



at the L3-4, L4-5, and L5-S1 disc levels when making an arrest while in the performance of duty. He stopped work on the date of injury. OWCP assigned this claim OWCP File No. xxxxxx470 and accepted lumbar radiculopathy, sprain of ligaments of the lumbar spine, and lumbar intervertebral disc displacement. It paid appellant wage-loss compensation for disability from work on the periodic rolls, effective January 5, 2020. OWCP applied a date-of-injury pay rate of \$2,263.64. Appellant underwent OWCP-authorized laminectomy at L3, L4, L5, and S1 on October 12, 2020. He retired effective December 9, 2020.

Appellant submitted a May 5, 2022 impairment rating report by Dr. Yury Sless, a Board-certified orthopedic surgeon. Dr. Sless opined that appellant reached maximum medical improvement (MMI) effective May 5, 2022, the date of his examination, as the clinical notes and his own examination findings demonstrated that appellant's bilateral lower extremity condition was stable. He determined that appellant sustained two percent permanent impairment of each lower extremity due to his accepted lumbar spine conditions under the standards of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)<sup>2</sup> and its supplemental publication, *The Guides Newsletter, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition* (July/August 2009).

On November 18, 2022 appellant filed a claim for compensation (Form CA-7) for a schedule award.

On November 22, 2022 OWCP referred appellant's case to Dr. Arthur S. Harris, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA), and requested that he review Dr. Sless' May 5, 2022 report and provide an opinion on permanent impairment. In the referral document, it advised Dr. Harris that appellant received two prior schedule awards: a December 19, 2016 award for two percent permanent impairment of the left lower extremity (awarded under OWCP File No. xxxxxx554), and a June 18, 2019 award for seven percent permanent impairment of the right lower extremity (awarded under OWCP File No. xxxxxx472). In a November 25, 2022 report, Dr. Harris concurred with Dr. Sless' assessment of two percent permanent impairment of each lower extremity. He referenced appellant's two prior schedule awards for the lower extremities and found that there was no increase in the permanent impairment of either lower extremity. Dr. Harris found that the date of MMI was May 5, 2022, the date of Dr. Sless' examination.

By decision dated December 27, 2022, OWCP denied appellant's claim for an additional schedule award. On February 9, 2023 appellant, through counsel, requested reconsideration and, by decision dated February 22, 2023, OWCP denied appellant's request for reconsideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a).

On May 28, 2023 appellant, through counsel, requested reconsideration. Appellant submitted a May 15, 2023 report wherein Dr. Sless referenced the two prior schedule awards for the lower extremities, and indicated that on May 5, 2022 he had examined appellant and calculated additional impairment of two percent in each lower extremity related to the accepted lumbar conditions. He concluded that, after combining these impairments, appellant had total permanent impairment of four percent in the left lower extremity and nine percent in the right lower extremity. In a June 16, 2023 report, Dr. Harris, serving as a DMA, indicated that he agreed with Dr. Sless that appellant had total permanent impairment of four percent in the left lower extremity and nine

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<sup>2</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

percent in the right lower extremity. He noted that this opinion took into account appellant's two prior schedule awards. Dr. Harris again found that the date of MMI was May 5, 2022, the date of Dr. Sless' examination.

By decision dated August 1, 2023, OWCP granted appellant a schedule award for an additional two percent permanent impairment of each lower extremity, bringing the total lower extremity permanent impairment for which appellant was compensated to four percent permanent impairment of the left lower extremity and nine percent permanent impairment of the right lower extremity. The decision listed the date of MMI as May 5, 2023, instead of May 5, 2022, the date of Dr. Sless' examination.<sup>3</sup> The award ran for 11.52 weeks from May 5 through July 24, 2023.<sup>4</sup>

On August 4, 2023 OWCP paid appellant \$20,200.96 in schedule award compensation for the period May 5 through July 15, 2023. On August 4, 2023 it also paid him \$2,525.12 in schedule award compensation for the period July 16 through 24, 2023. These payments totaled \$22,726.08.

In a January 3, 2024 preliminary overpayment determination, OWCP advised appellant that he had received an overpayment of compensation in the amount of \$1,347.84 for the period May 5 through July 24, 2023 because the August 1, 2023 schedule award was processed using the incorrect MMI date and it consequently paid the schedule award at the wrong weekly compensation pay rate. It indicated that, by decision dated August 1, 2023, it awarded appellant a schedule award for an additional two percent permanent impairment of each lower extremity for the period May 5, 2023 through July 24, 2023 (11.52 weeks or 80.64 days) using a weekly compensation pay rate of \$1,972.75. However, OWCP found that the schedule award should have been processed for the period May 5 through July 24, 2022 (11.52 weeks or 80.64 days) using a weekly compensation pay rate of \$1,855.75. It indicated that appellant had received total schedule award compensation in the amount of \$22,726.08 for the additional two percent permanent impairment of each lower extremity, but should have only received \$21,378.24 for this degree of permanent impairment of the lower extremities. OWCP provided the following calculation of the overpayment:

“You received a scheduled award using the MMI date of May 5, 2023 for the period May 5 through July 24, 2023 (11.52 weeks or 80.64 days) using a weekly compensation pay rate of \$1,972.75.

$\$1,972.75/7 = 281.821428$  per day [--] Partial day (.64)

$\$281.821428 \times 80 \text{ days} = \$22,545.71$  [--]  $\$281.821428 \text{ per day} \times .64 = \$180.37$

Total schedule award payment issued previously for May 5 through July 24, 2023:  
 $\$22,545.71 + \$180.37 = \$22,726.08$

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<sup>3</sup> The August 1, 2023 decision incorrectly listed the date of Dr. Sless' schedule award evaluation report as May 5, 2023, instead of the correct date of May 5, 2022.

<sup>4</sup> Prior to OWCP's granting of the August 1, 2023 schedule award, it had paid appellant wage-loss compensation for disability from work caused by the accepted October 18, 2019 employment injury.

You should have been paid a schedule award using the MMI date of May 5, 2022 for the period May 5 through July 24, 2022 (11.52 weeks or 80.64 days) using a weekly compensation pay rate of \$1,855.75.

$\$1,855.75/7 = 265.107142$  per day [--] Partial day (.64)

$\$265.107142 \times 80 \text{ days} = \$21,208.57$  [--]  $\$265.107142 \text{ per day} \times .64 = \$169.67$

Schedule award payment should have been issued for the period May 5 to July 24, 2022:  $\$21,208.57 + \$169.67 = \$21,378.24$

Overpayment for period May 5 through July 24, 2023:  $\$22,726.08 - \$21,378.24 = \$1,347.84$ .”

OWCP also determined that appellant was without fault in the creation of the overpayment and requested that he complete an overpayment recovery questionnaire (Form OWCP-20), and submit documentation including copies of income tax returns, bank account statements, bills and cancelled checks, pay slips, and other records that support income and expenses. It advised that, under 20 C.F.R. § 10.438, failure to submit the requested information within 30 days would result in the denial of waiver and no further request for waiver would be considered until the requested information was furnished. OWCP provided an overpayment action request form and informed appellant that he could request waiver of recovery of the overpayment and that, within 30 days of the date of the letter, he could request a final decision based on the written evidence or a precoupment hearing.

In a January 8, 2024 letter, counsel argued that the date of MMI was irrelevant to the calculation of the compensation rate for the August 1, 2023 schedule award. He maintained that the appropriate compensation rate would be appellant’s compensation rate at the date of the injury, and that the cost-of-living adjustment (COLA) would then be applied to this rate. Counsel stated, “Thus, the [COLA] is applied when the benefits are paid.” He asserted that Chapter 901.16a(5) of OWCP’s procedures<sup>5</sup> and 5 U.S.C. § 8146(a) applied to appellant’s case. Counsel requested that OWCP provide the regulations or case law that it was relying upon to support its “position that the compensation rate with COLA would stop at the date of [MMI].”

The case record contains a January 26, 2024 gross calculation detail report indicating that appellant’s weekly pay rate, incorporating the 75 percent (3/4) augmented compensation rate and adjustments under the consumer price index (CPI),<sup>6</sup> was \$1,855.75 for the period May 5, 2022 through February 28, 2023, and \$1,972.75 for the period March 1 through July 24, 2023. The document listed a date-of-injury pay rate of \$2,263.64.

On February 2, 2024 appellant, through counsel, requested a precoupment hearing before a representative of OWCP’s Branch of Hearings and Review. Counsel advised that appellant

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<sup>5</sup> See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.901.16a(5) (February 2013). This section of OWCP’s procedures provides that, where a schedule award is being paid and the claimant had no disability for work prior to the date of MMI, the one-year waiting period begins on the starting date of the award. This date represents the claimant’s first entitlement to compensation, even though the effective date of the pay rate is earlier.

<sup>6</sup> It is noted that the CPI is utilized to calculate a given COLA.

would not be submitting a Form OWCP-20. No Form OWCP-20 was received. On February 2, 2024 OWCP received an overpayment action request form in which appellant indicated he disagreed that the overpayment occurred.

During the prerecoupment hearing held on May 7, 2024, OWCP's hearing representative discussed the calculation of the compensation for the August 1, 2023 schedule award. Counsel argued that appellant was entitled to a March 1, 2023 CPI adjustment because he was paid schedule award compensation for an additional two percent permanent impairment of each lower extremity after March 1, 2023.

By decision dated July 10, 2024, OWCP's hearing representative finalized OWCP's preliminary overpayment determination, finding appellant received an overpayment of compensation in the amount of \$1,347.84 for the period May 5 through July 24, 2023, for which he was without fault, and that he was not entitled to waiver of recovery of the overpayment. The hearing representative advised that appellant received schedule award compensation for an additional two permanent impairment of each lower extremity and found that a \$1,347.84 overpayment was created due to an error in the date of MMI, which caused appellant to receive schedule award compensation based on an improper weekly pay rate. The hearing representative noted that the schedule award utilized an improper MMI date of May 5, 2023, rather than the proper date of May 5, 2022. The hearing representative found that a proper payment of appellant's schedule award compensation would be based on his date-of-injury pay rate, noting that this date-of-injury pay rate would be utilized in a calculation which took into account that appellant was entitled to be paid at the augmented 75 percent compensation rate and that he was entitled to COLA increases through the COLA effective March 1, 2022.<sup>7</sup> The use of the improper MMI date of May 5, 2023 led to an improper inclusion of a March 1, 2023 COLA increase in the calculation of the schedule award compensation paid to appellant. Consequently, appellant received \$22,726.08 based on a weekly pay rate of \$1,972.75 for the period May 5 through July 24, 2023, instead of the proper amount of \$21,378.24 based on a weekly pay rate of \$1,855.75 for the period May 5 through July 24, 2022. The hearing representative determined that appellant was not entitled to waiver of recovery of the overpayment because he had not submitted the requested financial information.<sup>8</sup>

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8102(a) of FECA<sup>9</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

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<sup>7</sup> The hearing representative stated, "[OWCP's] procedures indicate that the claimant is entitled to any CPI adjustments occurring one year after the October 18, 2019 pay rate date and prior to the end of the schedule award on July 24, 2022." He found that, therefore, appellant was entitled to receive the COLA increases that were effective March 1, 2021, and March 1, 2022.

<sup>8</sup> With respect to the recovery of an overpayment, the Board's jurisdiction is limited to those cases where OWCP seeks recovery from continuing compensation benefits. *A.B.*, Docket No. 18-0915 (issued October 24, 2018); *Miguel A. Muniz*, 54 ECAB 217 (2002). As appellant was not in receipt of continuing compensation at the time of OWCP's overpayment determination, the Board does not have jurisdiction over the method of recovery of the overpayment in this case. *See Lorenzo Rodriguez*, 51 ECAB 295 (2000); 20 C.F.R. § 10.441.

<sup>9</sup> 5 U.S.C. § 8101 *et seq.*

performance of his or her duty.<sup>10</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>11</sup>

The schedule award provisions of FECA,<sup>12</sup> and its implementing federal regulation,<sup>13</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 for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.<sup>14</sup> As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.<sup>15</sup>

The period covered by a schedule award commences on the date that the employee reaches MMI from the residuals of the employment injury. MMI means that the physical condition of the injured member of the body has stabilized and will not improve further.<sup>16</sup> The determination of the date of MMI is factual in nature and depends primarily on the medical evidence.<sup>17</sup>

When an injury that does not result in disability causes permanent impairment, the beneficiary is eligible for the COLAs under section 8146(a) of FECA, where the award for such impairment began more than one year prior to the date the COLA took effect.<sup>18</sup> However, when there is prior injury-related disability, OWCP’s procedures provide that the CPI adjustment start date for the schedule award is the effective date of the applicable pay rate.<sup>19</sup> These procedures indicate the following for determining the effective pay rate date for schedule awards in traumatic injury claims when there is injury-related disability prior to the period of the schedule award: “CPI Start Date = DOI [date of injury], DDB [date disability began], DOR [date of recurrence] (pay rate effective date).”<sup>20</sup>

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<sup>10</sup> *Id.* at § 8102(a).

<sup>11</sup> *Id.* at § 8129(a).

<sup>12</sup> *Id.* at § 8107.

<sup>13</sup> 20 C.F.R. § 10.404.

<sup>14</sup> *Id.* See also *T.T.*, Docket No. 18-1622 (issued May 14, 2019).

<sup>15</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.5a (March 2017); *id.* at Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

<sup>16</sup> *Adela Hernandez-Piris*, 35 ECAB 839 (1984).

<sup>17</sup> *J.B.*, Docket No. 11-1469 (issued February 14, 2012); *Franklin L. Armfield*, 28 ECAB 445 (1977).

<sup>18</sup> 5 U.S.C. § 8146(a); 20 C.F.R. § 10.420(b).

<sup>19</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900, Exhibit 1 (February 2013). See also *B.H.*, Docket No. 16-0252 (issued October 7, 2016).

<sup>20</sup> *Id.*

With respect to a given applicable pay rate date, section 8105(a) of FECA provides: “If the disability is total, the United States shall pay the employee during the disability monthly monetary compensation equal to 66 2/3 percent of his monthly pay, which is known as his basic compensation for total disability.”<sup>21</sup> Section 8101(4) of FECA defines “monthly pay” for purposes of computing compensation benefits as follows: “[T]he monthly pay at the time of injury, or the monthly pay at the time disability begins, or the monthly pay at the time compensable disability recurs, if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater...”<sup>22</sup> OWCP’s regulations define “disability” as “the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury.”<sup>23</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that appellant received an overpayment of compensation in the amount of \$1,347.84 for the period May 5 through July 24, 2023, for which he was without fault, due to the use of an incorrect pay rate for his schedule award.

In the present case, the record contains evidence, which demonstrates that appellant received \$22,726.08 in schedule award compensation for an additional two percent permanent impairment of each lower extremity when he was only entitled to receive \$21,378.24 for this percentage of impairment due to the use of an incorrect weekly pay rate related to an incorrect date of MMI for the August 1, 2023 schedule award.<sup>24</sup> OWCP found that appellant was entitled to an additional two percent permanent impairment of each lower extremity based on May 2, 2022 and May 15, 2023 reports of Dr. Sless, an attending physician, and November 25, 2022 and June 16, 2023 reports of Dr. Harris, the DMA. Dr. Sless opined that appellant reached MMI effective May 5, 2022, the date of his examination, as the clinical notes and his own examination findings demonstrated that appellant’s bilateral lower extremity condition was stable.<sup>25</sup> Dr. Harris agreed with Dr. Sless’ assessment that appellant reached MMI on May 5, 2022.

In a decision dated July 10, 2024, which finalized the January 3, 2024 preliminary overpayment determination, OWCP’s hearing representative explained that the additional two percent permanent impairment of each lower extremity entitled appellant to 11.52 weeks of compensation from May 5 through July 24, 2022 based on the weekly pay rate of \$1,855.75, but that appellant received 11.52 weeks of compensation from May 5 through July 24, 2023 based on an improper weekly pay rate of \$1,972.75.

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<sup>21</sup> 5 U.S.C. § 8105(a). Section 8110(b) of FECA provides that total disability compensation will equal three fourths of an employee’s monthly pay when the employee has one or more dependents. 5 U.S.C. § 8110(b).

<sup>22</sup> *Id.* at § 8101(4).

<sup>23</sup> 20 C.F.R. § 10.5(f).

<sup>24</sup> The Board notes that there is no dispute that appellant was owed schedule award compensation for an additional two percent permanent impairment of each lower extremity.

<sup>25</sup> *See supra* notes 16 and 17. *See also J.P.*, Docket No. 24-0927 (issued December 5, 2024).

The Board finds that, in determining that appellant received an overpayment of compensation in the amount of \$1,347.84, OWCP properly calculated appellant's actual entitlement to schedule award compensation by utilizing his applicable weekly pay rate based on his pay on the date of injury, October 18, 2019,<sup>26</sup> and by then taking into account his entitlement to compensation at the 75 percent augmented compensation rate for a claimant with a least one dependent<sup>27</sup> and his entitlement to appropriate COLA increases up to and including the COLA increase effective March 1, 2022. He was entitled to these COLA increases because the applicable pay rate date, October 18, 2019, was more than one year prior to the date that each COLA increase took effect. In determining appellant's entitlement to COLA increases, OWCP properly applied the precedent applicable to a claimant who, like appellant, had received injury-related disability prior to the period of the schedule award.<sup>28</sup> In reaching its determination of the overpayment amount, OWCP provided detailed calculations and supporting pay documents.

Appellant received \$22,726.08 for his August 1, 2023 schedule award during the period May 5 through July 24, 2023 based on the incorrect use of the weekly pay rate of \$1,972.75, related to an improper date of MMI, *i.e.*, May 5, 2023. Due to the utilization of this improper date of MMI rather than the proper date of MMI of May 5, 2022, this weekly pay rate calculation included a March 1, 2023 COLA to which appellant was not entitled. OWCP properly found that the weekly pay rate would have been \$1,855.75 if the proper MMI was utilized in the schedule award calculation and that, in total, appellant was only entitled to receive \$21,378.24 for the additional two percent permanent impairment of each lower extremity.

Counsel argued that appellant was entitled to a March 1, 2023 COLA by asserting that eligibility for a given COLA is judged from the standpoint of the date that schedule award benefits are paid, which in the present case was in early-August 2023. However, he did not provide support for this argument. Counsel did not explain how appellant would be entitled to the March 1, 2023 COLA that went into effect after the proper period of the schedule award, *i.e.*, May 5 through July 24, 2022. Counsel asserted that Chapter 901.16a(5) of OWCP's procedures applies to appellant's case, but this section of OWCP's procedures only applies when, unlike the present case, the claimant has no disability prior to the period of the schedule award.<sup>29</sup>

The Board notes that the difference between the amount appellant received due to use of the improper pay rate, \$22,726.08, and the amount he was actually entitled to receive, \$21,378.24, provides the figure of \$1,347.84 for the amount of the overpayment. Therefore, OWCP properly determined that appellant received a \$1,347.84 overpayment.

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

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

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<sup>26</sup> See *supra* notes 20 and 22. It is noted that the date of injury and date disability began are the same, October 18, 2019. Appellant would not qualify for a recurrent pay rate because he did not sustain a recurrence of disability. See *id.*

<sup>27</sup> See *supra* note 21.

<sup>28</sup> See *supra* notes 16 through 18.

<sup>29</sup> See *supra* note 5.

adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.<sup>30</sup>

Section 10.438 of OWCP's regulations provides that the individual who received the overpayment is responsible for providing information about income, expenses, and assets as 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. Failure to submit the requested information within 30 days of the request shall result in denial of waiver.<sup>31</sup>

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

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 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.<sup>32</sup> Appellant, however, had the responsibility to provide supporting financial information and documentation to OWCP.<sup>33</sup>

In its preliminary overpayment determination dated January 3, 2024, OWCP requested a completed overpayment recovery questionnaire and supporting financial documentation, including copies of income tax returns, bank account statements, bills, pay slips, and any other records to support his reported income and expenses. It advised appellant that it would deny waiver of recovery if he failed to furnish the requested financial information within 30 days. Appellant, however, did not respond to this information request. The evidence of record is, therefore, insufficient to establish that recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.<sup>34</sup>

Consequently, as appellant did not submit the information required under 20 C.F.R. § 10.438 of OWCP's regulations, which was necessary to determine his eligibility for waiver, the Board finds that OWCP properly denied waiver of recovery of the overpayment.<sup>35</sup>

### **CONCLUSION**

The Board finds that appellant received an overpayment of compensation in the amount of \$1,347.84 for the period May 5 through July 24, 2023, for which he was without fault, due to the use of an incorrect pay rate for his schedule award. The Board further finds that OWCP properly denied waiver of recovery of the overpayment.

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<sup>30</sup> 5 U.S.C. § 8129.

<sup>31</sup> 20 C.F.R. § 10.438.

<sup>32</sup> *Id.* at § 10.436.

<sup>33</sup> *Supra* note 31.

<sup>34</sup> *Supra* note 30.

<sup>35</sup> *See T.E.*, Docket No. 19-0348 (issued December 11, 2019).

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 10, 2024 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 17, 2026  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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