

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

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| P.D., Appellant |) | |
| |) | |
| and |) | Docket No. 18-0442 |
| |) | Issued: July 11, 2018 |
| U.S. POSTAL SERVICE, POST OFFICE, |) | |
| Poland, OH, Employer |) | |
| |) | |

Appearances:
Alan J. Shapiro, for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On December 28, 2017 appellant, through counsel, filed a timely appeal from a November 15, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (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 OWCP properly determined that appellant received an overpayment of schedule award compensation in the amount of \$2,268.80 for the period

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; see also 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

December 20, 2010 through January 10, 2011; and (2) whether OWCP properly denied waiver of recovery of the overpayment.

FACTUAL HISTORY

On December 11, 2009 appellant, then a 51-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on December 9, 2009 he injured his left knee when he slipped and fell while in the performance of duty. OWCP accepted the claim for left knee strain and a rupture of the left quadriceps tendon. Appellant stopped work on December 9, 2009. On February 2, 2010 he underwent surgical repair of the left quadriceps tendon rupture. Appellant resumed employment on April 10, 2011.

By decision dated August 29, 2012, OWCP granted appellant a schedule award for eight percent permanent impairment of the left lower extremity. The period of the award ran for 23.04 weeks from August 2, 2010 to January 10, 2011. OWCP based its schedule award decision on an April 5, 2012 impairment evaluation from Dr. Manhal Ghanma, an orthopedic surgeon, who provided a second opinion examination. Dr. Ghanma determined that appellant had eight percent permanent impairment of the left lower extremity due to his left quadriceps rupture according to Table 16-3 on page 509 of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).

On November 20, 2015 appellant filed a claim for an increased schedule award (Form CA-7). OWCP determined that a conflict in medical opinion existed between an OWCP medical adviser and Dr. Catherine Watkins Campbell, an attending physician Board-certified in family practice, regarding the extent of his left lower extremity impairment. It referred appellant to Dr. Dennis A. Glazer, a Board-certified orthopedic surgeon, for an impartial medical examination. In a March 16, 2017 impairment evaluation, Dr. Glazer determined that he had seven percent permanent impairment of the left lower extremity due to his left quadriceps tendon rupture under Table 16-3 of the A.M.A., *Guides*.³

By decision dated August 21, 2017, OWCP found that appellant had seven percent permanent impairment of the left lower extremity. It noted that he had previously received a schedule award on August 29, 2012 for eight percent permanent impairment of the left lower extremity calculated under the sixth edition of the A.M.A., *Guides*.

OWCP, on August 24, 2017, notified appellant of its preliminary determination that he received an overpayment of \$2,268.80 because it overpaid him compensation for a schedule award. It calculated the amount of the overpayment by dividing his weekly pay rate of \$787.78 by seven to find a daily pay rate of \$112.54. OWCP noted that it paid appellant \$18,150.39 in compensation for the original award of eight percent, or 161.28 days, when it should have paid him schedule award compensation of \$15,881.59, or 141.12 days, for his seven percent permanent impairment. It subtracted \$15,881.59 from \$18,150.39 to find an overpayment of \$2,268.80. OWCP advised appellant of its preliminary determination that he was without fault in the creation of the

³ Appellant telephoned OWCP on May 25, 2017, noting that Dr. Glazer had referenced the name of another individual in his report. Dr. Glazer provided an addendum report on June 2, 2016 correcting the reference to another individual.

overpayment. It requested that he complete the enclosed overpayment recovery questionnaire and submit supporting financial documents. Additionally, OWCP notified appellant that, within 30 days of the date of the letter, he could request a telephone conference, a final decision based on the written evidence, or a prerecoupment hearing.

Appellant, through counsel, on August 31, 2017 requested a telephone hearing before an OWCP hearing representative on the August 21, 2017 schedule award decision.

By decision dated November 15, 2017, OWCP determined that appellant received a \$2,268.80 overpayment of compensation for the period December 20, 2010 through January 10, 2011 as it overpaid him schedule award compensation. It found that he was without fault in creating the overpayment, but denied waiver of recovery of the overpayment, noting that he had not responded to its preliminary overpayment determination.

LEGAL PRECEDENT -- ISSUE 1

If a claimant received a schedule award and the medical evidence does not support the degree of permanent impairment awarded, an overpayment of compensation may be created.⁴ Claims for an increased schedule award based on the same edition of the A.M.A., *Guides* are subject to overpayment.⁵

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained left knee strain and a ruptured left quadriceps tendon on December 9, 2009. He underwent surgery to repair the tendon on February 2, 2010. In an August 29, 2012 decision, OWCP granted appellant a schedule award for eight percent permanent impairment of the left lower extremity due to his quadriceps rupture pursuant to the sixth edition of the A.M.A., *Guides*.

On November 20, 2015 appellant requested an increased schedule award. OWCP determined that a conflict in medical opinion existed on the issue of the extent of any permanent impairment. In a March 16, 2017 impairment evaluation, Dr. Glazer, the impartial medical examiner, utilized the sixth edition of the A.M.A., *Guides* and found that he had seven percent permanent impairment of the left lower extremity. As noted above, if a claimant has received a schedule award and the medical evidence does not support the degree of permanent impairment, an overpayment of compensation may be created.⁶ If, as in this case, the schedule award rating was performed using the same edition of the A.M.A., *Guides* and incorporated the same medical

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.9(e) (February 2013).

⁵ *Id.*; see also *W.M.*, Docket No. 13-0291 (issued June 12, 2013).

⁶ See *J.H.*, Docket No. 14-1463 (issued November 25, 2014).

conditions, the schedule award is subject to overpayment.⁷ OWCP, consequently, properly found an overpayment of compensation.

Appellant previously received a schedule award for eight percent permanent impairment of the left lower extremity, 161.28 days at a daily rate of \$112.54, or \$18,150.39.⁸ He was only entitled to schedule award compensation for 141.12 days, or \$15,881.59, a difference of \$2,268.80.⁹ The Board finds that OWCP properly determined that appellant received an overpayment of schedule award compensation in the amount of \$2,268.80 based upon receipt of an additional one percent permanent impairment of the left lower extremity.¹⁰

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA provides that an overpayment in compensation shall be recovered by OWCP 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.¹¹ Waiver of an overpayment is not permitted unless the claimant is without fault in creating the overpayment.¹²

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.¹³ 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 position for the worse.¹⁴ To establish that a valuable right has been relinquished, it must be shown that the right was in fact

⁷ See *supra* note 4; see also *R.W.*, Docket No. 14-0195 (issued October 10, 2014).

⁸ OWCP rounded down by .06 to find \$18,150.39 rather than \$18,150.45.

⁹ OWCP rounded down by .05 to find \$15,881.59 rather than \$15,881.64.

¹⁰ See *supra* note 4; see also *E.M.*, Docket No. 13-1378 (issued February 12, 2014).

¹¹ 5 U.S.C. § 8129.

¹² *Steven R. Cofrancesco*, 57 ECAB 662 (2006).

¹³ 20 C.F.R. § 10.436. An individual is deemed to need substantially all of his or her monthly income to meet current and ordinary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. *Desiderio Martinez*, 55 ECAB 245 (2004). OWCP procedures provide that assets must not exceed a resource base of \$4,800.00 for an individual or \$8,000.00 for an individual with a spouse or dependent plus \$960.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a) (June 2009).

¹⁴ *Id.* at § 10.437(a), (b).

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.¹⁵

Section 10.438 of OWCP 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.¹⁶

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied 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.¹⁷

In its preliminary determination dated August 24, 2017, OWCP explained the importance of providing the completed overpayment recovery questionnaire and supporting financial information. It advised appellant that waiver of recovery of the overpayment would be denied if he failed to furnish the requested financial information within 30 days. Appellant did not respond to the preliminary determination before OWCP issued its final overpayment determination on November 15, 2017. As a result, OWCP was not in the possession of the necessary financial information to determine whether recovery of the overpayment would defeat the purpose of FECA or if recovery would be against equity and good conscience. Because appellant failed to submit the requested information within 30 days, OWCP had no discretion in the matter; the law required a denial of waiver.¹⁸

As appellant did not submit the financial information required under section 10.438 to determine his eligibility for waiver, OWCP properly denied waiver of recovery of the overpayment of compensation in the amount of \$2,268.80.¹⁹

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of schedule award compensation in the amount of \$2,268.80 for the period December 20, 2010 through January 10, 2011. The Board further finds that OWCP properly denied waiver of recovery of the overpayment.

¹⁵ *Id.* at § 10.437(b)(1).

¹⁶ 20 C.F.R. § 10.438.

¹⁷ *Id.*, see also *R.H.*, Docket No. 15-0392 (issued February 3, 2016).

¹⁸ See *supra* note 16; see also *W.A.*, Docket No. 18-0070 (issued May 14, 2018).

¹⁹ See *T.S.*, Docket No. 13-1539 (issued January 6, 2014).

ORDER

IT IS HEREBY ORDERED THAT the November 15, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 11, 2018
Washington, DC

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

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

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