

left lower extremity to which he was not entitled; and (3) whether OWCP properly denied waiver of recovery of the overpayment of compensation.

FACTUAL HISTORY

On May 17, 2013 appellant, then a 40-year-old border patrol agent, filed a traumatic injury claim (Form CA-1) alleging that on May 9, 2013 he felt acute low back pain when retrieving a spare tire from the back of his vehicle, while in the performance of duty. OWCP accepted the claim for lumbar strain and left shoulder sprain. It subsequently expanded acceptance of the claim to include displacement of a lumbar intervertebral disc without myelopathy.²

On May 19, 2014 appellant underwent a hemilaminectomy on the right side with a partial facetectomy and foraminotomy and excision of a herniated nucleus pulposus (HNP) at L5-S1. On July 2, 2014 he underwent left shoulder surgery. On September 4, 2014 appellant resumed modified employment.

On December 10, 2014 appellant filed a claim for a schedule award (Form CA-7).

In a report dated October 2, 2014, Dr. Michael R. Lenihan, a Board-certified orthopedic surgeon, diagnosed an HNP at L5-S1 with right radiculopathy at the S1 distribution.³ He discussed appellant's complaints of pain and numbness in the right lower extremity. On examination Dr. Lenihan found reduced sensation in the S1 dermatome on the left versus the right and reduced motor strength at the S1 dermatome on repetitive toe raising on the right as compared to the left. He opined that appellant had moderate sensory deficit from the S1 nerve root using Table 16-12 on page 535 of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),⁴ which yielded nine percent permanent impairment. Dr. Lenihan further found a four percent sensory deficit, which he combined to find 13 percent permanent impairment of the right lower extremity. He advised that appellant's condition was permanent and stationary.

On January 31, 2015 Dr. Arthur S. Harris, a Board-certified orthopedic surgeon serving as a district medical adviser (DMA), noted that appellant had undergone a right-sided hemilaminectomy, partial facetectomy, foraminotomy, and L5-S1 disc excision. Citing *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition (July/August 2009) (*The Guides Newsletter*), he found that appellant had five percent permanent impairment due to S1 radiculopathy. Dr. Harris indicated that the impairment was of the left lower extremity, rather than the right as found by Dr. Lenihan.

² OWCP previously accepted that appellant sustained a left open fracture of the fibula, a right fracture of carpal bone, a left fracture of the ankle, a closed fracture of the tibia with fibula, a right closed fracture of the scaphoid bone of the wrist, right joint derangement of the forearm, localized primary osteoarthritis of the forearm, a right closed wrist dislocation, and a right nonunion fracture due to a September 28, 2011 employment-related motor vehicle accident, assigned OWCP File No. xxxxxx043.

³ Dr. Lenihan also provided findings regarding appellant's left upper extremity.

⁴ A.M.A., *Guides* (6th ed. 2009).

By decision dated March 11, 2015, OWCP granted appellant a schedule award for 11 percent permanent impairment of the left upper extremity and 5 percent permanent impairment of the left lower extremity. It indicated that it was paying him 34.32 weeks of compensation for the left arm and 14.4 weeks of compensation for the left leg. After cost-of-living adjustments, appellant's weekly compensation was \$1,403.00 beginning March 1, 2014. The period of the award ran from October 2, 2014 to September 8, 2015.

On April 10, 2017 appellant underwent a bilateral laminectomy at L4-5 with a hemifacetectomy, foraminotomy, and discectomy at L5-S1. He stopped work on that date and returned to work on September 7, 2017.

In an impairment evaluation dated October 31, 2017, Dr. Lenihan noted that on May 9, 2013 appellant had experienced low back pain radiating into the right lower extremity when he lifted a spare tire for his work vehicle. He advised that a July 17, 2013 magnetic resonance imaging (MRI) scan showed a large L5-S1 disc extrusion with a more focal extrusion on the right causing a "mass effect on the descending nerve roots, right greater than left" and a small L4-5 disc protrusion with mild narrowing of the left lateral recess. Dr. Lenihan indicated that appellant complained of back pain radiating bilaterally into the gluteus and down the right leg into the foot. He noted that he also had mild symptoms on the left side. Dr. Lenihan found reduced calf circumference and mild gastrosoleus weakness on the right compared to the left and a loss of sensation in the S1 dermatome. He advised that appellant had nine percent permanent "lower extremity impairment" due to a mild motor deficit at S1 using Table 16-12 of the A.M.A., *Guides*.

On January 24, 2018 appellant filed a Form CA-7 requesting an additional schedule award.

On July 12, 2018 Dr. Harris found that, according to *The Guides Newsletter*, appellant had 2 percent permanent impairment due to S1 right radiculopathy and 8 percent permanent impairment due-to-moderate motor weakness at S1 on the right, for a total right lower extremity impairment of 10 percent. He found that appellant had no "neurologic deficit in the lower extremity consistent with lumbar radiculopathy" on the left side. Dr. Harris explained that appellant had zero percent sensory and zero percent motor deficit of the left lower extremity, which resulted in zero percent permanent impairment of the left lower extremity impairment for lumbar radiculopathy. He noted that appellant had previously received an award for five percent permanent impairment of the left lower extremity. Dr. Harris opined that appellant had sustained no increase in his permanent impairment of the left lower extremity.

By decision dated February 4, 2019, OWCP granted appellant a schedule award for 10 percent permanent impairment of the right lower extremity. The period of the award ran for 28.8 weeks from October 31, 2017 to May 20, 2018.

In a preliminary overpayment determination dated February 19, 2019, OWCP advised appellant that he had received an overpayment of compensation in the amount of \$20,203.20 because he had previously received a schedule award for five percent permanent impairment of the left lower extremity when he had no left lower extremity impairment. It explained that he had received 14.4 weeks of compensation at the rate of \$1,403.00 a week for his left leg for a total overpayment amount of \$20,203.20. OWCP further advised appellant of its preliminary finding that he was not at fault in the creation of the overpayment and provided an overpayment recovery

questionnaire (Form OWCP-20) for his completion. It afforded him 30 days to respond and submit supporting financial documentation. OWCP further notified appellant 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 precoupment hearing.

On March 12, 2019 appellant requested a decision based on the written evidence. He submitted a completed Form OWCP-20 reporting monthly income of \$6,200.00 and monthly expenses of \$6,200.00. Under other funds, appellant reported \$60.00 cash on hand, a checking account balance of \$1,147.00, and a savings account balance of \$2,025.00. He also listed his claimed expenses as: rent or mortgage -- \$2,000.00; food -- \$1,000.00; clothing -- \$600.00; utilities -- \$1,000.00; other expenses -- \$1,200.00; and Internal Revenue Service (IRS) -- \$400.00. Appellant indicated that he had received a lump-sum direct deposit for the schedule award. He asserted that he was without fault and would suffer severe financial hardship to repay the debt especially as he was going through divorce proceedings. Appellant submitted a bank statement from February 8 to March 7, 2019 from showing a checking account balance of \$1,147.77 and a savings account balance of \$2,025.01, a statement from the IRS noting a balance of \$2,649.71, a mortgage statement form reflecting a monthly payment of \$1,972.76, a public utility bill for \$134.04 and a copy of a pleading filed in Superior Court of California-County of Imperial, Family Law court.

By decision dated April 2, 2019, OWCP finalized the overpayment of compensation in the amount of \$20,203.20, for which he was not at fault, finding that it had paid appellant a schedule award for five percent impairment of the left lower extremity when he had no permanent percent impairment of the left lower extremity. It calculated that he had received 14.4 weeks of compensation at the rate of \$1,403.00 a week for his left lower extremity, for a total overpayment amount of \$20,203.20. OWCP denied waiver of recovery of the overpayment of compensation, noting that appellant had not fully documented his expenses. It determined that his monthly income exceeded his expenses such that he was not entitled to waiver of recovery of the overpayment. OWCP noted that although appellant had submitted financial information in support of waiver, he had not provided supporting documentation for the following claimed amounts: food of \$1,000.00 a month; clothing of \$600.00 a month; utilities of \$1,000.00 a month; and other expenses of \$1,200.00 a month. It calculated his expenses as \$5,334.04 per month.⁵ As appellant's income exceeded his expenses by more than \$50.00, OWCP found that he was not entitled to waiver of recovery of the overpayment. It requested that he forward payment of \$500.00 a month to repay the overpayment.

⁵ OWCP calculated monthly costs of food \$1,000.00, clothing of \$600.00, mortgage of \$2,000.00, electricity of \$134.04, and home maintenance of \$1,200.00 for expenses of \$4,934.04. In addition to these expenses appellant paid \$400.00 a month to the IRS for total expenses of \$5,334.04. Total net income of \$6,200.00 minus total monthly household expenses of \$5,334.04 is a surplus of \$865.96 a month.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provisions of FECA,⁶ and its implementing federal regulations,⁷ 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. FECA, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such a determination is a matter which rests in the discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. OWCP evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*, published in 2009.⁸ 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.⁹

Neither FECA nor its implementing regulations provide for the payment of a schedule award for the permanent loss of use of the back/spine or the body as a whole. However, a schedule award is permissible where the employment-related spinal condition affects the upper and/or lower extremities.¹⁰ The sixth edition of the A.M.A., *Guides* provides a specific methodology for rating spinal nerve extremity impairment in *The Guides Newsletter*. It was designed for situations where a particular jurisdiction, such as FECA, mandated ratings for extremities and precluded ratings for the spine. FECA-approved methodology is premised on evidence of radiculopathy affecting the upper and/or lower extremities. The appropriate tables for rating spinal nerve extremity impairment are incorporated into OWCP's procedures.¹¹

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to a DMA for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the DMA providing rationale for the percentage of impairment specified.¹²

⁶ *Supra* note 1.

⁷ 20 C.F.R. § 10.404.

⁸ For decisions issued after May 1, 2009 the sixth edition of the A.M.A., *Guides* is used. A.M.A., *Guides*, (6th ed. 2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017); *see also id.* Chapter 3.700, Exhibit 1 (January 2010).

⁹ *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

¹⁰ 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a) and (b); *see A.G.*, Docket No. 18-0815 (issued January 24, 2019); *Jay K. Tomokiyo*, 51 ECAB 361, 367 (2000).

¹¹ *Supra* note 8 at Chapter 3.700, Exhibit 4 (January 2010).

¹² *See supra* note 8 at Chapter 2.808.6(f) (March 2017).

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met his burden of proof to establish more than 10 percent permanent impairment of the right lower extremity for which he previously received a schedule award.

In an October 2, 2014 impairment evaluation, Dr. Lenihan discussed appellant's complaints of numbness and pain in the right lower extremity and diagnosed an HNP at L5-S1 with right radiculopathy at the S1 distribution. He found that appellant had 13 percent permanent impairment of the right lower extremity.

On January 31, 2015 Dr. Harris reviewed Dr. Lenihan's report. He applied *The Guides Newsletter* to the findings of Dr. Lenihan and opined that appellant had five percent permanent impairment of the left lower extremity. Based on Dr. Harris' opinion, OWCP granted him a schedule award for five percent permanent impairment of the left lower extremity. However, as noted, Dr. Lenihan found that appellant had permanent impairment of the right rather than the left lower extremity. It appears that Dr. Harris made a typographical error in finding five percent of the left rather than the right lower extremity.

Appellant subsequently requested an increased schedule award. He submitted an October 31, 2017 report from Dr. Lenihan, who noted that appellant continued to experience back pain radiating bilaterally into the gluteus and down the right leg into the foot. Dr. Lenihan further indicated that appellant had mild left-sided symptoms. He found that appellant had reduced sensation at the S1 dermatome and mild weakness and reduced calf circumference on the right side. Dr. Lenihan opined that he had nine percent permanent impairment due to a mild motor deficit at S1. His report, however, lacks probative value as he failed to use *The Guides Newsletter* in calculating appellant's permanent impairment.¹³

On July 12, 2018 Dr. Harris reviewed Dr. Lenihan's report and opined that appellant had 8 percent permanent impairment of the right lower extremity due to residual motor weakness from radiculopathy at S1 and 2 percent permanent impairment of the right lower extremity for pain and impaired sensation from S1 lumbar radiculopathy, which he combined to find 10 percent permanent impairment of the right lower extremity. The Board finds that Dr. Harris appropriately applied the appropriate tables and grade schemes of *The Guides Newsletter* to the examination findings. The record contains no medical evidence in accordance with *The Guides Newsletter* demonstrating a greater percentage impairment of the right lower extremity.¹⁴

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.

¹³ A.H., Docket No. 19-1788 (issued March 17, 2020); A.R., Docket No. 17-1504 (issued May 25, 2018).

¹⁴ See T.K., Docket No. 19-1222 (issued December 2, 2019); C.S., Docket No. 18-0920 (issued September 23, 2019).

LEGAL PRECEDENT -- ISSUE 2

If a claimant received a schedule award and the medical evidence does not support the degree of permanent impairment awarded, an overpayment of compensation may be created.¹⁵ Claims for an increased schedule award based on the same edition of the A.M.A., *Guides* are subject to overpayment.¹⁶

It is well established that a claimant is entitled to a decision that contains findings of fact and a statement of reasons.¹⁷ A decision denying a claim should contain a correct description of the basis for the denial in order that the parties of interest have a clear understanding of the precise defect of the claim and the kind of evidence which would overcome it.¹⁸

ANALYSIS -- ISSUE 2

The Board finds that OWCP improperly determined that appellant received an overpayment of compensation in the amount of \$20,203.20, for which he was not at fault, for the period October 2, 2014 to January 20, 2015 because he received schedule award compensation for the left lower extremity to which he was not entitled.

By decision dated March 11, 2015, OWCP granted appellant a schedule award for five percent permanent impairment of the left lower extremity. It paid him 14.4 weeks of compensation for the left lower extremity at a weekly rate of \$1,403.00.

Appellant subsequently requested an increased schedule award. OWCP, however, did not issue a decision either denying or granting appellant a schedule award for the claimed increased permanent impairment of his left lower extremity. It only issued a decision granting appellant a schedule award for 10 percent permanent impairment of the right lower extremity. Nonetheless, when issuing its preliminary and final determinations declaring an overpayment of compensation in the amount of \$20,203.20, it found that appellant had no permanent impairment of the left lower extremity and thus his receipt of a schedule award for five percent permanent impairment of the left lower extremity on March 11, 2015 constituted an overpayment of compensation. In reaching this finding, OWCP relied upon the July 12, 2018 report of Dr. Harris, the DMA. Section 8124(a) of FECA provides that OWCP shall determine and make a finding of fact and make an award for or against payment of compensation.¹⁹ Section 10.126 of Title 20 of the Code of Federal Regulations provides that the decision of the Director of OWCP shall contain findings of fact and a statement of reasons.²⁰ OWCP's procedures provide that the reasoning behind OWCP's evaluation should be clear enough for the reader to understand the precise defect of the claim and

¹⁵ *Supra* note 8 at Chapter 2.808.9(e) (February 2013).

¹⁶ *Id.*; *see also P.D.*, Docket 18-0442 (issued July 11, 2018).

¹⁷ *See M.M.*, Docket No. 14-1166 (issued December 1, 2014); 20 C.F.R. § 10.126.

¹⁸ *O.M.*, Docket No. 19-0342 (issued November 15, 2019); *Patrick Michael Duffy*, 43 ECAB 280 (1991).

¹⁹ 5 U.S.C. § 8124(a).

²⁰ 20 C.F.R. § 10.126.

the kind of evidence which would overcome it.²¹ These requirements are supported by Board precedent.²²

The Board finds that appellant was entitled to a final decision on his request for an increased schedule award for the left lower extremity which contained findings of fact and a statement of reasons.²³ As OWCP did not issue a final decision on appellant's claim for an increased schedule award for the left lower extremity, the Board thus finds that it was premature and improper for OWCP to declare and issue a decision finding an overpayment of compensation on the basis that he was not entitled to a schedule award for a left lower extremity impairment.

Accordingly, the Board finds that OWCP has not established fact of overpayment. The record does not establish that appellant was not entitled to the previously paid five percent permanent impairment of the left lower extremity²⁴ as OWCP did not render a final decision on this issue. Therefore, the Board will reverse OWCP's April 2, 2019 decision.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish more than 10 percent permanent impairment of the right lower extremity for which he received a schedule award. The Board further finds that OWCP improperly determined that he received an overpayment of compensation in the amount of \$20,203.20, for which he was not at fault, for the period October 2, 2014 to January 20, 2015 because he received schedule award compensation for the left lower extremity to which he was not entitled.²⁵

²¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.5 (February 2013).

²² *C.M.*, Docket No. 20-0428 (issued August 25, 2020); *R.P.*, Docket No. 18-1128 (issued December 17, 2018); *R.B.*, Docket No. 16-1696 (issued September 7, 2017); *James D. Boller, Jr.*, 12 ECAB 45, 46 (1960).

²³ *See supra* note 18.

²⁴ *See A.S.*, Docket No. 13-1102 (issued October 29, 2013).

²⁵ In view of the Board's disposition of Issue 2, Issue 3 is rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the April 2, 2019 decision of the Office of Workers' Compensation Programs is reversed and the February 4, 2019 decision is affirmed.

Issued: September 24, 2020
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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