U. S. DEPARTMENT OF LABOR

# Employees' Compensation Appeals Board

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In the Matter of DANIEL C. WEHNER and DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, Falls Church, VA

*Docket No. 02-416; Submitted on the Record;*
*Issued August 2, 2002*

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DECISION and ORDER

Before COLLEEN DUFFY KIKO, WILLIE T.C. THOMAS, MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly calculated appellant's 15 percent schedule award for the left lower extremity; and (2) whether the Office properly determined that appellant received an overpayment in the amount of $1,083.23.

On November 12, 1991 appellant, then a 29-year-old special agent, filed a notice of traumatic injury alleging that on November 8, 1991 he was participating in a simulated arrest exercise, became entangled and fell to the ground, twisting his knee. The Office accepted appellant's claim for left knee strain, tear of the anterior cruciate ligament, tear of the medial collateral ligament, tear of the patellar collateral ligament, as well as corrective surgeries.

Appellant filed a claim for a schedule award and on April 29, 1999 appellant received a schedule award for 10 percent permanent impairment of the lower left extremity. By letter dated June 1, 1999, appellant requested an oral hearing. By decision dated July 28, 1999, the Office denied appellant's request for an oral hearing as untimely.

By letter dated January 15, 2000, appellant requested reconsideration. By decision dated October 31, 2000, the Office awarded appellant an additional 5 percent, totaling a 15 percent permanent impairment of the left lower extremity. Appellant requested reconsideration on January 4, 2001 and submitted an earnings and leave statement for the period ending August 30, 1997. He contended that the pay rate utilized in computing his schedule award should have been $1,439.60 for every two weeks instead of $1,196.40.

By decision dated March 8, 2001, the Office made a preliminary finding that appellant was overpaid benefits in the amount of $1,083.23, since the schedule award issued to appellant on April 29, 1999 was computed with a beginning date of August 20, 1997 instead of November 20, 1995. Appellant was at a lower compensation rate on November 20, 1995 than on August 20, 1997.

By decision dated March 8, 2001, the Office affirmed the October 31, 2000 decision, yet modified the start date of the initial schedule award period to be November 20, 1995.

By letter dated March 20, 2001, appellant requested reconsideration. He contended that the compensation rate used to determine his schedule award should have been 75 percent instead of 66 2/3 percent, since he was married during the period of the award.

By decision dated August 30, 2001, the Office denied modification of the October 31, 2000 decision.

The Board has reviewed the record and finds that this case is not in posture for decision and requires further development by the Office.

In this case, appellant received a schedule award for a 15 percent impairment for his left lower extremity. The weekly pay rate of the award was $1,196.30 every 2 weeks, the percentage of pay was 66 2/3 percent and the period of the award was November 20, 1995 to February 28, 1996.

The Office initially determined in its April 29, 1999 decision that the date of maximum medical improvement and the starting date of the period of the award was August 20, 1997. The date was based on the report of Dr. Dean R. Bennett, a Board-certified orthopedic surgeon, dated August 20, 1997. Subsequently, in its October 31, 2000 decision, the Office changed the date of maximum medical improvement to November 25, 1995. This date was apparently taken from an October 13, 2000 memorandum from the district medical adviser, who declared that the date of maximum medical improvement was November 20, 1995. The Office, however, did not explain why it changed the date of maximum medical improvement to November 20, 1995 and the record did not contain a physician's rationalized medical opinion indicating that this date represents the dated of maximum medical improvement. On remand the Office should request that appellant's treating physician provide a date of maximum medical improvement, since this date determines the outcome of other issues in appellant's case.

Appellant also contested the percentage of compensation used to determine the schedule award. The Board notes that the compensation rate may change during the period of the schedule award if appellant's dependency status changed during that time. Section 10.535(a) of the Federal Code of Regulations provides, while the employee has one or more dependents, the employee's basic compensation for wage loss or for permanent impairment shall be augmented as provided in 5 U.S.C. § 8110.[1] Also, section 10.535(c) states that an employee who is receiving augmented compensation shall be periodically required to submit a statement as to any dependents or to submit supporting documents such as birth or marriage certificates or court orders, to determine if he or she is still entitled to augmented compensation.[2] In other words, the Office must determine whether appellant had dependents during the period compensation was paid.

[1] 20 C.F.R. § 10.535(a).

[2] 20 C.F.R. § 10.535(c).

The case will be remanded to the Office to determine the date of maximum medical improvement and whether appellant was entitled to augmented compensation. The Office should develop the evidence as necessary to determine whether an overpayment of compensation exists and, if so, the amount of any overpayment.

The decisions of the Office of Workers' Compensation Programs dated August 30 and March 8, 2001 are hereby set aside and remanded the case to the Office for further development consistent with this opinion of the Board.

Dated, Washington, DC
August 2, 2002

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member