

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

_____)	
J.P., Appellant)	
)	
and)	Docket No. 24-0927
)	Issued: December 5, 2024
U.S. POSTAL SERVICE, TROY POST OFFICE,)	
Troy, IL, Employer)	
_____)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On September 16, 2024 appellant filed a timely appeal from an August 1, 2024 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (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 received an overpayment of compensation in the amount of \$2,067.98 for the period October 25, 2022 through March 26, 2023, for which she was not at fault, due to the use of an incorrect pay rate for her schedule award; and (2) whether OWCP properly denied appellant's request for waiver of recovery of the overpayment.

FACTUAL HISTORY

On November 17, 2019 appellant, then a 57-year-old city letter carrier, filed an occupational disease claim (Form CA-2) alleging that she sustained injury to her left shoulder

¹ 5 U.S.C. § 8101 *et seq.*

and neck due to factors of her federal employment, including lifting heavy trays of mail and sorting and casing mail. She noted that she first became aware of her claimed injury on June 19, 2019 and first realized its relationship to her federal employment on October 2, 2019. Appellant did not stop work. OWCP accepted that she sustained a medium-sized, full-thickness tear of the rotator cuff of the left shoulder.² Appellant then stopped work on May 23, 2020 and underwent OWCP-authorized left shoulder surgery on May 27, 2020, including rotator cuff repair and debridement of the superior labrum and coracoacromial ligament. She returned to full-duty work on January 4, 2021. OWCP paid appellant wage-loss compensation for disability from work on the supplement rolls, commencing May 30, 2020, and on the periodic rolls, commencing September 13, 2020.

On September 14, 2021 appellant filed a claim for compensation (Form CA-7) for a schedule award.

In an August 3, 2021 report, Dr. John W. Ellis, Board-certified in family medicine, determined appellant's permanent impairment under the standards of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).³ He found that appellant had 19 percent permanent impairment of the left upper extremity based on the range of motion (ROM) method of evaluating permanent impairment.⁴ Dr. Ellis determined that appellant reached maximum medical improvement (MMI) on the date of the examination.

In October 2021 OWCP referred appellant, along with the medical record, a statement of accepted facts (SOAF) and a series of questions, to Dr. Michael H. Ralph, a Board-certified orthopedic surgeon, for a second opinion examination and impairment rating under the standards of the sixth edition of the A.M.A., *Guides*. In a November 10, 2021 report, Dr. Ralph referenced appellant's left rotator cuff tear and determined that she had five percent permanent impairment of the left upper extremity based on the diagnosis-based impairment (DBI) rating method.⁵ On February 28, 2022 Dr. Taisha S. Williams, a Board-certified physiatrist serving as a district medical adviser (DMA), agreed with Dr. Ralph's impairment rating.

In September 2022, after determining that there was a conflict in the medical opinion evidence between Dr. Ellis and Dr. Ralph, OWCP referred appellant, along with the medical record, and a SOAF, to Dr. Frank Petkovich, a Board-certified orthopedic surgeon, for an impartial medical examination and impairment rating under the standards of the sixth edition of the A.M.A., *Guides*. In an October 25, 2022 report, Dr. Petkovich reported physical examination findings, referenced appellant's left rotator cuff tear, and determined that she had seven percent permanent impairment of the left upper extremity based on the DBI rating method. He found that appellant reached MMI on May 27, 2020.

² OWCP later expanded the acceptance of appellant's claim to include dizziness, giddiness, and other peripheral vertigo (bilateral).

³ A.M.A., *Guides* (6th ed. 2009).

⁴ *See id.* at 475, Table 15-34.

⁵ *See id.* at 403, Table 15-5.

By decision dated May 15, 2023, OWCP granted appellant a schedule award for seven percent permanent impairment of the left upper extremity. The award ran for 21.84 weeks from October 25, 2022 through March 26, 2023. It was based on a date of MMI of October 25, 2022 and used a weekly pay rate of \$1,419.27 that was in effect on October 25, 2022. OWCP advised that the schedule award was based on the impairment rating of Dr. Petkovich, the impartial medical examiner (IME). Documentation in the case record reveals that appellant received a total of \$23,247.64 for this schedule award during the period October 25, 2022 through March 26, 2023.

On May 17, 2023 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. After a preliminary review, by decision dated August 7, 2023, OWCP's hearing representative set aside the May 15, 2023 decision and remanded the case to OWCP for further development, to be followed by a *de novo* decision. The hearing representative directed OWCP to refer appellant back to Dr. Petkovich in his role as IME to obtain a supplemental report assessing the permanent impairment of appellant's left upper extremity, which included a calculation under the ROM rating method in accordance with FECA Bulletin No. 17-06.⁶

OWCP referred appellant's case back to Dr. Petkovich. In an October 17, 2023 report, Dr. Petkovich indicated that appellant did not actively give a full range of motion; therefore, he used the DBI rating method to determine that appellant had seven percent permanent impairment of the left upper extremity under the standards of the sixth edition of the A.M.A., *Guides*. He found that appellant reached MMI on August 3, 2021. Dr. Petkovich explained that the August 3, 2021 date for MMI was based on the fact that, after August 3, 2021, no further diagnostic evaluation or treatment was necessary for appellant's left shoulder with respect to the accepted June 19, 2019 employment injury.

By decision dated March 6, 2024, OWCP determined that the permanent impairment of appellant's left upper extremity of seven percent entitled her to 21.84 weeks of compensation from August 3, 2021 through January 3, 2022 based on her weekly pay rate of \$1,293.02 in that this was her weekly pay rate at the time of the corrected date of MMI, *i.e.*, August 3, 2021. It noted that appellant received \$23,247.64 for her May 15, 2023 schedule award during the period October 25, 2022 to March 26, 2023, based on the weekly pay rate of \$1,419.27 that was in effect on October 25, 2022. OWCP advised that appellant was entitled to receive \$21,179.66 under the March 6, 2024 schedule award determination. The schedule award determination was based on the updated opinion of Dr. Petkovich, the IME.

On March 6, 2024 OWCP received pay records showing that appellant had received \$23,247.64 for her May 15, 2023 schedule award during the period October 25, 2022 through March 26, 2023 based on the weekly pay rate of \$1,419.27 in effect on October 25, 2022. A March 6, 2024 OWCP worksheet revealed that appellant would receive \$21,179.66 in schedule award compensation with use of the weekly pay rate of \$1,293.02 in effect on August 3, 2021.

In a preliminary overpayment determination dated May 6, 2024, OWCP advised appellant that she received an overpayment of compensation in the amount of \$2,067.98 for the period October 25, 2022 through March 26, 2023 because her schedule award was paid based on

⁶ See FECA Bulletin No. 17-06 (issued May 8, 2017).

an incorrect pay rate related to an improper date of MMI. It explained that appellant received \$23,247.64 in schedule award compensation based on an improper weekly pay rate of \$1,419.27 related to an improper date of MMI, *i.e.*, October 25, 2022. However, appellant was only entitled to receive \$21,179.66 in schedule award compensation based on the proper weekly pay rate of \$1,293.02 related to the proper date of MMI, *i.e.*, August 3, 2021. OWCP detailed the calculation of the overpayment as follows:

“You were paid \$23,247.64 for 21.84 weeks of compensation for the period 10/25/2022 to 03/26/2023 based on [an MMI] date of 10/25/2022. The pay rate in effect on 10/25/2022 was \$1,419.27 weekly.

$\$1,419.27 \times 75\% \text{ compensation rate} = \$1,064.4525 \text{ weekly compensation paid.}$

$\$1,064.4525 \text{ weekly compensation} \times 21.84 \text{ weeks} = \$23,247.64 \text{ paid.}$

You were entitled to \$21,179.66 for 21.84 weeks of compensation for the period 08/03/2021 to 01/02/2022 based on [an MMI] date of 08/03/2021. The pay rate in effect on 08/03/2021 was \$1,293.02 weekly.

$\$1,293.02 \times 75\% \text{ compensation rate} = \$969.765 \text{ weekly compensation entitlement.}$

$\$969.765 \text{ weekly compensation} \times 21.84 \text{ weeks} = \$21,179.66 \text{ entitlement.}$

$\$23,247.64 \text{ paid} - \$21,179.66 \text{ entitlement} = \$2,067.98 \text{ overpayment.}”$

OWCP also preliminarily determined that appellant was without fault in the creation of the overpayment. It also advised her that she could submit evidence challenging the fact, amount, or finding of fault, and request waiver of the overpayment. OWCP requested that she complete and return an overpayment action request form and a financial information questionnaire (Form OWCP-20) within 30 days. It also 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. OWCP advised her that it would deny waiver of recovery of the overpayment if she failed to furnish the requested financial information within 30 days. It provided her with an overpayment action request form and notified her that, within 30 days of the date of the letter, she could request a final decision based on the written evidence or a precoupment hearing.

OWCP received an overpayment action request form, signed on May 15, 2024, in which appellant disagreed that the overpayment occurred and requested waiver of recovery of the overpayment. Appellant indicated that she was without fault in the creation of the overpayment because the date of MMI for her schedule award had been changed.

OWCP also received a Form OWCP-20, signed on May 15, 2024, in which appellant reported that she received \$4,939.00 in monthly income comprised of \$3,200.00 in salary from the employing establishment and \$1,739.00 in Social Security Administration (SSA) payments.

She also reported that she had \$3,680.33 in monthly expenses.⁷ Appellant indicated that she had assets of \$700.00 comprised of cash in hand, and checking and savings account balances. She submitted documentation in the form of SSA payment records, employing establishment salary statements, billing statements, and credit card statements.⁸

By decision dated August 1, 2024, OWCP determined that appellant received an overpayment of compensation in the amount of \$2,067.98 for the period October 25, 2022 through March 26, 2023. It found that she was not at fault in the creation of the overpayment but that the overpayment was not subject to waiver. OWCP indicated that the evidence of record revealed that appellant had \$5,480.44 in monthly income comprised of \$3,741.44 in salary from the employing establishment⁹ and \$1,739.00 in SSA payments. It further found that she had \$3,404.33 in monthly expenses. Appellant also had assets of \$700.00 comprised of cash in hand, and checking and savings account balances. OWCP determined that waiver of recovery of the overpayment was not warranted as appellant's monthly income exceeded her monthly expenses by more than \$50.00. It required recovery of the overpayment by deducting \$200.00 from appellant's compensation payments every four weeks.¹⁰

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of FECA¹¹ 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.¹² 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.”¹³

⁷ Appellant reported monthly expenses of \$300.00 for rent/mortgage, \$1,000.00 for food, \$500.00 for clothing, \$780.00 for utilities, \$300.00 for other unspecified expenses, and \$800.00 for credit card payments comprised of four credit card payments of \$200.00 each.

⁸ The employing establishment salary statements revealed that appellant earned \$1,726.82 every two weeks.

⁹ OWCP applied the following formula to derive a monthly income figure based on appellant's salary from the employing establishment as supported by the evidence of record: \$1,726.82 every 2 weeks times 26 pay periods in a year, divided by 12 months.

¹⁰ 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.

¹¹ 5 U.S.C. § 8101 *et seq.*

¹² *Id.* at § 8102(a).

¹³ *Id.* at § 8129(a).

The schedule award provisions of FECA,¹⁴ and its implementing federal regulation,¹⁵ 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.¹⁶ As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.¹⁷

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.¹⁸ The determination of the date of MMI is factual in nature and depends primarily on the medical evidence.¹⁹

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$2,067.98 for the period October 25, 2022 through March 26, 2023, for which she was not at fault, due to the use of an incorrect pay rate for her schedule award.

In the present case, the record contains evidence, which demonstrates that appellant received \$23,247.64 in schedule award compensation for seven percent permanent impairment of the left upper extremity when she was only entitled to receive \$21,179.66 for this degree of impairment due to the use of an incorrect weekly pay rate related to an incorrect date of MMI for the schedule award. After development of the medical evidence, OWCP found that appellant had seven percent permanent impairment of the left upper extremity based on an October 17, 2023 report of Dr. Petkovich, the IME who was directed to provide an updated assessment of permanent impairment. He determined that appellant reached MMI on August 3, 2021. Dr. Petkovich explained that the August 3, 2021 date for MMI was based on the fact that, after August 3, 2021, no further diagnostic evaluation or treatment was necessary for appellant's left shoulder with respect to the June 19, 2019 employment injury.²⁰ By decision dated March 6, 2024, OWCP explained that the permanent impairment of appellant's left upper extremity of seven percent entitled her to 21.84 weeks of compensation from August 3, 2021 through January 3, 2022 based on her weekly pay rate of \$1,293.02 in that this was her weekly pay rate at

¹⁴ *Id.* at § 8107.

¹⁵ 20 C.F.R. § 10.404.

¹⁶ *Id.* See also *T.T.*, Docket No. 18-1622 (issued May 14, 2019).

¹⁷ 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).

¹⁸ *Adela Hernandez-Piris*, 35 ECAB 839 (1984).

¹⁹ *J.B.*, Docket No. 11-1469 (issued February 14, 2012); *Franklin L. Armfield*, 28 ECAB 445 (1977).

²⁰ See *supra* notes 18 and 19.

the time of the corrected date of MMI, *i.e.*, August 3, 2021. It noted that appellant had previously received \$23,247.64 for her May 15, 2023 schedule award during the period October 25, 2022 through March 26, 2023 based on the incorrect use of the weekly pay rate of \$1,419.27 related to an improper date of MMI, *i.e.*, October 25, 2022. OWCP further advised that appellant was entitled to receive \$21,179.66 under the March 6, 2024 schedule award determination.

The Board notes that the difference between the amount appellant received due to use of the improper pay rate, \$23,247.64, and the amount she was actually entitled to receive, \$21,179.66, provides the figure of \$2,067.98 for the amount of the overpayment. Therefore, OWCP properly determined that appellant received a \$2,067.98 overpayment.

LEGAL PRECEDENT -- ISSUE 2

The waiver or refusal to waive an overpayment of compensation by OWCP is a matter that rests within OWCP's discretion pursuant to statutory guidelines.²¹ Section 8129 of FECA²² provides that an overpayment must be recovered 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." Thus, a finding that appellant was without fault does not automatically result in waiver of recovery of the overpayment. OWCP must then exercise its discretion to determine whether recovery of the overpayment would defeat the purpose of FECA or would be against equity and good conscience.²³

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 his or her 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 from data provided by the Bureau of Labor Statistics.²⁴ An individual's liquid assets include, but are not limited to, cash on hand, the value of stocks, bonds, savings accounts, mutual funds, and certificates of deposits. 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.²⁵

²¹ See *L.D.*, Docket No. 18-1317 (issued April 17, 2019); *P.J.*, Docket No. 18-0248 (issued August 14, 2018); *Robert Atchison*, 41 ECAB 83, 87 (1989).

²² 5 U.S.C. § 8129(1)-(b); *A.C.*, Docket No. 18-1550 (issued February 21, 2019); see *D.C.*, Docket No. 17-0559 (issued June 21, 2018).

²³ *A.C.*, *id.*; see *V.T.*, Docket No. 18-0628 (issued October 25, 2018).

²⁴ 20 C.F.R. § 10.436. OWCP's procedures provide that a claimant is deemed to need substantially all of his or her current net income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Final Overpayment Determinations*, Chapter 6.400.4a(3) (September 2020). OWCP's procedures further provide that 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. *Id.* at Chapter 6.400.4a(2).

²⁵ *Id.* at Chapter 6.400.4b(3)(a), (b).

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 or her position for the worse.²⁶ 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.²⁷

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 of recovery of the overpayment.²⁸

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied appellant's request for 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.²⁹

Appellant has not established that recovery of the overpayment would defeat the purpose of FECA because she has not shown both that she needs substantially all of her current income to meet ordinary and necessary living expenses and that her assets do not exceed the allowable resource base. As properly determined by OWCP, appellant's monthly income exceeded her monthly ordinary and necessary expenses by approximately \$2,076.00. OWCP reviewed the financial representations and supporting documentation submitted by appellant and found that the evidence of record reflects that appellant had \$5,480.44 in monthly income, \$3,404.33 in monthly expenses, and \$700.00 in assets. As appellant's current income exceeded her current ordinary and necessary living expenses by more than \$50.00 she has not shown that she needs substantially all of her current income to meet current ordinary and necessary living expenses.³⁰ Because appellant has not met the first prong of the two-prong test of whether recovery of the overpayment would defeat the purpose of FECA, it is unnecessary for OWCP to consider the second prong of the test, *i.e.*, whether appellant's assets exceed the allowable resource base.

²⁶ 20 C.F.R. § 10.437(a), (b).

²⁷ *Id.* at § 10.437(b)(1).

²⁸ *Id.* at § 10.438.

²⁹ *Id.* at § 10.436.

³⁰ *See supra* note 24.

Appellant has not provided any evidence to support that she relied on payments or relinquished a valuable right or changed her position for the worse in reliance on payments received as part of the overpayment.

The Board finds that appellant has not established that she was entitled to waiver of recovery of the overpayment on the basis 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.³¹

As appellant failed to establish that recovery of the overpayment of compensation would either defeat the purpose of FECA or be against equity and good conscience, the Board thus finds that OWCP properly denied waiver of recovery of the overpayment.

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$2,067.98 for the period October 25, 2022 through March 26, 2023, for which she was not at fault, due to the use of an incorrect pay rate for her schedule award. The Board further finds that OWCP properly denied her request for waiver of recovery of the overpayment.

³¹ See *L.D.*, Docket No. 18-1317 (issued April 17, 2019); *William J. Murphy*, 41 ECAB 569, 571-72 (1989).

ORDER

IT IS HEREBY ORDERED THAT the August 1, 2024 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 5, 2024
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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