

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

_____)	
L.D., Appellant)	
)	
and)	Docket No. 19-0671
)	Issued: August 28, 2020
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Cleveland, OH, Employer)	
_____)	

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

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On February 5, 2019 appellant filed a timely appeal from a December 19, 2018 merit decision and a January 15, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).¹ Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.³

¹ Appellant timely requested oral argument pursuant to section 501.5(b) of the Board's *Rules of Procedure*. 20 C.F.R. § 501.5(b). By order dated July 16, 2020, the Board exercised its discretion and denied the request, finding that the arguments on appeal could adequately be addressed in a decision based on the case record. *Order Denying Request for Oral Argument*, Docket No. 19-0671 (issued July 16, 2020).

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that following the January 15, 2019 nonmerit decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUES

The issues are: (1) whether OWCP has met its burden of proof to establish that appellant received an overpayment of compensation in the amount of \$20,933.64, for which she was not at fault, because she received schedule award compensation for her right upper extremity to which she was not entitled; (2) whether OWCP properly denied appellant's request for waiver of recovery of the overpayment; (3) whether OWCP properly required recovery of the overpayment by deducting \$782.00 from appellant's continuing compensation payments every 28 days; and (4) whether OWCP properly denied appellant's request for a hearing pursuant to 5 U.S.C. § 8124(b).

FACTUAL HISTORY

This case has previously been before the Board.⁴ The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On January 19, 2012 appellant, then a 48-year-old mail processing clerk, filed a traumatic injury claim (Form CA-1) alleging that on January 18, 2012 her right shoulder "popped" while in the performance of duty. OWCP accepted her traumatic injury claim for right shoulder sprain and right shoulder impingement syndrome. It authorized payment of intermittent wage-loss compensation as of March 6, 2012. Appellant worked limited duty until October 2013, when she stopped work due to a left shoulder condition. She ultimately retired on disability, effective August 8, 2014.

By decision dated May 23, 2014, OWCP granted appellant a schedule award for five percent permanent impairment of the right upper extremity. The period of the award ran for 15.6 weeks of compensation from November 18, 2013 through March 7, 2014.

On June 2, 2014 appellant requested a hearing before an OWCP hearing representative. By decision dated March 19, 2015, an OWCP hearing representative affirmed the May 23, 2014 schedule award decision. On May 26, 2015 appellant appealed the March 19, 2015 decision to the Board.

On April 28, 2016 OWCP expanded acceptance of the claim to include the additional condition of algoneurodystrophy, right shoulder. On May 31, 2017 it indicated that the accepted conditions of the claim also included unspecified rotator cuff tear or rupture of left shoulder (not specified as traumatic), incomplete rotator cuff tear or rupture of left shoulder (not specified as traumatic), impingement syndrome of left shoulder, right shoulder and upper arm sprain, other affections of right shoulder region, not elsewhere classified, and old disruption of posterior cruciate ligament.

⁴ Docket No. 15-1311 (issued July 21, 2017).

By decision dated July 21, 2017, the Board set aside the hearing representative's March 19, 2015 schedule award decision concerning the right upper extremity.⁵ The Board remanded the case for OWCP to utilize a consistent method for calculating upper extremity impairment ratings.

Following further development, in a September 4, 2017 report, Dr. Herbert White, Jr., Board-certified in physical medicine and rehabilitation serving as a DMA, reviewed the medical evidence of record, including a November 18, 2013 permanent impairment evaluation from Dr. Jeff C. Kirschman, a Board-certified family practitioner and Board-certified occupational medicine specialist.⁶ He opined that appellant reached maximum medical improvement (MMI) on November 18, 2013, the date of Dr. Kirschman's impairment examination and report. Utilizing the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),⁷ the DMA opined that appellant had five percent right upper extremity impairment for right partial thickness rotator cuff tear under the diagnosed-based impairment (DBI) methodology. He further found that under the range of motion (ROM) impairment methodology appellant had 16 percent right upper extremity impairment. Thus, the DMA opined that appellant had 16 percent permanent impairment of the right upper extremity as the ROM impairment methodology yielded the greatest impairment. As appellant was previously awarded 5 percent permanent impairment of her right upper extremity, the DMA indicated that she was entitled to an additional impairment award of 11 percent, for a total of 16 percent right upper extremity permanent impairment.

By decision dated September 18, 2017, OWCP granted appellant an additional schedule award for 11 percent permanent impairment of the right upper extremity, for a total of 16 percent permanent impairment of the right upper extremity. The period of the award ran for 34.32 weeks of compensation from May 2 through December 28, 2014 for a total of \$25,585.56.

In a May 8, 2018 report, Dr. Robert R. Reppy, an osteopath and family medicine specialist, indicated that appellant reached MMI for her bilateral upper extremities on May 4, 2018. For the right upper extremity, he found that appellant had one percent permanent impairment for grade C, class 1 nonspecific shoulder pain under Table 15-5, page 401 under the DBI methodology.⁸

On June 8, 2018 appellant filed a claim for an additional schedule award (Form CA-7).

On July 10, 2018 OWCP forwarded appellant's case record to a DMA to determine the extent of appellant's permanent impairment.

In a July 14, 2018 report, Dr. White, again serving as a DMA, reviewed the medical evidence of record and determined that appellant had reached MMI on May 8, 2018. He utilized

⁵ Docket No. 15-1311 (issued July 21, 2017).

⁶ In a November 18, 2013 report, Dr. Kirschman opined that appellant had 15 percent permanent impairment of the right upper extremity under the sixth edition of the A.M.A., *Guides*.

⁷ A.M.A., *Guides* (6th ed. 2009).

⁸ Dr. Reppy also found that the ROM methodology yielded 13 percent permanent impairment of the left upper extremity.

Dr. Reppy's May 8, 2018 evaluation findings and set forth impairment ratings for the both upper extremities. For the right upper extremity, under the DBI methodology, the DMA opined that appellant had four percent permanent impairment for a grade D, class 1 partial-thickness rotator cuff tear under the Shoulder Regional Grid, Table 15-5 page 402. He set forth his calculations under the A.M.A., *Guides*. Under the ROM impairment rating method, the DMA indicated that he obtained a right upper extremity permanent impairment rating of 7 percent as opposed to Dr. Reppy's right upper extremity impairment rating of 13 percent. He indicated that Dr. Reppy properly recorded three separate ROM motion efforts. Using Dr. Reppy's ROM findings and rounding to the nearest number ending in 0, the DMA calculated under Table 15-34, page 475: 110 degrees flexion equaled three percent impairment; 40 (35) degrees extension equaled one percent impairment; 90 degrees abduction equaled three percent impairment; 80 degrees adduction equaled zero percent impairment; 80 degrees internal rotation equaled zero percent impairment; and 70 degrees external rotation equaled zero percent impairment, for a total upper extremity impairment of seven percent.⁹ Under Table 15-35, page 477, and Table 15-7, page 406, he assigned a grade modifier for physical examination (GMPE) of 1 and a grade modifier for functional history (GMFH) of 2. No grade modifier for clinical studies (GMCS) was utilized as the studies were used to define the CDX. The DMA then used Table 16-17, page 545, to find a ROM modifier adjustment of .35 percent (5 percent times 7 percent), which yielded a total permanent impairment of 7.35 percent rounded down to 7 percent. He concluded that the ROM methodology of 7 percent impairment represented appellant's right upper extremity impairment as it produced the higher rating over the 4 percent DBI methodology. As appellant's previous right upper extremity impairment totaled 16 percent, the DMA concluded that appellant had no additional impairment.

By decision dated July 18, 2018, OWCP granted appellant a schedule award for 12 percent permanent impairment of the left upper extremity. Appellant subsequently requested a review of the written record by a representative of OWCP's Branch of Hearings and Review.

By decision dated November 13, 2018, OWCP's hearing representative affirmed OWCP's July 18, 2018 decision regarding appellant's left upper extremity permanent impairment. The hearing representative noted that the July 18, 2018 decision was silent with regard to appellant's right upper extremity permanent impairment. Therefore, the case file was remanded for a formal decision regarding the permanent impairment of the right upper extremity as well as any further development regarding a resulting overpayment.

In a November 16, 2018 notice, OWCP advised appellant of its preliminary determination that she received a \$20,933.64 overpayment of compensation because she was granted schedule award compensation for a total of 16 percent permanent impairment of the right upper extremity, when she was only entitled to receive schedule award compensation for a total 7 percent permanent impairment. It explained that the difference between her current right upper extremity permanent impairment of 7 percent and 16 percent previously awarded, was 9 percent. In the overpayment calculation memorandum, OWCP calculated that the nine percent permanent impairment she was overpaid equated to 196.56 days or 28.08 weeks, which multiplied by the \$106.50 daily

⁹ The Board notes that Dr. Reppy recorded adduction of 75, 70, and 77 degrees. The DMA's notation of 80 degrees of adduction is harmless error as adduction greater than 40 degrees equals zero percent impairment under Table 15-34.

compensation paid, amounted to \$20,933.64 for the period in question. It noted that she was previously paid a total of \$25,585.56 for the period May 2 through December 28, 2014 in schedule award compensation for the additional 11 percent right upper extremity impairment.¹⁰ OWCP also preliminarily determined that appellant was not at fault in the creation of the overpayment. It advised her that she could submit evidence challenging the fact or amount of the overpayment, or request waiver of recovery of the overpayment. OWCP informed appellant that she could submit additional evidence in writing or at a precoupment hearing, but that a precoupment hearing must be requested within 30 days of the date of the written notice of overpayment. It requested that she complete and return an overpayment recovery questionnaire (Form OWCP-20) within 30 days even if she was not requesting waiver of the overpayment. Appellant did not respond.

By decision dated December 19, 2018, OWCP finalized the November 16, 2018 preliminary overpayment determination that appellant received a \$20,933.64 overpayment of compensation, for which she was without fault, because she received schedule award compensation for a total of 16 percent permanent impairment of the right upper extremity, but was only entitled to schedule award compensation for 7 percent. It also denied waiver of recovery of the overpayment and required recovery by deducting \$782.00 from her continuing compensation.

On January 8, 2019 OWCP received an overpayment action request form dated December 30, 2018, on which appellant noted his disagreement that the overpayment occurred. The envelope was postmarked January 2, 2019.

By decision dated January 15, 2019, OWCP advised appellant that it issued its final overpayment decision on December 19, 2018 as it had not received a request for hearing on the preliminary determination that an overpayment of compensation had occurred. It further noted that a final decision concerning an overpayment was not subject to the hearing provision of 5 U.S.C. § 8124(b).

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.¹¹ Section 8129(a) of FECA provides, in pertinent part, that when an overpayment has been made to an individual under this subchapter because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.¹²

¹⁰ This was verified by a schedule award payment plate indicating that for the period May 2 through December 28, 2014 appellant received an additional 11 percent right arm schedule award payment for 34.32 weeks of entitlement or \$25,585.56.

¹¹ 5 U.S.C. § 8102(a).

¹² *Id.* at § 8129(a).

ANALYSIS -- ISSUE 1

The Board finds that OWCP has not met its burden of proof to establish an overpayment of compensation.

The Federal (FECA) Procedure Manual Chapter 2.808.9(e) provides that, before addressing the issue of whether an overpayment is appropriate, the schedule award issue must be resolved. Before the amount of overpayment can be determined, the evidence must clearly establish the degree of permanent impairment.¹³ Herein, OWCP failed to issue a new impairment determination regarding the right upper extremity prior to issuing its overpayment decision. As it failed to issue a new impairment determination pertaining to the right upper extremity with appeal rights, it did not discharge its responsibility in ruling upon her request for an additional schedule award.

CONCLUSION

The Board finds that OWCP has not met its burden of proof to establish that appellant received an overpayment of compensation.

ORDER

IT IS HEREBY ORDERED THAT the December 19, 2018 decision of the Office of Workers' Compensation Programs is reversed and the January 15, 2019 decision is set aside as the issue of OWCP's denial of a prerecoupment hearing is moot.¹⁴

Issued: August 28, 2020
Washington, DC

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

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

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

¹³ R.S., Docket No. 20-0311 (issued July 8, 2020).

¹⁴ In light of this disposition, the remaining issues are rendered moot.