded. The Board further finds that OWCP properly denied his request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a); that he received an overpayment of compensation in the amount of \$33,929.78 for the period April 22, 2010 through September 28, 2011; and that OWCP properly denied waiver of recovery of the overpayment.

⁴⁹ See *C.H.*, Docket No. 15-0799 (issued June 19, 2015).

⁵⁰ See *A.W.*, Docket No. 15-0190 (issued August 10, 2016).

⁵¹ *L.S.*, 59 ECAB 350 (2008).

⁵² 20 C.F.R. § 10.433.

⁵³ See *E.M.*, Docket No. 07-0785 (issued August 17, 2007); *Id.* at § 10.436.

ORDER

IT IS HEREBY ORDERED THAT the July 1, March 22, and February 26, 2016 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: March 15, 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