

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

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**R.H., Appellant**

**and**

**DEPARTMENT OF HOMELAND SECURITY,  
BORDER PATROL STATION, Tucson, AZ,  
Employer**

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**Docket No. 08-919  
Issued: October 2, 2008**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On February 8, 2008 appellant filed a timely appeal from the December 17, 2007 and January 16, 2008 merit decisions of an Office of Workers' Compensation Programs' hearing representative, who affirmed schedule awards. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the case. The Board also has jurisdiction to review the February 19, 2008 overpayment decision.

**ISSUES**

The issues are: (1) whether appellant has more than a 10 percent impairment of his right lower extremity or more than a 7 percent impairment of his left; and (2) whether the Office properly denied waiver of an overpayment resulting from a duplicate schedule award, and if so, whether the Office properly reduced the overpayment by applying a schedule award that was payable.

## **FACTUAL HISTORY**

On February 17, 2001 appellant, then a 49-year-old senior border patrol agent, injured his left knee in the performance of duty when he stepped on the side of a mound and it collapsed. The Office accepted his claim for derangement of meniscus, left knee.<sup>1</sup> On January 20, 2002 appellant injured his right knee in the performance of duty when he jumped out of his vehicle and landed on a rock. The Office accepted his claim for right knee meniscus tear, and he underwent medial and lateral partial meniscectomies.<sup>2</sup>

On September 22, 2002 appellant again injured his right knee in the performance of duty. He was walking from his vehicle, stopped on uneven ground and felt his right knee pop. The Office accepted his claim for internal derangement of the right knee and appellant underwent another partial medial meniscectomy. On December 9, 2003 the Office issue a schedule award for a 10 percent impairment of the right lower extremity due to medial and lateral partial meniscectomies.<sup>3</sup>

On December 13, 2003 appellant tripped on a metal piece of flooring at work and his left knee popped. The Office accepted this claim for left knee osteoarthritis.<sup>4</sup>

On May 28, 2005 appellant twisted his right knee while walking down wet stairs at work. The Office accepted his claim for right knee meniscal tear. Appellant underwent medial and lateral partial meniscectomies, a partial resection of the medial synovial plica and a chondroplasty of the femoral groove. On February 22, 2006 the Office issued a schedule award for a 10 percent impairment of the right lower extremity due to the medial and lateral partial meniscectomies.

The Office referred appellant, together with a statement of accepted facts, to Dr. Jon T. Abbott, a Board-certified orthopedic surgeon, for a current evaluation of impairment. On May 16, 2007 Dr. Abbott reported that appellant's chief complaint was discomfort in his right knee. On examination of the right knee, appellant had 6 degrees valgus alignment, 0 to 130 degrees range of motion and 2+ tenderness over the medial joint line. X-rays showed five millimeters medial joint space and seven millimeters lateral joint space. The patellofemoral joint appeared normal. On the left, appellant had three degrees valgus, 0 to 130 degrees range of motion, tenderness along the medial joint line. X-rays showed three millimeters medial joint space and six millimeters lateral joint space. Motor examination was 5/5 in all motor groups bilaterally, and sensory examination was bilaterally intact. Thigh circumference was 48 centimeters on the right and 49 on the left. Calf measurements were equal.

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<sup>1</sup> OWCP File No. xxxxxx367.

<sup>2</sup> OWCP File No. xxxxxx070.

<sup>3</sup> OWCP File No. xxxxxx070.

<sup>4</sup> OWCP File No. xxxxxx070.

On the basis of Dr. Abbott's evaluation, the Office issued an August 28, 2007 schedule award for a seven percent impairment of the left lower extremity due to a loss of cartilage interval in the medial compartment of the left knee.

In a decision dated December 17, 2007, an Office hearing representative found that appellant had no more than a 10 percent impairment of his right lower extremity and no more than a 7 percent impairment of his left. In a January 16, 2008 decision, another Office hearing representative affirmed the Office's August 28, 2007 schedule award for a seven percent impairment of the left lower extremity.

On August 2, 2007 the Office issued a preliminary determination that appellant was not at fault in the creation of a \$35,626.01 overpayment. The Office noted that it had twice issued the 10 percent schedule award for the right lower extremity based on the same impairment. Appellant completed an overpayment recovery questionnaire listing income, expenses and assets. At a prerecoupment hearing before an Office hearing representative on December 4, 2007, appellant testified that he was currently working as a senior patrol agent making \$1,764.00 biweekly. He stated that his wife earned \$1,768.00 biweekly.<sup>5</sup> Appellant reviewed his monthly expenses with the hearing representative.<sup>6</sup> After the hearing, he submitted copies of receipts relating to pharmacy, medical and propane expenses. Appellant wrote that medical and other expenses were over \$600.00 a month, and he was sure he was not identifying some expenses. He added that he applied the February 22, 2006 schedule award to his home mortgage.

In a decision dated February 19, 2008, the Office hearing representative found that a \$35,626.01 overpayment arose when the Office issued duplicate schedule awards for the right lower extremity. The hearing representative found that appellant was not at fault in the creation of the overpayment. The hearing representative denied waiver and noted that appellant had \$752.00 in excess monthly income.<sup>7</sup> The hearing representative determined that appellant could repay the debt at a rate of \$500.00 a month.

Also on February 19, 2008, the Office notified appellant that it was applying the \$23,520.94 schedule award for his left lower extremity to the \$35,626.01 overpayment. This left a net overpayment of \$12,105.07.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8107 of the Federal Employees' Compensation Act<sup>8</sup> authorizes the payment of schedule awards for the loss or loss of use of specified members, organs or functions of the body.

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<sup>5</sup> This represents a total net household income of \$7,652.67:  $((\$1,768.00 + \$1,764.00) \times 26 \text{ weeks}) / 12 \text{ months}$ . Appellant testified that he was multiplying the biweekly total by two and rounding off to \$6,900.00.

<sup>6</sup> Monthly expenses included: \$2,500.00 mortgage, \$200.00 property tax, \$800.00 food, \$50.00 clothing, \$950.00 utilities, \$800.00 miscellaneous and \$1,000.00 revolving credit.

<sup>7</sup> The hearing representative used appellant's rounded figure of \$6,900.00 income, lowered miscellaneous expenses from \$800.00 to \$600.00 and added \$48.00 for propane tank expense.

<sup>8</sup> 5 U.S.C. § 8107.

Such loss or loss of use is known as permanent impairment. The Office evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.<sup>9</sup>

### **ANALYSIS -- ISSUE 1**

Appellant notes that the A.M.A., *Guides* identifies numerous causes of impairment, including dysesthesia, weakness, atrophy, pain, nerve denigration and range of motion. He contends that his impairment rating should account for all of his symptoms, including always being in pain, inability to fall asleep or sleep for any length of time, nausea and vomiting caused by pain medication, and a distorted sense of taste for foods and beverages. Appellant argues that all of these are clinically appropriate for impairment calculation purposes.

The A.M.A., *Guides* lists 13 methods to assess lower extremity impairment. These methods fall into three basic categories: (1) anatomic impairment, including atrophy, arthritis and nerve injury; (2) functional impairment, including range of motion and muscle strength; and (3) diagnosis-based impairment, including fractures and meniscectomies.<sup>10</sup> However, many of these methods may not be used together for evaluating a single impairment. The A.M.A., *Guides* provides a Cross-Usage Chart at Table 17-2 showing which combinations are allowed.<sup>11</sup> The evaluating physician should select the clinically most specific method of assessment.<sup>12</sup> Typically, one method will adequately characterize the impairment and its impact on the ability to perform activities of daily living. If more than one method can be used, the method that provides the higher rating should be adopted.<sup>13</sup>

Appellant injured his left knee on February 17, 2001. He injured it again on December 13, 2003. The Office accepted that his left knee osteoarthritis was a result of federal employment. The most specific method for evaluating impairment due to osteoarthritis is found in Chapter 17.2h of A.M.A., *Guides*. This chapter explains that the hallmark of all types of arthritis is thinning of the articular cartilage, which correlates well with disease progression.<sup>14</sup> Table 17-31, page 544, shows arthritis impairments based on roentgenographically determined cartilage intervals. X-rays obtained in 2007 by Dr. Abbott, the referral orthopedic surgeon,

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<sup>9</sup> 20 C.F.R. § 10.404. Effective February 1, 2001 the Office began using the A.M.A., *Guides* (5<sup>th</sup> ed. 2001). Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.7b.(4) (August 2002). Because the Office has not yet specified the use of the 6<sup>th</sup> edition of the A.M.A., *Guides*, standards found in the 5<sup>th</sup> edition currently apply.

<sup>10</sup> A.M.A., *Guides* 525, Table 17-1.

<sup>11</sup> *Id.* at 526, Table 17-2.

<sup>12</sup> *Id.* at 526.

<sup>13</sup> *Id.* at 527.

<sup>14</sup> *Id.* at 544.

showed three millimeters medial joint space in appellant's left knee. Under Table 17-31, this represents a seven percent impairment of his left lower extremity, which the Office awarded.<sup>15</sup>

Appellant argues his rating should also incorporate for pain and inability to perform activities of daily living. Impairment ratings in the body organ system chapters of the A.M.A., *Guides* already make allowance for any accompanying pain.<sup>16</sup> These ratings reflect not only the severity of the medical condition but the degree to which the impairment decreases an individual's ability to perform common activities of daily living.<sup>17</sup> Appellant argues that his rating should include muscle weakness, atrophy and loss of motion. The Cross-Usage Chart at Table 17-2 on page 526 of the A.M.A., *Guides* prohibits combining the rating for arthritis with any of these.

Three degrees valgus alignment and 130 degrees active range of knee motion represent no impairment under Table 17-10, page 537. Dr. Abbott found no peripheral nerve injury. Manual muscle testing was 5/5. Thigh circumference was greater on the left. So other applicable anatomic and functional methods of assessment yield no more favorable result.

The Board will affirm the Office's December 17, 2007 and January 16, 2008 decisions finding no more than a seven percent impairment of appellant's left lower extremity due to loss of cartilage interval in the medial compartment of the knee. Rating the left lower extremity under Table 17-31, page 544 of the A.M.A., *Guides* is the most specific method of evaluating impairment due to osteoarthritis and the x-rays of record do not establish more than a seven percent impairment.

Appellant injured his right knee several times and underwent several surgeries. Following his January 20, 2002 injury, he underwent a medial and lateral partial meniscectomy. Appellant had a second medial partial meniscectomy after his September 22, 2002 injury. After his May 28, 2005 injury, he underwent another medial and lateral partial meniscectomy.

The most specific method of assessing impairment due to meniscectomy is found in Chapter 17.2j of the A.M.A., *Guides*. Table 17-33, page 546, indicates that, when both a medial and lateral meniscectomy are present, as in appellant's case, the lower extremity impairment is 10 percent, which the Office awarded. Appellant is not entitled to a higher rating because he underwent several meniscectomies and came away with less cartilage each time. Only a total meniscectomy would give him a higher rating under the A.M.A., *Guides*.

Appellant's diagnosis-based estimate for meniscectomy may not be combined with loss due to range of motion, muscle strength or atrophy.<sup>18</sup> It may be combined with an estimate for

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<sup>15</sup> Six millimeters lateral joint space represents no impairment.

<sup>16</sup> A.M.A., *Guides* 20. Dr. Abbott did not report that appellant's pain was excessive in the context of his objectively verifiable medical condition, that appellant had a well-established pain syndrome without significant, identifiable organ dysfunction to explain the pain (such as reflex sympathetic dystrophy), or that appellant had other associated pain syndromes (such as peripheral neuropathy or causalgia). *See id.* at 570.

<sup>17</sup> *Id.* at 4.

<sup>18</sup> *Id.* at 526, Table 17-2.

arthritis, but x-rays showed five millimeters medial and seven millimeters lateral joint space, which reflect no impairment under Table 17-31, page 544. Other applicable anatomic and functional methods of assessment do not give appellant a more favorable result. Six degrees valgus alignment and 130 degrees active range of motion in the knee represent no impairment under Table 17-10, page 537. As noted, Dr. Abbott found appellant's strength to be 5/5 in all groups. There was no peripheral nerve injury. There was a one-centimeter difference in thigh atrophy on the right. This is the smallest ratable impairment possible and represents a three percent impairment of the lower extremity under Table 17-6, page 530 of the A.M.A., *Guides*. But this is not greater than the rating for meniscectomies and may not be combined with it.

The Board will affirm the Office's December 17, 2007 decision finding no more than a 10 percent impairment of appellant's right lower extremity due to medial and lateral partial meniscectomies. Rating the right lower extremity under Table 17-33, page 546 of the A.M.A., *Guides* is the most specific method of evaluating impairment due to meniscectomies and gives appellant the most favorable schedule award.

### **LEGAL PRECEDENT -- ISSUE 2**

When an overpayment of compensation has been made 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.<sup>19</sup>

The Office may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment.<sup>20</sup> If the Office finds that the recipient of an overpayment was not at fault, repayment will still be required unless (1) adjustment or recovery of the overpayment would defeat the purpose of the Federal Employees' Compensation Act or (2) adjustment or recovery of the overpayment would be against equity and good conscience.<sup>21</sup>

### **ANALYSIS -- ISSUE 2**

An overpayment occurred when the Office twice gave appellant a schedule award for the same impairment. Following his September 22, 2002 employment injury, the Office issued a schedule award for a 10 percent impairment of the right lower extremity due to medial and lateral

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<sup>19</sup> 5 U.S.C. § 8129(a).

<sup>20</sup> 20 C.F.R. § 10.433(a) (1999).

<sup>21</sup> *Id.* at § 10.434. Recovery of an overpayment will defeat the purpose of the Act if such recovery would cause hardship to a currently or formerly entitled beneficiary because: (a) the beneficiary from whom the Office seeks recovery needs substantially all of his or her current income (including compensation benefits) to meet current ordinary and necessary living expenses; and (b) the beneficiary's assets do not exceed a specified amount as determined by the Office from data furnished by the Bureau of Labor Statistics. A higher amount is specified for a beneficiary with one or more dependents. *Id.* at § 10.436. Recovery of an overpayment is considered to be against equity and good conscience when any individual who received an overpayment would experience severe financial hardship in attempting to repay the debt. *Id.* at § 10.437(a). Recovery of an overpayment is also considered to be against equity and good conscience when any individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse. *Id.* at § 10.437(b).

partial meniscectomies. It then erroneously issued the same award for the same impairment after appellant's May 28, 2005 employment injury. That schedule award constituted a double payment.

Appellant was without fault in the creation of the overpayment and is therefore eligible for waiver. The hearing representative found, however, that appellant had an estimated \$752.00 in excess monthly income. The hearing representative accepted appellant's estimate of \$6,900.00 monthly income, but properly converted the biweekly income he reported at the oral hearing comes to \$7,652.67 in monthly income.<sup>22</sup> Even if one were to accept without documentation every expense appellant claimed on his overpayment recovery questionnaire, at the oral hearing and in his subsequent correspondence, appellant has over \$1,300.00 in excess monthly income.<sup>23</sup> Therefore, he does not need substantially all of his current income to meet current ordinary and necessary living expenses.<sup>24</sup>

Further, the evidence does not establish that appellant gave up a valuable right or changed his position for the worse in reliance on the February 22, 2006 schedule award. Appellant stated that he applied the schedule award to his home mortgage, but converting the funds into home equity and reducing his mortgage debt does not establish that he detrimentally relied on the schedule award by relinquishing a valuable right that cannot be regained or by making a decision that resulted in a loss.

Recovery of the overpayment will not defeat the purpose of the Act because appellant does not need substantially all of his current income to meet current ordinary and necessary living expenses. Recovery will not be against equity and good conscience because the evidence does not establish detrimental reliance. Repayment of the debt is therefore required by law. The Board will affirm the hearing representative's February 19, 2008 decision denying waiver.

The Board's jurisdiction to review the collection of an overpayment is limited to cases of adjustment, where the Office decreases later payments of compensation to which the individual is entitled.<sup>25</sup> Because appellant was due a schedule award for his left lower extremity, the Board finds that the Office properly applied that schedule award compensation to reduce the amount of the overpayment to \$12,105.07.<sup>26</sup> Because the Office must recover the balance of the overpayment by means other than a decrease in later payments of compensation -- appellant was

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<sup>22</sup> Multiplying the biweekly figure by two, as appellant did, shortchanges the yearly income by four full weeks, or about \$7,064.00.

<sup>23</sup> Using appellant's original figure of \$800.00 miscellaneous plus \$48.00 for propane tank expense, total expenses equal \$6,348.00.

<sup>24</sup> Appellant's resource base also greatly exceeds that required to demonstrate hardship in repaying the debt. See *Eloise K. Hahn*, Docket No 01-1199 (issued June 25, 2002) (the employee's contribution to the Thrift Savings Plan, and the contribution's earnings, are considered assets for purposes of determining waiver).

<sup>25</sup> *Levon H. Knight*, 40 ECAB 658 (1989).

<sup>26</sup> Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Debt Liquidation*, Chapter 6.0300.8(b) (May 2004).

employed and not receiving ongoing compensation for wage loss -- the Board lacks jurisdiction to review the repayment schedule of \$500.00 a month.

**CONCLUSION**

The Board finds that appellant has no more than a 10 percent impairment of his right lower extremity and no more than a seven percent impairment of his left. The Board finds that the Office properly denied waiver of the overpayment resulting from the duplicate schedule award. The Board further finds that the Office properly reduced the overpayment by applying the schedule award payable for appellant's left lower extremity.

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 19 and January 16, 2008 and December 17, 2007 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: October 2, 2008  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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