

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

R.S., Appellant)	
)	
and)	Docket No. 12-1030
)	Issued: December 19, 2012
DEPARTMENT OF THE NAVY, NAVAL)	
AVIATION DEPOT, Cherry Point, NC,)	
Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 16, 2012 appellant filed a timely appeal from the March 2, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP), which found him at fault in creating an overpayment. 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.

ISSUE

The issue is whether an overpayment of compensation arose from the recalculation of appellant's impairment under the current guidelines for evaluation.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

In a prior appeal,² the Board found that appellant was not entitled to an increased schedule award. Appellant previously received compensation for a 42 percent impairment of his left upper extremity (27 percent in 2000 plus 15 percent in 2007) and a 25 percent impairment of his right upper extremity (10 percent in 2000 plus 15 percent in 2007). He later claimed an increased award and submitted a June 4, 2009 impairment evaluation. An OWCP medical adviser reviewed the findings under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (6th ed. 2009) and determined that appellant had a three percent impairment of the left upper extremity and a nine percent impairment of the right. He found that this was appellant's total impairment, not to be added to his previous awards.

The Board found that the latest impairment rating did not establish that appellant was entitled to an increased schedule award. The facts of this case as set forth in the Board's prior decision are hereby incorporated by reference.³

Following that appeal, OWCP made a preliminary determination that appellant received a \$38,373.19 overpayment of compensation because he was paid schedule award compensation for a 72 percent total impairment of his upper extremities (42 percent left, 30 percent right⁴) but was entitled to only a 12 percent total impairment (3 percent left, 9 percent right). It considered his previous awards to be excessive by 60 percent (72 minus 12). OWCP added all the compensation paid to appellant and subtracted the compensation he should have received for a 12 percent total impairment. This amounted to \$38,373.19.

OWCP also made a preliminary finding that appellant was at fault: "The overpayment is in the amount of \$38,373.19 and was generated by the claimant accepting an incorrect payment, specifically, a schedule award that was later reduced (effectively rescinded)." It restated these grounds when it concluded that appellant was with fault because he accepted an incorrect payment.

In a March 2, 2012 decision, OWCP finalized its preliminary determination. It found that appellant was at fault in creating a \$38,373.19 overpayment of compensation because he knowingly accepted wage-loss compensation to which he was not entitled.⁵

Appellant argues it was no fault of his that the overpayment occurred.

² Docket No. 10-1923 (issued April 20, 2011).

³ In 1998 appellant, a 40-year-old sandblaster, filed an occupational disease claim alleging that his carpal tunnel syndrome was a result of hand-cleaning, stripping or blasting small aircraft components, which made his hands numb. OWCP accepted his claim for bilateral carpal tunnel syndrome and approved surgical releases.

⁴ The total for the right upper extremity was, in fact, 25 percent.

⁵ The standard is not whether appellant accepted an incorrect payment or "knowingly accepted" compensation to which he was not entitled, but whether he accepted a payment that he knew or should have known was incorrect. 20 C.F.R. § 10.433(a). The knowledge component of this standard relates to the incorrectness of the payment, not to the acceptance.

LEGAL PRECEDENT

FECA authorizes the payment of schedule awards for the loss or loss of use of specified members, organs or functions of the body.⁶ Such loss or loss of use is known as permanent impairment. OWCP evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*.⁷ For impairment ratings calculated on and after May 1, 2009, OWCP should advise any physician evaluating permanent impairment to use the sixth edition.⁸

If a claimant who has received a schedule award calculated under a previous edition of the A.M.A., *Guides* is entitled to additional benefits, the increased award will be calculated according to the sixth edition. Should the subsequent calculation result in a percentage of impairment lower than the original award (as sometimes occurs), a finding should be made that the claimant has no more than the percentage of impairment originally awarded, that the evidence does not establish an increased impairment and that OWCP has no basis for declaring an overpayment. Similarly, awards made prior to May 1, 2009 (the effective date for use of the sixth edition) should not be reconsidered merely on the basis that the A.M.A., *Guides* have changed.⁹

ANALYSIS

As the Board noted in the prior appeal, appellant received compensation for a 42 percent impairment of his left upper extremity and a 25 percent impairment of his right. OWCP issued these awards under the fourth and fifth editions of the A.M.A. *Guides*.¹⁰

Appellant submitted a June 4, 2009 impairment evaluation showing, under the applicable sixth edition of the A.M.A., *Guides*, a three percent impairment of the left upper extremity and a nine percent impairment of the right. This was appellant's total impairment and was not to be added to his previous awards.

OWCP's procedures make clear that a subsequent calculation under the sixth edition of the A.M.A., *Guides* sometimes, as in this case, results in a percentage of impairment that is lower than the original award. When this occurs, OWCP should find, as it did here, that the evidence does not establish an increased impairment and that the claimant has no more than the percentage of impairment originally awarded. The procedure manual notes that OWCP has no basis for declaring an overpayment.

⁶ 5 U.S.C. § 8107.

⁷ 20 C.F.R. § 10.404.

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6.a (January 2010).

⁹ *Id.* at Chapter 2.808.7.b(4).

¹⁰ The fourth edition became effective on November 1, 1993 and the fifth edition became effective on February 1, 2001. *Id.* at Chapter 2.1601.8.c (October 2011).

OWCP did not make that finding, it found instead that appellant received an overpayment because his evaluation under the sixth edition showed a total impairment of 12 percent when compared to the prior awards for which he was previously paid. It declared an overpayment arising from the recalculation of his impairment under the sixth edition of the A.M.A., *Guides* in

contrast to the prior editions. OWCP did not declare an overpayment based on any administrative error in its previous awards.¹¹ The Board finds that, in light of OWCP procedures, fact of overpayment is not established.

Accordingly, the Board will set aside OWCP's March 2, 2012 decision finding a \$38,373.19 overpayment of compensation.

CONCLUSION

The Board finds that OWCP has failed to establish that appellant received an overpayment of compensation.

ORDER

IT IS HEREBY ORDERED THAT the March 2, 2012 decision of the Office of Workers' Compensation Programs is reversed.

Issued: December 19, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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

¹¹ Any previous impairment to the member under consideration is included in calculating the percentage of loss except when the prior impairment was due to a work-related injury and a schedule award was granted for such prior impairment, in which case the percentage already paid is subtracted from the total percentage of impairment. *Id.* at Chapter 2.808.7.a(2) (January 2010).