United States Department of Labor
Employees' Compensation Appeals Board

B.F., Appellant	)	
and	)	**Docket No. 13-785**
	)	**Issued: September 20, 2013**
U.S. POSTAL SERVICE, POST OFFICE, Lancaster, PA, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 12, 2013 appellant, through her attorney, filed a timely appeal from an October 15, 2012 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.

ISSUES

The issues are: (1) whether appellant has established that she has greater than a 21 percent permanent impairment of her left upper extremity, for which she received a schedule award; (2) whether OWCP met its burden of proof to rescind her additional 1 percent schedule award; (3) whether it properly determined that appellant received an overpayment in the amount of $1,230.96 for the period March 31 to April 21, 2011 on the basis that she received a schedule award which was subsequently rescinded; (4) whether OWCP abused its discretion in denying waiver of the overpayment.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This is the second appeal before the Board. Appellant, then a 54-year-old clerk, filed a claim for benefits after sheinjured her left shoulder on May 14, 2003. OWCP accepted under case File No. xxxxxx046the conditions of left shoulder tendinitis and left shoulder osteoarthritis.On October 22, 2004 appellant underwent arthroscopic debridement of the rotator cuff, decompression and resection of distal clavicle. The procedure was performed by Dr. Lawrence S. Pollack, an osteopath specializing in orthopedic surgery. OWCP subsequently accepted under claim File No. xxxxxx713 bilateral carpal tunnel syndrome. Dr. Pollack performed a left carpal tunnel release on May 12, 2006 and a right carpal tunnel release on September 18, 2006.

In February 2009 appellant filed a Form CA-7 claim for a schedule award based on a partial loss of use of her upper extremities.

By decision dated March 3, 2009, under File No. xxxxxx713,OWCP granted appellant a schedule award for a 10 percent permanent left upper extremity impairment and a 10 percent permanent right upper extremity impairment based on her accepted bilateral carpal tunnel syndrome.

By decision dated April 27, 2009, OWCP found that appellant had an 11 percent permanent impairment of the left upper extremity in addition to the 10 percent appellant had received under the March 3, 2009 decision. Appellant would be paid at the weekly rate of $852.86, the rate in effect as of October 22, 2004 for 34.32 weeks.

By letter dated May 1, 2009, appellant's attorney requested an oral hearing for claim File No. xxxxxx046, which was held on August 20, 2009.

At the July 28, 2009 hearing, counsel contended that because appellant also had an accepted claim for a left upper extremity impairment based on a preexisting left shoulder condition under File No.xxxxxx046, for which she had received a separate schedule award, her award should have been paid at the higher pay rate in effect as of July 14, 2006.

By decision dated October 14, 2009, OWCP's hearing representative affirmed the March 3, 2009 decision. She recommended that OWCP combine claim File Nos. xxxxxx713 and xxxxxx046, as they both pertained to upper extremity conditions accepted by OWCP. The hearing representative further found that the hearing representative with jurisdiction over the April 27, 2009 schedule award decision should issue a separate decision addressing whether the schedule award under File No. xxxxxx046 should be paid at a higher pay rate.

By decision dated November 18, 2009, OWCP's hearing representative affirmed the April 27, 2009 schedule award decision.

In a January 25, 2011 decision,[2] the Board set aside OWCP's October 14 and November 18, 2009 decisions finding a conflict in the medical opinion evidence regarding the degree of appellant's permanent impairment.The Board remanded the case for referral of

[2] Docket Nos. 10-635 and 10-636 (issued January 25, 2011).

appellant, the case record and a statement of accepted facts to an independent medical examiner to resolve the conflict. The complete facts of this case are set forth in the Board's January 25, 2011 decision and are herein incorporated by reference.

In a letter dated February 15, 2011, issued under File No. xxxxxx713, OWCP stated that appellant's pay rate as of May 14, 2012 was derived from a Form CA-7 certified by the employing establishment on May 24, 2006. The pay rate was calculated based on her base pay of $47,184.00 a year and $1,527.31 annual night differential pay.

OWCP referred appellant to Dr. David C. Baker, M.D., a Board-certified orthopedic surgeon, for a referee medical examination. In an April 1, 2011 report, Dr. Baker found that appellant had a 12 percent left upper extremity impairment for her left shoulder condition and a 5 percent left upper extremity impairment for left-sided carpal tunnel syndrome in conformance with the updated, sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[3]

With regard to the left shoulder, Dr. Baker stated that appellant had several diagnoses presented in the October 22, 2004 surgery, an arthroscopic subacromial decompression for impingement syndrome/rotator cuff tendinitis with distal clavicle excision and debridement of the labrum. He noted that as Section 15.2e at page 390 of the A.M.A., *Guides* indicated that it was not uncommon for several diagnosed conditions to be present simultaneously in the shoulder, the evaluator was expected to choose the most significant diagnosis and to rate only that diagnosis using the diagnosis-based method; where Clinical Studies (GMCS) confirmed more than one of the following diagnoses -- rotator cuff tear, superior labrum anterior or posterior [SLAP] or other labral lesion or biceps tendon pathology, the grade could be modified according to the clinical studies adjustment table. Dr. Baker stated that the diagnosis for acromioclavicular joint resection at Table 15-5 at page 403,[4] the shoulder regional grid; upper extremity impairments, yielded the highest rating under this method, which produced a class 1 default impairment. Applying the net adjustment formula at Section 15, pages 406, 410 and 411 of the A.M.A., *Guides*,[5] he found that the grade modifier at Table 15-7, page 406 for Functional History (GMFH) was 2, for a moderate problem based on a *Quick*DASH score of 50; the grade modifier for Physical Examination (GMPE) at Table 15-8, page 408 was 1, for a mild problem due to minimal palpatory findings, without observed abnormalities; the grade modifier for clinical studies at Table 15-9, page 410 was 2, based on rotator cuff tendinitis and a degenerative labrum. Pursuant to the formula set forth at pages 411-12,[6] Dr. Baker subtracted the grade modifier of 1 from grade 2 for functional history, grade 1 for physical examination and grade 2 for clinical studies, which yielded a net adjusted grade of 2, which moved the default left upper extremity impairment, class 1, from 10 to 12 percent.

[3] Dr. Baker also rated a three percent right upper extremity impairment for right-sided carpal tunnel syndrome. The right upper extremity impairment rating is not at issue on appeal.

[4] A.M.A., *Guides* 403.

[5] *Id*.at 406, 410-11.

[6] *Id*.at 411-12.

With regard toan impairment for the accepted condition of left carpal tunnel syndrome, Dr. Baker rated a five percent impairment pursuant to Table 15-23, page 449 of the A.M.A., *Guides*, the table used for calculating entrapment/compression neuropathy impairment.[7] Using this table, under the heading of "Test Findings," he found that there was no motor conduction block or axonal loss, but with conduction below, for a grade modifier of 1. Under the heading of "History," Dr. Baker rated a grade modifier of 1 for mild intermittent symptoms. For physical examination findings, he rated a grade 2 for decreased sensation without atrophy or weakness. Pursuant to the rating process set forth at page 448, Dr. Baker determined that the average value for these modifiers, based on adding 1 for history and 3 for physical findings, then dividing the total of 5 by 3, equaled 1.66, which he rounded off to 2; this produced a mid-range impairment of 2 under Table 15-23. Given that appellant's *Quick*DASH test score was 50, this yielded a mild grade modifier of 2, which yielded a five percent impairment rating for left carpal tunnel syndrome.

In a pay rate memoranda dated April 8 and May 20, 2011, OWCP determined that appellant had a pay rate of $936.76 a week in accordance with the information provided in the May 24, 2006 Form CA-7. It calculated $907.38 in weekly base pay ($47,184.00 divided by 52 weeks) and added $29.37 in night differential pay ($1,527.31 divided by 52).[8]

In a report dated May 17, 2011, Dr. Berman, OWCP's medical adviser, concurred with Dr. Baker's opinion and credited his findings and conclusions.

By decision dated May 23, 2011, OWCP paid an additional one percent for the left upper extremity, left shoulder condition, for a total 22 percent award, for the period of compensation from March 31 to April 21, 2011, for total of 3.12 weeks of compensation; appellant would be paid at the weekly rate of $852.86.

By letter dated June 2, 2011, counsel requested an oral hearing.

By decision dated August 16, 2011,OWCP's hearing representative set aside the May 23, 2011 decision. He found that OWCP erred by having Dr. Berman review Dr. Baker's report because Dr. Berman was part of the conflict of medical opinion that Dr. Baker was asked to resolve. The hearing representative instructed OWCP to assign a different medical adviser to review Dr. Baker's report and to make a determination regarding appellant's pay rate as of May 14, 2006.

On remand, OWCP referred the file to Dr. Christopher Brigham, Board-certified in family practice and an OWCP medical adviser. In an August 18, 2011 report, Dr. Brigham concurred with Dr. Baker's assessment of 5 percent for carpal tunnel syndrome and 12 percent for the left shoulder. He found that appellant's left upper extremity impairment was 16 percent under the Combined Values Table of the A.M.A., *Guides*. Dr. Brigham further indicated that, since the amount of the schedule award did not exceed the 21 percent left upper extremity

[7] *Id*.at 449.

[8] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.10(a) (March 2011). A copy of the April 8, 2011 pay rate memo has been placed in the present file.

impairment previously awarded, she was not entitled to an additional impairment award under the A.M.A., *Guides*.

By decision dated September 20, 2011, OWCP found that, based on Dr. Brigham's opinion, appellant had no additional impairment of the left upper extremity under the sixth edition of the A.M.A., *Guides*.It found that, because her total left upper extremity impairment was 16 percent and she had previously been awarded 22 percent for the left upper extremity, there was no basis for an additional schedule award.

In a preliminary notice of overpayment dated September 22, 2011, OWCP found that an overpayment in the amount of $2,063.88 had occurred, representing the schedule award paid on May 23, 2011. It found that an overpayment had occurred because appellant erroneously received compensation for an additional impairment award. The previous award,which had been rated under the fifth edition of the A.M.A., *Guides*, had granted 21 percent of the left upper extremity. As appellant was only entitled to 16 percent of the left upper extremity, the additional 1 percent was incorrect. Thus, OWCP rescinded that additional one percent. It found that appellant was without fault in creating the overpayment and allowed her 30 days to challenge the overpayment or request a recoupment hearing.

By letter dated September 23, 2011, counsel requested a review of the written record of the September 20, 2011 decision.

By decision dated March 28, 2012, OWCP's hearing representative affirmed the September 20, 2011 decision, finding that the weight of medical evidence established that appellant had a 16 percent left upper extremity impairment. The hearing representative also foundthat an overpayment had occurred due to the one percent schedule award issued on May 23, 2011, as this award was erroneous. The hearing representative remanded and directed OWCP to first determine the correct pay rate as of May 14, 2006 and to recalculate any overpayment stemming from the May 23, 2011 one percent schedule award.

In an April 13, 2012 memorandum, OWCP stated that as of May 14, 2006 appellant's weekly pay rate was $936.76 aweek and not $852.86 a week. It noted that she had been underpaid $832.92 due to the incorrect payrate. OWCP calculated that,with the proper pay rate of $936.76, appellant should have been paid $22,351.93. It determined that, due to the overpayment of the one percent schedule award issued on May 23, 2011, shehad received $23,582.89, which resulted in an overpayment of $1,230.96. The total of $1,230.96 represented her overpayment, for which appellant was found to be without fault. OWCP attached pay rate worksheets and pay rate memoranda.

By decision dated April 20, 2012, OWCP issued a preliminary notice that an overpayment in the amount of $1,230.96 had occurred due to the incorrect pay rate and rescinded May 23, 2011 schedule award for the period March 31 to April 21, 2011. It found that appellant was without fault in creating the overpayment and allowed her 30 days to challenge the overpayment or request a recoupment hearing.

On August 10, 2012 counsel requested a review of the written record.

By decision dated October 15, 2012, OWCP's hearing representative affirmed the April 20, 2012 decision and finalized the preliminary overpayment determination. The hearing representative further found that appellant was not entitled to waiver of the overpayment.

LEGAL PRECEDENT

The schedule award provision of FECA[9] and its implementing regulations[10] 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. The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[11] The claimant has the burden of proving that the condition for which a schedule award is sought is causally related to his or her employment.[12]

The sixth edition of the A.M.A., *Guides* provides a diagnosis-based method of evaluation utilizing the World Health Organization's International Classification of Functioning, Disability and Health (ICF).[13] Under the sixth edition, for upper extremity impairments the evaluator identifies the impairment class for the Diagnosed Condition (CDX), which is then adjusted by grade modifiers based on GMFH, GMPE and GMCS.[14] The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).[15]

Impairment due to carpal tunnel syndrome is evaluated under the scheme found in Table 15-23 (Entrapment/Compression Neuropathy Impairment) and accompanying relevant text.[16] In Table 15-23, grade modifiers levels (ranging from zero to four) are described for the categories test findings, history and physical findings. The grade modifier levels are averaged to arrive at the appropriate overall grade modifier level and to identify a default rating value. The default rating value may be modified up or down by one percent based on functional scale, an assessment of impact on daily living activities.[17]

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[9] 5 U.S.C. § 8107.

[10] 20 C.F.R. § 10.404. Effective May 1, 2009, OWCP began using the A.M.A., *Guides* (6th ed. 2009).

[11] *Id.*

[12] *Veronica Williams*, 56 ECAB 367, 370 (2005).

[13] A.M.A., *Guides*, *supra* note 4 at 3, section 1.3, The International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement.

[14] *Id.* at 385-419

[15] *Id.* at 411.

[16] *Supra* note 7.

[17] *Id.* at 448-50.

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to OWCP's medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with OWCP's medical adviser providing rationale for the percentage of impairment specified.[18]

ANALYSIS -- ISSUE 1

The overpayment in this case was based on an underlying schedule award determination and rescission of one percent of the award for permanent impairment of appellant's left upper extremity. The Board must review the underlying decisions to determine if an overpayment has been established.[19]Counsel argues in his appeal brief that Dr. Baker's impartial medical report was insufficiently rationalized to represent the weight of the medical evidence. He asserts that he did not measure loss of range of motion in the left shoulder in degrees in all planes during his physical examination, as required by the A.M.A., *Guides*; Dr. Baker merely indicated that the left shoulder motion was equal to that of the right without providing specific measurements or reasons. Counsel further contends that Dr. Baker did not indicate how he measured motor strength in appellant's left shoulder, merely stating that she had intact strength. In addition, he argues that Dr. Baker contradicted himself by finding that appellant had no neurologic deficits in the upper extremities, then finding a positive Phalen's sign, while failing to describe which extremity he measured. Lastly, counsel contends that Dr. Baker failed to provide an overall impairment rating to the left upper extremity based on the Combined Value Charts, providing separate ratings for the left shoulder and left carpal tunnel conditions.

The Board does not accept appellant's argument. The Board notes that the A.M.A., *Guides* indicate that a range of motion impairment should not be combined with the diagnosed-based impairment.[20] Dr. Baker chose his method of rating impairment pursuant to page 389 of the A.M.A., *Guides*, which states that,"if more than one diagnosis can be used, the highest causally related impairment rating should be used; this will generally be the more specific diagnosis."[21] He explained why his method of calculating appellant's impairment rating was the most appropriate one and provided a thorough, well-rationalized report based on his examination findings and on appellant's history; he then calculated an impairment pursuant to the applicable

[18]*See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(d) (August 2002).

[19]*Russell E. Wageneck*, 46 ECAB 653 (1995); *see alsoJ.F.*, Docket No. 08-2396 (issued March 19, 2009).

[20]*See* A.M.A., *Guides*497, Diagnosis-Based Impairment, which states:

> "Most Impairments are based on the Diagnosis-based Impairment where impairment class is determined by the diagnosis and specific criteria ….Range of motion is primarily used as a physical examination adjustment factor and is only used to determine actual impairment values when it is not possible to otherwise define impairment. Ratings based on range of motion …. cannot be combined with other approaches."

[21] A.M.A., *Guides* 389.

tables and protocols of the sixth edition of the A.M.A., *Guides*. The Board finds that Dr. Baker's report is sufficient to warrant the special weight of an impartial examiner.[22]

The section of the A.M.A., *Guides* which rates diagnosis-based impairments for the upper extremities is located at Chapter 15, which states at page 387, Section 15.2 that impairments are defined by class and grade. This section states:

> "The impairment class is determined first, by using the corresponding diagnosis-based regional grid. The grade is then determined using the adjustment grids provided in Section 15.3. Once the impairment class has been determined, based on the diagnosis, the grade is initially assigned the default value, C. The final impairment grade, within the class, is calculated using the grade modifiers, or nonkey factors, as described in Section 15.3. Grade modifiers include functional history, physical examination and clinical studies. The grade modifiers are used on the Net Adjustment Formula described in Section at 15.3d to calculate a net adjustment. The final impairment grade is determined by adjusting the grade up or down the default value C. by the calculated net adjustment." The lowest possible grade is A and adjustments less than minus 2 from the default value C will automatically be considered A; the highest possible grade is E and adjustments greater than plus 2 will automatically be considered E. The regional grid is used for 2 purposes: (1) to determine the most appropriate class for a specific regional diagnosis and (2) to determine the final impairment after appropriate adjustments are made using the grade modifiers."[23]

The regional grid is used for two purposes: (1) to determine the most appropriate class for a specific regional diagnosis; and (2) to determine the final impairment after appropriate adjustments are made using the grade modifiers.[24]

Using the formula above and the net adjustment formula outlined at pages 406 to 411 of the A.M.A., *Guides*, Dr. Baker relied on appellant's October 2004 surgery for arthroscopic subacromial decompression to rate the degree of impairment from her accepted left shoulder condition, which was based on diagnoses of impingement syndrome/rotator cuff tendinitis with distal clavicle excision and debridement of the labrum. He found that an acromioclavicular joint resection yielded a class 1 impairment default impairment under Table 15-5 at page 403 of the A.M.A., *Guides*. Dr. Baker then applied the net adjustment formula at pages 406, 410 and 411 of the A.M.A., *Guides*, finding that appellant had a grade modifier of 2 for functional history, a grade modifier of 1 for physical examination and a grade modifier of 2 for clinical studies. He subtracted the grade modifier of 1 from the above categories for a total net adjusted grade of 2, which adjusted the default left upper extremity impairment from 10 to 12 percent. As this finding was rendered in accordance with the applicable tables and protocols in the A.M.A., *Guides* for rating left upper extremity impairments based on shoulder impairments, the Board

[22] It is well established that the opinion of an impartial medical specialist is to be given special weight. *See Anna M. Delaney*, 53 ECAB 384 (2002).

[23] A.M.A., *Guides* 387.

[24] *Id.*

finds that Dr. Baker properly rated a 12 percent left upper extremity impairment for appellant's accepted left shoulder condition.

With regards to a rating for left carpal tunnel syndrome, Dr. Baker advised that appellant had a grade modifier of 1 for test findings, based on no motor conduction block or axonal loss, with conduction below; a grade 1 modifier for history for mild intermittent symptoms; and a grade 2 modifier for physical examination findings, based on decreased sensation without atrophy or weakness. He then properly totaled the modifiers and found an average of 2, rounded off. Factoring in appellant's *Quick*DASH score of 50, which produced a grade 2 modifier, Dr. Baker rated a five percent impairment for left-sided carpal tunnel syndrome. This rating was proper, ashe relied on the appropriate sections and tables of the A.M.A., *Guides* pertaining to rating impairment based on carpal tunnel syndrome and sufficiently explained how he arrived at his five percent impairment rating for the left upper extremity.

Dr. Brigham, OWCP's medical adviser, reviewed Dr. Baker's report. He concurred with his findings and conclusions and determined that appellant had a 16 percent left upper extremity impairment under the A.M.A., *Guides,* after combining the left upper extremity impairments pursuant to the Combined Values Table of the A.M.A., *Guides*. The Board finds that the record supports that appellant has no more than a 16 percent left upper extremity impairment. There is no other medical evidence of record addressing the extent of his permanent impairment under the appropriate edition of the A.M.A., *Guides* which supports any greater impairment. Because appellant had previously received a schedule award for a 21 percent impairment of the left upper extremity, she was not entitled to an increased award. OWCP properly found that she had no additional permanent impairment of the left upper extremity.

LEGAL PRECEDENT -- ISSUE 2

Section 8128 of FECA provides that the Secretary of Labor may review an award for or against payment of compensation at any time on his motion or on application.[25] The Board has upheld OWCP's authority to reopen a claim at any time on its own motion under section 8128 of FECA and where supported by the evidence, set aside or modify a prior decision and issue a new decision.[26] The Board has noted, however, that the power to annul an award is not an arbitrary one and that an award for compensation can only be set aside in the manner provided by the compensation statute.[27]

Workers' compensation authorities generally recognize that compensation awards may be corrected, in the discretion of the compensation agency and in conformity with statutory provision, where there is good cause for so doing, such as mistake or fraud. It is well established that, once OWCP accepts a claim, it has the burden of justifying the termination or modification benefits. This holds true where, as here, OWCP later decides that it erroneously accepted a

[25] 5 U.S.C. § 8128.

[26] *See John W. Graves*, 52 ECAB 160 (2000).

[27] *Id.; see also K.N.*, Docket No. 11-540 (issued February 2, 2012).

schedule award claim. In establishing that its prior acceptance was erroneous, OWCP is required to provide a clear explanation of the rationale for recission.[28]

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly determined that appellant's additional one percent schedule award was issued in error as the evidence of record was not sufficient to establish that she had an additional one percent permanent impairment caused by her accepted left shoulder condition.

As noted above, Dr. Baker's April 1, 2011 report found that appellant had a 12 percent left upper extremity impairment for the left shoulder and a five percent left upper extremity impairment for left carpal tunnel syndrome. Dr. Brigham, the DMA, reviewed this report and opined that Dr. Baker had correctly calculated appellant's left upper extremity impairment, except that, pursuant to the Combined Values Chart, the impairment value was 16 percent. While appellant had already received a schedule award for 21 percent impairment of the left upper extremity, OWCP granted her an additional one percent schedule award in its May 23, 2011 decision. The Board finds that OWCP improperly granted this schedule award. There was no evidence of record to establish the additional one percent impairment. Dr. Brigham reviewed Dr. Baker's report on September 20, 2011 and found appellant had only 16 percent impairment for her left upper extremity. However, since appellant has received the award for 21 percent impairment of the left upper extremity pursuant to a rating under the fifth edition of the A.M.A., *Guides*, the lower rating pursuant to the sixth edition could not justify a reduction of the prior award for 21 percent impairment, made under the fifth edition of the A.M.A., *Guides.*[29] The Board finds that OWCP properly determined that appellant had no more than a 21 percent permanent impairment of the left upper extremity.

LEGAL PRECEDENT -- ISSUE 3

Section 8108 of FECA[30] provides for the reduction of compensation for subsequent injury to the same member:

> "The period of compensation payable under the schedule in section 8107(c) of this title is reduced by the period of compensation paid or payable under the schedule for an earlier injury if --
>
> > (1) compensation in both cases is for disability of the same member or function or different parts of the same member or function or for disfigurement; and

[28] *Id.*

[29] *See* FECA Bulletin 09-03(issued March 15, 2009).

[30] 5 U.S.C. § 8108.

> (2) the Secretary of Labor finds that compensation payable for the later disability in whole or in part would duplicate the compensation payable for the preexisting disability."

FECA at 5 U.S.C. § 8101(4) defines "monthly pay" as the 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.

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly determined that appellant received an overpayment of compensationin the amount of $1,230.96. OWCP properly recalculated appellant's pay rate, based upon her 2006 date of disability from her carpal tunnel claim which resulted in a higher pay rate, from the rate she had been paid pursuant to her 2004 left shoulder date of disability. Based upon her higher pay rate, appellant had been underpaid $832.92. However she was also overpaid the one percent schedule award, in the amount of $2,063.88. Appellant received $23,582.89 in compensation for her schedule award but was only entitled to receive $22,351.93. The net total of $1,230.96 represented her overpayment in schedule award payments.

LEGAL PRECEDENT -- ISSUE 4

The waiver or refusal to waive an overpayment of compensation by OWCP is a matter that rests within its discretion pursuant to statutory guidelines.[31] These statutory guidelines are found in section 8129(b) of FECA which states: "Adjustment or recovery [of an overpayment] by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience."[32] If OWCP finds a claimant to be without fault in the matter of an overpayment, then, in accordance with section 8129(b), it may only recover the overpayment if it determined that recovery of the overpayment would neither defeat the purpose of FECA nor be against equity and good conscience.

According to 20 C.F.R. § 10.436, recovery of an overpayment would defeat the purpose of FECA if recovery would cause hardship because the beneficiary needs substantially all of her income (including compensation benefits) to meet current ordinary and necessary living

[31] *See Robert Atchison*, 41 ECAB 83, 87 (1989).

[32] 5 U.S.C. § 8129(b).

expenses and also, if the beneficiary's assets do not exceed a specified amount as determined by OWCP from data provided by the Bureau of Labor Statistics.[33] According to 20 C.F.R. § 10.437, 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 position for the worse.[34]http://www.dol.gov/ecab/decisions/2010/Apr/09-1444.htm_-_ftn19 To establish that a valuable right has been relinquished, it must be shown that the right was in fact valuable, that it cannot be regained and that the action was based chiefly or solely in reliance on the payments or on the notice of payment.[35]

Since OWCP found appellant to be without fault in the matter of the overpayment, then, in accordance with section 8129(b), it may only recover the overpayment if it determined that recovery of the overpayment would neither defeat the purpose of FECA nor be against equity and good conscience.

Section 10.438 of OWCP's regulations provide:

> "(a) 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. This information will also be used to determine the repayment schedule, if necessary.
>
> "(b) Failure to submit the requested information within 30 days of the request shall result in denial of waiver and no further request for waiver shall be considered until the requested information is furnished."[36]

ANALYSIS -- ISSUE 4

In the April 20, 2012 notice of the preliminary overpayment determination, OWCP requested that appellant complete and return an enclosed financial information questionnaire within 30 days of the date of the notice even if she was not requesting waiver of the overpayment. Appellant did not submit such information within the allotted time. Therefore, OWCP properly determined that she did not establish entitlement to waiver of the overpayment

[33] 20 C.F.R. § 10.436. An individual is deemed to need substantially all of his monthly income to meet current and ordinary living expenses if monthly income does not exceed monthly expenses by more than $50.00. *Desiderio Martinez*, 55 ECAB 245 (2004). OWCP procedures provide that assets must not exceed a resource base of $4,800.00 for an individual or $8,000.00 for an individual with a spouse or dependent plus $960.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a) (October 2004).

[34] *Id.* at § 10.437(a), (b).

[35] *Id.* at § 10.437(b)(1).

[36] *Id.* at § 10.438.

under the above-described standards. Appellant did not provide financial information within the appropriate time period to show that she was entitled to waiver of the overpayment.

CONCLUSION

Appellant has establishedno more than a 21 percent permanent impairment of her left upper extremity. OWCP properly rescinded acceptance of her May 23, 2011 schedule award for an additional one percent. The Board further finds that appellant received a $1,230.96 overpayment of compensation, and that OWCP did not abuse its discretion by refusing to waive recovery of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' October 15, 2012 decision is affirmed.

Issued: September 20, 2013
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board