United States Department of Labor
Employees' Compensation Appeals Board

R.G., Appellant	)	
and	)	**Docket No. 21-0491**
	)	**Issued: March 23, 2023**
DEPARTMENT OF LABOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, Dallas, TX, Employer	)	

Appearances:
Appellant, pro se
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 February 11, 2021 appellant filed a timely appeal from a January 25, 2021 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

ISSUES

The issues are: (1) whether appellant has met her burden of proof to establish greater than 8 percent permanent impairment of her right upper extremity and 19 percent permanent impairment of her left upper extremity, for which she previously received schedule award compensation; (2) whether OWCP properly determined that appellant received an overpayment of

[1] 5 U.S.C. § 8101 *et seq*.

[2] The Board notes that, following the January 25, 2021 decision, appellant submitted additional evidence to OWCP. However, the Board's *Rules of Procedures* 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*.

compensation in the amount of $26,608.85 for the period September 26, 2017 through May 10, 2019, for which she was without fault, as her schedule award compensation exceeded her entitlement; and (3) whether OWCP properly denied appellant's request for waiver of recovery of the overpayment.

FACTUAL HISTORY

On May 2, 2013 appellant, then a 45-year-old contact representative, filed an occupational disease claim (Form CA-2) alleging that on or before March 19, 2013, she developed pain in her neck, left shoulder, left elbow, and left hand due to factors of her federal employment including repetitive upper extremity motions while reviewing imaged records and keyboarding responses. OWCP accepted the claim for brachial neuritis or radiculitis, cervical radiculopathy; neck sprain; left shoulder and upper arm sprain; left elbow and forearm sprain; and later expanded acceptance of its claim to include bilateral carpal tunnel syndrome. It paid appellant compensation for attendance at medical appointments commencing May 6, 2013.

On November 29, 2017 appellant filed a claim for compensation (Form CA-7) for a schedule award. In support thereof, she submitted a September 28, 2017 impairment rating by Dr. Robert A. Helsten, a family practitioner. Dr. Helsten provided a history of injury and treatment. On examination, he performed range of motion (ROM) studies using an inclinometer. Regarding the left shoulder, Dr. Helsten observed 140 degrees of flexion, 150 degrees of abduction, and 60 degrees of internal rotation. For the left elbow, he observed 110 degrees of flexion, 50 degrees of pronation, and 60 degrees of supination. Dr. Helsten diagnosed cervical radiculopathy, cervical sprain, left shoulder/arm sprain, left elbow sprain, and bilateral carpal tunnel syndrome. He utilized the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)[3] to calculate bilateral upper extremity impairment using the diagnosis-based impairment (DBI) method. Dr. Helsten opined that appellant had attained maximum medical improvement (MMI) as of September 28, 2017. Referring to Table 15-23, page 449 (Entrapment/Compression Neuropathy Impairment) of the A.M.A., *Guides* to evaluate right carpal tunnel syndrome, he noted a grade modifier for clinical studies (GMCS) of 3 for electrodiagnostic findings, a grade modifier for functional history (GMFH) of 2 for significant intermittent symptoms, and a grade modifier for physical findings (GMPE) of 3 for loss of muscle mass and diminished grip strength. Dr. Helsten added the three modifiers to equal 8, and divided the total by 3 to equal 2.66, rounded upward to 3. He administered a *Quick*DASH questionnaire with a score of 70, consistent with a grade modifier of 3. Dr. Helsten therefore found an eight percent permanent impairment of the right upper extremity. He followed the same process to find an eight percent permanent impairment of the left upper extremity due to carpal tunnel syndrome. Regarding the left elbow sprain, Dr. Helsten utilized Table 15-4, page 398 of the A.M.A., *Guides* (Elbow Regional Grid) and found a diagnosis-based impairment (DBI) for appellant's class of diagnosis (CDX) of left elbow strain, which resulted in a class 1 impairment with a default value of 1. He found a GMFH of 1 due to pain with strenuous activities. Dr. Helsten found that GMPE and GMCS were not applicable. He applied the net adjustment formula (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX) = (1-1) + (1-1) + (0-1) = -1, and found a one percent permanent impairment of the left elbow. Regarding the left shoulder sprain, Dr. Helsten referred to Table 15-5, of the A.M.A., *Guides* (Shoulder Regional Grid) to find a class 1 impairment for a CDX of left shoulder sprain, with a default impairment rating of one

[3] A.M.A., *Guides* (6th ed. 2009).

percent. He found a GMFH of 2 for pain with normal activities, a GMPE of 2 for moderate palpatory findings and crepitus with shoulder flexion and extension, and a GMCS of 0. Dr. Helsten applied the net adjustment formula, (2-1) + (2-1) + (0-1) to calculate a net adjustment of 1, raising the default value upward to two percent permanent impairment of the left upper extremity.

On March 1, 2018 OWCP referred appellant's case to Dr. Arthur S. Harris, a Board-certified orthopedic surgeon serving as DMA, to provide an opinion on permanent impairment under the standards of the A.M.A., *Guides*. In a July 19, 2018 report, Dr. Harris concurred with Dr. Helsten's assessment of an eight percent permanent impairment of each upper extremity due to carpal tunnel syndrome. He opined that the ROM would result in greater percentages of impairment of the left shoulder and elbow. Regarding the left shoulder, Dr. Helsten found a three percent permanent impairment due to limited shoulder flexion according to Table 15-34, page 475 (Shoulder Range of Motion), three percent impairment for loss of shoulder abduction, and two percent impairment due to limited internal rotation, for a total eight percent permanent impairment of the left upper extremity. Regarding the left elbow, he found three percent upper extremity impairment for limited flexion according to Table 15-33, page 474 (Elbow/Forearm Range of Motion), one percent upper extremity for loss of pronation, and one percent impairment for loss of supination, equaling a total five percent permanent impairment of the left upper extremity impairment. Utilizing the Combined Values Chart, Dr. Harris found 19 percent permanent impairment of the left upper extremity.

By decision dated August 28, 2018, OWCP granted appellant a schedule award for 8 percent permanent impairment of the right upper extremity (arm) due to carpal tunnel syndrome, and 19 percent permanent impairment of the left upper extremity (arm) due to carpal tunnel syndrome and limited motion of the left shoulder and elbow. The award ran for 84.24 weeks from September 28, 2017 through May 10, 2019.

On December 6, 2019 OWCP expanded its acceptance of appellant's claim to include aggravation of cervical spondylosis with radiculopathy; aggravation of cervical spinal stenosis; aggravation of cervical disc disorder with radiculopathy at C4-5, C5-6, and C6-7; sprain of joints and ligaments of other parts of neck; and aggravation of cervical disc disorder with radiculopathy of the occipital-atlanto-axial region.

On March 3, 2020 appellant filed a Form CA-7 for an additional schedule award. In support thereof, she submitted a January 30, 2020 impairment rating by Dr. Ronnie Shade, a Board-certified orthopedic surgeon. Dr. Shade reviewed medical records, noted findings on examination, and opined that appellant had attained MMI. He used three trials to obtain ranges of motion for the left shoulder: 160 degrees of flexion equaling a three percent upper extremity impairment; 35 degrees of extension equaling a one percent upper extremity impairment; 25 degrees of horizontal adduction equaling a one percent upper extremity impairment; 145 degrees of abduction equaling a three percent upper extremity impairment; 80 degrees of internal rotation; and 80 degrees of external rotation. Regarding the left shoulder and left elbow, Dr. Shade found a GMFH of 2, a GMPE of 1 and no GMCS. Dr. Shade administered a *Quick*DASH questionnaire with a score of 68 for the left shoulder and 34 for the right shoulder. Regarding both wrists, he found a GMFH of 2, GMPE of 1 and no GMCS. Dr. Shade observed ranges of left elbow motion within normal limits. He found a final 1 percent permanent impairment of the left upper extremity due to left elbow impairment using the DBI method for a sprain with no net grade modifier, a 3 percent permanent impairment of the left upper extremity due to carpal tunnel syndrome, and a 2 percent permanent impairment of the left upper extremity for mild C6 radiculopathy according to

Table 17-2, pages 564-566 of the A.M.A., *Guides* (Cervical Spine Regional Grid), a 23 percent whole person impairment for the cervical spine with the acknowledgement that FECA did not provide for whole person impairments, and 2 percent permanent impairment of the right upper extremity due to carpal tunnel syndrome.

On April 1, 2020 OWCP referred appellant's case to Dr. Harris to provide an opinion on permanent impairment under the standards of the A.M.A., *Guides*. In an April 9, 2020 report, Dr. Harris found a 2 percent permanent impairment of the right upper extremity and a 14 percent permanent impairment of the left upper extremity. He noted that according to Table 15-14, page 425 (Sensory and Motor Severity) of the A.M.A., *Guides* and Table 1 of *The Guides Newsletter, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition* (July/August 2009) (*The Guides Newsletter*), appellant had no permanent left upper extremity impairment due to cervical radiculopathy. Dr. Harris explained that Dr. Shade and Dr. Ford had made a mathematical error in calculating the percentage of permanent impairment for the left upper extremity, as they included percentages for permanent impairment of the spine according to Table 17-2, although the spine was not a scheduled member under FECA. He found that as appellant had previously been granted a schedule award for 8 percent permanent impairment of the right upper extremity and 19 percent permanent impairment of the left upper extremity, that appellant had not established a greater percentage of impairment.

In a June 12, 2020 report, Dr. Shade reviewed Dr. Harris' April 1, 2020 report and concurred with his determination of 14 percent permanent impairment of the left upper extremity. He acknowledged that his January 30, 2020 impairment rating contained a mathematical error in calculating permanent impairment of the left upper extremity.

By decision dated June 16, 2020, OWCP denied appellant's claim for an increased schedule award, based on Dr. Shade's opinion as reviewed by Dr. Harris, which found a lesser percentage of bilateral upper extremity impairment than that previously awarded.

In a memorandum dated July 2, 2020, OWCP indicated that a potential overpayment was identified. It noted that appellant had received a schedule award for 8 percent permanent impairment of the right upper extremity and 19 percent permanent impairment of the left upper extremity. Appellant's total schedule award compensation for the 84.24-week period from September 28, 2017 through May 10, 2019, was $65,109.65. Dr. Shade's January 30, 2020 impairment rating, as reviewed by Dr. Harris, established 14 percent permanent impairment of the left upper extremity and 2 percent permanent impairment of the right upper extremity, equal to 49.92 weeks of compensation. This resulted in a reduction of 34.32 weeks of compensation. OWCP therefore determined that schedule award compensation paid for the 34.32-week period from September 11, 2018 through May 10, 2019, in the amount of $26,608.85, represented an overpayment of compensation.

On July 2, 2020 OWCP informed appellant of its preliminary overpayment determination that she had received a $26,608.85 overpayment of schedule award compensation for the period September 28, 2018 through May 10, 2019. It explained that she had received $65,109.65 for 8 percent permanent impairment of the right upper extremity and 19 percent permanent impairment of the left upper extremity, when she was entitled to only $38,500.80 for 2 percent permanent impairment of the right upper extremity and 14 percent permanent impairment of the left upper extremity. OWCP also made a preliminary overpayment determination that appellant was without fault in the creation of the overpayment. It advised her that she could submit evidence challenging

the fact or amount of the overpayment, or request waiver of recovery of the overpayment. OWCP provided an overpayment action request form and informed appellant that she could submit additional evidence in writing or at a prerecoupment hearing, but that a prerecoupment hearing must be requested within 30 days of the date of the written notice of overpayment. It requested that she 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. OWCP requested that appellant 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. It advised her that it would deny waiver of recovery of the overpayment if she failed to furnish the requested financial information within 30 days.

In response, appellant completed an overpayment action request form signed on July 20, 2020 requesting a prerecoupment hearing and waiver of recovery of the overpayment. She also submitted a completed Form OWCP-20 and financial documentation establishing monthly household income of $5,680.13, monthly expenses of $4,160.00 for rent or mortgage, food, clothing, utilities, and debt repayment, and assets including $40.00 cash on hand, $305.00 in a savings account, and $40,000.00 in a retirement account. Appellant submitted a reduction-in-force notice indicating that appellant's husband had lost his job in April 2020. She provided pay stubs from her husband's new employment from May through July 2020, with year-to-date earnings of $11,002.03. Appellant noted that her husband's employment was of a temporary nature with variable hours.

At the prerecoupment hearing, conducted telephonically on November 9, 2020, appellant asserted that she would not have requested an increased schedule award had she known that an overpayment could result. She contended that recovery of the overpayment would create severe financial hardship.

By decision dated January 25, 2021, OWCP's hearing representative finalized the preliminary overpayment determination, finding that appellant was overpaid compensation in the amount of $26,608.85 for the period September 28, 2017 through May 10, 2019, as she previously received a schedule award for a greater permanent impairment than she was found to have. The hearing representative found appellant without fault in creation of the overpayment. She denied waiver of recovery of the overpayment as appellant had between $341.34 and $1,520.13 in monthly discretionary income and thus did not need substantially all of her income to meet ordinary and necessary living expenses. The hearing representative based the calculation of monthly discretionary income on appellant's husband's income of $2,750.21 a month, utilizing the $11,002.03 in year-to-date income amortized over a four-month period beginning in May 2020. This resulted in a combined monthly household income of $5,680.13. Additionally, appellant's asset base of $40,000.00 exceeded the $10,300.00 resource base for an individual with a spouse. Recovery of the overpayment would, therefore, not defeat the purpose of FECA. The hearing representative directed recovery of the overpayment at the rate of $325.00 a month.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provisions of FECA[4] 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.[5] 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.[6] As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (6th ed. 2009).[7]

In addressing upper extremity impairments, the sixth edition requires identification of the CDX, which is then adjusted by GMFH, GMPE, and GMCS.[8] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[9]

The A.M.A., *Guides* also provide that the ROM impairment methodology is to be used as a stand-alone rating for upper extremity impairments when other grids direct its use or when no other DBI sections are applicable.[10] If ROM is used as a stand-alone approach, the total of motion impairment for all units of function must be calculated. All values for the joint are measured and added.[11] Adjustments for functional history may be made if the evaluator determines that the resulting impairment does not adequately reflect functional loss and functional reports are determined to be reliable.[12]

OWCP issued FECA Bulletin No. 17-06 to explain the use of the DBI methodology *versus* the ROM methodology for rating of upper extremity impairments.[13] Regarding the application of

[4] 5 U.S.C. § 8101 *et seq*.

[5] *Id*. at § 8107; 20 C.F.R. § 10.404.

[6] 20 C.F.R. § 10.404; *H.H.*, Docket No. 19-1530 (issued June 26, 2020); *L.T.*, Docket No. 18-1031 (issued March 5, 2019); *see also Ronald R. Kraynak*, 53 ECAB 130 (2001).

[7] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); *id*. at Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5 (March 2017).

[8] A.M.A., *Guides* 383-492.

[9] *Id*. at 411.

[10] *Id*. at 461.

[11] *Id*. at 473.

[12] *Id*. at 474.

[13] FECA Bulletin No. 17-06 (issued May 8, 2017).

ROM or DBI impairment methodologies in rating permanent impairment of the upper extremities, FECA Bulletin No. 17-06 provides in pertinent part:

> "As the [A.M.A.,] *Guides* caution that, if it is clear to the evaluator evaluating loss of ROM that a restricted ROM has an organic basis, three independent measurements should be obtained and the greatest ROM should be used for the determination of impairment, the CE [claims examiner] should provide this information (*via* the updated instructions noted above) to the rating physician(s).
>
> "Upon initial review of a referral for upper extremity impairment evaluation, the DMA should identify (1) the methodology used by the rating physician (*i.e.*, DBI or ROM) and (2) whether the applicable tables in Chapter 15 of the [A.M.A.,] *Guides* identify a diagnosis that can alternatively be rated by ROM. *If the A.M.A, Guides allow for the use of both the DBI and ROM methods to calculate an impairment rating for the diagnosis in question, the method producing the higher rating should be used*."[14] (Emphasis in the original.)
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> The Bulletin further advises:
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> "If the rating physician provided an assessment using the ROM method and the [A.M.A.,] *Guides* allow for use of ROM for the diagnosis in question, the DMA should independently calculate impairment using both the ROM and DBI methods and identify the higher rating for the CE."

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed through an OWCP medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with an OWCP medical adviser providing rationale for the percentage of impairment specified.[15]

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met her burden of proof to establish greater than 8 percent permanent impairment of the right upper extremity and 19 percent permanent impairment of the left upper extremity, for which she previously received schedule award compensation.

In a January 30, 2020 report, Dr. Shade, appellant's treating physician, opined that appellant had five percent permanent impairment of the left upper extremity for limited shoulder motion, one percent permanent impairment of the left upper extremity for a left elbow sprain utilizing the DBI method, three percent permanent impairment of the left upper extremity for carpal tunnel syndrome, two percent permanent impairment of the left upper extremity for mild C6 radiculopathy according to Table 17-2, and two percent permanent impairment of the right upper extremity for carpal tunnel syndrome. He also found 23 percent permanent impairment of

[14] *Id*.

[15] *Supra* note 7 at Chapter 2.808.6f (March 2017).

the whole person due to cervical spine impairment, but correctly acknowledged that FECA did not allow schedule awards for the body as a whole.[16]

In accordance with its procedures, OWCP properly routed the case record back to its DMA, Dr. Harris, who indicated in an April 1, 2020 report that he had reviewed Dr. Shade's January 30, 2020 report and opined that the 2 percent permanent left upper extremity impairment under Table 17-2 should not have been included as the spine is not a scheduled member of the body under FECA. Dr. Harris found that appellant had no permanent impairment of the left upper extremity due to cervical radiculopathy. He correctly applied the DBI impairment method of evaluating permanent impairment to find 14 percent permanent impairment of the left upper extremity due to impaired motion of the shoulder and elbow, and mild left carpal tunnel syndrome. Dr. Harris also found two percent permanent impairment of the right upper extremity due to carpal tunnel syndrome. He provided a detailed explanation of why the DBI method offered the greater percentage of impairment and was thus preferable to the ROM method.

Dr. Shade submitted a June 12, 2020 addendum report in which he concurred with Dr. Harris' April 1, 2020 impairment calculation of 14 percent permanent impairment of the left upper extremity and 2 percent permanent impairment of the right upper extremity.

The Board finds that Dr. Harris, the DMA, properly applied the standards of the A.M.A., *Guides* to the physical examination findings of Dr. Shade. The DMA accurately summarized the relevant medical evidence including findings on examination and reached conclusions about appellant's conditions that comported with these findings.[17] He properly referred to the A.M.A., *Guides* in calculating appellant's percentage of permanent impairment of the right upper extremity based on carpal tunnel syndrome and of the left upper extremity due to carpal tunnel syndrome and limited shoulder and elbow motion. As his report is detailed, well rationalized, and based on a proper factual background, the DMA's opinion represents the weight of the medical evidence. There is no medical evidence of record utilizing the appropriate tables of the sixth edition of the A.M.A., *Guides*, demonstrating a greater percentage of permanent impairment of either upper extremity. Accordingly, the Board finds that, as appellant has not submitted medical evidence establishing more than 8 percent permanent impairment of the right upper extremity and 19 percent permanent impairment of the left upper extremity, she has not met her burden of proof.

[16] FECA specifically excludes the back from the definition of organ. 5 U.S.C. § 8101(19). *See also J.G.*, Docket No. 21-1192 (issued March 14, 2022); *D.K.*, Docket No. 21-0303 (issued July 8, 2021); *S.M.*, Docket No. 14-1052 (issued September 4, 2014).

[17] *K.K.*, 20-1532 (issued January 24, 2022); *M.S.*, Docket No. 19-1011 (issued October 29, 2019); *W.H.*, Docket No. 19-0102 (issued June 21, 2019); *J.M.*, Docket No. 18-1387 (issued February 1, 2019).

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 permanent impairment.

LEGAL PRECEDENT -- ISSUE 2

Section 8102(a) of FECA[18] 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.[19] 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."[20]

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

ANALYSIS -- ISSUE 2

The Board finds that appellant received an overpayment of compensation in the amount of $26,608.85, for which she was without fault, for the period September 28, 2017 through May 10, 2019 for which she was without fault, as her schedule award compensation exceeded her entitlement.

In the present case, appellant received $65,109.65 in schedule award compensation for 8 percent permanent impairment of the right upper extremity and 19 percent permanent impairment of the left upper extremity. However, for the reasons explained above, she was only entitled to receive $38,500.80 for 2 percent permanent impairment of the right upper extremity and 14 percent permanent impairment of the left upper extremity. The difference between these two amounts, $26,608.85, constitutes an overpayment of compensation. 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*. Therefore, OWCP properly determined that appellant received a $26,608.85 overpayment.

[18] *Supra* note 1.

[19] 5 U.S.C. § 8102(a).

[20] *Id*. at § 8129(a).

[21] *Supra* note 7, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.9e (February 2013).

[22] *Id*. *F.P.*, Docket No. 20-1646 (issued August 3, 2021); *see also W.M*., Docket No. 13-0291 (issued June 12, 2013).

LEGAL PRECEDENT -- ISSUE 3

Section 8129 of FECA provides that an overpayment in compensation shall be recovered by OWCP 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.[23]

Section 10.436 of OWCP's implementing regulations provides that recovery of an overpayment would defeat the purpose of FECA if such recovery would cause hardship because the beneficiary from whom OWCP seeks recovery needs substantially all of his or her current 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. An individual is deemed to need substantially all of his or her current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than $50.00.[24] Also, 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.[25] An individual's liquid assets include, but are not limited to cash, the value of stocks, bonds, saving accounts, mutual funds, and certificate of deposits.[26] 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 Thrift Savings Plan or 401(k)), jewelry, and artwork.[27]

Section 10.437 of OWCP's implementing regulations provides that 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.[28] OWCP's procedures provide that, to establish that a valuable right has been relinquished, an individual must demonstrate that the right was in fact valuable, that he or she was unable to get the right back, and that his or her action was based primarily or solely on reliance on the payment(s) or on the notice of payment.[29]

Section 10.438 of OWCP's regulations provide that the individual who received the overpayment is responsible for providing information about income, expenses, and assets as

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[23] 5 U.S.C. § 8129.

[24] Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Final Overpayment Determinations*, Chapter 6.400.4a(2) (September 2020); *N.J.*, Docket No. 19-1170 (issued January 10, 2020); *M.A.*, Docket No. 18-1666 (issued April 26, 2019).

[25] *Id.* at Chapter 6.400.4.a(2) (September 2020).

[26] *Id.* at Chapter 6.400.4.b(3).

[27] *Id.* at Chapter 6.400.4b(3)(a), (b).

[28] 20 C.F.R. § 10.437; *P.M.*, Docket No. 21-0915 (issued December 14, 2021); *see E.H.*, Docket No. 18-1009 (issued January 29, 2019).

[29] *Supra* note 24 at Chapter 6.400.4c(3) (September 2020).

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. The information is also used to determine the repayment schedule, if necessary.[30]

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly denied waiver of recovery of the overpayment.

As OWCP found appellant without fault in the creation of the overpayment, waiver of recovery of the overpayment must be considered, and repayment is still required unless adjustment or recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.[31]

The Board finds that as appellant reported $40,000.00 in assets in a Form OWCP-20 on July 20, 2020 she had not met the standard for waiver of recovery of the overpayment because her assets exceed the allowable resource base of $10,300.00 for an individual with a spouse, such as appellant.[32] Furthermore, appellant provided detailed financial information regarding her monthly household income and expenses, which demonstrated that she had no less than $341.34 in monthly discretionary income. The Board finds that this evidence establishes that recovery of the overpayment would not defeat the purpose of FECA.[33]

The Board further finds that appellant 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. Therefore, OWCP properly found that recovery of the overpayment would not defeat the purpose of FECA or be against equity and good conscience.[34]

Because appellant has not established that, recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience, the Board finds that OWCP properly denied waiver of recovery of the $26,608.85 overpayment.[35]

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of $26,608.85 for the period September 28, 2017 through May 10, 2019, for which she was without

[30] 20 C.F.R. § 10.438(a); *M.S.*, Docket No. 18-0740 (issued February 4, 2019).

[31] *Id.* at § 10.436.

[32] *Supra* note 29 at Chapter 6.400.4c(3) (September 2020).

[33] 20 C.F.R. § 10.441(a).

[34] *P.M., supra* note 28; *M.R.*, Docket No. 20-1622 (issued June 30, 2021); *L.D.*, Docket No. 18-1317 (issued April 17, 2019); *William J. Murphy*, 41 ECAB 569, 571-72 (1989).

[35] *P.M., id.*; *F.K.*, Docket No. 20-1609 (issued June 24, 2021); *D.M.*, Docket No. 17-0810 (issued October 2, 2017).

fault, as her schedule award compensation exceeded her entitlement. The Board further finds that OWCP properly denied appellant's request for waiver of recovery of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the January 25, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 23, 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