

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

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N.T., Appellant)	
)	
and)	Docket No. 21-0236
)	Issued: January 24, 2023
U.S. POSTAL SERVICE, POST OFFICE,)	
Napierville, IL, Employer)	
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Appearances:
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On December 9, 2020 appellant, through his representative, filed a timely appeal from an October 22, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

¹ 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.

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant was properly paid schedule award compensation from May 25 through September 22, 2012 for permanent impairment of his right upper extremity.

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances set forth in the Board's prior decision are incorporated herein by reference. The facts relevant to this appeal are as follows.

On September 24, 2011 appellant, then a 39-year-old laborer-custodian, filed a traumatic injury claim (Form CA-1) alleging that on September 17, 2011 he sustained a right wrist injury when mowing grass while in the performance of duty. OWCP accepted the claim for right wrist osteoarthritis.

The record indicates that appellant underwent right wrist scaphoid excision and fusion surgery on December 20, 2011. Appellant stopped working and began receiving wage-loss compensation on the supplemental rolls.

On May 29, 2012 appellant submitted a claim for compensation (Form CA-7) requesting a schedule award.

By decision dated September 18, 2012, OWCP issued a schedule award for 11 percent permanent impairment of the right upper extremity. The period of the award was 34.32 weeks from May 25, 2012 to January 20, 2013. It noted that wage-loss compensation had already been paid through September 22, 2012 and that a claimant could not receive both wage-loss compensation and a schedule award concurrently. In addition, OWCP stated that "compensation for total disability will offset compensation payable for your schedule award through the ending date of the award [January 20, 2013]."

The record indicates that, during the period May 25, 2012 to January 20, 2013, appellant continued to receive compensation for total disability designated as wage-loss disability compensation. As of July 1, 2012, compensation was paid every 28 days on the periodic rolls.

On November 11, 2013 appellant submitted a November 1, 2013 report from Dr. Eugene Lopez, a Board-certified orthopedic surgeon. Dr. Lopez provided a history and results on examination. He opined that appellant had 11 percent permanent impairment to the right arm under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).⁴ Dr. Lopez identified Table 15-3 of the A.M.A., *Guides*

³ Docket No. 15-1827 (issued February 1, 2016), *denying petition for recon.*, Docket No. 15-1827 (issued November 13, 2016).

⁴ A.M.A., *Guides* (6th ed. 2009).

and found that appellant had a class 1 grade D impairment under the diagnosis of arthrodesis, intercarpal fusion of the wrist.⁵

OWCP referred the evidence to Dr. David H. Garelick, a Board-certified orthopedic surgeon and OWCP district medical adviser (DMA), for review. In a November 25, 2013 report, he opined that Dr. Lopez had accurately applied the A.M.A., *Guides*. The DMA opined that the date of maximum medical improvement (MMI) remained May 25, 2012.

On September 30, 2013 appellant, through counsel, resubmitted a copy of a July 22, 2012 report from Dr. Brian A Murphy, an orthopedic surgeon specializing in hand surgery. By decision dated December 11, 2013, OWCP determined that appellant was not entitled to an increased schedule award. It acknowledged that he had previously been awarded an 11 percent right upper extremity permanent impairment.

On December 17, 2013 appellant, through counsel, requested a hearing before a representative of OWCP's Branch of Hearings and Review. A hearing was held on June 10, 2014. Appellant argued that he had not properly been paid his schedule award because he had been paid wage-loss compensation, not schedule award compensation. He argued that OWCP "should hold the schedule award in abeyance" until the claimant was no longer receiving wage-loss compensation.

By decision dated August 26, 2014, an Office hearing representative vacated the December 11, 2013 decision. The hearing representative found that the decision was "confusing" and remanded the case to clarify whether wage-loss benefits should have been interrupted for the schedule award payment.

In a decision dated November 18, 2014, OWCP again found that appellant had failed to establish increased permanent impairment. It found that, due to a computer error, however, his compensation code had not been changed from the periodic rolls to a schedule award. OWCP noted that, nonetheless, appellant could not receive wage-loss compensation and a schedule award concurrently.

On November 24, 2014 appellant, through counsel, again requested a hearing before a representative of OWCP's Branch of Hearings and Review. At the hearing held on January 26, 2015, counsel argued that appellant could not be at MMI while he was receiving wage-loss compensation for total disability.

By decision dated March 10, 2015, an Office hearing representative affirmed the November 18, 2014 decision.

On September 3, 2015 appellant, through counsel, appealed the March 10, 2015 decision to the Board. By decision dated February 1, 2016,⁶ the Board affirmed the March 10, 2015 decision, finding that appellant had not established greater than 11 percent permanent impairment

⁵ *Id.* at 397.

⁶ *Supra* note 3.

of his right upper extremity, and that his date of MMI was May 25, 2012. The Board further found that, although OWCP did not change the payment code, he continued to receive the same amount of compensation he would have been paid; appellant had been properly paid compensation from the date of MMI, May 25, 2012 to January 15, 2013; and appellant continued to receive wage-loss compensation after that date.

On January 23, 2017 appellant, through counsel, requested reconsideration, asserting that appellant lost months of his schedule award as OWCP did not convert his wage-loss compensation to a schedule award payment. He asserted that appellant lost four months of the schedule award he was entitled to and, thus, had been adversely impacted by OWCP's failure to convert appellant's wage-loss compensation to a schedule award payment. The record contains a number of letters from counsel inquiring into the status of his reconsideration request, which had been filed on January 23, 2017.

By decision dated October 22, 2020, OWCP denied modification.

LEGAL PRECEDENT

Section 8107 of FECA⁷ authorizes the payment of schedule awards for the loss or loss of use, of specified members, organs or functions of the body. Such loss or loss of use is known as permanent impairment.⁸

A schedule award is payable consecutively, but not concurrently, with an award for wage loss for the same injury.⁹ The period covered by a schedule award commences on the date that the employee reaches MMI from the residuals of the injury.¹⁰ The question of when MMI has been reached is a factual one that depends upon the medical findings in the record. The determination of such date is to be made in each case upon the basis of the medical evidence in that case.¹¹ The date of MMI is usually considered to be the date of the medical examination that determined the extent of the permanent impairment.¹² OWCP's procedures provide that a retroactive determination of the date of MMI is not *per se* erroneous. When the medical evidence establishes that the employee did, in fact, reach MMI by such date, the determination is proper.¹³

⁷ 5 U.S.C. § 8107.

⁸ 20 C.F.R. § 10.404.

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.4(a)(3) (February 2013); *see also J.D.*, Docket No. 19-1363 (issued April 10, 2020); *L.D.*, Docket No. 18-1317 (issued April 17, 2019); *E.S.*, Docket No. 16-1248 (issued May 15, 2017); *M.B.*, Docket No. 12-1344 (issued December 21, 2012).

¹⁰ *Id.* at Chapter 2.808.7(b) (February 2013).

¹¹ *Id.*; *S.M.*, Docket No. 18-0837 (issued January 11, 2019); *see D.S.*, Docket No. 15-1244 (issued August 24, 2015)

¹² *Supra* note 10; *see A.D.*, Docket No. 17-1996 (issued March 5, 2016); *W.S.*, Docket No. 16-0344 (issued April 4, 2016).

¹³ *Supra* note 9 at Chapter 2.808.7(b)(3).

ANALYSIS

The Board finds that appellant was properly paid compensation for his 11 percent permanent impairment of the right upper extremity from May 25 through September 22, 2012.

Preliminary, the Board notes that it is unnecessary for the Board to consider the evidence that was previously considered in its February 1, 2016 decision. Findings made in prior Board decisions are *res judicata* absent any further review by OWCP under section 8128 of FECA.¹⁴

On January 23, 2017 counsel submitted a request for reconsideration asserting that appellant did not receive four months of the schedule award to which he was entitled, during a period in which he received wage-loss compensation for total disability. By decision dated October 22, 2020, OWCP denied appellant's request for reconsideration. It noted it was well-established that a claimant may not concurrently receive compensation under a schedule award and wage loss for disability.¹⁵ While the payments appellant received during the period in question were designated as wage-loss disability payments instead of schedule award payments, OWCP found the record devoid of any evidence establishing entitlement to any additional compensation.

As noted in the prior Board decision, OWCP's September 18, 2012 decision indicated that appellant had been paid temporary total disability from May 25 through September 22, 2012. OWCP acknowledged in a November 18, 2014 decision that normally the continuing disability payments would be interrupted and the payment code changed to a schedule award.¹⁶ A review of the record shows that OWCP did not change the code in this case to a schedule award instead of periodic rolls disability payment. However, appellant continued to receive the same amount of compensation he would have been paid had the payments been properly coded as schedule award payments instead of as periodic rolls disability payments through January 15, 2013.

The Board finds that appellant failed to establish any adverse result from OWCP's failure to properly code the payments in the compensation system at the time of the determination. It is well established that a claimant may not concurrently receive compensation under a schedule award and wage loss for disability.¹⁷ Whether the payments were designated as wage-loss disability payments or schedule award payments, appellant has submitted no evidence showing entitlement to any additional compensation.¹⁸ Thus, contrary to counsel's contention, appellant received the proper compensation for his schedule award for which he was entitled covering the period May 25 to September 22, 2012. He did not establish a loss of any benefits in this case.

¹⁴ *T.B.*, Docket No. 20-1413 (issued July 1, 2021); *M.D.*, Docket No. 20-0007 (issued May 13, 2020); *D.B.*, Docket No. 17-1444 (issued January 11, 2018); *Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998).

¹⁵ *Supra* note 13.

¹⁶ *See D.C.*, Docket No. 10-1046 (issued January 19, 2011).

¹⁷ *Supra* note 9 at Chapter 2.808.4(a)(3).

¹⁸ *Id.* *See also J.S.*, Docket No. 19-1363 (issued April 10, 2020); *L.D.*, Docket No. 18-1317 (issued April 17, 2019); *E.S.*, Docket No. 16-1248 (issued May 15, 2017); *M.B.*, Docket No. 12-1344 (issued December 21, 2012).

The Board finds that appellant was properly paid compensation for his 11 percent permanent impairment of the right upper extremity from May 25 through September 22, 2012.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant was properly paid compensation for his permanent impairment of his right upper extremity from May 25 through September 22, 2012.

ORDER

IT IS HEREBY ORDERED THAT the October 22, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 24, 2023
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