United States Department of Labor
Employees' Compensation Appeals Board

T.W., Appellant	)	
and	)	**Docket No. 15-0636**
	)	**Issued: September 26, 2016**
DEPARTMENT OF LABOR, BENEFITS REVIEW BOARD, Washington DC, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 27, 2015 appellant filed a timely appeal of an August 19, 2014 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 to consider the merits of the case.[2]

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of $19,867.47 because OWCP paid her for a schedule award to which she was not entitled; and (2) whether OWCP properly denied waiver of recovery of the overpayment.

[1] 5 U.S.C. § 8101 *et seq.*

[2] Appellant filed a timely request for oral argument, pursuant to 20 C.F.R. § 501.5(b). After exercising its discretion pursuant to 20 C.F.R. § 501.5(a), the Board by a November 9, 2015 order, denied appellant's request because it could adequately address appellant's contentions based on a review of the case record. *Order Denying Request for Oral Argument*, Docket No. 15-0636 (issued November 9, 2015).

On appeal, appellant contends that the August 19, 2014 overpayment decision was incorrect as OWCP did not properly develop and grant her schedule award claims upon which the overpayment was determined and calculated.

FACTUAL HISTORY

On October 21, 2008 appellant, then a 55-year-old paralegal specialist, filed an occupational disease claim (Form CA-2) alleging that she developed bilateral tricompartmental degenerative knee arthritis due to factors of her federal employment.

In a report dated October 8, 2008, Dr. Nigel M. Azer, a Board-certified orthopedic surgeon, reviewed x-rays and diagnosed tricompartmental degenerative arthritis of both knees. He found that appellant's arthritis mostly involved the medial compartment, as well as the patellofemoral articulation. Dr. Azer found crepitus in both knees with 10 to 95 degrees of flexion and medial joint line tenderness. He noted that appellant's arthritis was varus on the right and valgus on the left.

By decision dated January 5, 2009, OWCP accepted appellant's claim for aggravation of bilateral tricompartmental degenerative arthritis of the knees.

Dr. Azer examined appellant and reviewed knee x-rays on January 12, 2009. He found medial joint space narrowing in the right knee with subchondral sclerosis and slight medial subluxation of the right knee. X-rays of the left knee demonstrated joint space narrowing and peripheral osteophytes on the lateral compartment. Appellant underwent a magnetic resonance imaging (MRI) scan of her left knee on April 21, 2009. This scan demonstrated osteoarthritis of the lateral compartment with displacement of the meniscus from the joint space. Appellant also exhibited joint space effusion with a small Baker's cyst.

On July 21, 2009 Dr. Azer performed an arthroscopy of appellant's left knee with chondroplasty and partial mediolateral meniscectomy and lavage.[3]

Dr. Azer noted on October 5, 2009 that appellant continued to have crepitus in both knees with diffuse lateral joint-line tenderness in the left knee and diffuse medial joint-line tenderness in the right knee. He reviewed additional x-rays which showed arthritis changes in the left knee including lateral joint space narrowing, subchondral sclerosis and peripheral osteophytes. Appellant's right knee x-rays demonstrated moderate medial joint space narrowing, subchondral sclerosis, and peripheral osteophytes. Dr. Azer noted that appellant would eventually require total knee arthroplasty, but that she was currently at maximum medical improvement (MMI).

Appellant filed a claim for a schedule award (Form CA-7) on November 10, 2009. In a letter dated November 20, 2009, OWCP requested additional medical evidence comporting with the American Medical Association, *Guides to the Evaluation of Permanent Impairment.*[4] On

[3] In a decision dated September 11, 2009, OWCP denied appellant's claimed period of disability from July 19 to 20, 2009 finding that July 19, 2009 was not a scheduled workday. It further noted that she had not submitted medical evidence to support her total disability from work on July 20, 2009.

[4] A.M.A., *Guides*, 6th ed. (2009).

December 2, 2009 Dr. Azer reported that appellant underwent partial medial and lateral meniscectomies with 12 percent impairment of the left leg due to these surgeries. He also noted that appellant's primary joint cartilage interval measured two millimeters, for 20 percent impairment of the left lower extremity. Dr. Azer found that appellant had only a two millimeter cartilage interval of the patellofemoral joint or 10 percent impairment of the left leg. He combined these impairment ratings to reach 33 percent permanent impairment of the left lower extremity.

OWCP's medical adviser reviewed this rating and disagreed with Dr. Azer's methods, finding that only the meniscectomies should be included in her schedule award determination. He found that appellant had 12 percent permanent impairment of her left lower extremity.

By decision dated January 22, 2010, OWCP granted appellant a schedule award for 12 percent permanent impairment of her left lower extremity due only to partial medial and lateral meniscectomies. The period of the award was from December 2, 2009 through July 31, 2010.

Dr. Azer examined appellant on May 5, 2010 due to her bilateral knee conditions. He noted that appellant wished to proceed with a total knee arthroplasty. Dr. Azer examined x-rays which demonstrated complete obliteration of the medial joint space on the right knee with narrowing of the tibiofemoral articulation. X-rays of the left knee exhibited tricompartmental arthritis. Dr. Azer diagnosed post-traumatic valgus arthritis of the left knee and post-traumatic varus arthritis of the right knee. He opined that appellant had failed conservative treatment of her left knee and met the clinical and radiographic criteria for total knee arthroplasty.

On November 16, 2010 Dr. Azer performed a left total knee arthroplasty on appellant. Appellant returned to work on March 7, 2011.

On May 2, 2011 Dr. Azer noted that appellant wished to proceed with a right knee total replacement arthroscopy. Appellant filed an additional Form CA-7 requesting a schedule award on May 12, 2011. In a report dated June 1, 2011, Dr. Azer described appellant's left knee condition and total knee replacement. He found that x-rays demonstrated excellent position of the total knee arthroplasty on the left side with no component migration of radiolucency. Appellant's left leg demonstrated full extension to 130 degrees of flexion. He found that appellant had reached MMI with regard to her left knee. Dr. Azer opined that under the A.M.A., *Guides* a good result of a knee replacement was 25 percent permanent impairment of the left lower extremity.[5]

In regard to appellant's right leg, Dr. Azer found varus alignment in the right knee with marked crepitus. Appellant's range of motion on the right was from 5 to 95 degrees of flexion with mild instability to valgus and varus stressing as well as crepitus at the patellofemoral articulation. Dr. Azer found that appellant had no cartilage interval and primary knee joint arthritis. He reported that she had an angular deformity in varus which was a grade 3 modifier. Dr. Azer noted that appellant had a moderate grade 2 limitation in right knee range of motion.

[5] *Id.* at 511, Table 16-3.

Using the A.M.A., *Guides*, he opined that appellant had 58 percent permanent impairment of her right lower extremity.[6]

OWCP's medical adviser reviewed this report on July 31, 2011 and found that appellant was entitled to 25 percent permanent impairment of her left lower extremity, less the previous award of 12 percent or 13 percent permanent impairment of the left leg. In regard to appellant's right lower extremity, he found that appellant was entitled to 10 percent permanent impairment due to loss of flexion and 10 percent due to loss of extension or 20 percent permanent impairment of the right leg.[7]

By decision dated August 9, 2011, OWCP granted appellant schedule awards for an additional 13 percent permanent impairment of her left leg and 20 percent permanent impairment of her right leg. The period of the schedule awards was from June 1, 2011 to March 27, 2013 or 95.04 weeks of compensation for total permanent impairments of 33 percent of her lower extremities.

Appellant received compensation for her schedule awards from June 1 to July 30, 2011 in the amount of $12,107.44. She received a payment from July 31 through August 27, 2011 in the amount of $5,650.14 and a payment from August 28 through September 24, 2011 in the amount of $5,650.14.

Appellant requested a lump-sum payment of her schedule award on August 19, 2011. OWCP calculated that her remaining schedule award ran for 549.28 days and that her annual compensation was $73,451.82 and that her remaining lump-sum total was $108,261.94. On September 27, 2011 it granted appellant a direct lump-sum payment of $108,261.94.

Dr. Azer performed a right total knee arthroplasty on October 18, 2011. In a report dated November 12, 2012, he found that appellant had reached MMI. Dr. Azer reported that appellant was ambulating without a limp and had active range of motion from full extension to 130 degrees of flexion. X-rays of the right knee showed excellent position of the total knee arthroplasty with no evidence of radiolucency or component migration.

Appellant requested an additional schedule award (Form CA-7) on November 20, 2012. In a report dated December 10, 2012, Dr. Azer found that appellant had range of motion of her right knee of 0 to 120 degrees compared to 0 to 130 degrees on the left. He again noted that appellant's right knee x-rays demonstrated excellent position of the cruciate retaining rotating platform total knee arthroplasty. Dr. Azer found that appellant had mild motion deficit of the right knee and accorded appellant class 3-B impairment of the right lower extremity at 34 percent permanent impairment.[8]

OWCP's medical adviser reviewed Dr. Azer's December 10, 2012 report and found that he had not provided sufficient findings to reach a determination of appellant's permanent

[6] *Id.*

[7] *Id.* at 549, Table 16-23.

[8] *Id.* at 511, Table 16-3.

impairment for schedule award purposes. He recommended that OWCP refer appellant for a second opinion evaluation.

OWCP referred appellant for a second opinion evaluation with Dr. Robert Allen Smith, a Board-certified orthopedic surgeon, on March 7, 2013. In a report dated March 28, 2013, Dr. Smith reviewed appellant's history of injury and medical history. He diagnosed bilateral total knee replacements with good results. Dr. Smith found that appellant's knees demonstrated satisfactory alignment, with range of motion between 0 and 125 degrees, and no evidence of instability or atrophy. He noted that appellant's motor strength was normal. Dr. Smith applied the A.M.A., *Guides* and noted that appellant's diagnoses of total knee replacement with good result was a class 2 condition with a default rating of 25 percent of the lower extremity.[9] He listed appellant's grade modifiers as functional history grade 1, physical examination grade 1, and clinical studies grade 1. Dr. Smith applied the formula and determined that appellant's net adjustment was -3 resulting in 21 percent permanent impairment of each of her lower extremities.

OWCP's medical adviser reviewed this report on April 23, 2013 and concurred with Dr. Smith's findings and conclusions. He noted that appellant had previously received schedule award for 20 percent permanent impairment of her right lower extremity, such that she was entitled to an additional 1 percent impairment for the right lower extremity. OWCP's medical adviser further noted that appellant had previously received schedule award totaling 25 percent of her left lower extremity, but that Dr. Smith's report supported only 21 percent impairment of the left lower extremity. He found that appellant was not entitled to an additional schedule award for impairment of her left lower extremity.

By decision dated July 8, 2013, OWCP granted appellant a schedule award for an additional one percent permanent impairment of her right lower extremity. The period of the award was from March 28 through April 17, 2013 in the amount of $4,262.40.

On July 31, 2013 OWCP identified an overpayment of compensation as appellant was previously awarded 25 percent permanent impairment of the left lower extremity and the medical evidence currently supported only 21 percent permanent impairment of the left lower extremity. It found that she received compensation from June 1, 2001 to March 27, 2013 in the amount of $131,669.66. OWCP further determined that appellant was entitled to receive compensation in the amount of $111,802.19 for the period June 1, 2011 through December 16, 2012 including a lump sum of $88,394.47. It found that she received an overpayment of compensation in the amount of $19,867.47.

On September 20, 2013 OWCP made a preliminary determination that appellant had received an overpayment of compensation in the amount of $19,867.47 for the period December 16, 2012 through March 27, 2013 as she received compensation for schedule awards totaling 25 percent permanent impairment for the left lower extremity while the medical evidence support impairment of 21 percent. It found that she was without fault in the creation of the overpayment. OWCP provided appellant with her appeal rights, an overpayment recovery questionnaire, and allowed her 30 days to respond.

[9] *Id.*

Appellant requested a prerecoupment hearing from OWCP's Branch of Hearings and Review on October 15, 2013. She disagreed with the finding of overpayment and alleged that the September 20, 2013 preliminary determination was in error.

Appellant testified at the oral hearing on April 25, 2014. She argued that the preliminary overpayment determination was inconsistent with the previous calculations. Appellant further argued that a new OWCP medical adviser was required to review her claim after her referral to Dr. Smith. She also asserted that there was an unresolved conflict of medical opinion evidence regarding the range of motion of her right knee. Appellant contended that the additional degrees of loss of range of motion, and the functional history limitations found by her physician, would increase her schedule award to 31 percent as a class 3 impairment. She indicated that she was not going to complete the overpayment recovery questionnaire.

By decision dated August 19, 2014, OWCP's hearing representative found that an overpayment of $19,867.47 occurred. He determined that appellant had not followed her appeal rights regarding the July 8, 2013 schedule award determination of 21 percent of each lower extremity, that OWCP properly followed the calculations of lump sum overpayments, and that as appellant failed to provide financial information, the entire amount of the overpayment was due and not subject to waiver.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of FECA[10] and its implementing regulations[11] set forth the number of weeks of compensation payable to employees sustaining permanent impairment for loss of use of scheduled members or functions of the body. FECA, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which rests in the discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. OWCP evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*.[12]

The protocol and formula of the sixth edition of the A.M.A., *Guides* requires that the physician determine the Class of Diagnosis (CDX) for the lower extremity and apply the appropriate grade modifiers for Functional History (GMFH), Physical Examination (GMPE), and Clinical Studies (GMCS) and apply the following formula (GMFH-CDX) + (GMPE-CDX) + (GMCS–CDX) to reach the appropriate grade within the CDX.[13]

[10] 5 U.S.C. § 8107.

[11] 20 C.F.R. § 10.404.

[12] For new decisions issued after May 1, 2009 OWCP began using the sixth edition of the A.M.A., *Guides*. A.M.A., *Guides*, 6th ed. (2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.5a (February 2013); and Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

[13] A.M.A., *Guides* 521.

It is well established that, when the attending physician fails to provide an estimate of impairment conforming to the A.M.A., *Guides*, his or her opinion is of diminished probative value in establishing the degree of permanent impairment and OWCP may rely on the opinion of its medical adviser to apply the A.M.A., *Guides* to the findings of the attending physician.[14]

FECA's implementing regulations prohibit the payment of duplicative schedule awards for the same member by the following provision:

> (c) The period of compensation payable under 5 U.S.C. § 8107(c) shall be reduced by the period of compensation paid or payable under the schedule for an earlier injury if--
>
> > (1) Compensation in both cases is for impairment of the same member or function or different parts of the same member or function or for disfigurement; and
> >
> > (2) [OWCP] finds that compensation payable for the later impairment in whole or in part, would duplicate the compensation payable for the preexisting impairment.[15]

If a claimant receives a schedule award and the medical evidence does not support the degree of permanent impairment awarded, an overpayment of compensation may be created.[16]

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation because OWCP paid her for a schedule award to which she was not fully entitled.

OWCP accepted that appellant sustained an aggravation of bilateral tricompartmental degenerative knee arthritis due to her job duties. Appellant's attending physician, Dr. Azer, submitted a series of reports supporting her permanent impairment due to her accepted condition. Dr. Azer's reports did not comport with the A.M.A., *Guides*. He did not provide the grade modifiers he used to reach his impairment ratings and did not apply the formula for calculating the appropriate grade within the classes of diagnosis-based estimates as required by the A.M.A., *Guides*. OWCP's medical adviser reviewed these reports and applied the A.M.A., *Guides* to Dr. Azer's findings. Appellant received a schedule award on January 22, 2010 for 12 percent permanent impairment of her left leg. On August 9, 2011 OWCP granted appellant schedule

[14] *Linda Beale*, 57 ECAB 429 (2006).

[15] 20 C.F.R. § 10.404(c).

[16] *See R.R.*, Docket No. 14-2031 (issued March 9, 2015); *L.C.*, Docket No. 09-2274 (issued July 7, 2010); *J.G.*, Docket No. 09-2081 (issued May 6, 2010); *M.S.*, Docket No. 08-2070 (issued September 11, 2009); *see also Richard Saldibar*, 51 ECAB 585 (2000) (the Board found that the overpayment issue was not in posture because OWCP had not properly resolved the schedule award issue).

awards for an additional 13 percent permanent impairment of her left leg and 20 percent permanent impairment of her right leg based on OWCP's medical adviser's review of Dr. Azer's reports.

In a report dated June 1, 2011, Dr. Azer determined that appellant had 25 percent permanent impairment of the left lower extremity. He further found that appellant had class 3-B impairment of the right lower extremity at 34 percent permanent impairment. Dr. Azer again failed to provide the grade modifiers used, apply the appropriate formula, or fully explain how he reached his impairment ratings.

Due to the deficiencies in Dr. Azer's report, OWCP referred appellant for a second opinion evaluation with Dr. Smith. Dr. Smith provided a detailed report, including his findings on physical examination, and he provided his evaluation of these findings through the grade modifiers required by the A.M.A., *Guides*. He applied the above-described formula and determined that appellant had 21 percent permanent impairment of each of her legs based on her good results following total knee replacement, with good position, stability, and functional usage. OWCP's medical adviser reviewed this report and found that it complied with the A.M.A., *Guides*. The Board finds that Dr. Smith's report is the only medical evidence in the record which includes all the elements required by the A.M.A., *Guides* and applies the appropriate formula to reach an impairment rating. For these reasons, the Board finds that this report constitutes the weight of the medical opinion evidence and establishes that appellant has 21 percent permanent impairment of each of her lower extremities for schedule award purposes.

As appellant has no submitted rationalized medical opinion evidence supporting more than 21 percent permanent impairment of her left leg, OWCP properly found that receipt of a schedule award for 25 percent permanent impairment of her left leg resulted in an overpayment of compensation.

The Board is, however, unable to determine how OWCP reached its calculations of the amount of the overpayment. Appellant received payment for four percent more impairment than that to which she was entitled. OWCP determined in its August 9, 2011 decision that appellant was entitled to compensation from June 1, 2011 to March 27, 2013 or 665.28 days of compensation for her total impairments of 33 percent of her lower extremities (13 percent additional left leg and 20 percent right leg impairment). Based on the additional medical evidence from Dr. Smith, OWCP properly determined that appellant was entitled to compensation for only 29 percent of her lower extremities or 4 percent less than she previously received.[17] Permanent impairment for 29 percent of her lower extremities would entitle her to 601.92 days of compensation for the period June 1, 2011 to January 22, 2013. Instead, OWCP utilized the period June 1, 2011 to December 16, 2012 or approximately 560 days in determining the lump sum due appellant. OWCP's procedures require when recalculating a lump-sum payment, the claims examiner enter the original start date, in this case June 1, 2011, but then key in the appropriate new ending date.[18] The Board is unable to determine how OWCP reached the

[17] OWCP previously granted appellant a schedule award for the additional one percent impairment of her right lower extremity.

[18] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Lump-Sum Payments* Chapter 2.1300.4b (July 2003).

ending date utilized and consequentially cannot determine that the lump-sum payment based on this ending date properly calculated appellant's entitlement for schedule award purposes. A later ending date of the lump-sum payment of the schedule award would result in a smaller overpayment amount for appellant. Consequently, while the evidence establishes that appellant received an overpayment of compensation, the case is not in posture for decision regarding the amount of the overpayment.[19] The Board will remand the case for OWCP to recalculate the overpayment of compensation.

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation. However, the case is not in posture regarding the amount of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT August 19, 2014 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: September 26, 2016
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

[19] As the case is not in posture regarding the amount of the overpayment, it is premature to address the issue of waiver of recovery of the overpayment.