

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

A.N., Appellant)	
)	
and)	Docket No. 22-0999
)	Issued: August 4, 2023
U.S. POSTAL SERVICE, SANTA MONICA)	
POST OFFICE, Santa Monica, CA, Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 15, 2022 appellant filed a timely appeal from December 20, 2021 and May 19, 2022 merit decisions of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (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 appellant has met his burden of proof to establish greater than two percent permanent impairment of the right lower extremity, for which he previously received a schedule award; (2) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$137,431.26 for the period January 1, 2014 through July 18, 2020, for which he was without fault, as he concurrently received Social Security Administration (SSA) age-related retirement benefits and FECA wage-loss compensation, without appropriate offset; and (3) whether OWCP properly denied waiver of recovery of the overpayment.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On September 12, 2014 appellant, then a 66-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that he sustained right knee conditions as a result of factors of his federal employment. He first became aware of the conditions and their relationship to his federal employment on August 20, 2014. Appellant stopped work on September 10, 2014. On the reverse side of the claim form, a box indicated that his retirement coverage was under the Federal Employees Retirement System (FERS). OWCP accepted the claim for tear of the right medial meniscus of the knee, right knee sprain of the medial collateral ligament, and right leg joint effusion. It paid appellant wage-loss compensation on the supplemental rolls beginning September 13, 2014, and on the periodic rolls commencing April 5, 2015.

On May 2, 2016 appellant underwent OWCP-approved right knee arthroscopy with partial medial meniscectomy; chondral debridement of the medial, lateral, and patellofemoral joint compartments; and three-compartment synovectomy. He retired from federal service as of August 26, 2018.

In a progress report dated April 25, 2019, Dr. Christopher DeCarlo, a Board-certified physiatrist, examined appellant for right knee diagnoses including meniscal tear, joint effusion, medial collateral ligament (MCL) sprain, anterior cruciate ligament (ACL) sprain, and status post arthroscopy. On physical examination, he noted mild medial and lateral joint tenderness to palpation, full range of motion (ROM) to flexion and extension of the right knee with negative orthopedic testing.

On February 14, 2020 OWCP forwarded to SSA a FERS/SSA dual benefits form to obtain information regarding appellant's receipt of SSA age-related retirement benefits.

On June 24, 2020 SSA completed the dual benefits calculation form, which listed appellant's SSA age-related retirement benefit rates with and without a FERS offset from January 2014 through January 2020. The form indicated that: beginning January 2014, appellant's SSA rate with FERS was \$2,002.20 and without FERS was \$142.30; beginning December 2014, his SSA rate with FERS was \$2,036.20 and without FERS was \$144.70; beginning January and December 2015, his SSA rate with FERS was \$2,072.00 and without FERS was \$147.50; beginning January 2016, his SSA rate with FERS was \$2,074.80 and without FERS was \$150.50; beginning December 2016, his SSA rate with FERS was \$2,081.00 and without FERS was \$150.90; beginning January 2017, his SSA rate with FERS was \$2,082.20 and without FERS was \$154.90; beginning December 2017, his SSA rate with FERS was \$2,123.80 and without FERS was \$157.90; beginning January 2018, his SSA rate with FERS was \$2,123.80 and without FERS was \$160.90; beginning December 2018, his SSA rate with FERS was \$2,183.20 and without FERS was \$165.40; beginning January 2019 his SSA rate with FERS was \$2,184.20 and without FERS was \$167.30; beginning December 2019 his SSA rate with FERS was \$2,219.10 and without FERS was \$169.90; and beginning January 2020 his SSA rate with FERS was \$2,219.10 and without FERS was \$171.00.

In an August 3, 2020 FERS offset overpayment calculation worksheet, OWCP explained its calculation of appellant's SSA offset overpayment from September 13, 2014 through July 18, 2020. For the 79 days from September 13 through November 30, 2014, appellant was

overpaid \$4,843.92. For the 20 days from December 1 through 20, 2014, he was overpaid \$1,247.14. For the three days from December 22 through 24, 2014, appellant was overpaid \$187.07. For the three days from December 29 through 31, 2014, he was overpaid \$187.07. For the eight days from January 2 through 9, 2015, appellant was overpaid \$507.56. For the 325 days from January 10 through November 30, 2015, he was overpaid \$20,619.64. For the 31 days from December 1 through 31, 2015, appellant was overpaid \$1,966.80. For the 335 days from January 1 through November 30, 2016, he was overpaid \$21,251.88. For the 31 days from December 1, 2016 through December 31, 2016, appellant was overpaid \$1,972.52. For the 334 days from January 1 through November 30, 2017, he was overpaid \$21,221.48. For the 30 from December 1 through 30, 2017, appellant was overpaid \$1,944.30. For the 334 days from January 1 through November 30, 2018, he was overpaid \$21,613.47. For the 31 days from December 1 through 31, 2018, appellant was overpaid \$2,062.15. For the 334 days from January 1 through November 30, 2019, he was overpaid \$22,208.06. For the 31 days from December 1 through 31, 2019, appellant was overpaid \$2,094.24. For the 200 days from January 1 through July 18, 2020, he was overpaid \$13,503.96. The total overpayment was determined to be \$137,431.26.

The record reveals inconsistencies, however, between the overpayment offset calculation work sheet and appellant's FECA compensation payment history, including that appellant was not paid wage-loss compensation for October 10 through 13, 2014; and February 6 through 8, 2015.

On February 24, 2021 OWCP advised appellant of its preliminary overpayment determination that he had received an overpayment of compensation in the amount of \$137,431.26 for the period January 1, 2014 through July 18, 2020, for which he was without fault, because he concurrently received FECA wage-loss compensation and SSA age-related retirement benefits without an appropriate offset. It included a FERS offset calculation sheet setting forth the claimed basis of the overpayment. OWCP determined that he was without fault in the creation of the overpayment. It requested that the employee submit a completed overpayment recovery questionnaire (Form OWCP-20) to determine a fair recovery method. OWCP requested financial information, including copies of income tax returns, bank account statements, bills, pay slips, and any other records to support income and expenses. It advised appellant that it would deny waiver if he failed to furnish the requested financial information within 30 days. OWCP further provided him with an overpayment action request form and notified him that within 30 days of the date of the letter he could request a final decision based on the written evidence, or a prerecoupment hearing.

On March 8, 2021 appellant requested a prerecoupment hearing before a representative of OWCP's Branch of Hearings and Review. He contested the overpayment and submitted a completed Form OWCP-20, which delineated his income, expenses, and assets. Appellant reported a total of \$9,067.00 in monthly income, which was comprised of \$3,328.00 in SSA benefits, \$1,569.00 in Office of Personnel Management (OPM) retirement benefits, and \$4,170.00 in rental income. He reported a total of \$9,434.21 in monthly expenses, which was comprised of \$1,126.00 for housing, \$2,500.00 for food, \$200.00 for clothing, \$530.00 for utilities, \$510.21 for monthly credit card payments, and \$4,568.00 for other expenses. Appellant reported assets totaling \$240,000.00, which included \$100.00 in cash on hand, \$400.00 in a checking account, \$70,500.00 in a savings account, \$59,000.00 in stocks and bonds, and \$110,000.00 in money market accounts. He provided financial documentation in support of his reported income and expenses. A hearing was held on September 23, 2021.

On June 8, 2021 appellant filed a claim for compensation (Form CA-7) for a schedule award.

On April 23, 2021 Dr. Charles Xeller, a Board-certified orthopedic surgeon, examined appellant to determine appellant's percentage of permanent impairment and date of maximum medical improvement (MMI). He reviewed appellant's history of injury and the medical record. On physical examination of appellant's right knee, Dr. Xeller observed ROM with 102 to 104 degrees of flexion and 10 to 13 degrees of extension. He noted significant pain and crepitation as well as varus in the right knee more than the left. Reviewing x-rays and magnetic resonance imaging (MRI) studies of the right knee, Dr. Xeller noted significant degenerative osteoarthritis. He diagnosed a right medial meniscus tear, MCL sprain, and osteoarthritis. Referring to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),² under Table 16-3, page 511, he used osteoarthritis as the class of diagnosis (CDX) upon which the rating was based. Dr. Xeller noted that this corresponded to a Class 1 impairment for 3 mm cartilage interval, with a default value of seven percent. He assigned a grade modifier for functional history (GMFH) of 2 for the use of a cane; a grade modifier for physical examination (GMPE) of 2 due to considerable varus and 2 cm of swelling in the right knee *versus* the left with antalgic gait; and a grade modifier for clinical studies (GMCS) of 2 due to an American Academy of Orthopedic Surgeons (AAOS) score of two. With these net adjustments Dr. Xeller determined that appellant had nine percent right lower extremity permanent impairment.

On June 17, 2021 OWCP referred the record, including a statement of accepted facts (SOAF) to Dr. Jovito Estaris, a Board-certified occupational medicine physician serving as a district medical adviser (DMA). In a report dated June 29, 2021, Dr. Estaris reviewed the medical record, including the April 23, 2021 report of Dr. Xeller. He noted that physical examination of the right knee demonstrated full ROM to flexion and extension. Dr. Estaris used the medial meniscus tear of the right knee as the CDX upon which the rating was based. Using Table 16-3, page 509 of the A.M.A., *Guides*, he noted a Class 1 impairment with a default value of 2 due to partial medial meniscectomy. Referring to Table 16-6 and Table 16-7, pages 516-17 of the A.M.A., *Guides*, he determined that the GMFH was 2 due to the use of a cane for ambulation; the GMPE was 1 due to right knee swelling, and the GMCS was not used. The net adjustment thus moved one grade to the right, resulting in a final 2 percent permanent impairment rating of the right lower extremity. In explaining the difference in his impairment rating from Dr. Xeller's, he noted that there was inconsistency in the ROM measurements of Drs. DeCarlo and Xeller. Referring to page 517 of the A.M.A., *Guides*, he stated that if multiple previous evaluations had been documented, and there was inconsistency in a rating class between the findings of two observers, the results were to be considered invalid. Furthermore, Dr. Estaris noted that the criteria for a Class 1 right lower extremity impairment rating using primary knee arthritis as the diagnosis upon which the rating was based, with a default value of 7, were a 3 mm cartilage interval, full-thickness articular cartilage defect, or ununited osteochondral fracture. However, Dr. Xeller did not make any finding in this regard based on his review of appellant's MRI scan. As such, Dr. Estaris found that the most appropriate diagnosis to use was meniscal injury, Class 1

² A.M.A., *Guides* (6th ed. 2009).

impairment, as appellant had a partial medial meniscectomy. Dr. Estaris stated that the date of MMI was April 23, 2021, which was the date of the examination by Dr. Xeller.

By decision dated August 5, 2021, OWCP granted appellant a schedule award for two percent permanent impairment of the right lower extremity. The award ran for 5.76 weeks from April 23 through June 2, 2021.

By decision dated December 20, 2021, OWCP's hearing representative finalized the preliminary overpayment determination, finding that appellant had received an overpayment of compensation in the amount of \$137,431.26 for the period January 1, 2014 through July 18, 2020 because appellant concurrently received SSA age-related retirement benefits and FECA wage-loss compensation without an appropriate offset. The hearing representative further found that appellant was without fault in the creation of the overpayment, but denied waiver of recovery of the overpayment.

On February 18, 2022 appellant requested reconsideration of the August 5, 2021 schedule award decision.

By decision dated May 19, 2022, OWCP denied modification of its August 5, 2021 decision.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provisions of FECA,³ and its implementing federal regulations,⁴ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or 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 a 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*, published in 2009.⁵

The sixth edition of the A.M.A., *Guides* provides a diagnosis-based method of evaluation utilizing the World Health Organization's *International Classification of Functioning Disability and Health (ICF): A Contemporary Model of Disablement*.⁶ Under the sixth edition, the evaluator identifies the impairment CDX, which is then adjusted by GMFH, GMPE, and GMCS.⁷ The net

³ *Supra* note 1.

⁴ 20 C.F.R. § 10.404.

⁵ For decisions issued after May 1, 2009 the sixth edition of the A.M.A., *Guides* is used. A.M.A., *Guides* (6th ed. 2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (March 2017); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

⁶ A.M.A., *Guides* (6th ed. 2009), p.3, section 1.3.

⁷ *Id.* at 494-531

adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).⁸ The standards for evaluation of permanent impairment of an extremity under the A.M.A., *Guides* are based on all factors that prevent a limb from functioning normally, such as pain, sensory deficit, and loss of strength.⁹

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to a DMA for an opinion concerning the percentage of permanent impairment using the A.M.A., *Guides*.¹⁰

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met his burden of proof to establish greater than two percent permanent impairment of the right lower extremity, for which he previously received a schedule award.

In his report dated April 23, 2021, Dr. Xeller, referring to the A.M.A., *Guides*, under Table 16-3, page 511, used osteoarthritis as the diagnosis upon which the rating was based. Dr. Xeller noted that this corresponded to a Class 1 impairment with a default value of seven percent. He assigned a GMFH of 2 for the use of a cane; a GMPE of 2 due to considerable varus and 2 cm of swelling in the right knee versus the left with antalgic gait; and a GMCS of 2 due to an AAOS score of two. With these adjustments Dr. Xeller found that appellant had nine percent permanent impairment of the right lower extremity impairment. The Board notes that OWCP has not accepted a work-related right knee arthritis condition and the medical evidence of record does not otherwise establish the existence of such conditions, whether preexisting or work related in nature.¹¹ Dr. Xeller therefore incorrectly rated appellant's right knee impairment based on a diagnosis of arthritis.¹²

On June 22, 2021 Dr. Estaris reviewed the medical record, including the April 23, 2021 report of Dr. Xeller. He used appellant's medial meniscus tear of the right knee as the diagnosis upon which the rating was based. Using Table 16-3, page 509 of the A.M.A., *Guides*, Dr. Estaris noted a Class 1 impairment with a default value of 2 due to partial medial meniscectomy. Referring to Table 16-6 and Table 16-7, pages 516-17 of the A.M.A., *Guides*, he determined that the GMFH was 2 due to the use of a cane for ambulation; the GMPE was 1 due to right knee swelling, and the GMCS was not used. The net adjustment thus moved one grade to the right, resulting in a final

⁸ *Id.* at 521.

⁹ *P.W.*, Docket No. 19-1493 (issued August 12, 2020); *C.H.*, Docket No. 17-1065 (issued December 14, 2017); *E.B.*, Docket No. 10-0670 (issued October 5, 2010); *Robert V. Disalvatore*, 54 ECAB 351 (2003); *Tammy L. Meehan*, 53 ECAB 229 (2001).

¹⁰ *A.C.*, Docket No. 19-1333 (issued January 8, 2020); *B.B.*, Docket No. 18-0782 (issued January 11, 2019); *supra* note 5 at Chapter 2.808.6f (March 2017).

¹¹ *M.C.*, Docket No. 19-1428 (issued February 3, 2020); *D.H.*, Docket No. 17-0530 (issued July 2, 2018); *D.F.*, 59 ECAB 288 (2007); *Kenneth E. Leone*, 46 ECAB 133 (1994).

¹² *W.C.*, Docket No. 20-0691 (issued July 19, 2022).

two percent permanent impairment rating of the right lower extremity. Dr. Estaris found that the most appropriate diagnosis to use was meniscal injury, with a CDX of 1, as appellant had a partial medial meniscectomy. He stated that the date of MMI was April 23, 2021, the date of the examination by Dr. Xeller.

The Board finds that OWCP properly relied on the opinion of Dr. Estaris, serving as the DMA, as he appropriately applied the sixth edition of the A.M.A., *Guides* in determining that appellant had no greater than two percent permanent impairment of the right lower extremity.

As appellant has not established greater than two percent permanent impairment of the right lower extremity, for which he previously received a schedule award, the Board finds that he has not met his burden of proof.

Appellant may request a schedule award or increased schedule award at any time based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased permanent impairment.

LEGAL PRECEDENT -- ISSUE 2

Section 8102 of FECA provides that the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.¹³ Section 8116 limits the right of an employee to receive compensation. While an employee is receiving compensation, he or she may not receive salary, pay, or remuneration of any type from the United States.¹⁴

Section 10.421(d) of the implementing regulations requires that OWCP reduce the amount of compensation by the amount of SSA age-related retirement benefits that are attributable to federal service of the employee.¹⁵ FECA Bulletin No. 97-09 provides that FECA benefits have to be adjusted for the FERS portion of SSA benefits because the portion of the SSA benefit earned as a federal employee is part of the FERS retirement package, and the receipt of FECA benefits and federal retirement concurrently is a prohibited dual benefit.¹⁶

ANALYSIS -- ISSUE 2

The Board finds that OWCP has established that appellant received an overpayment of compensation for the period September 13, 2014 through July 18, 2020, for which he was without fault, as he concurrently received SSA age-related retirement benefits and FECA wage-loss compensation without an appropriate offset.

¹³ 5 U.S.C. § 8102(a).

¹⁴ *Id.* at § 8116.

¹⁵ 20 C.F.R. § 10.421(d); *see L.W.*, Docket No. 19-0787 (issued October 23, 2019); *S.M.*, Docket No. 17-1802 (issued August 20, 2018).

¹⁶ FECA Bulletin No. 97-09 (issued February 3, 1997); *see also N.B.*, Docket No. 18-0795 (issued January 4, 2019).

The record indicates that, while appellant was in receipt of wage-loss compensation under FECA, he also intermittently received SSA age-related retirement benefits attributable to federal service without an appropriate offset. As previously noted, OWCP is required to reduce the amount of compensation by the amount of any SSA age-related retirement benefits that are attributable to the employee's federal service.¹⁷ The fact of the overpayment has therefore been established.

In its August 5, 2021 decision, OWCP incorrectly stated that appellant's period of overpayment began on January 1, 2014, when OWCP's overpayment calculation memorandum established that appellant received an overpayment of compensation beginning September 13, 2014. The period of the overpayment is, therefore, modified to September 13, 2014 through July 18, 2020.

The Board further finds, however, that the case is not in posture for decision with regard to the amount of the overpayment. As noted above, the record reveals inconsistencies between the overpayment offset calculation work sheet and appellant's FECA compensation payment history, including that appellant was not paid wage-loss compensation for October 10 through 13, 2014; and February 6 through 8, 2015. As the overpayment calculation included dates when appellant was not in fact paid wage-loss compensation, the Board finds that there is no overpayment with regard to those dates.¹⁸

On remand, OWCP shall recalculate the amount of the overpayment.¹⁹ It shall then issue a new preliminary overpayment determination with an overpayment action request form, a Form OWCP-20, and instructions for appellant to provide supporting financial information. After this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.²⁰

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish greater than two percent impairment of the right lower extremity, for which he previously received a schedule award. The Board further finds that fact of overpayment is established; however, the period of the overpayment is modified to September 13, 2014 through July 18, 2020. The Board also finds that the amount of the overpayment is not in posture for decision.

¹⁷ *Supra* note 6.

¹⁸ *Supra* note 14.

¹⁹ *See R.K.*, Docket No. 21-0873 (issued May 8, 2023).

²⁰ In light of the Board's disposition of Issue 2, Issue 3 is rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the May 19, 2022 decision of the Office of Workers' Compensation Programs is affirmed. The December 20, 2021 decision of the Office of Workers' Compensation Programs is affirmed as modified in part and set aside in part. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: August 4, 2023
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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