

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

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D.C., Appellant )

and )

U.S. POSTAL SERVICE, KILMER )  
PROCESSING & DISTRIBUTION CENTER, )  
Edison, NJ, Employer )

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**Docket Nos. 22-0020 & 22-0297  
Issued: April 24, 2023**

*Appearances:*

*Michael D. Overman, Esq., for the appellant<sup>1</sup>  
Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

JANICE B. ASKIN, Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge  
JAMES D. MCGINLEY, Alternate Judge

**JURISDICTION**

On October 7, 2021 appellant, through counsel, filed a timely appeal from an April 23, 2021 merit decision of the Office of Workers' Compensation Programs (OWCP) and the Clerk of the Appellate Boards assigned Docket No. 22-0020.<sup>2</sup> On December 21, 2021 appellant, through counsel, filed a timely appeal from a November 23, 2021 merit decision of OWCP and the Clerk of the Appellate Boards assigned Docket No. 22-0297. Pursuant to the Federal Employees'

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<sup>1</sup> In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

<sup>2</sup> The Board notes that appellant's Application for Review (AB-1) Form dated October 5, 2021 indicated that she was appealing a July 19, 2021 OWCP decision. Although the record as transmitted to the Board does not contain a final adverse decision issued by OWCP on July 19, 2021, counsel, in his brief, specifically appeals the April 23, 2021 decision.

Compensation Act<sup>3</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

### **ISSUES**

The issues are: (1) whether appellant has met her burden of proof to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award; (2) whether OWCP properly determined that appellant received an overpayment of compensation \$13,555.39 for which she was not at fault, for the period September 6, 2018 through January 4, 2019 because she received schedule award compensation for the right lower extremity to which she was not entitled; and (3) whether OWCP properly denied waiver of recovery of the overpayment.

### **FACTUAL HISTORY**

This case has been previously before the Board on a different issue.<sup>4</sup> 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 July 15, 2013 appellant, then a 43-year-old employee, filed a traumatic injury claim (Form CA-1) alleging that on July 10, 2013 she sprained her right knee while in the performance of duty. She stopped work on July 26, 2013. OWCP assigned that claim OWCP File No. xxxxxxx206.<sup>5</sup> On January 16, 2014 it accepted the claim for unspecified internal derangement of the right knee and derangement of the right hip, right thigh, and right back. OWCP subsequently expanded the acceptance of appellant's claim to include lumbar sprain/strain. In a June 25, 2015 decision, it terminated her wage-loss compensation and medical benefits, effective that date as she no longer had residuals or disability causally related to the July 10, 2013 employment injury. On October 27, 2015 an OWCP hearing representative affirmed the June 25, 2015 termination decision. By decision dated August 29, 2016, the Board affirmed OWCP's October 27, 2015 decision.

OWCP received a January 9, 2017 medical report from Dr. Arthur F. Becan, an attending orthopedic surgeon, which noted appellant's history of injury on July 10, 2013 and medical treatment. Utilizing the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (A.M.A., *Guides*),<sup>6</sup> Dr. Becan determined that appellant had a combined 44 percent permanent impairment of the right lower extremity and a combined 3 three

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<sup>3</sup> 5 U.S.C. § 8101 *et seq.*

<sup>4</sup> Docket No. 16-0430 (issued August 29, 2016).

<sup>5</sup> Appellant has prior claims. She filed a claim for an October 27, 2004 traumatic injury, which OWCP accepted for right knee contusion under OWCP File No. xxxxxx805, and a June 26, 2013 traumatic injury under xxxxxx881, which was denied by OWCP.

<sup>6</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

percent permanent impairment of the left lower extremity. He determined that she reached maximum medical improvement (MMI) on the date of his impairment evaluation.

On April 5, 2017 appellant filed a claim for compensation (Form CA-7) for a schedule award.

On May 2, 2017 OWCP referred the case record to Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA). In a May 2, 2017 report, Dr. Katz reviewed the medical evidence, including Dr. Becan's report and recommended a second opinion examination to address discrepancies in the findings of neurological impairment between Dr. Becan and Dr. Stephen Schneider, a Board-certified orthopedic surgeon and an impartial medical examiner (IME), who examined appellant on January 20, 2015.

In an addendum report dated August 2, 2017, Dr. Becan addressed the concerns expressed by Dr. Katz. He explained that Dr. Schneider's January 20, 2015 evaluation was performed almost two years prior to his evaluation on January 9, 2017. Dr. Becan stood by his right lower extremity impairment rating of 44 percent and left lower extremity impairment rating of 3 percent.

On August 23, 2017 Dr. Katz noted his review of Dr. Becan's August 2, 2017 addendum report. He advised that his prior opinion that a conflict in medical opinion existed between Dr. Becan and Dr. Schneider remained unchanged. Dr. Katz again recommended that appellant be referred for a second opinion evaluation.

On September 13, 2017 OWCP declared a conflict in medical opinion between Dr. Becan and Dr. Katz regarding the extent of appellant's permanent impairment due to the July 10, 2013 employment injury. On June 25, 2018 it referred appellant, a statement of accepted facts (SOAF), the medical record, and a list of questions, to Dr. Dean L. Carlson, a Board-certified orthopedic surgeon, selected as the IME to resolve the conflict in the medical opinion evidence.

In a September 6, 2018 report, Dr. Carlson reviewed the history of appellant's July 10, 2013 employment injury. He provided findings on physical, neurological, and sensory examination. Dr. Carlson determined that appellant had reached MMI as of the date of his examination. He opined that she had six percent permanent impairment of the right lower extremity due to a diagnosis of right knee osteoarthritis based on the sixth edition of the *A.M.A., Guides*.

OWCP, by decision dated December 18, 2018, granted appellant a schedule award for six percent permanent impairment of the right lower extremity based on the opinion of Dr. Carlson as the IME. The period of the award ran for 17.28 weeks from September 6, 2018 through January 4, 2019 and the payments were based on a pay rate of \$747.28 per week. Payment plates reflect that OWCP paid appellant schedule award compensation in the net amount of \$13,556.16 for the period September 6, 2018 through January 4, 2019.

On January 3, 2019 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review regarding the December 18, 2018 schedule award decision.

OWCP subsequently received a May 14, 2019 report from Dr. Becan who noted the deficiencies in Dr. Carlson's September 6, 2018 report. Dr. Becan continued to stand by his 44 percent right lower extremity impairment rating and 3 percent left lower extremity impairment rating.

An oral hearing was held on May 15, 2019. By decision dated July 29, 2019, an OWCP hearing representative set aside the December 18, 2018 schedule award decision and remanded the case to OWCP for further development of the medical evidence. She found that OWCP improperly declared a conflict in the medical opinions of Dr. Becan and Dr. Katz as Dr. Katz did not offer an impairment rating; rather, he recommended additional medical development with a Board-certified specialist who performed rating examinations in accordance with the A.M.A., *Guides*. Based on this it was improper to declare a conflict, instead OWCP should have referred appellant for a second opinion examination. The hearing representative found that the opinion of Dr. Carlson could not be afforded the special weight of the medical evidence as an IME, but that of a second opinion physician. She further found that the opinion of Dr. Carlson, in his September 6, 2018 report, was not based on a complete and an accurate SOAF as it did not list all of appellant's accepted claims or a formal acceptance letter regarding her accepted lumbar sprain/strain. Therefore, the hearing representative remanded the case to OWCP to administratively combine the instant claim, assigned OWCP File No. xxxxxx206, with OWCP File Nos. xxxxxx805 and xxxxxx881. She also instructed OWCP to update the SOAF to include these claims, to clarify the accepted conditions as the electronic record reflected acceptance of lumbar sprain/strain, but as noted above, there was no formal acceptance letter for this condition. Lastly, the hearing representative instructed OWCP to request an impairment rating report from Dr. Carlson.

On remand, OWCP was informed that Dr. Carlson had retired in June 2019 and on February 11, 2020 it referred appellant, an updated SOAF, the medical record, and a list of questions, to Dr. Stanley Askin, a Board-certified orthopedic surgeon, for a second opinion evaluation of permanent impairment in accordance with the standards of the A.M.A., *Guides*.<sup>7</sup>

In a February 28, 2020 report, Dr. Askin described appellant's July 10, 2013 employment injury, reviewed the SOAF and medical record, and provided physical examination findings. He found no objective findings consequential to the work injury and related that there was no medical reason as to why appellant could not have fully recovered from the employment injury. As such, Dr. Askin further found that her subjective complaints were not supported by objective findings. He attributed the imperfections within appellant's right knee, right hip, and back to being a morbidly obese middle-aged person. Dr. Askin determined that she had reached MMI and found that there was no diagnosis or permanent impairment causally related to the accepted employment injury. He concluded that appellant had zero percent permanent impairment.

On March 31, 2020 Dr. Katz reviewed Dr. Askin's February 28, 2020 report and agreed with his finding that appellant had no permanent impairment based on his physical examination.

On June 16, 2020 OWCP declared a conflict in medical opinion between Dr. Becan and Dr. Askin with regard to the assessment of appellant's bilateral lower extremity permanent

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<sup>7</sup> Also on remand, OWCP administratively combined the present claim assigned OWCP File No. xxxxxx206 with OWCP File Nos. xxxxxx881 and xxxxxx805, with the latter serving as the master file.

impairment due to the July 13, 2010 employment injury. On June 18, 2020 it referred appellant, a SOAF, the medical record, and a list of questions, to Dr. Ian B. Fries, a Board-certified orthopedic surgeon, selected as the IME to resolve the conflict in the medical opinion evidence.

In an August 29, 2020 report, Dr. Fries noted that appellant was evaluated on August 18, 2020. He noted the accepted conditions of unspecified internal derangement of right knee, derangement of right hip, right thigh, and right back, and contusion of the right knee. Dr. Fries reviewed the SOAF and medical evidence, performed a physical examination, and found that appellant had no motor reflex, or sensory reflex findings to support lumbar spine impairment as they were normal. There were no motor findings, including the absence of objectively measurable thigh or calf atrophy. Subjective sensory symptoms were not in a dermatomal pattern. Rather, they were consistent with peripheral neuropathy. Appellant had no subjective findings to support radiculopathy, *e.g.*, straight leg lifting did not provoke radicular symptoms. Dr. Fries indicated that there were only objective findings of minor losses of lumbar spine and right knee range of motion attributable to right knee patellar chondromalacia, a documented preexisting degenerative condition, and not to the minor trauma that occurred seven years ago. He noted that no imaging studies had been provided to him for review. Dr. Fries also noted that complete records had not been provided to him for review regarding appellant's prior claims for April 20, 2002 and June 26, 2013 traumatic injuries under OWCP File Nos. xxxxxx768 and 881, which were denied by OWCP, and an October 27, 2004 traumatic injury under OWCP File No. xxxxxx805, which OWCP accepted for right knee contusion. He maintained that it was "preposterous" to consider seven years of total disability due to the accepted right lower extremity and lumbar conditions. Dr. Fries indicated that while OWCP considered derangement an appropriate diagnosis, it provided no scientifically supported condition. He determined that appellant reached MMI on August 18, 2020, the date of his impairment evaluation. Dr. Fries opined that she had no ratable permanent impairment causally related to her July 10, 2013 employment injury in accordance with the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter, Rating Spinal Nerve Extremity Impairment (The Guides Newsletter)* (July/August 2009). He noted that Dr. Becan was not a Board-certified orthopedic surgeon. Dr. Fries also noted discrepancies in Dr. Becan's motor and sensory findings. He advised that his own examination finding of sensory symptoms was consistent with peripheral neuropathy likely due to diabetes and not radiculopathy. Dr. Fries related that his finding was supported by Dr. Carlson and Dr. Askin and that Dr. Katz noted the discrepancies in Dr. Becan's findings.

OWCP, by decision dated November 5, 2020, denied appellant's claim for a schedule award, finding that the September 14, 2020 opinion of Dr. Fries as the IME represented the special weight of the medical evidence and established that appellant had no permanent impairment of a scheduled member or function of the body as a result of the accepted July 10, 2013 employment injury.

On November 11, 2020 appellant, through counsel, requested an oral hearing before an OWCP hearing representative.

By decision dated April 23, 2021, an OWCP hearing representative affirmed the November 5, 2020 schedule award decision. She accorded the special weight of the medical evidence to Dr. Fries' impartial medical opinion.

In a preliminary determination dated May 28, 2021, OWCP notified appellant that she had received an overpayment of schedule award compensation in the amount of \$13,555.39 for the period September 6, 2018 through January 4, 2019. It explained that she had received \$13,555.39 for six percent permanent impairment of the right lower extremity that was set aside on December 18, 2018 because it was determined that she had no work-related permanent impairment. OWCP also made a preliminary determination that appellant was not at fault in the creation of the overpayment and requested that she complete an overpayment action request form and an overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documentation. Additionally, it advised her that, within 30 days of the date of the letter, she could request a final decision based on the written evidence or a prerecoupment hearing.

On June 8, 2021 appellant's counsel requested a prerecoupment hearing.

By decision dated July 15, 2021, OWCP finalized the May 8, 2021 preliminary overpayment determination, finding that appellant was overpaid compensation in the amount of \$13,555.39 during the period September 6, 2018 through January 4, 2019 because the schedule award compensation she received for six percent permanent impairment of the right lower extremity was set aside because it was determined that she had no work-related permanent impairment. It further found that she was without fault in the creation of the overpayment, but denied waiver of recovery of the overpayment because she did not respond to the overpayment recovery questionnaire and provide supporting financial documentation necessary to establish that recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience. OWCP requested payment of the overpayment in full.

By letter dated August 10, 2021, an OWCP hearing representative notified appellant that a telephonic hearing was scheduled for October 13, 2021 at 11:15 a.m. Eastern Standard Time (EST).

During the October 13, 2021 telephonic prerecoupment hearing, counsel cited Board precedent and contended that OWCP prematurely issued its May 28, 2021 preliminary overpayment determination as appellant had appealed the April 23, 2021 schedule award decision to the Board.

By decision dated November 23, 2021, an OWCP hearing representative finalized the May 8, 2021 preliminary overpayment determination that appellant received an overpayment of compensation in the amount of \$13,555.39 for the period September 6, 2018 through January 4, 2019 as she received schedule award compensation for six percent permanent impairment of the right lower extremity while the evidence of record established that she had no work-related permanent impairment. He further finalized the preliminary finding that she was without fault in creation of the overpayment but denied waiver of recovery of the overpayment because she did not respond to the overpayment recovery questionnaire and provide supporting financial documentation necessary to establish that recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience. The hearing representative required recovery of the overpayment in full within 30 days.

## LEGAL PRECEDENT -- ISSUE 1

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.<sup>8</sup>

The schedule award provisions of FECA<sup>9</sup> and its implementing regulations<sup>10</sup> 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 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.<sup>11</sup> As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).<sup>12</sup> 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.<sup>13</sup>

Neither FECA nor its implementing regulations provide for the payment of a schedule award for the permanent loss of use of the back or spine,<sup>14</sup> or the body as a whole. However, a schedule award is permissible where the employment-related spinal conditions affect the upper and/or lower extremities.<sup>15</sup> The sixth edition of the A.M.A., *Guides* (2009) provides a specific methodology for rating spinal nerve extremity impairment in *The Guides Newsletter*, which is a supplemental publication of the sixth edition of the A.M.A., *Guides*. It was designed for situations where a particular jurisdiction, such as FECA, mandated ratings for extremities and precluded ratings for the spine. The FECA-approved methodology is premised on evidence of radiculopathy

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<sup>8</sup> See *T.H.*, Docket No. 19-1066 (issued January 29, 2020); *D.F.*, Docket No. 18-1337 (issued February 11, 2019); *Tammy L. Meehan*, 53 ECAB 229 (2001).

<sup>9</sup> 5 U.S.C. § 8107.

<sup>10</sup> 20 C.F.R. § 10.404.

<sup>11</sup> *Id.* See also *Ronald R. Kraynak*, 53 ECAB 130 (2001).

<sup>12</sup> See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5.a (March 2017).

<sup>13</sup> *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

<sup>14</sup> 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).

<sup>15</sup> *Supra* note 12 at Chapter 2.808.5.c(3) (March 2017).

affecting the upper and/or lower extremities. The appropriate tables for rating spinal nerve extremity impairment are incorporated in the Federal (FECA) Procedure Manual.<sup>16</sup>

Section 8123(a) of FECA provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.<sup>17</sup> When there are opposing reports of virtually equal weight and rationale, the case must be referred to an IME, pursuant to section 8123(a) of FECA (5 U.S.C. § 8123(a)), to resolve the conflict in the medical evidence.<sup>18</sup> Where a case is referred to an IME for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.<sup>19</sup>

### ANALYSIS -- ISSUE 1

The Board finds that this case is not in posture for decision regarding appellant's entitlement to schedule award compensation.

OWCP properly found a conflict in the medical opinion evidence between Dr. Becan, appellant's attending physician, who found that appellant had 44 percent permanent impairment of the right lower extremity and 3 percent permanent impairment of the left lower extremity, and Dr. Askin, an OWCP second opinion physician, who found that appellant had no lower extremity permanent impairment. It properly referred her to Dr. Fries, pursuant to 5 U.S.C. § 8123(a), for an impartial medical examination in order to resolve the conflict in the medical opinion. In his September 14, 2020 report, Dr. Fries opined that appellant had no ratable lower extremity permanent impairment under the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter*. He noted appellant's accepted conditions of unspecified internal derangement of the right knee and derangement of the right hip, thigh, and back, and right knee contusion, but related that it was preposterous to consider seven years of total disability due to these conditions. Dr. Fries provided physical examination findings, noting that the only objective findings included minor losses of lumbar spine and right knee range of motion, which he attributed to appellant's preexisting right knee patellar chondromalacia. However, he also noted that imaging studies had not been provided to him for review. Dr. Fries also noted that complete records had not been provided to him for review regarding appellant's prior claims for April 20, 2002 and June 26, 2013 traumatic injuries under OWCP File Nos. xxxxxx768 and 881, which were denied by OWCP, and an October 27, 2004 traumatic injury under OWCP File No. xxxxxx805, which OWCP accepted for right knee contusion.

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<sup>16</sup> *Supra* note 12 at Chapter 3.700, Exhibit 4 (January 2010); *see L.H.*, Docket No. 20-1550 (issued April 13, 2021); *N.G.*, Docket No. 20-0557 (issued January 5, 2021).

<sup>17</sup> 5 U.S.C. § 8123(a). *See R.C.*, Docket No. 18-0463 (issued February 7, 2020); *see also G.B.*, Docket No. 16-0996 (issued September 14, 2016).

<sup>18</sup> *See M.R.*, Docket No. 19-0526 (issued July 24, 2019); *C.R.*, Docket No. 18-1285 (issued February 12, 2019).

<sup>19</sup> *V.H.*, Docket No. 20-0012 (issued November 5, 2020).



Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. The claimant has the burden of proof to establish entitlement to compensation. However, OWCP shares responsibility in the development of the evidence to see that justice is done.<sup>20</sup> Once it undertakes development of the record, it must do a complete job in procuring medical evidence that will resolve the relevant issues in the case.<sup>21</sup>

In a situation where OWCP secures an opinion from an IME for the purpose of resolving a conflict in the medical evidence and the opinion from such IME requires clarification or elaboration, it has the responsibility to secure a supplemental report from the examiner for the purpose of correcting the defect in the original opinion.<sup>22</sup>

The Board finds that while Dr. Fries addressed appellant's permanent impairment rating, he clearly noted that appellant's entire medical record, including all diagnostic studies, was not provided for his review. OWCP should have referred the entire medical record including all diagnostic reports and/or studies to Dr. Fries, once he noted this discrepancy.<sup>23</sup>

The Board also notes that Dr. Fries disputed that appellant's accepted condition of derangement was an appropriate diagnosis. However, as noted, appellant's claim was accepted by OWCP for internal derangement of the right knee and derangement of the right hip, thigh, and back, and this was reflected on the SOAF provided to Dr. Fries. The Board has held that, if a referee physician does not use the SOAF as the framework in forming his or her opinion, the probative value of the opinion is seriously diminished or negated altogether.<sup>24</sup> Further, the Board notes that it is the function of the medical expert to give an opinion only on medical questions, not to find facts.<sup>25</sup> As Dr. Fries may not disregard the accepted facts of the case, the Board further finds that his report is not entitled to the special weight of the medical opinion evidence.<sup>26</sup>

On remand OWCP shall refer appellant's entire medical record to Dr. Fries and request that he provide a supplemental opinion regarding appellant's permanent impairment pursuant to the sixth edition of the A.M.A., *Guides*. If Dr. Fries is unable to clarify or elaborate on his original report or if the doctor's supplemental report is also vague, speculative or lacks rationale, OWCP must submit the case record, together with a detailed statement of accepted facts to a second

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<sup>20</sup> See *L.B.*, Docket No. 19-0432 (issued July 23, 2019); *William J. Cantrell*, 34 ECAB 1223 (1983).

<sup>21</sup> *Id.*; see also *S.A.*, Docket No. 18-1024 (issued March 12, 2020).

<sup>22</sup> *J.C.*, Docket No. 20-0064 (issued September 4, 2020); *S.R.*, Docket No. 17-1118 (issued April 5, 2018); *Nancy Lackner (Jack D. Lackner)*, 40 ECAB 232, 238 (1988); see also *James P. Roberts*, 31 ECAB 1010 (1980).

<sup>23</sup> *Id.*

<sup>24</sup> See also *Q.S.*, Docket No. 20-0701 (issued November 10, 2021); *T.M.*, Docket No. 20-1143 (issued December 14, 2020); *D.F.*, Docket No. 20-1286 (issued June 17, 2021).

<sup>25</sup> *S.D.*, Docket No. 17-1271 (issued November 7, 2017); *S.J.*, Docket No. 09-1355 (issued May 20, 2010); *Paul King*, 54 ECAB 356 (2003)

<sup>26</sup> *L.L.*, Docket No. 15-0672 (issued September 23, 2016); *Richard Higgins*, Docket No. 04-0183 (June 21, 2004).

impartial specialist for a rationalized medical opinion on the issue in question.<sup>27</sup> After such further development as necessary, OWCP shall issue a *de novo* decision.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8102(a) of FECA<sup>28</sup> 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 or her duty.<sup>29</sup> 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.”<sup>30</sup>

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.<sup>31</sup> If, during the course of the appeals process, it is determined that the initial schedule award decision must be set aside, a new schedule award decision should be issued that fully addresses the reasons for the change in rating. Declaring an overpayment thereafter is appropriate if the *de novo* decision substantiates a lesser degree of impairment than previously awarded, so long as both ratings are based on the same edition of the A.M.A., *Guides*. The resulting overpayment should have a finding of without fault.<sup>32</sup>

### **ANALYSIS -- ISSUE 2**

In light of the Board’s disposition of Issue 1, the Board finds that OWCP improperly determined that appellant received an overpayment of compensation in the amount of \$13,555.39 for the period September 6, 2018 through January 4, 2019. Therefore, the November 23, 2021 overpayment decision must be reversed.<sup>33</sup>

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<sup>27</sup> See *L.R.*, Docket No. 21-1312 (issued March 6, 2023); *F.H.*, Docket No. 17-1924 (issued January 25, 2019); *Talmadge Miller*, 47 ECAB 673 (1996); *Harold Travis*, 31 ECAB 1071, 1078 (1979).

<sup>28</sup> *Supra* note 3.

<sup>29</sup> 5 U.S.C. § 8102(a).

<sup>30</sup> *Id.* at § 8129(a).

<sup>31</sup> See *M.F.*, Docket Nos. 21-0759 & 21-1037 (issued May 4, 2022); *D.M.*, Docket No. 21-1124 (issued July 7, 2022).

<sup>32</sup> *Id.* See *supra* note 12 at *Hearings and Review of the Written Record*, Chapter 2.1601.8c (February 2022).

<sup>33</sup> In view of the Board’s disposition of Issues 1 and 2, Issue 3 is rendered moot.

**CONCLUSION**

The Board finds that this case is not in posture for decision regarding appellant's entitlement to schedule award compensation. The Board further finds that OWCP improperly determined that appellant received an overpayment of compensation in the amount of \$13,555.39 for the period September 6, 2018 through January 4, 2019.

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 23, 2021 decision of the Office of Workers' Compensation Programs regarding the denial of a schedule award is set aside, and the case is remanded for further proceedings consistent with this decision of the Board. The November 23, 2021 decision of the Office of Workers' Compensation Programs regarding the overpayment is reversed.

Issued: April 24, 2023  
Washington, DC

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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

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