

wage-loss compensation for the period December 18, 2019 through January 4, 2020; and (4) whether OWCP properly denied waiver of recovery of the overpayment.

FACTUAL HISTORY

On July 7, 2011 appellant, then a 53-year-old mail processor, filed an occupational disease claim (Form CA-2) alleging that she experienced pain in her shoulders, knees, hands, upper and lower back, and left foot due to factors of her federal employment. OWCP accepted the claim for sprains of the thoracic and lumbar areas of the spine, wrists, shoulders and upper arm, left hip and thigh, knees, and left ankle. It later expanded the acceptance of the claim to include left medial meniscus tear and authorized left knee arthroscopy, partial medial meniscectomy, partial lateral meniscectomy, patelloplasty, lateral tibial plateau, and medial femora condyle chondroplasty which occurred on December 8, 2011. OWCP paid appellant wage-loss compensation on the supplemental rolls commencing August 9, 2011 and on the periodic rolls beginning November 20, 2011.

In a September 24, 2014 report, Dr. Mark Greenspan, an orthopedic surgeon, related extensive physical examination findings. He opined that appellant had reached maximum medical improvement (MMI) and provided permanent impairment ratings using the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment (A.M.A., Guides)*.² Dr. Greenspan found that appellant had 7 percent permanent impairment of the right shoulder, 1 percent permanent impairment of the wrists, 2 percent permanent impairment of the left hip, 10 percent permanent impairment of the knees, and 1 percent permanent impairment of the left foot. He rated appellant's thoracic and lumbar spine impairments and concluded that appellant had a total whole person impairment of 30 percent.

In a September 12, 2017 report, Dr. Greenspan detailed appellant's physical examination findings including range of motion findings. Diagnoses included bilateral shoulder overuse syndrome, acromioclavicular arthrosis, right shoulder supraspinatus/ infraspinatus tendinosis, bilateral upper extremities overuse syndrome, bilateral wrist sprain, thoracic musculoligamentous sprain, thoracic spondylosis, L3-4 bilateral facet arthrosis, L4 grade 1 anterolisthesis, L4-5 right foraminal disc protrusion with right neural foraminal narrowing and bilateral facet arthrosis, L5-S1 central disc protrusion with mild central canal narrowing, bilateral face arthrosis, and bilateral neural foraminal narrowing, left hip sprain, left knee medial meniscus posterior horn tear, left knee medial tibiofemoral loss arthritis, left knee medial patellar facet chondromalacia, left knee Baker's cyst, left knee superior patella enthesopathy, severe left knee degenerative joint disease, right knee medial meniscus tear, right knee medial femoral condyle osteochondral abnormality, right knee lateral meniscus posterior horn degeneration, left foot Morton's Neuroma, and small Baker's cyst. Dr. Greenspan referred to his September 24, 2014 report for details regarding appellant's permanent impairment rating.

On October 11, 2019 OWCP referred appellant, together with a statement of accepted facts (SOAF), the medical record, and a set of questions to Dr. Ghol Bahman Ha'Eri, a Board-certified

² A.M.A., *Guides* (6th ed. 2009).

orthopedic surgeon, for a second opinion evaluation in order to determine the status of her accepted conditions, along with treatment recommendations, if any, and appropriate work restrictions.

Dr. Ha'Eri, in a report dated November 13, 2019, detailed the history of appellant's accepted April 26, 2011 employment injury and medical treatment. He reported appellant's physical examination findings, noting that regional examination of the thoracic and lumbar spine revealed no thoracic tenderness, mild diffuse lumbar tenderness, no paraspinal muscle spasm, and negative bilateral straight leg raising. Appellant had limited lumbar range of motion (ROM). Dr. Ha'Eri reported that physical examination of appellant's shoulders revealed limited ROM on the right and no abnormality on the left. An examination of the lower extremities revealed no neurological deficit, full left hip ROM with no tenderness, full bilateral knee ROM, mild diffuse bilateral knee tenderness and no joint effusion. Dr. Ha'Eri advised that appellant's work-related conditions had resolved due to the lack of any evidence supporting continuing residuals or disability. He noted, however that there was objective evidence of lower back and bilateral knee degenerative conditions, which might require future medical care on a nonindustrial basis. Diagnoses included resolved work-related lumbar and thoracic sprains; nonwork-related L4-5 and L5-S1 lumbar disc protrusion; work-related bilateral shoulder sprain with residual right shoulder stiffness; work-related bilateral wrist sprain, resolved; work-related left hip sprain, resolved; work-related left ankle sprain, resolved; bilateral work-related knee sprain; and bilateral knee degenerative posterior horn meniscus tear. Dr. Ha'Eri opined that appellant was disabled from performing her date-of-injury mail processor job due to degenerative lumbar disc disease and bilateral knee degenerative changes. However, he related that appellant was capable of working a 40-hour work week with restrictions. In an attached work capacity evaluation (Form OWCP-5c), Dr. Ha'Eri provided work restrictions, which included: no more than three hours of walking and standing; no bending, stooping, squatting, kneeling, climbing, or operating a motor vehicle at work; no more than three hours of pushing, pulling, and lifting no more than 10 pounds.

On December 18, 2019 appellant filed a claim for compensation (Form CA-7) for a schedule award.

On December 19, 2019 OWCP issued a notice proposing to terminate appellant's wage-loss compensation and medical benefits as she no longer had residuals or disability due to her accepted employment conditions.

On January 6, 2020 appellant elected to receive OPM benefits in lieu of FECA benefits, effective December 18, 2019.

In a January 6, 2020 letter, OPM advised OWCP that appellant elected to receive OPM benefits, effective December 18, 2019, in lieu of compensation benefits under FECA. It also noted that it appeared appellant's last FECA payment occurred on January 4, 2020. OPM requested that OWCP provide a letter affirming the termination of appellant's FECA benefits, so that it could begin payment of appellant's retirement benefits.

In a January 7, 2020 development letter, OWCP requested that appellant submit a report from her attending physician, which addressed whether she had reached MMI and, if so, to evaluate permanent impairment in accordance with the standards of the sixth edition of the A.M.A., *Guides*. It afforded her 30 days to submit the necessary evidence.

In a separate letter of even date to OPM, OWCP indicated that appellant elected to receive OPM benefits effective December 18, 2019 in lieu of compensation benefits under FECA, and it requested that OPM commence annuity payments effective that date. It also requested that OPM reimburse OWCP in the amount of \$1,492.17 for FECA benefits paid during the period December 18, 2019 through January 4, 2020.

An OWCP compensation termination fiscal worksheet dated January 7, 2020 noted that the effective date of the periodic rolls termination was December 18, 2019 due to appellant's election of December 18, 2019 as the effective date for the receipt of her OPM benefits. It also noted that an overpayment in the amount of \$1,492.17 had been created as she continued to receive FECA compensation benefits for 18 additional days after her effective election date for the period December 18, 2019 through January 4, 2020.

On January 9, 2020 OWCP issued a preliminary determination that appellant received an overpayment of compensation in the amount of \$1,492.17 for the period December 18, 2019 through January 4, 2020. It explained that the overpayment was the result of her receipt of FECA compensation benefits through January 4, 2020 after having elected receipt of OPM benefits, effective December 18, 2019. OWCP determined that appellant was without fault in the creation of the overpayment. It provided a calculation of the overpayment and requested that she complete an overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documentation. OWCP advised that failure to submit the requested information within 30 days would result in the denial of waiver of the overpayment. Additionally, it provided an overpayment action request form and notified appellant that within 30 days of the date of the letter, she could request a final decision based on the written evidence or a precoupment hearing.

By decision dated January 29, 2020, OWCP finalized the termination of appellant's wage-loss compensation and medical benefits effective that day.

By decision dated February 11, 2020, OWCP finalized the overpayment and finding that she was without fault in the creation of the overpayment. It further found waiver of the recovery of the overpayment was not warranted and that it had contacted OPM to reimburse OWCP for benefits paid for the period December 18, 2019 through January 4, 2020 in the amount of \$1,492.17.

By decision February 13, 2020, OWCP denied appellant's claim for a schedule award as the medical evidence was insufficient to establish a permanent impairment of a scheduled member or function of the body and her entitlement to wage-loss compensation and medical benefits were terminated effective January 29, 2020.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provisions of FECA and its implementing regulations 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.³ However, FECA does not specify the manner in which the percentage of loss shall be determined. For consistent results and

³ *Supra* note 1 at § 8107; 20 C.F.R. § 10.404.

to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. Through its implementing regulations, OWCP adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.⁴ As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).⁵ 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.⁶

It is the claimant's burden of proof to establish permanent impairment of a scheduled member or function of the body as a result of an employment injury.⁷ OWCP's procedures provide that, to support a schedule award, the file must contain competent medical evidence which shows that the impairment has reached a permanent and fixed state and indicates that the date on which this occurred MMI, describes the impairment in sufficient detail so that it can be visualized on review, and computes the percentage of impairment in accordance with the A.M.A., *Guides*.⁸ Its procedures further provide that, if a claimant has not submitted a permanent impairment evaluation, it should request a detailed report that includes a discussion of how the impairment rating was calculated.⁹ If the claimant does not provide an impairment evaluation and there is no indication of permanent impairment in the medical evidence of file, the claims examiner may proceed with a formal denial of the award.¹⁰

ANALYSIS -- ISSUE 1

The Board finds that this case is not in posture for decision with regard to appellant's schedule award claim.

In support of her schedule award claim, appellant submitted medical reports from Dr. Greenspan dated September 24, 2014 and September 17, 2017, in which he opined that appellant had reached MMI and provided permanent impairment ratings using the sixth edition of the A.M.A., *Guides*.

The record also reflects appellant's left knee surgical procedures, which are ratable under the A.M.A., *Guides*. OWCP, however, did not refer these reports to a district medical adviser

⁴ *Id.* at § 10.404. *E.S.*, Docket No. 20-0559 (issued October 29, 2020); *see also Ronald R. Kraynak*, 53 ECAB 130 (2001).

⁵ *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); *see also* Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (March 2017).

⁶ *J.C.*, Docket No. 20-1071 (issued January 4, 2021); *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

⁷ *J.C., id.*; *Edward Spohr*, 54 ECAB 806 (2003); *Tammy L. Meehan*, 53 ECAB 229 (2001).

⁸ *Supra* note 5 at Chapter 2.808.5 (March 2017).

⁹ *Id.* at Chapter 2.808.6(a) (March 2017).

¹⁰ *Id.*

(DMA), but instead denied appellant's schedule award claim finding that her entitlement to medical benefits and wage-loss compensation had been terminated effective January 29, 2020, and no report providing a permanent impairment rating had been received.

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter.¹¹ While the claimant has the responsibility to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence. It has the obligation to see that justice is done.¹² Dr. Greenspan opined that appellant had reached MMI regarding her accepted conditions. OWCP should have referred the case record to a DMA to confirm that MMI had been reached for her accepted conditions and to address application of the A.M.A., *Guides* as to permanent impairment, if any.¹³

The Board, therefore, finds that the case must be remanded to OWCP for further development. On remand OWCP shall forward the medical record to a DMA for an opinion addressing whether appellant has reached MMI for her accepted conditions, whether she has permanent impairment of a scheduled member or function of the body in accordance with the sixth edition of the A.M.A., *Guides* and, if so, the extent of her permanent impairment.¹⁴ Following this and other such further development deemed necessary, OWCP shall issue a *de novo* decision on appellant's schedule award claim.

LEGAL PRECEDENT -- ISSUE 2

Once OWCP accepts a claim and pays compensation, it has the burden of proof to justify termination or modification of an employee's compensation benefits.¹⁵ After it has determined that, an employee has disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.¹⁶ OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.¹⁷

¹¹ *S.M.*, Docket No. 18-0837 (issued January 11, 2019); *K.G.*, Docket No. 17-0821 (issued May 9, 2018); *John J. Carlone*, 41 ECAB 354 (1989).

¹² *Id.*

¹³ *Supra* note 5 at Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.8(i) (September 2010); *see S.M.*, *supra* note 11; *N.I.*, Docket No. 16-1027 (issued January 11, 2017) (finding that the claimant's physician provided an impairment rating under the sixth edition of the A.M.A., *Guides* and that, therefore, the file should have been routed to OWCP's medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*).

¹⁴ *S.M.*, *supra* note 11; *T.W.*, Docket No. 16-0176 (issued January 10, 2018).

¹⁵ *J.D.*, Docket No. 20-1167 (issued January 26, 2021); *D.G.*, Docket No. 19-1259 (issued January 29, 2020); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

¹⁶ *See J.D.*, *id.*; *R.P.*, Docket No. 17-1133 (issued January 18, 2018); *Jason C. Armstrong*, 40 ECAB 907 (1989); *Charles E. Minnis*, 40 ECAB 708 (1989); *Vivien L. Minor*, 37 ECAB 541 (1986).

¹⁷ *J.D.*, *id.*; *M.C.*, Docket No. 18-1374 (issued April 23, 2019); *Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

ANALYSIS -- ISSUE 2

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective January 29, 2020.

In his November 13, 2019 report, Dr. Ha'Eri related that appellant's physical examination revealed no thoracic tenderness, mild diffuse lumbar tenderness, no paraspinal muscle spasm, negative bilateral straight leg raising, and limited lumbar ROM. Other examination findings included limited right shoulder ROM, no left shoulder abnormality, no lower extremity neurological deficit, full left hip and bilateral knee ROM, mild diffuse bilateral knee tenderness and no joint effusion. Dr. Ha'Eri advised that her work-related conditions had resolved given the lack of any objective finding on physical examination. However, he noted there was objective evidence of lower back and bilateral knee degenerative conditions, which might require future medical care on a nonindustrial basis. Dr. Ha'Eri found that appellant was not capable of returning to her date-of-injury mail processor job due to degenerative lumbar disc disease and bilateral knee degenerative changes, but was capable of working a 40-hour work week with restrictions.

Dr. Ha'Eri did not provide sufficient medical rationale in support of his opinion that appellant ceased to have residuals and disability causally related to her accepted April 26, 2011 employment injury. Appellant sustained employment injuries affecting multiple areas of her body, including thoracic spine, lumbar spine, bilateral wrist, bilateral shoulder and upper arm sprain, left hip and thigh, bilateral knee, left ankle, and left medial meniscus tear. OWCP had also authorized left knee arthroscopy, partial medial meniscectomy, partial lateral meniscectomy, patelloplasty, lateral tibial plateau, and medial femora condyle chondroplasty surgery. However, Dr. Ha'Eri did not discuss the specific accepted employment-related conditions in any detail. He did not provide any discussion of when appellant's employment-related conditions had resolved, based upon the medical evidence of record, or otherwise provide sufficient medical rationale in support of his opinion that appellant ceased to have employment-related residuals and disability. Dr. Ha'Eri related continuing diagnoses of some conditions, including bilateral shoulder and wrist sprains. The Board has held that a medical opinion is of limited probative value if it contains a conclusion regarding a given medical matter which is unsupported by medical rationale.¹⁸ Dr. Ha'Eri's report is therefore of limited probative value and insufficient to carry the weight of the medical evidence. As such the Board finds that OWCP erred in relying on his opinion as the basis to terminate wage-loss compensation and medical benefits for the accepted employment injuries. Therefore, OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits.¹⁹

LEGAL PRECEDENT -- ISSUE 3

Section 8102 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

¹⁸ See *P.C.*, Docket No. 20-0371 (issued January 26, 2021); *L.G.*, Docket No. 19-0142 (issued August 8, 2019); *E.R.*, Docket No. 15-1046 (issued November 12, 2015); *C.M.*, Docket No. 14-0088 (issued April 18, 2014).

¹⁹ *P.C.*, *id.*; *J.H.*, Docket No. 18-0103 (issued October 15, 2018); *J.S.*, Docket No. 17-0804 (issued August 10, 2018).

performance of duty.²⁰ Section 8116 of FECA defines the limitations on the right to receive compensation benefits.²¹ Section 8116(a) provides that, while an employee is receiving workers' compensation benefits, he or she may not receive salary, pay, or remuneration of any type from the United States, except in return for services actually performed or for certain payments related to service in the Armed Forces, including benefits administered by the Department of Veterans Affairs, unless such benefits are payable for the same injury or the same death being compensated for under FECA.²² Section 10.421(a) of OWCP's implementing regulations provides that a beneficiary may not receive wage-loss compensation concurrently with a federal retirement or survivor annuity.²³ The beneficiary must elect the benefit that he or she wishes to receive.²⁴

OWCP's procedures also explain that the employee must make an election between FECA benefits and OPM benefits. The employee has the right to elect the monetary benefit which is the more advantageous.²⁵

ANALYSIS -- ISSUE 3

The Board finds that OWCP improperly determined that appellant received an overpayment of compensation in the amount of \$1,492.17 for the period December 18, 2019 through January 4, 2020.

On January 6, 2020 appellant elected OPM retirement benefits, effective December 18, 2019. OPM, however, continued to pay her wage-loss compensation for temporary total disability for the period December 18, 2019 through January 4, 2020. OWCP calculated that an overpayment of \$1,492.17 was therefore created.

A FECA beneficiary may not receive wage-loss compensation concurrently with a federal retirement or survivor annuity.²⁶ The clear language of section 8116(a) of FECA, section 10.421(a) of OWCP's implementing regulations, and OWCP's procedures prohibit the concurrent receipt of FECA wage-loss benefits and a federal annuity.²⁷

²⁰ *Supra* note 1 at § 8102.

²¹ *Id.* at § 8116.

²² *Id.* at 8116(a).

²³ 20 C.F.R. § 10.421(a).

²⁴ *Id.*

²⁵ *Supra* note 5, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.4(a) (January 1997); *see also V.C.*, Docket No. 20-0852 (issued January 28, 2021); *D.J.*, Docket No. 20-0004 (issued May 21, 2020); *R.S.*, Docket No. 11-0428 (issued September 27, 2011); *Harold Weisman*, Docket No. 93-1335 (issued March 30, 1994).

²⁶ *Supra* note 22; *B.C.*, Docket No. 20-1415 (issued April 14, 2021).

²⁷ *Supra* note 25.

However, there is no evidence of record establishing that appellant actually received OPM retirement benefits for the period December 18, 2019 through January 4, 2020.²⁸ The Board has previously held that the mere fact that a claimant received FECA benefits after the date of an OPM election will not establish receipt of a prohibited dual benefit.²⁹ The record must substantiate that appellant actually received dual benefits. While the record reflects that appellant received FECA benefits for this period, the Board finds that OWCP had not established that she concurrently received OPM retirement benefits for the same period.³⁰

Therefore, the Board finds that OWCP has not met its burden of proof to establish that the overpayment occurred.³¹

CONCLUSION

The Board finds that this case is not in posture for decision as to whether appellant has established a permanent impairment of a scheduled member or function of the body, warranting a schedule award. The Board also finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective January 29, 2020. The Board further finds that OWCP improperly determined that appellant received an overpayment of compensation in the amount of \$1,492.17 for the period December 18, 2019 through January 4, 2020.³²

²⁸ See *V.C.*, *supra* note 25; *V.B.*, Docket No. 19-1874 (issued June 4, 2020); *C.P.*, Docket No. 19-0732 (issued September 5, 2019); *J.M.*, Docket No. 15-1604 (issued May 23, 2016).

²⁹ *B.H.*, Docket No. 13-1955 (issued January 29, 2014).

³⁰ See *R.R.*, Docket No. 18-0032 (issued May 3, 2018) (the election form signed by appellant on December 21, 2018 was insufficient to show that he actually began receiving OPM retirement benefits). See also *E.R.*, Docket No. 18-0084 (issued July 27, 2018).

³¹ See *J.A.*, Docket No. 18-0259 (issued August 5, 2019).

³² In light of the Board's disposition of Issue 3, Issue 4 is rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the January 29 and February 11, 2020 decisions of the Office of Workers' Compensation Programs are reversed. The February 13, 2020 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further proceedings consistent with this decision of the Board.

Issued: October 13, 2021
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