

ISSUES

The issues are: (1) whether appellant has met her burden of proof to establish greater than three percent permanent impairment of her left upper extremity; (2) whether appellant received an overpayment of compensation in the amount of \$9,175.92 for the period March 13 through June 7, 2008, for which she was not at fault; (3) whether OWCP properly denied appellant's request for waiver of recovery of the overpayment; and (4) whether OWCP properly required recovery of the overpayment by deducting \$300.00 from appellant's continuing compensation payments every 28 days.

FACTUAL HISTORY

On March 13, 2006 appellant, then a 40-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging a left shoulder injury due to carrying a mailbag on her left shoulder while delivering mail at work. OWCP accepted her claim for rotator cuff tear of the left shoulder and, on January 4, 2007, appellant underwent OWCP-authorized arthroscopic left rotator cuff repair. It paid her wage-loss compensation on the supplemental rolls for disability from work commencing January 4, 2007.

On August 17, 2015 appellant filed a claim for a schedule award (Form CA-7) due to her accepted employment condition.

Appellant submitted an October 1, 2015 report from Dr. Nicholas Diamond, an osteopath Board-certified in physical medicine and rehabilitation, who determined that appellant had 13 percent permanent impairment of her left upper extremity under the standards of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).⁴ Dr. Diamond applied the range of motion (ROM) method of evaluating permanent impairment by utilizing Table 15-34 on page 475. He found ratable deficits upon flexion, abduction, and internal rotation.

On April 28, 2016 OWCP referred appellant's case to Dr. David Garelick, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA). It requested that he review Dr. Diamond's October 1, 2015 report and provide an opinion on permanent impairment under the sixth edition of the A.M.A., *Guides*. In an April 28, 2016 report, Dr. Garelick utilized the diagnosis-based impairment (DBI) rating method to find that, under Table 15-5 (Shoulder Regional Grid), page 403, the class of diagnosis (CDX) for appellant's left rotator cuff tear resulted in a class 1 impairment with a default value of five percent. He derived a grade modifier for functional history (GMFH), grade modifier for physical examination (GMPE), and grade modifier for clinical studies (GMCS). Dr. Garelick utilized the net adjustment formula, (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX), which resulted in a grade E or seven percent permanent impairment of the left upper extremity.⁵ He recommended against using Dr. Diamond's rating because it was based on ROM.

⁴ A.M.A., *Guides* (6th ed. 2009).

⁵ Dr. Garelick did not identify the specific grade modifier values he used in the net adjustment formula.

By decision dated July 14, 2016, OWCP granted a schedule award for seven percent permanent impairment of her left upper extremity. The award ran for 21.84 weeks from January 8 to June 8, 2008 and was based on the April 28, 2016 report of Dr. Garelick.

On July 15, 2016 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. Prior to a hearing being held, OWCP's hearing representative issued a January 4, 2017 decision setting aside the July 14, 2016 decision and remanding the case to OWCP for further consideration by Dr. Garelick of the validity of Dr. Diamond's permanent impairment rating under the ROM method. On remand, OWCP referred the case back to Dr. Garelick in his role as DMA and, on January 13, 2017, Dr. Garelick essentially reiterated his prior opinion in which he expressed his preference for utilizing the DBI rating method over the ROM method to evaluate permanent impairment.

OWCP determined that a second opinion examination regarding appellant's permanent impairment was necessary. On January 27, 2017 it referred appellant for this purpose to Dr. Willie E. Thompson, a Board-certified orthopedic surgeon. In a report dated February 24, 2017, Dr. Thompson determined that appellant had 12 percent permanent impairment of her left upper extremity under the ROM rating method of the sixth edition of the A.M.A., *Guides*. However, he did not list ROM findings for appellant's left shoulder and he noted that an objective evaluation of appellant's left shoulder was difficult due to her exaggerated responses to all measures of examination.

On July 9, 2017 OWCP referred appellant's case to Dr. Todd Fellars, a Board-certified orthopedic surgeon serving as a DMA, and requested that he review Dr. Thompson's report and provide an opinion on permanent impairment. In a July 11, 2017 report, Dr. Fellars indicated that he could not calculate an impairment rating for appellant's left upper extremity utilizing the ROM rating method because Dr. Thompson did not list ROM findings. However, he utilized the DBI rating method to find that, under Table 15-5, the CDX for appellant's left rotator cuff tear resulted in a class 1 impairment with a default value of five percent. Dr. Fellars derived a GMCS of 2 due to the moderate pathology seen in the studies. He could not include a score for GMFH due to appellant's unreliable pain behavior and could not include a score for GMPE due to her minimal participation in the examination. He utilized the net adjustment formula, $(GMFH - CDX) = (2 - 1) = +1$, which resulted in a grade D or six percent permanent impairment of the left upper extremity.

By decision dated September 21, 2017, OWCP determined that appellant had not met her burden of proof to establish greater than seven percent permanent impairment of her left upper extremity, for which she previously received a schedule award.

Following an additional request for a telephonic hearing, OWCP's hearing representative issued a decision on May 25, 2018 which set aside the September 21, 2017 decision and remanded the case to OWCP for an additional examination to include a complete ROM measurement evaluation, either by Dr. Thompson or another second opinion physician. On July 17, 2018 OWCP referred appellant for a second opinion examination with Dr. Noubar Didizian, a Board-certified orthopedic surgeon, in order to further evaluate permanent impairment.

In an August 8, 2018 report, Dr. Didizian reported physical examination findings, noting that, when he asked appellant to move her left shoulder actively, she was highly erratic,

noncompliant, and nonphysiologic. He attempted to test appellant's left shoulder ROM three times for each type of motion, but indicated that "the numbers were just too erratic to be able to record anything to make any sense." Dr. Didizian recorded other physical examination findings, noting no muscle weakness or peripheral nerve involvement in the left upper extremity. He then addressed appellant's permanent impairment, noting that a ROM impairment rating was not possible "because of noncompliance." Dr. Didizian utilized the DBI rating method to find that, under Table 15-5, the CDX for appellant's left rotator cuff tear resulted in a class 1 impairment with a default value of five percent (available for cases of objective residual loss with normal motion). He derived a GMFH of 1 (based on *QuickDASH* score of 21), GMPE of 2, and GMCS of 2. Dr. Didizian utilized the net adjustment formula, $(GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX) = (1-1) + (2-1) + (2-1) = +2$, which resulted in a grade E or seven percent permanent impairment of the left upper extremity.

On November 21, 2018 OWCP referred appellant's case to Dr. Kevin Kuhn, a Board-certified orthopedic surgeon serving as a DMA, for further evaluation of permanent impairment. In a November 26, 2018 report, Dr. Kuhn cited appellant's nonphysiologic responses on examination and noted that a permanent impairment rating evaluation under the ROM rating method would be invalid. He utilized the DBI rating method to find that, under Table 15-5, the CDX for appellant's left rotator cuff tear resulted in a class 1 impairment with a default value of three percent (residuals symptoms without consistent objective findings). Dr. Kuhn calculated a GMFH of 1 (based on *QuickDASH* score of 21), GMPE of 0 (based on inconsistent findings), and GMCS of 2 (based on moderate findings). He utilized the net adjustment formula, $(GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX) = (1-1) + (0-1) + (2-1) = +0$, which he indicated resulted in a grade D or four percent permanent impairment of the left upper extremity.

By decision dated January 23, 2019, OWCP determined that appellant had not met her burden of proof to establish greater than seven percent permanent impairment of her left upper extremity, for which she previously received a schedule award.

Following another request for a telephonic hearing, OWCP's hearing representative issued a decision on July 9, 2019 which set aside the January 23, 2019 decision and remanded the case to OWCP in order to request an opinion from Dr. Didizian regarding Dr. Kuhn's November 26, 2018 impairment rating.

On August 15, 2019 OWCP requested that Dr. Didizian review Dr. Kuhn's November 26, 2018 impairment rating and provide an opinion on the permanent impairment rating provided therein. In a September 4, 2019 report, Dr. Didizian noted that he concurred with Dr. Kuhn's assessment of appellant's CDX and grade modifiers as provided in his November 26, 2018 report. He indicated that, under Table 15-5, the CDX for appellant's left rotator cuff tear resulted in a class 1 impairment with a default value of three percent (residuals symptoms without consistent objective findings). Dr. Didizian derived a GMFH of 1 (based on *QuickDASH* score of 21), GMPE of 0 (based on inconsistent findings), and GMCS of 2 (based on moderate findings). He utilized the net adjustment formula, $(GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX) = (1-1) + (0-1) + (2-1) = +0$, which resulted in no movement from the grade C default value of three percent permanent impairment of the left upper extremity. Dr. Didizian indicated that Dr. Kuhn used the same grade modifiers in his November 26, 2018 report, but advised that he improperly noted a net adjustment of +1, thereby resulting in a grade D or four percent permanent impairment of the left upper extremity.

On September 18, 2019 OWCP referred appellant's case back to Dr. Kuhn in order for him to comment on Dr. Didizian's September 4, 2019 report. In an October 17, 2019 report, Dr. Kuhn concurred with Dr. Didizian's assessment that appellant had three percent permanent impairment of her left upper extremity. He provided a net adjustment formula calculation, $(GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX) = (1-1) + (0-1) + (2-1) = +0$, and thereby acknowledged that he had previously erred when he inadvertently calculated a net adjustment of +1. Dr. Kuhn repeated his earlier opinion, provided on November 26, 2018, that appellant's nonphysiologic responses on examination by Didizian meant that a permanent impairment rating evaluation under the ROM rating method would be invalid.

By decision dated October 22, 2019, OWCP determined that, based on the opinions of Dr. Didizian and Dr. Kuhn, appellant only had three percent permanent impairment of her left upper extremity. It found that, as appellant was previously paid a schedule award for seven percent permanent impairment of her left upper extremity, the medical evidence did not support an increase in the permanent impairment already compensated. OWCP indicated, "Additionally, an overpayment for 4 percent of the Left Upper Extremity will be pursued. You will receive separate correspondence regarding this."

In an October 25, 2019 notice, OWCP advised appellant of its preliminary determination that she received a \$9,175.92 overpayment of compensation for the period March 13 through June 7, 2008.⁶ It also made a preliminary determination that she was not at fault in the creation of the overpayment. OWCP advised appellant that she could submit evidence challenging the fact or amount of the overpayment, or request waiver of recovery of the overpayment. It informed her that she could submit additional evidence in writing or at prerecoupment hearing, but that a prerecoupment hearing must be requested within 30 days of the date of the written notice of overpayment. OWCP requested that appellant complete and return an overpayment recovery questionnaire (Form OWCP-20) within 30 days even if she was not requesting waiver of recovery of the overpayment. It requested that she submit supporting financial documentation, including copies of income tax returns, bank account statements, bills, pay slips, and any other records to support income and expenses. OWCP advised appellant that it would deny waiver of recovery of the overpayment if she failed to furnish the requested financial information within 30 days.

On October 31, 2019 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review with respect to OWCP's October 22, 2019 schedule award decision.

On November 6, 2019 appellant requested a prerecoupment hearing before a representative of OWCP's Branch of Hearings and Review regarding the claimed overpayment. She disagreed that the overpayment occurred and requested waiver of recovery of the overpayment. In an overpayment recovery questionnaire, signed on November 20, 2019, appellant reported \$3,146.12 in monthly income, \$2,690.00 in the monthly expenses, and \$255.00 in assets (cash, checking account, and savings account). Appellant's monthly expenses consisted of \$1,000.00 for

⁶ The case record contains payment records and worksheets showing that appellant received \$15,827.63 in schedule award payments for seven percent permanent impairment of her left upper extremity and that she would have received \$6,651.71 in schedule award payments if she had been properly paid for three percent permanent impairment of her left upper extremity.

rent/mortgage, \$300.00 for food, \$200.00 for utilities, \$440.00 for credit card payments, and \$750.00 for miscellaneous expenses.

During a February 10, 2019 hearing addressing both the schedule award and overpayment matters, counsel indicated that he disagreed with OWCP's assessment that appellant only had three percent permanent impairment of her left upper extremity. He generally argued that principles of *stare decisis* and *res judicata* prevented OWCP's declaration of an overpayment. Appellant provided testimony regarding her monthly expenses, noting that she had \$87,000.00 in her Thrift Savings Plan (TSP) account.

By decision dated March 12, 2020, OWCP's hearing representative affirmed the October 22, 2019 decision finding that appellant had no greater than three percent permanent impairment of her left upper extremity, noting that the determination was properly based on the opinions of Dr. Didizian and Dr. Kuhn. She found that appellant received an overpayment of compensation in the amount of \$9,175.92 for the period March 13 through June 7, 2008, for which she was not at fault. The hearing representative determined that although appellant was not at fault in the creation of the overpayment, the overpayment was not subject to waiver because appellant's monthly income exceeded her monthly expenses by more than \$50.00 and her assets exceeded the allowable resource base. She noted that payment documents in the case record showed that appellant had income of \$3,118.16 every 28 days, which equaled \$3,378.01 per month, and that it was accepted that she had monthly expenses of \$2,690.00, as reported on her overpayment recovery questionnaire. Appellant also had \$87,000.00 in assets in her TSP account. The hearing representative required recovery of the overpayment by deducting \$300.00 from appellant's continuing compensation payments every 28 days.⁷

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of FECA,⁸ and its implementing federal regulation,⁹ 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 As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.¹¹

⁷ The case record contains a second decision dated March 12, 2020 of OWCP's hearing representative which contains similar language, but it appears to be a draft decision.

⁸ 5 U.S.C. § 8107.

⁹ 20 C.F.R. § 10.404.

¹⁰ *Id.*

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.5a (March 2017); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

In determining impairment for the upper extremities under the sixth edition of the A.M.A., *Guides*, an evaluator must establish the appropriate diagnosis for each part of the upper extremity to be rated. With respect to the shoulder, the relevant portion of the arm for the present case, reference is made to Table 15-5 (Shoulder Regional Grid) beginning on page 401. After the CDX is determined from the Shoulder Regional Grid (including identification of a default grade value), the net adjustment formula is applied using the GMFH, GMPE, and GMCS. The net adjustment formula is $(GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX)$.¹² Under Chapter 2.3, evaluators are directed to provide reasons for their impairment rating choices, including choices of diagnoses from regional grids and calculations of modifier scores.¹³

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met her burden of proof to establish greater than three percent permanent impairment of her left upper extremity.

The Boards find that the opinions of Dr. Didizian, OWCP's referral physician, and Dr. Kuhn, the DMA, show that appellant only has three percent permanent impairment of her left upper extremity under the sixth edition of the A.M.A., *Guides*. The Board notes that it was proper for OWCP to refer appellant to Dr. Didizian due to the deficiencies of reports produced by prior OWCP referral physicians

In an August 8, 2018 report, Dr. Didizian reported physical examination findings, noting that, when he asked appellant to move her left shoulder actively, she was highly erratic, noncompliant, and nonphysiologic. He attempted to test appellant's left shoulder ROM three times for each type of motion, but indicated that "the numbers were just too erratic to be able to record anything to make any sense." Dr. Didizian recorded other physical examination findings, noting no muscle weakness or peripheral nerve involvement in the left upper extremity. He then addressed appellant's permanent impairment, noting that a ROM impairment rating was not possible "because of noncompliance." Dr. Didizian utilized the DBI rating method of Table 15-5 to find that appellant had seven percent permanent impairment of her left upper extremity.¹⁴

In a November 26, 2018 report, Dr. Kuhn cited appellant's nonphysiologic responses on examination and noted that a permanent impairment rating evaluation under the ROM rating method would be invalid. He utilized the DBI rating method to find that, under Table 15-5, the CDX for appellant's left rotator cuff tear resulted in a class 1 impairment with a default value of three percent (residuals symptoms without consistent objective findings). Dr. Kuhn calculated a GMFH of 1 (based on *QuickDASH* score of 21), GMPE of 0 (based on inconsistent findings), and GMCS of 2 (based on moderate findings). He utilized the net adjustment formula, $(GMFH - CDX)$

¹² See A.M.A., *Guides* (6th ed. 2009) 405-12. Table 15-5 also provides that, if motion loss is present for a claimant with certain diagnosed conditions, permanent impairment may alternatively be assessed using Section 15.7 (ROM impairment). Such a ROM rating stands alone and is not combined with a DBI rating. *Id.* at 401-05, 475-78.

¹³ *Id.* at 23-28.

¹⁴ A.M.A., *Guides* 403, Table 15-5.

+ (GMPE - CDX) + (GMCS - CDX) = (1-1) + (0-1) + (2-1) = +0, which he indicated resulted in a grade D or four percent permanent impairment of the left upper extremity.¹⁵

In a September 4, 2019 report, Dr. Didizian noted that he concurred with Dr. Kuhn's assessment of appellant's CDX and grade modifiers as provided in his November 26, 2018 report. He indicated that, under Table 15-5, the CDX for appellant's left rotator cuff tear resulted in a class 1 impairment with a default value of three percent (residuals symptoms without consistent objective findings). Dr. Didizian derived a GMFH of 1 (based on *QuickDASH* score of 21), GMPE of 0 (based on inconsistent findings), and GMCS of 2 (based on moderate findings). He utilized the net adjustment formula, (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX) = (1-1) + (0-1) + (2-1) = +0, which resulted in no movement from the grade C default value of three percent permanent impairment of the left upper extremity. Dr. Didizian indicated that Dr. Kuhn used the same grade modifiers in his November 26, 2018 report, but advised that he improperly noted a net adjustment of +1, thereby resulting in a grade D or four percent permanent impairment of the left upper extremity. In an October 17, 2019 report, Dr. Kuhn concurred with Dr. Didizian's assessment that appellant had three percent permanent impairment of her left upper extremity. He acknowledged that he had previously erred when he inadvertently calculated a net adjustment of +1. Dr. Kuhn repeated his earlier opinion, provided on November 26, 2018, that appellant's nonphysiologic responses on examination by Dr. Didizian meant that a permanent impairment rating evaluation under the ROM rating method would be invalid.

The Board finds that both Dr. Didizian and Dr. Kuhn ultimately properly applied the DBI rating method under standards of the sixth edition of the A.M.A., *Guides* to determine that appellant had three percent permanent impairment of her left upper extremity. Although Dr. Didizian previously used the DBI rating method to determine that appellant had seven percent permanent impairment of her left upper extremity, he had inappropriately used a level of class 1 impairing diagnosis, found at Table 15-5, for individuals with objective residual loss and normal motion. He later appropriately rated appellant under a level of class 1 impairing diagnosis for individuals, such as appellant, with residual symptoms without consistent objective findings.¹⁶ In addition, Dr. Kuhn acknowledged that he had previously erred when he inadvertently calculated a net adjustment of +1, instead of the proper net adjustment of +0.¹⁷ Both physicians properly determined that it was not possible to use the ROM rating method due to the fact that appellant consistently provided invalid ROM findings.¹⁸ As such, the Board finds that appellant has no more than three percent permanent impairment of her left upper extremity.

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.

¹⁵ See *supra* note 12.

¹⁶ A.M.A., *Guides* 403, Table 15-5.

¹⁷ See *supra* note 12.

¹⁸ A.M.A., *Guides* 464 (providing detailed procedures for obtaining valid ROM findings).

LEGAL PRECEDENT -- ISSUE 2

Section 8102(a) of FECA¹⁹ 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 his duty.²⁰ Section 8129(a) of FECA provides, in pertinent part:

“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.”²¹

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.²² Claims for an increased schedule award based on the same edition of the A.M.A., *Guides* are subject to overpayment.²³

ANALYSIS -- ISSUE 2

The Board finds that appellant received an overpayment of compensation in the amount of \$9,175.92 for the period March 13 through June 7, 2008, for which she was not at fault.

In the present case, appellant received \$15,827.63 in schedule award compensation for seven percent permanent impairment of her left upper extremity. However, for the reasons explained above, appellant was only entitled to receive \$6,651.71 in schedule award compensation for three percent permanent impairment of her left upper extremity. The difference between these two amounts, \$9,175.92, constitutes an overpayment. As noted above, OWCP’s procedures allow for the declaration of such an overpayment as both awards were calculated under the same edition of the A.M.A., *Guides*.²⁴ Therefore, OWCP properly determined that appellant received a \$9,175.92 overpayment.

¹⁹ *Supra* note 2.

²⁰ *Id.* at § 8102(a).

²¹ *Id.* at § 8129(a).

²² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.9(e) (February 2013).

²³ *Id.* See also *W.M.*, Docket No. 13-0291 (issued June 12, 2013).

²⁴ See notes 23 and 24. Counsel generally argued that principles of *stare decisis* and *res judicata* prevented OWCP’s declaration of an overpayment, but he did not provide support for this argument.

LEGAL PRECEDENT -- ISSUE 3

The waiver or refusal to waive an overpayment of compensation by OWCP is a matter that rests within OWCP's discretion pursuant to statutory guidelines.²⁵ Section 8129 of FECA²⁶ provides that an overpayment must be recovered 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." Thus, a finding that appellant was without fault does not automatically result in waiver of recovery of the overpayment. OWCP must then exercise its discretion to determine whether recovery of the overpayment would defeat the purpose of FECA or would be against equity and good conscience.²⁷

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 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.²⁸ An individual's liquid assets include, but are not limited to, cash on hand, the value of stocks, bonds, savings accounts, mutual funds, and certificates of deposits. Nonliquid assets include, but are not limited to, the fair market value of an owner's equity in property such as a camper, boat, second home, furnishings/supplies, vehicle(s) above the two allowed per immediate family, retirement account balances (such as TSP or 401(k)), jewelry, and artwork.²⁹

According to 20 C.F.R. § 10.437 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 attempting to repay the debt and when an individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.³⁰ To establish that a valuable right has been relinquished, it must be shown that the right was in fact valuable, that it cannot be regained, and that the action was based chiefly or solely in reliance on the payments or on the notice of payment.³¹

²⁵ See *L.D.*, Docket No. 18-1317 (issued April 17, 2019); *P.J.*, Docket No. 18-0248 (issued August 14, 2018); *Robert Atchison*, 41 ECAB 83, 87 (1989).

²⁶ 5 U.S.C. § 8129(1)-(b); *A.C.*, Docket No. 18-1550 (issued February 21, 2019); see *D.C.*, Docket No. 17-0559 (issued June 21, 2018).

²⁷ *A.C.*, *id.*; see *V.T.*, Docket No. 18-0628 (issued October 25, 2018).

²⁸ 20 C.F.R. § 10.436. OWCP's procedures provide that a claimant is deemed to need substantially all of his or her current net income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Determinations*, Chapter 6.400.4a(3) (September 2018). OWCP's procedures further provide that assets must not exceed a resource base of \$6,200.00 for an individual or \$10,300.00 for an individual with a spouse or dependent, plus \$1,200.00 for each additional dependent. *Id.* at Chapter 6.400.4a(2).

²⁹ *Id.* at Chapter 6.400.4b(3)(a), (b).

³⁰ 20 C.F.R. § 10.437(a), (b).

³¹ *Id.* at § 10.437(b)(1).

Section 10.438 of OWCP's regulations provides that 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. Failure to submit the requested information within 30 days of the request shall result in denial of waiver of recovery of the overpayment.³²

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly denied appellant's request for waiver of recovery of the overpayment.

Appellant has not established that recovery of the overpayment would defeat the purpose of FECA because she has not shown both that she needs substantially all of her current income to meet ordinary and necessary living expenses and that her assets do not exceed the allowable resource base. The Board notes that the case record reflects that appellant has \$87,000.00 in assets in her TSP account, an amount which exceeds the allowable resource base of \$11,500.00 for an individual, such as appellant, who has two dependents within the meaning of FECA.³³ As appellant's current assets exceed the allowable resource base, she has not established that recovery of the overpayment would defeat the purpose of FECA.³⁴ Because appellant has not met the second prong of the two-prong test of whether recovery of the overpayment would defeat the purpose of FECA, it is unnecessary for OWCP to consider the first prong of the test, *i.e.*, whether she needs substantially all of her current income to meet current ordinary and necessary living expenses.

Appellant also has not established that recovery of the overpayment would be against equity and good conscience because she has not shown, for the reasons noted above, that she would experience severe financial hardship in attempting to repay the debt or that she relinquished a valuable right or changed her position for the worse in reliance on the payment which created the overpayment.³⁵

Because appellant has failed to establish that recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience, she has failed to show that OWCP abused its discretion by refusing to waive recovery of the overpayment.

³² *Id.* at § 10.438.

³³ *See supra* note 29. The case record also reflects that appellant has monthly income of \$3,378.01 and monthly expenses of \$2,690.00.

³⁴ *See id.*

³⁵ *See L.D.*, Docket No. 18-1317 (issued April 17, 2019); *William J. Murphy*, 41 ECAB 569, 571-72 (1989).

LEGAL PRECEDENT -- ISSUE 4

The Board's jurisdiction over recovery of an overpayment is limited to reviewing those cases where OWCP seeks recovery from continuing compensation under FECA.³⁶ Section 10.441 of Title 20 of the Code of Federal Regulations provides that if an overpayment of compensation has been made to one entitled to future payments, proper adjustment shall be made by decreasing subsequent payments of compensation, "taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual, and any other relevant factors, so as to minimize any hardship."³⁷ When an individual fails to provide the requested information on income, expenses and assets, OWCP should follow minimum collection guidelines, which state in general that government claims should be collected in full and that, if an installment plan is accepted, the installments should be large enough to collect the debt promptly.³⁸

ANALYSIS -- ISSUE 4

The Board finds that OWCP properly required recovery of the overpayment by deducting \$300.00 from her continuing compensation payments every 28 days.

The record supports that, in requiring recovery of the overpayment by deducting \$300.00 from appellant's compensation payments every 28 days, OWCP took into consideration the financial information submitted by appellant as well as the factors set forth in section 10.441 and found that this method of recovery would minimize any resulting hardship on appellant.³⁹ OWCP followed minimum collection guidelines by requiring installments large enough to collect the full debt promptly. Therefore, the Board finds that it properly required recovery of the overpayment by deducting \$300.00 from appellant's continuing compensation payments every 28 days.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish greater than three percent permanent impairment of her left upper extremity. The Board also finds that appellant received an overpayment of compensation in the amount of \$9,175.92 for the period March 13 through June 7, 2008, for which she was not at fault. The Board further finds that OWCP properly denied appellant's request for waiver of recovery of the overpayment and properly required recovery of the overpayment by deducting \$300.00 from her continuing compensation payments every 28 days.

³⁶ *R.W.*, Docket No. 19-0451 (issued August 7, 2019); *C.A.*, Docket No. 18-1284 (issued April 15, 2019); *Albert Pinero*, 51 ECAB 310 (2000); *Lorenzo Rodriguez*, 51 ECAB 295 (2000).

³⁷ 20 C.F.R. § 10.441; *see A.F.*, Docket No. 19-0054 (issued June 12, 2019); *Donald R. Schueler*, 39 ECAB 1056, 1062 (1988).

³⁸ *R.O.*, Docket No. 18-0076 (issued August 3, 2018); *Gail M. Roe*, 47 ECAB 268 (1995).

³⁹ OWCP's hearing representative noted that appellant had monthly income of \$3,378.01, monthly expenses of \$2,690.00, and assets of \$87,000.00.

ORDER

IT IS HEREBY ORDERED THAT the March 12, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 28, 2021
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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