

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

_____)	
K.R., Appellant)	
)	
and)	Docket No. 21-1316
)	Issued: August 3, 2022
GENERAL SERVICES ADMINISTRATION,)	
PUBLIC BUILDINGS SERVICE, New York, NY,)	
Employer)	
_____)	

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

Case Submitted on the Record

ORDER REVERSING CASE

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
JAMES D. MCGINLEY, Alternate Judge

On August 30, 2021 appellant filed a timely appeal from an August 17, 2021 merit decision of the Office of Workers' Compensation Programs (OWCP). The Clerk of the Appellate Boards assigned Docket No. 21-1316.¹

On April 4, 2014 appellant, then a 47-year-old engineer, filed a traumatic injury claim (Form CA-1) alleging that on April 2, 2014 she was a passenger in the back seat of a taxi which was involved in a motor vehicle accident when on travel status while in the performance of duty. She stopped work that day. Appellant returned to full-time work on April 9, 2014. OWCP accepted the claim for sprains of the neck, right shoulder, lumbosacral joint ligaments, contusion of right chest wall, closed fracture of right ribs, spondylosis with radiculopathy of the cervical region, spinal stenosis of the lumbar spine, and spondylosis without myelopathy or radiculopathy

¹ The Board notes that, following the August 17, 2021 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.*

of the lumbosacral region. It paid appellant intermittent wage-loss compensation on the supplemental rolls commencing May 19, 2014.

On October 26, 2016 appellant underwent an OWCP approved L5-S1 posterior spinal fusion.

On December 18, 2018 appellant filed a Form CA-7 claim for compensation for a schedule award. By decision dated August 28, 2019, OWCP issued her a schedule award for five percent permanent impairment of the left lower extremity. The weight of the medical evidence was accorded to the July 29, 2019 report of Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA). The award ran 14.4 weeks for the period April 10 through July 19, 2019.

By decision dated January 21, 2020, OWCP issued a schedule award for four percent permanent impairment of the right upper extremity and two percent permanent impairment of the right lower extremity. The weight of the medical evidence was accorded to the reports of Dr. Robert F. Draper, a Board-certified orthopedic surgeon serving as a second opinion examiner, and the DMA, indicating that appellant had two percent permanent impairment of each lower extremity and a four percent permanent impairment of the right upper extremity. The award ran for 18.24 weeks for the period September 27, 2019 through February 1, 2020.

On May 1, 2020 OWCP advised appellant of its preliminary overpayment determination that she had received an overpayment in the amount of \$13,929.84 for the period June 9 through July 19, 2019 as she was only entitled to two percent permanent impairment to the left lower extremity, but received an award for five percent permanent impairment to the left lower extremity. It further notified her of its preliminary finding that she was without fault in the creation of the overpayment. OWCP provided appellant with an overpayment action request form and an overpayment recovery questionnaire (Form OWCP-20). Additionally, it notified her that, within 30 days of the date of the letter, she could request a telephone conference, a final decision based on the written evidence, or a prerecoupment hearing.

On May 28, 2020 appellant requested a prerecoupment hearing, which was held telephonically on September 3, 2020. By decision dated October 16, 2020, an OWCP hearing representative vacated OWCP's January 21, 2020 decision and remanded the case for further development of the schedule award issue, which included addressing newly submitted medical evidence.

By decision dated December 1, 2020, OWCP denied the claim for an increased schedule award. It found that the medical evidence did not support an increase in the five percent permanent impairment paid for the left lower extremity and further found that appellant should have only received a schedule award for two percent permanent impairment for the left lower extremity.

On December 17, 2020 appellant requested a hearing regarding OWCP's December 1, 2020 decision.

On January 22, 2021 OWCP advised appellant of its preliminary overpayment determination that she had received an overpayment of compensation in the amount of \$16,307.30 for the period April 10, 2019 through February 1, 2020, because she was only entitled to two

percent permanent impairment of the left lower extremity, but received five percent permanent impairment of the left lower extremity in error. It also noted that there was no basis for applying the Consumer Price Index (CPI) or cost of living increase to the schedule award paid during the period April 10 through July 19, 2019 and on September 27, 2019 through February 1, 2020. OWCP advised appellant that she was found to be without fault in creation of the overpayment. It provided her with an overpayment action request form and an overpayment recovery questionnaire (Form OWCP-20). Additionally, OWCP notified appellant that, within 30 days of the date of the letter, she could request a telephone conference, a final decision based on the written evidence, or a prerecoupment hearing.

By decision dated February 5, 2021, an OWCP hearing representative, after a preliminary review, set aside OWCP's December 1, 2020 schedule award decision and remanded the case for issuance of a proper schedule award decision. The hearing representative found that appellant had never been afforded an appropriate decision explaining her correct entitlement to a schedule award.

By decision dated February 10, 2021, OWCP denied appellant's claim for additional impairment to the left lower extremity greater than two percent permanent impairment. It also found that she was not entitled to CPI as part of her schedule award.

On February 11, 2021 appellant disagreed that the overpayment occurred and requested a prerecoupment hearing, which was held telephonically on June 4, 2021.

On June 23, 2021 appellant requested reconsideration of OWCP's February 10, 2021 decision and submitted arguments in support of her request.²

By decision dated August 17, 2021, an OWCP hearing representative finalized that its January 22, 2021 preliminary overpayment determination that appellant had received an overpayment of compensation in the amount of \$16,307.30 for the period April 10, 2019 through February 1, 2020, because she was only entitled to two percent permanent impairment of the left lower extremity, but erroneously received five percent permanent impairment of the left lower extremity. The hearing representative noted that while appellant had requested reconsideration of the February 10, 2021 schedule award decision following her overpayment hearing, the preliminary overpayment decision of January 22, 2021 was in posture for finalization. OWCP's hearing representative also finalized its finding that she was without fault in the creation of the overpayment and determined that the overpayment was due and payable in full as no financial information had been submitted to assess a repayment plan.

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.³ Before the amount of any overpayment can be determined, the evidence must clearly establish the degree of permanent impairment.⁴ Herein, on June 23, 2021 appellant requested

² OWCP had not issued a decision at the time of appellant's August 30, 2021 appeal.

³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.9(e) (February 2013); *see also L.D.*, Docket No. 19-0671 (issued August 28, 2020).

⁴ *R.S.*, Docket No. 20-0311 (issued July 8, 2020).

reconsideration of the February 10, 2021 schedule award decision. Thus, the schedule award claim was interlocutory in nature on August 17, 2021 when an OWCP hearing representative finalized its January 22, 2021 preliminary overpayment determination that appellant had received an overpayment of compensation in the amount of \$16,307.30 for the period April 10, 2019 through February 1, 2020, because she was only entitled to two percent permanent impairment of the left lower extremity, but erroneously received five percent permanent impairment of the left lower extremity.

Accordingly, the Board finds that OWCP's August 17, 2021 decision must be reversed. Following resolution of the schedule award determination, OWCP shall issue a new preliminary overpayment determination in compliance with its regulations, if applicable.⁵

IT IS HEREBY ORDERED THAT the August 17, 2021 decision of the Office of Workers' Compensation Programs is reversed.

Issued: August 3, 2022
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board

⁵ On remand, *see supra* note 3 at Chapter 2.808.9(f) (February 2022) (an overpayment should not be declared when a claim for an increased schedule award yields a percentage of impairment lower than the original award).