

**United States Department of Labor
Employee's Compensation Appeals Board**

WILLIE C. HOWARD, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
TRENTON, NJ, Employer**

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**Docket Nos. 04-342 & 04-464
Issued: May 27, 2004**

Appearances:
Jeffrey Zeelander, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On November 24, 2003 appellant filed a timely appeal of a November 6, 2003 decision of the Office of Worker's Compensation Programs which found that he had a 13 percent impairment of the left lower extremity for which he received a schedule award. On December 15, 2003 he appealed from a December 4, 2003 Office decision, which found an overpayment of compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award and the overpayment decisions.

ISSUES

The issues on appeal are: (1) whether appellant has more than a 13 percent impairment of the left lower extremity for which he received a schedule award; (2) whether the Office properly determined that appellant received an overpayment of \$13,104.00 for the period of June 11 through November 19, 2001; and (3) whether the Office properly denied waiver of recovery of the overpayment.

FACTUAL HISTORY

This is the second appeal in this case. In a July 18, 2003 decision, the Board set aside Office decisions dated February 20, 2003 and April 16, 2002 and remanded the case for further development. The Board found that the Office improperly calculated appellant's schedule award based on the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* instead of the fifth edition of A.M.A., *Guides*, which became effective February 1, 2001. The Board also found that appellant submitted medical evidence from Dr. James H. Acker dated January 8, 2002, which was not considered by the Office. The law and facts of the Board's prior decision are incorporated herein by reference.¹

Prior to the Board's decision, the Office found that there was a conflict of medical opinion between Dr. David Weiss, appellant's treating Board-certified orthopedic surgeon and an Office medical adviser. Dr. Weiss concluded that, pursuant to the fourth edition of the A.M.A., *Guides*, appellant had a 34 percent impairment of his left lower extremity due to weakness, pain and crepitus. The Office medical adviser concluded that, appellant had no more than a two percent impairment of his left lower extremity. Thereafter, appellant was referred to an impartial medical specialist to resolve the conflict. In a report dated June 11, 2001, Dr. Robert Dennis the impartial medical specialist and a Board-certified orthopedics surgeon, determined that appellant sustained an eight percent impairment of the left lower extremity. In a July 20, 2001 Office decision, the Office granted a schedule award for eight percent impairment of the left lower extremity. This award was later determined to be in error, as appellant had already received a schedule award for a 13 percent impairment of his left lower extremity, which was greater than the degree of impairment found by the impartial medical specialist.

On April 22, 2002 the Office issued a preliminary overpayment determination, finding that appellant was erroneously paid an additional eight percent impairment for the period of June 11 to November 19, 2001, in the amount of \$13,104.00. The Office determined that appellant was not at fault in the overpayment. The Office advised him that he had the right to submit, within 30 days, evidence or arguments regarding the overpayment and his eligibility for waiver of the overpayment and provided appellant with an overpayment questionnaire to submit. On April 25, 2002 appellant, through his attorney, requested preresumption oral hearing with regard to the overpayment. He contended that the matter was not in posture for review as the underlying determination that there was an overpayment was based on the schedule award, which was the subject of an appeal to the Board.

In a memorandum dated October 24, 2003, the Office referred Dr. Dennis's reports of June 11, 2001 and March 24, 2002, the case record and a January 8, 2002 surgical report from Dr. Acker to the Office's medical adviser for evaluation of the impairment of appellant's left lower extremity in accordance with the fifth edition of the A.M.A., *Guides*. Dr. Acker's operative report dated January 28, 2002, indicated that he performed a left knee arthroscopy with chondral debridement, medial femoral condyle and excision of the medial infrapatellar plica. He diagnosed left knee chondromalacia, medial femoral condyle trochlear groove and medial patella plica.

¹ Docket No. 03-911 (issued July 18, 2003).

On October 24, 2003 the Office medical adviser determined that the date of maximum medical improvement was March 15, 2001. He advised that appellant sustained a six percent impairment of the left lower extremity.² The Office medical adviser noted quadriceps muscle atrophy equaling 1 centimeter loss for a 3 percent impairment rating,³ gastrocnemius muscle atrophy of 1 centimeter for a 3 percent impairment rating and range of motion on flexion of 130 degrees totaling 0 percent impairment,⁴ for a combined total of 6 percent impairment of the left lower extremity. The medical adviser indicated that Dr. Dennis used the fourth edition of the A.M.A. *Guides* in his March 24, 2002 report, whereas he properly utilized the fifth edition of the A.M.A. *Guides* and that the findings under both editions of the A.M.A. *Guides* were the same. He concluded that appellant sustained a six percent impairment of the left lower extremity.

In a decision dated November 6, 2003, the Office denied appellant's claim for an additional schedule award, finding that the medical evidence did not establish more than a 13 percent impairment of the left lower extremity for which he had previously received a schedule award.

On December 4, 2003 the Office finalized the overpayment determination, finding that appellant was overpaid compensation benefits in the amount of \$13,104.00, for which he was without fault. The Office noted that on August 1, 1996 appellant was awarded a schedule award for a 13 percent impairment of the left lower extremity. Subsequently, on July 1, 2001 the Office erroneously issued a schedule award which granted appellant an additional 8 percent impairment of the left lower extremity. As he had already received an award for a 13 percent impairment which was greater than the degree of impairment found by the impartial medical specialist, he was not entitled to the additional 8 percent. The Office noted that the period of the overpayment was from June 11 through November 19, 2001.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act⁵ and its implementing regulation⁶ set forth the number of weeks of compensation payable to employees sustaining impairment from loss or loss of use, of scheduled members or functions of the body. However, the Act does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.

² Compare Table 37, fourth edition at 77 with Table 17-6, fifth edition at 530.

³ *Id.*

⁴ Compare Table 41, fourth edition at 78 with Table 17-10, fifth edition at 537.

⁵ 5 U.S.C. § 8107.

⁶ 20 C.F.R. § 10.404 (2003).

ANALYSIS -- ISSUE 1

The Office accepted appellant's claim for left knee strain and left medial meniscus tear and authorized arthroscopic surgery performed on September 29, 1994, June 10, 1997 and January 8, 2002. The Office reviewed the medical evidence and determined that a conflict existed in the medical evidence between appellant's attending physician, Dr. Weiss and an Office medical adviser, concerning the impairment rating of the left lower extremity. The Office referred appellant to Dr. Dennis to resolve the conflict.

Where there exists a conflict of medical opinion and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, is entitled to special weight.⁷

The Board finds that the opinion of Dr. Dennis is sufficiently well rationalized and based upon a proper factual background such that it is entitled to special weight and establishes that appellant has no more than 13 percent impairment of the left lower extremity.

In his report of March 24, 2002, Dr. Dennis reviewed appellant's history and reported that he sustained quadriceps muscle atrophy equaling 1 centimeter loss for a 3 percent impairment rating,⁸ gastrocnemius muscle atrophy of 1 centimeter for a 3 percent impairment rating and range of motion on flexion of 130 degrees totaling a 0 percent impairment,⁹ for a combined total of 6 percent impairment of the left lower extremity. Dr. Dennis found that, based on the fourth edition of the A.M.A., *Guides*, he had a six percent impairment rating for lower left extremity.

The Office medical adviser properly utilized the findings of Dr. Dennis and correlated them to the provisions of the fifth edition of the A.M.A., *Guides*. The medical adviser noted that appellant sustained a six percent impairment of the lower extremities based on quadriceps muscle atrophy equaling 1 centimeter loss for a 3 percent impairment rating;¹⁰ and gastrocnemius muscle atrophy of 1 centimeter for a 3 percent impairment rating; and range of motion on flexion of 130 degrees totaling a 0 percent impairment,¹¹ for a combined total impairment of 6 percent impairment of the left lower extremity. The A.M.A., *Guides*, Table 17-2, provides that, if the evaluator uses the loss of muscle atrophy, muscle strength, range of motion or ankylosis loss analysis, then the evaluator cannot also use the arthritis analysis, the gait derangement analysis or the diagnostic-based estimates.¹² The Board notes that Dr. Acker's operative report appears to

⁷ *Gloria J. Godfrey*, 52 ECAB 486 (2001).

⁸ *Supra* note 2.

⁹ *Supra* note 4.

¹⁰ *Supra* note 2.

¹¹ *Supra* note 4.

¹² *See* A.M.A., *Guides* (fifth ed.), Table 17-2 at 526.

provide diagnostic-based information. The Board finds that the medical adviser properly correlated the findings of Dr. Dennis to the fifth edition of the A.M.A., *Guides*. Upon review of both the fourth and fifth editions of the A.M.A., *Guides*, the Board notes that there is no difference in the impairment rating in appellant's case.¹³

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Act provides as follows:

“Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and, when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience.”¹⁴ No waiver of an overpayment is possible if the claimant is at fault in creating the overpayment.”¹⁵

Section 10.432¹⁶ of the Regulations provides in pertinent part:

“The individual may present this evidence to [the Office] in writing or at a prerecoupment hearing. The evidence must be presented or the hearing requested within 30 days of the date of the written notice of overpayment. Failure to request the hearing within this 30-day time period shall constitute a waiver of that right.”¹⁷

ANALYSIS -- ISSUE 2

The Board finds that this case is not in posture for decision with respect to the overpayment of compensation, as the Office improperly issued the December 4, 2003 overpayment decision without properly addressing appellant's request for a prerecoupment hearing, which was timely filed on April 25, 2002, within 30 days of the April 22, 2002 preliminary overpayment notice.

The Office afforded appellant 30 days in which to request a telephone conference, prerecoupment hearing or a decision on the written record. Appellant, through his attorney, requested an oral hearing on April 25, 2002, well within the allowed 30-day period. Thus, his request for a prerecoupment hearing was timely. The Office improperly ignored this request and, therefore, the December 4, 2003 decision was premature. The case will be remanded for the Office to respond to appellant's request for a prerecoupment hearing regarding the overpayment of compensation.

¹³ *Supra* note 2 and 4 and 12.

¹⁴ 5 U.S.C. § 8129(b).

¹⁵ *Gregg B. Manston*, 45 ECAB 344 (1994).

¹⁶ 20 C.F.R. § 10.432.

¹⁷ *Id.*

CONCLUSION

The Board finds that the Office properly determined that appellant had no more than a 13 percent impairment of the left lower extremity for which he received a schedule award. The Board further finds that, with respect to the overpayment of compensation, the case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the November 6, 2003 decision of the Office of Workers' Compensation Programs is affirmed and that the December 4, 2003 decision of the Office is hereby set aside and the case is remanded for further proceedings consistent with this opinion.¹⁸

Issued: May 27, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

¹⁸ In view of the Board's disposition of the case with respect to the overpayment finding, the issue of fact, amount and waiver of overpayment is rendered moot.