

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES TACKETT and DEPARTMENT OF THE ARMY,
CORPUS CHRISTI ARMY DEPOT, Corpus Christi, TX

*Docket No. 02-1200; Submitted on the Record;
Issued June 12, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that an overpayment in the amount of \$84,218.94 was created; and (2) whether the Office abused its discretion by denying waiver of the overpayment.

Appellant, then a 51-year-old tool and die maker, sustained bilateral knee injuries on June 13, 1986 while employed with the Department of the Army. The case was accepted for right/left dislocation of knees, right total knee replacement, left knee arthroscopy and left arthrodesis of knee. Appellant received appropriate compensation and benefits and returned to work on October 4, 1998.

As a result of his accepted work-related injury, appellant received several schedule awards.

By decision dated October 27, 1987, the Office granted appellant a schedule award for a 26 percent permanent impairment of the right lower extremity for the period June 2, 1987 to November 7, 1988.

By decision dated January 9, 1996, the Office granted appellant a schedule award for an additional 24 percent permanent impairment of the right lower extremity (50 percent total) and for a 20 percent impairment to the left lower extremity for the period August 17, 1995 to January 20, 1998.

On April 29, 1999 appellant's case record was forwarded to an Office medical adviser who determined, in a report dated April 29, 1999, that appellant's date of maximum medical improvement was October 22, 1998 and that appellant sustained a 50 percent permanent impairment of the right lower extremity and a 50 percent permanent impairment of the left lower extremity.

By decision dated June 15, 1999, the Office granted appellant a schedule award for a 24 percent permanent impairment of the right lower extremity (74 percent total) and for a 30 percent impairment to the left lower extremity (50 percent total) covering the period of October 22, 1998 to October 14, 2001.¹

In an April 20, 2001 memorandum, the Office noted that it appeared that appellant had previously received awards for a 50 percent impairment to the right lower extremity and had received an overpayment of 24 percent to the right lower extremity with the June 15, 1999 schedule award.

In a letter dated May 9, 2001, the Office advised appellant that it had made a preliminary determination that an overpayment of compensation had occurred in the amount of \$84,218.94. The Office advised appellant that an overpayment occurred because appellant had previously received schedule awards for a 50 percent impairment to the right lower extremity. The Office further advised appellant that he was not without fault in the creation of the overpayment. The Office also advised appellant that he had the right to submit within 30 days, any additional evidence or arguments if he disagreed that the overpayment occurred, if he disagreed with the amount of the overpayment and if he believed that recovery of the overpayment should be waived. Additionally, the Office advised appellant that he could request a preresumption hearing before an Office hearing representative.

On May 29, 2001 appellant requested a telephone conference.

Appellant completed an Office overpayment recovery questionnaire on May 29, 2001 indicating that his total monthly income was \$2,561.25 and that his total monthly expenses were \$3,010.00. In response to the questions on assets, appellant indicated that he had no cash on hand, a checking account balance of \$125.00, a savings account balance of \$4,000.00, stock worth \$959.00 and no personal property.

A telephone conference was held on June 27, 2001 and appellant provided additional information, including financial documentation.

In a July 18, 2001 memorandum, the Office determined appellant was without fault in the creation of the overpayment and modified the prior fault finding to without fault.

By decision dated July 19, 2001, the Office found that appellant received an \$84,218.94 overpayment of compensation, for which he was without fault in creating. The Office found that waiver of the overpayment in the amount of \$84,218.94 was not warranted, as appellant had \$5,084.00 in assets. The Office also found that appellant's income exceeded expenses by more than \$50.00.

The Board finds that appellant received an overpayment of compensation by payment of a schedule award for 24 percent in excess of the 50 percent impairment supported by the medical evidence pertaining to his right lower extremity.

¹ The award indicated right upper extremity and left upper extremity, however, this appears to be a typographical error.

The record indicates that appellant originally received a schedule award dated October 27, 1987 for a 26 percent permanent impairment of the right leg. The Office paid another schedule award on January 9, 1996 for an additional 24 percent impairment to the right leg, for a total of 50 percent impairment of the right lower extremity. In an April 29, 1999 report, the Office medical adviser indicated that appellant was at maximum medical improvement as of October 22, 1998 and had a total of 50 percent permanent impairment to each of the lower extremities. Appellant subsequently received a third schedule award on June 15, 1999 for an additional 24 percent to the right lower extremity (74 percent total) and 30 percent for the left leg. On April 20, 2001 the Office determined that the additional award of 24 percent to the right lower extremity on June 15, 1999 caused appellant to receive a payment in excess of a 50 percent impairment as estimated by the Office medical adviser. As a result of this overpayment, the Office calculated that an overpayment was created in the amount of \$84,218.94. The Board finds that appellant should not have received the June 15, 1999 payment for 24 percent additional impairment to the right lower extremity as his total impairment of the right lower extremity was 50 percent, for which he had been previously compensated. This June 15, 1999 payment caused him to receive an overpayment of compensation. Appellant does not dispute that he received the payment; however, he disputes the amount of the overpayment.

The Board finds that the case is not in posture for a decision with regard to the amount of the overpayment of compensation.

Appellant indicated that he did not realize that he was not entitled to the June 15, 1999 payment of an additional impairment of 24 percent to the right lower extremity as he had received several prior schedule awards. He noted his injury worsened and, therefore, did not realize an erroneous award had been made. The Office agreed and found that he was without fault in the creation of the overpayment. Appellant also questioned how the overpayment was calculated and indicated that he was entitled to the additional award (30 percent) for his left lower extremity. He indicated the \$84,218.94 amount was incorrect, as the overpayment was the total amount of the schedule award that he had received.

The Board finds that it is unclear how the Office determined that an overpayment of 24 percent to the right lower extremity would total an overpayment in the amount of \$84,218.94. The record reflects that the initial award of 26 percent to the right lower extremity in 1987 equated to \$29,436.83. The Office did not explain how it determined that the erroneous award of 24 percent to the same lower extremity would equate to \$84,218.94. The record also reflects that, although appellant received an erroneous award to the right lower extremity on June 15, 1999, he was still entitled to a portion of the award for 30 percent to the left lower extremity. The record does not contain any calculation addressing the percentage of the award appellant was entitled to receive and clearly setting forth that portion to which he was not entitled. In *Sandra K. Neil*,² the Board noted that, when seeking to recover an overpayment, the Office should provide a clear statement showing how the overpayment was calculated. The current overpayment amount of \$84,218.94 appears to include portions of the schedule award for the left extremity impairment to which appellant is entitled to benefits. As the calculation appears to be in error and is unclear as to how the Office determined the overpayment amount of

² 40 ECAB 924 (1989).

\$84,218.94, the case will be remanded to recalculate the amount of the overpayment of compensation.³

The July 19, 2001 decision of the Office of Workers' Compensation Programs is hereby affirmed insofar as it determined the fact of overpayment. It is remanded for a redetermination of the amount of the overpayment and to determine his eligibility for waiver and recovery.

Dated, Washington, DC
June 12, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

³ As the amount is not in posture, the Office will have to reevaluate waiver and recovery, in order to preserve appellant's right to appeal.