

approved surgery. Appellant underwent a partial lateral meniscectomy on March 29, 1993. The Office determined that she had a two percent permanent impairment of her right lower extremity.¹

On November 29, 1996 appellant filed a claim alleging that she injured her right ankle in the performance of duty. The Office accepted this claim for degenerative joint disease of the posterior subtalar joint in her right ankle. On March 29, 1999 the Office issued a schedule award for a 21 percent permanent impairment of appellant's right foot.²

On June 6, 2002 an orthopedist reported that appellant's right knee had progressively deteriorated. He diagnosed lateral compartment osteoarthritis, status post meniscectomy. The Office accepted a recurrence of disability and approved surgery. On March 25, 2004 Dr. Robert A. DiUlio, an orthopedic surgeon, performed an arthroscopy of the right knee with resection of a degenerative tear of the lateral meniscus. On May 12, 2004 he reported that appellant was totally disabled from March 25 through May 8, 2004 and could return to limited duty with permanent restrictions on May 10, 2004.

On July 5, 2004 an Office medical adviser reviewed appellant's chart and determined that she had a 25 percent permanent impairment of her right lower extremity due to a one millimeter cartilage interval in her right knee. He advised: "This represents 25 percent additional right lower extremity permanent partial impairment and does not include impairment related to her right ankle."

On March 31, 2005 the Office issued a schedule award for an additional four percent permanent impairment of the right lower extremity, or 11.52 weeks of compensation, payable from May 9 to July 28, 2004.³ The Office explained: "You previously had been awarded 23 percent of your right lower extremity due to your injury, you are due an additional 4 percent, therefore, you are awarded 27 percent permanent partial impairment of your right lower extremity."

The Office made an initial schedule award payment of \$16,392.25 on December 17, 2004 and a second payment of \$2,261.00 on December 25, 2004.

¹ OWCP File No. 100408253. See American Medical Association, *Guides to the Evaluation of Permanent Impairment* 85 (4th ed. 1993) (Table 64). On appeal, appellant argues that she did not, in fact, receive a schedule award for this impairment. Although the record contains no formal schedule award decision, it shows that the Office paid appellant \$2,364.31 by check dated January 31, 1997. This represented 5.76 weeks of schedule compensation from July 1 to August 10, 1993.

² OWCP File No. 100462337. An Office medical consultant reported that this percentage was validly supported by both a diagnosis-based estimate for intraarticular fracture of the subtalar bone (A.M.A., *Guides* 86 (4th ed. 1993) (Table 64)) and by an arthritis impairment for a one millimeter cartilage interval at the subtalar joint (A.M.A., *Guides* 83 (4th ed. 1993) (Table 62)).

³ Total loss of a lower extremity entitles a claimant to 288 weeks of compensation. 5 U.S.C. § 8107(c)(2). Compensation for partial loss of use is proportionate. Section 8107(c)(19). Four percent of 288 weeks of compensation is 11.52 weeks of compensation. The Office began the period of the schedule award after total disability ended on May 8, 2004 and appellant was cleared to return to limited duty.

On April 1, 2005 the Office made a preliminary determination that appellant received a \$12,243.14 overpayment of compensation because she was entitled to \$6,410.11 for an additional four percent impairment of the right lower extremity, but the Office erroneously paid \$18,653.25. The Office found that she was without fault in creating the overpayment.

Appellant requested waiver. She completed an overpayment recovery questionnaire and submitted financial documentation on income and expenses. Appellant stated that she did not cash the second check she received for \$2,261.00, as she did not know what it was for. She indicated that she was enclosing the check with her letter dated April 27, 2005.

In a decision dated August 15, 2005, the Office finalized its preliminary determination that appellant received a \$12,243.14 overpayment. After explaining how the overpayment occurred, the Office stated as follows:

“After carefully studying your case and fully considering any additional evidence or arguments submitted, we have decided not to waive the overpayment. The reasons for this decision are explained in the above letter.”⁴

The Office requested that appellant send a check in the amount of \$12,243.14 each month until the overpayment was repaid.

LEGAL PRECEDENT -- ISSUE 1

Section 8107 of the Federal Employees' Compensation Act authorizes the payment of schedule awards for the loss or loss of use of specified members or functions of the body.⁵ 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*.⁶

It is well established that preexisting impairments to the scheduled member are to be included when determining entitlement to a schedule award.⁷ Office procedures state that any previous impairment to the member under consideration is included in calculating the percentage of loss except when the prior impairment is due to a previous work-related injury, in which case the percentage already paid is subtracted from the total percentage of impairment.⁸

⁴ No such reasons appear in the Office's August 15, 2005 decision.

⁵ 5 U.S.C. § 8107.

⁶ 20 C.F.R. § 10.404 (1999).

⁷ *Michael C. Milner*, 53 ECAB 446, 450 (2002); *Raymond E. Gwynn*, 35 ECAB 247 (1983)

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.7.a(2) (November 1998).

ANALYSIS -- ISSUE 1

The Office incorrectly determined the percentage previously awarded for permanent impairment of appellant's right lower extremity. In its March 31, 2005 decision, the Office stated: "You previously had been awarded 23 percent of your right lower extremity due to your injury." This number is simply the sum of the previous awards: two percent for appellant's partial lateral meniscectomy, and 21 percent for the degenerative joint disease of the posterior subtalar joint in her right ankle.

The first award was for impairment of the right lower extremity, while the second award was for impairment of the right foot. The regional foot impairment must be converted to a lower extremity impairment before percentages may be combined.⁹ According to Table 62, page 83, of the A.M.A., *Guides* (4th ed. 1993), a 21 percent impairment of the foot due to a one millimeter cartilage interval at the subtalar joint is a 15 percent impairment of the lower extremity.¹⁰ Using the Combined Values Chart, this 15 percent impairment of the lower extremity combines with a two percent impairment of the lower extremity for a total preexisting impairment of 17 percent.¹¹ This is the actual percentage previously awarded for the permanent impairment of appellant's right lower extremity.

The Office incorrectly excluded the preexisting foot impairment when it calculated appellant's total current percentage of loss.

In his July 5, 2004 report, the Office medical adviser correctly observed that a one millimeter cartilage interval in appellant's right knee represents a 25 percent impairment of her right lower extremity,¹² and he cautioned that this additional impairment "does not include impairment related to her right ankle." Because any previous impairment to the member under consideration is included in calculating the percentage of loss -- in this case appellant had 2 preexisting impairments of her right lower extremity -- the Office should have combined the 25 percent additional impairment with the 17 percent previously awarded. Again using the Combined Values Chart, these impairments combine for a 38 percent total current impairment of the right lower extremity.¹³

Because appellant's preexisting impairment was due to work-related injuries, the Office should have subtracted the 17 percent previously awarded from the 38 percent total current

⁹ See generally A.M.A., *Guides* 528 (5th ed. 2001) (combining several impairments involving different parts of the same lower extremity).

¹⁰ See also *id.* at 527 (to calculate the lower extremity impairment percent from a specific part impairment percent (e.g., foot), multiply by 0.7).

¹¹ A.M.A., *Guides* 322 (4th ed. 1993). If the patient has several impairments of the same lower extremity, or impairments of different parts, such as the ankle and a toe, the estimates for the impairments are combined. *Id.* at 75.

¹² A.M.A., *Guides* 544 (5th ed. 2001) (Table 17-31). Effective February 1, 2001 the Office began using the fifth edition of the A.M.A., *Guides*.

¹³ *Id.* at 604.

impairment. Properly followed, this procedure establishes that appellant is entitled to a schedule award for a 21 percent additional impairment of her right lower extremity.¹⁴

The Board will set aside the Office's March 31, 2005 decision, which awarded compensation for an additional lower extremity impairment of only four percent. The Board will remand the case to the Office for a schedule award reflecting that appellant has a 21 percent additional impairment of her right lower extremity, entitling her to 60.48 weeks of compensation.¹⁵

LEGAL PRECEDENT -- ISSUE 2

If there is permanent disability involving the loss, or loss of use, of a member or function of the body or involving disfigurement, the employee is entitled to basic compensation for the disability, as provided by the schedule in section 8107(c) of the Act, at the rate of two-thirds of her monthly pay.¹⁶

ANALYSIS -- ISSUE 2

Appellant received no overpayment of compensation. The Office made an initial schedule award payment of \$16,392.25 on December 17, 2004 and a second payment of \$2,261.00 on December 25, 2004, for a total of \$18,653.25. At a weekly pay rate of \$834.65, appellant's entitlement for the 21 percent additional impairment of her right lower extremity amounts to \$33,653.09 (two-thirds of \$834.65 times 60.48 weeks of compensation). Accordingly, there is an underpayment of \$14,999.84.¹⁷ The Board will therefore reverse the Office's August 15, 2005 overpayment decision and remand the case for appropriate payment of compensation due.

¹⁴ This is less than the 25 percent additional impairment found by the Office medical adviser for the cartilage interval in her knee, and it should be. As the A.M.A., *Guides* explains, the method for combining various impairments is based on the principle that a second impairment does not apply to the whole unit but only to the part or value that remains after the preceding impairment has been applied. *Id.* at 438.

¹⁵ Twenty-one percent of 288 weeks of compensation is 60.48 weeks of compensation. *See supra* note 3.

¹⁶ 5 U.S.C. § 8107(a); *see id.* § 8101(4) ("monthly pay" means the monthly pay at the time of injury, or the monthly pay at the time disability begins, or the monthly pay at the time compensable disability recurs, if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater); *id.* § 8114(c) (when compensation is paid on a weekly basis, the weekly equivalent of the monthly pay is deemed one-fifty-second of the average annual earnings). In this case, appellant's compensation is based on the weekly equivalent of her monthly pay at the time of the accepted recurrence of disability in June 2002, when she was earning \$43,402.00 a year as a Grade 1, Step O, letter carrier (modified).

¹⁷ If appellant voided the December 25, 2004 check for \$2,261.00, as alleged, the Office owes \$17,260.84. The Office must resolve the status of this check upon return of the case record. The Office should also take care to follow procedures for establishing the date of maximum medical improvement and for avoiding conversion of periods paid for temporary total disability. *See generally* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.7.a(1) (November 1998).

CONCLUSION

The Board finds that appellant has a 21 percent additional impairment of her right lower extremity, for which she is entitled to compensation. The Office incorrectly calculated the preexisting impairment and incorrectly excluded the foot impairment from the total current impairment of the lower extremity. The Board also finds that appellant received no overpayment. The compensation due for her additional impairment exceeds the compensation paid.

ORDER

IT IS HEREBY ORDERED THAT the August 15, 2005 overpayment decision of the Office of Workers' Compensation Programs is reversed. The Office's March 31, 2005 schedule award decision is set aside. The case is remanded for further action consistent with this opinion.

Issued: January 24, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board