

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

_____	)	
<b>L.I., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 08-549</b>
	)	<b>Issued: July 2, 2008</b>
<b>DEPARTMENT OF HOMELAND SECURITY,</b>	)	
<b>CUSTOMS &amp; BORDER PROTECTION,</b>	)	
<b>Campo, CA, Employer</b>	)	
_____	)	

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
DAVID S. GERSON, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On December 19, 2007 appellant filed a timely appeal from the September 20, 2007 merit decision of the Office of Workers' Compensation Programs, which found an overpayment of compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the case.

**ISSUE**

The issue is whether the Office properly found an overpayment arising from appellant's April 26, 1999 schedule award.

**FACTUAL HISTORY**

On September 25, 1997 appellant, then a 28-year-old border patrol agent, sustained an injury in the performance of duty: "While following a group of suspected illegal aliens on a trail leading north, I had to go over and across some cap rocks. While I attempted to walk over the cap rocks, I slipped and fell hitting my left knee." The Office accepted his claim for left knee

chondromalacia. On July 11, 1998 the Office issued a schedule award for a 10 percent impairment of the left lower extremity.<sup>1</sup>

On November 11, 1998 appellant sustained a similar injury in the performance of duty: “While attempting to apprehend a group of undocumented aliens, I was going through some cap rocks when I fell and hit both my knees against a large rock.” The Office accepted his claim for bilateral knee internal derangement. On April 26, 1999 the Office issued a schedule award for a 15 percent impairment of each lower extremity.<sup>2</sup>

In a November 1, 2000 memorandum, the Office found two errors in the April 26, 1999 schedule award. The Office determined that it should not have paid compensation for the full 15 percent impairment of appellant’s left lower extremity because it previously paid for a 10 percent impairment of that extremity. So only a five percent additional impairment was payable. This caused an overpayment. The Office also determined that it had used an incorrect pay rate: appellant was a GS-9/1 border patrol agent, not a GS-5/1 border patrol agent. This caused an underpayment. The Office concluded that it owed appellant \$8,699.41 under the April 26, 1999 schedule award. The Office offset \$3,838.03 against this underpayment to collect an overpayment from the July 11, 1998 schedule award, also due to an incorrect pay rate.

On November 2, 2000 the Office wrote to appellant as follows:

“As indicated in our telephone conversation earlier this week, both an overpayment and underpayment were calculated on files 13-1176329 and 13-1146294. You are due a total of \$8,699.41. You were overpaid \$3,838.03. You indicated *via* telephone this week that you were willing for the Office to deduct the overpayment from the total owed to you. This has been done.

“The payment has been keyed and you should receive \$4,861.38 direct deposit on November 10, 2000. We will be processing your new schedule award once this action has been completed.”

The record shows that the Office directly deposited \$4,861.38 into appellant’s account.

On August 17, 2007 the Office made a preliminary determination that appellant received an overpayment because it had twice paid him a schedule award for the first 10 percent impairment of his left lower extremity. The Office found that appellant was at fault in creating the overpayment because he knew or should have known that a schedule award for the same impairment cannot be paid twice for the same body part.

In a decision dated September 20, 2007, the Office finalized its preliminary determination. The Office found that appellant received an overpayment because both schedule awards paid for the initial 10 percent impairment of his left lower extremity. The Office found

---

<sup>1</sup> OWCP File No. 13-1146294.

<sup>2</sup> OWCP File No. 13-1176329.

that appellant was at fault in creating the overpayment because “no response to this office’s preliminary determination has been received.”

On September 27, 2007 the Office received appellant’s request for a prerecoupment hearing, which was postmarked on September 19, 2007. In a decision dated October 18, 2007, the Office found that appellant was not entitled to an oral hearing as a matter of right under 5 U.S.C. § 8124 because his request was untimely. The Office considered appellant’s request and, exercising discretion, determined that he could equally well address the issue in his case by requesting reconsideration.

### **LEGAL PRECEDENT**

When an overpayment has been made to an individual because of an error of fact or law, adjustment shall be made by decreasing later payments to which the individual is entitled.<sup>3</sup> If a sufficiently large lump-sum payment of compensation is due the debtor for a single period of past entitlement or for a schedule award, the debt should be recovered in full by a single deduction from compensation owed. The Office should send the debtor a letter explaining the recovery method.<sup>4</sup>

### **ANALYSIS**

The Office may not recover the same overpayment twice. In its November 1, 2000 memorandum, the Office found that the April 26, 1999 schedule award should not have paid appellant for a 15 percent impairment of his left lower extremity. Appellant previously received compensation for a 10 percent impairment, so only an additional five percent was payable. The Office investigated the matter and concluded that the April 26, 1999 schedule award ultimately created an underpayment of compensation, not an overpayment, because of an incorrect pay rate.

Apparently unaware that it settled this matter on November 10, 2000, the Office found that it paid appellant twice for the first 10 percent impairment of his left lower extremity. The Office’s overpayment determination does not acknowledge its November 1, 2000 memorandum. The Office does not address its previous calculations or its previous conclusion that the April 26, 1999 schedule award caused an underpayment.

As there appears to be no basis for the Office’s finding that appellant is currently in receipt of an overpayment arising from the April 26, 1999 schedule award, fact of overpayment is not established. The Board will reverse the Office’s September 20, 2007 decision. The Office’s October 18, 2007 decision denying an oral hearing under 5 U.S.C. § 8124 is moot.<sup>5</sup>

---

<sup>3</sup> 5 U.S.C. § 8129(a).

<sup>4</sup> Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Debt Liquidation*, Chapter 6.300.8.b (May 2004).

<sup>5</sup> Failure to request a prerecoupment hearing within 30 days of the written notice of overpayment shall constitute a waiver of that right. 20 C.F.R. § 10.432 (1999). The only review of a final decision concerning an overpayment is to the Board. The provisions of 5 U.S.C. § 8124(b) (concerning hearings) and 5 U.S.C. § 8128(a) (concerning reconsiderations) do not apply to such a decision. *Id.* at § 10.440(b).

**CONCLUSION**

The Board finds that the Office has not established a current overpayment arising from appellant's April 26, 1999 schedule award.

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 20, 2007 decision of the Office of Workers' Compensation Programs is reversed.

Issued: July 2, 2008  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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

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