

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

_____)	
R.S., Appellant)	
)	
and)	Docket No. 20-0311
)	Issued: July 8, 2020
U.S. POSTAL SERVICE, FREDERICK N.)	
WEATHERS POST OFFICE, St. Louis, MO,)	
Employer)	
_____)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On November 22, 2019 appellant, through counsel, filed a timely appeal from a November 5, 2019 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.

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.*

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$45,057.81, for which he was without fault, because he received schedule award compensation for which he was not entitled; (2) whether it properly denied appellant's request for waiver of recovery of the overpayment; and (3) whether OWCP properly required recovery of the overpayment by deducting \$500.00 from appellant's continuing compensation payments every 28 days.

FACTUAL HISTORY

On September 26, 2014 appellant, then a 54-year-old city carrier, filed an occupational disease claim (Form CA-2) alleging that he developed a degenerative left knee condition as a result of his repetitive federal employment duties, specifically walking on concrete and up and down stairs in cold weather.³ He indicated that he first became aware of his condition and realized that it resulted from his federal employment on February 14, 2014. Appellant stopped work on August 16, 2014. OWCP accepted his claim for left knee medial osteoarthritis. It paid wage-loss compensation on the supplemental rolls until September 23, 2014 when appellant returned to full-time modified duty.

On July 23, 2015 appellant filed a claim for a schedule award (Form CA-7). By decision dated March 15, 2016, OWCP granted him a schedule award for 20 percent permanent impairment of the left lower extremity (left leg). The schedule award ran for 57.6 weeks from August 12, 2015 to September 18, 2016.⁴

On October 31, 2016 appellant underwent authorized left knee unicondylar arthroplasty. OWCP paid wage-loss compensation and placed him on the periodic rolls, effective December 11, 2016. On February 9, 2016 appellant returned to part-time modified duty.

On May 15, 2017 appellant filed a Form CA-7 for an increased schedule award.

Appellant submitted a June 6, 2017 report from Dr. Neil Allen, a Board-certified neurologist and internist, who noted that appellant's claim was accepted for left knee degenerative osteoarthritis. Dr. Allen reviewed appellant's employment and medical history and provided examination findings. He utilized Table 16-3 on page 511 of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).⁵ Dr.

³ Appellant subsequently filed a traumatic injury claim (Form CA-1) on October 3, 2017 alleging that on that date he cut his chin and hurt his leg when he tripped between two trucks while in the performance of duty. He did not stop work. OWCP accepted appellant's claim for left leg contusion and head laceration. That case, OWCP File No. xxxxxx721, was administratively combined with the current claim, OWCP File No. xxxxxx321, with the latter serving as the master file.

⁴ The schedule award was based on the February 22, 2016 report of OWCP's district medical adviser (DMA), Dr. Arnold T. Berman, a Board-certified orthopedic surgeon, who opined that appellant had 20 percent left lower extremity permanent impairment based on his diagnosis of left knee osteoarthritis.

⁵ A.M.A., *Guides* (6th ed. 2009).

Allen indicated that appellant had reached maximum medical improvement (MMI) and using the diagnosis-based impairment (DBI) rating method, appellant was a class 3, default 37 percent (grade C), for status post tibial osteotomy, poor result. He explained that there was no DBI classification for a unicondylar arthroplasty “so tibial osteotomy was chosen as it most closely resembles a unicondylar arthroplasty.” Dr. Allen assigned a grade modifier for functional history (GMFH) of 2 because of appellant’s antalgic gait and lower limb questionnaire score of 55. He reported that he did not consider grade modifiers for physical examination (GMPE) or clinical studies (GMCS) as he considered them in his class of diagnosis (CDX) placement. After applying the net adjustment formula, $((2-3) + (0) + (0) = -1)$, Dr. Allen determined that appellant had a net adjustment score of -1, which resulted in 34 percent (grade B) permanent impairment for his left lower extremity (LLE).

On February 28, 2018 appellant voluntarily retired from federal employment.

OWCP referred appellant’s claim, along with a statement of accepted facts (SOAF) and Dr. Allen’s June 6, 2017 report to a DMA, Dr. Arthur S. Harris, a Board-certified orthopedic surgeon. In an April 20, 2018 report, the DMA indicated that he had reviewed the SOAF and concurred with Dr. Allen’s finding that appellant had 34 percent left lower extremity permanent impairment. He utilized Table 16-3, on page 511, of the sixth edition of the A.M.A., *Guides* and noted diagnoses of status post left knee medial unicondylar arthroplasty and status post left knee excision and debridement of hematoma with polyethylene exchange. The DMA reported “the claimant has 34 percent lower extremity impairment for having a fair result following unicondylar knee arthroplasty with documented motion deficits (CDX 3B/GM).” He noted that the date of MMI was June 6, 2017.

By decision dated September 18, 2018, OWCP granted appellant a schedule award for 34 percent permanent impairment of the LLE (left leg). The award ran for 97.92 weeks from June 6, 2017 to April 22, 2019.

In an April 23, 2019 letter, OWCP requested that the DMA address appellant’s prior schedule award of 20 percent LLE permanent impairment and provide an addendum report clarifying whether his April 20, 2018 impairment rating report included the prior percentage awarded. In a May 1, 2019 report, the DMA clarified that, since appellant was previously awarded 20 percent permanent impairment for his LLE, he was entitled to an increase of 14 percent permanent impairment for a total of 34 percent LLE permanent impairment.

In a June 10, 2019 notice, OWCP advised appellant of its preliminary determination that he received a \$45,057.81 overpayment of compensation because he received schedule award compensation for 34 percent permanent impairment of the left lower extremity, but was only entitled to receive schedule award compensation for 14 percent permanent impairment. In the overpayment calculation memorandum, it explained that he received a total of \$76,698.29 in schedule award compensation, but that subtracting \$31,540.47 for his appropriate entitlement to schedule award compensation for 14 percent permanent impairment yielded a \$45,047.81 overpayment. OWCP also made a preliminary determination that appellant was not at fault in the creation of the overpayment. It advised him that he could submit evidence challenging the fact or amount of the overpayment, or request waiver of recovery of the overpayment. OWCP informed appellant that he could submit additional evidence in writing or at a precoupment hearing, but

that a prerecoupment hearing must be requested within 30 days of the date of the written notice of overpayment. It requested that he complete and return an overpayment recovery questionnaire (Form OWCP-20) within 30 days even if he was not requesting waiver of the overpayment.

On June 18, 2019 appellant, through counsel, requested a telephonic prerecoupment hearing with a representative of OWCP's Branch of Hearings and Review regarding the possibility of waiver of recovery of the overpayment. He also submitted a completed Form OWCP-20.

On October 2, 2019 a telephonic prerecoupment hearing was held.

By decision dated November 5, 2019, an OWCP hearing representative finalized the June 10, 2019 preliminary overpayment determination. She found that appellant received a \$45,057.81 overpayment of compensation, for which he was without fault, because he received schedule award compensation for an additional 34 percent permanent impairment of the left lower extremity, but was only entitled to receive schedule award compensation for an additional 14 percent permanent impairment of the left lower extremity as he had a previously received a schedule award for 20 percent of the LLE. The hearing representative denied his request for waiver of recovery of the overpayment since his monthly income exceeded his monthly expenses by more than \$50.00. She indicated that repayment in the monthly amount of \$500.00 was reasonable and would allow for timely collection of the debt.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.⁶ Section 8129(a) of FECA provides, in pertinent part, that when an overpayment has been made to an individual under this subchapter because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.⁷

If a claimant receives a schedule award and the medical evidence does not support the degree of permanent impairment awarded, an overpayment may be created.⁸ OWCP's procedures provide that claims for an increased schedule award based on the same edition of the A.M.A., *Guides* are subject to overpayment.⁹ If a claimant requests an increased schedule award due to a belief that his or her medical condition has deteriorated since the original award has been issued, and additional development is undertaken to address this claim for an increased schedule award, a new schedule award decision should be issued that addresses and substantiates the newly

⁶ 5 U.S.C. § 8102(a).

⁷ *Id.* at § 8129(a).

⁸ *J.C.*, Docket No. 09-1526 (issued June 1, 2010); *Michael Reed*, Docket No. 04-0734 (issued October 5, 2004).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.9(e) (February 2013).

determined impairment rating. If a lesser degree of impairment than previously awarded is substantiated, an overpayment thereafter is appropriate.¹⁰

ANALYSIS -- ISSUE 1

The Board finds that OWCP did not establish that an overpayment of compensation had been created; therefore, this case must be reversed.

OWCP had previously granted appellant a schedule award for 20 percent LLE permanent impairment based on his accepted condition of left knee osteoarthritis. On May 15, 2017 appellant filed a claim for an increased schedule award and submitted medical evidence. After development of the evidence, OWCP granted him a schedule award for an additional 34 percent LLE permanent impairment. In an April 23, 2019 letter, it requested that the DMA clarify whether the 34 percent LLE permanent impairment included the prior percentage that was awarded. In a May 1, 2019 supplemental report, the DMA simply explained that, since appellant was previously awarded 20 percent LLE permanent impairment, he was only entitled to an increase of 14 percent LLE permanent impairment. By decision dated November 5, 2019, an OWCP hearing representative finalized the June 10, 2019 preliminary overpayment decision and determined that appellant received a \$45,057.81 overpayment of compensation, for which he was without fault, because he received schedule award compensation for 34 percent LLE permanent impairment, but was only entitled to an increase of 14 percent LLE permanent impairment.

The Board finds that OWCP failed to adequately support its determination that appellant received a \$45,057.81 overpayment of compensation because he received schedule award compensation for 34 percent permanent impairment of his LLE when he was only entitled to an additional 14 percent permanent impairment. The Federal (FECA) Procedure Manual Chapter 2.808.9(e) provides that, before addressing the issue of whether an overpayment is appropriate, the schedule award issue must be resolved. Before the amount of overpayment can be determined, the evidence must clearly establish the degree of permanent impairment.

The Board has previously held that simply comparing the prior percentage of permanent impairment awarded to the current impairment for the same member is not always sufficient to deny an increased schedule award claim. The issue is not whether the current permanent impairment rating is greater than the prior impairment ratings, but whether it duplicates in whole or in part the prior impairment rating.¹¹

OWCP failed to take into account that the LLE ratings were not based on the same accepted conditions. Therefore, the underlying schedule award issue remains unresolved. As OWCP has not properly resolved the underlying issue of appellant's entitlement to a schedule award, the Board finds that the overpayment issue cannot be addressed until the schedule award issue is

¹⁰ *Id.*

¹¹ *P.M.* Docket No. 18-1215 (issued June 18, 2020); *Richard Saldibar*, 51 ECAB 585 (2000).

properly resolved.¹² In light of the Board's disposition of the first issue, the issues of waiver of recovery of overpayment and repayment are rendered moot.

CONCLUSION

The Board finds that, as fact of overpayment has not been established, the November 5, 2019 must be reversed.

ORDER

IT IS HEREBY ORDERED THAT the November 5, 2019 decision of the Office of Workers' Compensation Programs decision is reversed.

Issued: July 8, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

¹² *Id.*