United States Department of Labor
Employees' Compensation Appeals Board

D.D., Appellant	)	
and	)	**Docket No. 06-1650**
	)	**Issued: April 12, 2007**
U.S. POSTAL SERVICE, POST OFFICE, Tampa, FL, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 12, 2006 appellant filed a timely appeal of a June 28, 2006 merit decision of the Office of Workers' Compensation Programs in which an Office hearing representative affirmed the denial of wage-loss compensation and finalized an overpayment determination. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this overpayment decision.

ISSUES

The issues are: (1) whether the Office properly determined that the issue presented was whether appellant met his burden of proof to establish that he had partial disability for two hours a day during the period January 8 to March 4, 2005 due to his accepted employment injuries; (2) whether the Office properly determined that appellant received a $1,986.74 overpayment of compensation for the period July 23 to September 3, 2005; (3) whether the Office properly determined that appellant was at fault in creating the overpayment; and (4) whether the Office properly recovered the overpayment by withholding $163.00 from continuing compensation payments.

FACTUAL HISTORY

On March 1, 1999 appellant, then a 43-year-old mail processor, filed an occupational disease claim alleging that the standing and pivoting in his job caused a right knee condition. The Office accepted the claim for exacerbation of rotatory instability, joint derangement and osteoarthritis right knee with arthroscopic surgery completed November 12, 1999, arthroscopic surgery to the right knee on August 7, 2001, right total knee arthroplasty surgery on February 25, 2003 and revision right knee arthroplasty surgery on April 7, 2005. It also expanded the claim to include a consequential injury to his fractured fifth metacarpal bone left hand. Appellant returned to limited-duty work following each surgery and the Office paid appropriate compensation benefits.

By decision dated December 22, 2000, the Office issued a schedule award for a 25 percent permanent impairment of the right leg. By decision dated April 16, 2002, the Office found that appellant's actual earnings as a modified mail processor, effective October 27, 2001, fairly and reasonably represented his wage-earning capacity and that he had no loss of wage-earning capacity. Following his February 25, 2003 total right knee replacement surgery, the Office placed appellant on its periodic rolls. In an April 2, 2003 letter, the Office advised appellant of the terms and conditions of being on the periodic rolls. This included notifying the Office immediately upon return to work and returning any checks to the Office which included a portion of a period in which he worked in order to avoid an overpayment of compensation.

Appellant returned to work on May 31, 2003 and continued to work in a limited-duty capacity. In a September 26, 2003 decision, the Office found that appellant received an overpayment in the amount of $1,438.93 for the period May 31 to June 14, 2003 as he received compensation for wage loss after he returned to work.[1]

Medical evidence from appellant's treating physician, Dr. Bernard D. Fishalow, a Board-certified orthopedic surgeon, indicated that appellant's right knee condition was worsening and that he should work daytime hours due to his knee condition. On November 9, 2004 the employing establishment offered appellant limited duty casing mail in a sit down position from 6:00 a.m. to 2:50 p.m. Following a period of partial disability,[2] Dr. Fishalow stated, in a December 27, 2004 return to work slip, appellant could return to light-duty work on December 28, 2004. He advised that, due to appellant's knee condition, he needed to stay on the day shift to avoid "driving conditions/heavy traffic." On December 28, 2004 the employing establishment offered appellant limited duty for sedentary work casing mail with hours of work from 3:30 a.m. to 12:00 p.m.

On January 5, 2005 appellant indicated that the work hours offered were outside the work hours of 6:00 a.m. to 12:30 p.m. set by Dr. Fishalow. He indicated that he would work only the

[1] The Office eventually wrote this debt off as uncollectible as appellant had declared bankruptcy.

[2] Appellant filed a Form CA-7 claim for compensation for 32 hours of leave without pay for the period November 29 to December 1, 2004. By decision dated February 15, 2005, the Office paid appellant 4 hours of pay each day for a total of 12 hours of leave without pay.

hours set by his physician and would file a Form CA-7 claiming compensation for the "work hours that I am not able to work due to my job-related medical restrictions."

Medical reports from Dr. Fishalow were submitted. In a December 31, 2004 report, Dr. Fishalow stated that appellant had problems with his right knee and "cannot be on it for any long periods of time." He indicated rotary instability with synovial thickening, but no effusion or swelling. In a January 28, 2005 report, Dr. Fishalow advised that appellant's right knee showed rotary instability with no frank effusion. He noted that appellant reported problems with prolonged standing, walking, squatting, kneeling, climbing and driving.

In a March 8, 2005 letter, Freda Infinger, an injury compensation specialist for the employing establishment, noted that Dr. Fishalow had previously recommended that appellant work daylight hours 6:00 a.m. to 2:30 p.m. to avoid heavy traffic and due to the rotary instability of the right knee. She argued that the modified job offered to appellant began at 3:30 a.m., which would have less traffic than at 6:00 a.m., and that Dr. Fishalow had not provided any medical rationale as to why appellant could only work between 6:00 a.m. to 2:30 p.m.

On March 9, 2005 appellant filed a Form CA-7 for wage loss commencing January 8 to March 4, 2005 claiming 2 hours per day wage-loss compensation for a total of 76 hours. Submitted were copies of his time analysis starting in January 2005 which indicated that he had worked six hours per day.[3] Also submitted was a June 17, 2004 report from Dr. Fishalow which advised that appellant needed to work 6:00 a.m. to 2:30 p.m. due to the rotary instability and swelling of the right knee.

In a March 15, 2005 report, Dr. Fishalow recommended a revision to appellant's right knee prosthesis as his right knee had progressive swelling, pain and instability. In a March 30, 2005 report, he advised that appellant would be out approximately three months following his scheduled April 7, 2005 surgery. The Office approved the revision right total knee arthropathy and paid compensation for eight hours per day wage loss for the period beginning April 7, 2005.

In a letter dated April 6, 2005, the Office advised appellant that it could not pay two hours of wage-loss compensation per day for the period January 8 to March 4, 2005 because there was no medical justification from his physician explaining why he could only work six hours a day. It also noted that appellant had been released to work eight hours a day and there appeared to be no medical rationale from his physician explaining why he could only work from 6:00 a.m. to 2:30 p.m. as opposed to working 3:30 a.m. to 12:00 p.m. The Office requested that appellant have his physician explain why he could not work beginning 3:30 a.m. Appellant was provided 30 days to provide the requested information. No medical reports were submitted.

[3] Appellant also filed CA-7 forms claiming wage-loss compensation for the period March 5 to April 8, 2005 for 50 hours and April 8 to 15, 2005 for 40 hours. As indicated in the text, the Office paid wage-loss compensation for the period beginning April 7, 2005. The record does not contain any decision pertaining to appellant's claim of wage-loss compensation for the period March 5 to April 8, 2005; thus, the Board does not have jurisdiction over this matter as it only has jurisdiction to consider and decide appeals from final Office decisions. 5 U.S.C. § 501.2(c).

By decision dated May 25, 2005, the Office denied compensation for wage loss for the period January 8 to March 4, 2005 for two hours a day on the basis that the medical documentation did not support disability during that period.

On June 20, 2005 appellant requested an oral hearing of the Office's May 25, 2005 decision. Additional reports from Dr. Fishalow noting appellant's condition following the April 7, 2005 surgery were submitted.[4]

On July 19, 2005 the employing establishment made an offer of limited duty to appellant for sedentary work with hours of 3:30 p.m. to 7:30 p.m.[5] On July 23, 2005 appellant returned to work in a four-hour, sedentary duty capacity. On August 23, 2005 he accepted the July 19, 2005 job offer.

The Office terminated compensation for eight hours per day wage loss effective September 4, 2005. Appellant received four hours of wage-loss compensation per day effective September 5, 2005.[6]

On September 8, 2005 the Office made a preliminary determination that appellant received an overpayment in the amount of $1,986.74 from July 23 to September 3, 2005 as appellant had worked limited duty four hours a day since July 23, 2005 but continued to receive total disability compensation. The Office determined that appellant was with fault in the creation of the overpayment as he knew or should have known that he was no longer entitled to compensation benefits once he returned to work on July 23, 2005 and should have returned the payments to the Office. It requested that appellant submit financial information and state whether he wanted a hearing or requested a waiver of the overpayment. The worksheets indicate that for the period July 23 to September 3, 2005 appellant received total disability compensation in the amount of $4,010.79 but should have been paid $2,024.05 for 4 hours loss of wages per day.

The record reflects that appellant stopped work September 17, 2005 and filed a claim for wage-loss compensation. Medical evidence of record included: reports and OWCP-5 forms from Dr. Fishalow, which advised that appellant could only work four hours per day sedentary work, along with medical reports from July 18, September 13, October 6, 10 and 13, November 7 and December 9, 2005, which reported on appellant's condition and advised of the medical necessity to work during daytime hours only. Also submitted were: medical reports from Dr. Marc Alan Reiskind, Board-certified in physical medicine and rehabilitation, dated January 10 through April 4, 2005; a September 12, 2005 medical report from Dr. Frances

[4] In a July 18, 2005 report, Dr. Fishalow indicated that appellant could return to sedentary work four hours a day from 6:00 a.m. to 10:00 a.m. before the leg starts swelling.

[5] In a July 19, 2005 letter, Ms. Infinger advised that because Dr. Fishalow provided no medical rationale for his requested hours, the specific hours requested were not considered a physical restriction as it was not medically justified for appellant's recovery.

[6] The record reflects that appellant received supplemental payments for wage loss covering the periods September 4 to 23, 2005 and September 24 to 30, 2005.

Sahebzamani, Ph.D., ARNP; reports from Maureen Kapatkin, ARNP, MB, dated October 6 and 20, 2005; a December 1, 2005 report from Dr. George Haidukewych, a Board-certified orthopedic surgeon; and a January 18, 2006 report from Dr. Thomas Bernasek, a Board-certified orthopedic surgeon. These reports noted appellant's right knee conditions and/or provided comments on whether it was medically preferable for appellant to work the day shift.[7]

A hearing was held on April 3, 2006. Appellant provided a history of the hours he worked at the employing establishment. With respect to his claim for two hours wage-loss compensation for the period January 8 through March 4, 2005, he stated that he worked limited-duty daytime hours from about 2003 to January 2005 and his right knee did not swell. In January 2005, appellant stated that the employing establishment only had six hours of limited duty available during daytime hours, so he worked six hours a day from about January 8 to March 4, 2005 and claimed compensation for the two hours per day wage loss. Concerning the overpayment, appellant stated that he returned to work four hours a day on July 23, 2005 to about September 14, 2005. He stated that, when he received a compensation check after he returned to work, he thought he was entitled to it as he knew he was entitled to half-time compensation. Appellant stated that he did not recall receiving a letter telling him to return any checks received after returning to work. He further stated that he did not believe that he was at fault in the creation of the overpayment as he was unaware that he received an overpayment in compensation. Appellant further stated that he would experience financial hardship if he had to repay the overpayment. The Office hearing representative provided appellant 30 days to submit medical evidence in support of his partial wage-loss compensation claim and a documented financial statement showing financial hardship.

In an April 17, 2006 statement, Pat Davis-Weeks, a union representative, argued that the medical evidence supported appellant's wage-loss claim for two hours per day compensation in early 2005 as it indicated earlier work hours were a medical necessity because appellant's edema was less early in the day. Of record were reports from Dr. Fishalow dated January 23, February 6 and April 6, 2006, noting appellant's progress.

In an April 19, 2006 financial statement, appellant indicated that his monthly income was workers' compensation of $1,632.00; and from the Department of Veterans Affairs was $2,523.00 and after June 1, 2006 would be $391.00. Accordingly, he stated that he currently received $4,155.00 monthly income but as of June 1, 2006 would receive $2,023.00 monthly income. Appellant listed his expenses as: mortgage $1,249.00; cable $54.00; Alltel $71.00; divorce payment $500.00; electric $100.00; car insurance $68.00; dentist $25.00; orthodontist $120.00; loan to CIV $207.00; food $500.00; gas $200.00; house expenses $25.00; property tax $133.00 for a total of $3,252.00. Documentation was provided for the above expenses with the exception of food, gas, house expenses and property tax. No list or documentation of assets was provided.

In a decision dated June 28, 2006, the Office hearing representative found that appellant was not entitled to partial wage-loss compensation for two hours a day for the period January 8

[7] Appellant subsequently returned to work after the Office, in an April 19, 2006 letter, denied appellant's request to change his work hours to the day.

to April 8, 2005. The Office hearing representative additionally found that appellant received an overpayment in the amount of $1,986.74 for which he was at fault in the acceptance of the overpayment. The Office hearing representative noted that, since appellant did not provide a list of assets and failed to document all his expenses, recovery of the overpayment would be set at a minimal rate of 10 percent of the current four-week compensation payment or $163.00.

LEGAL PRECEDENT -- ISSUE 1

A wage-earning capacity decision is a determination that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn wages. Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.[8]

The Office's procedure manual provides that, [i]f a formal loss of wage-earning capacity decision has been issued, the rating should be left in place unless the claimant requests resumption of compensation for total wage loss. In this instance, the claims examiner will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity.[9]

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was, in fact, erroneous.[10] The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.[11]

ANALYSIS -- ISSUE 1

The Office developed the evidence and determined that the issue presented was whether appellant had established a partial disability for two hours of work for the period January 8 to March 4, 2005. Under the circumstances of this case, however, the Board finds that the issue presented was whether the April 16, 2002 wage-earning capacity determination should be modified.

Appellant is seeking compensation for a partial disability for a total of 76 hours of work for the period January 8 to March 4, 2005 directly related to the accepted right knee conditions. At the time appellant claimed his partial disability, he was working in a permanent light-duty position casing mail and performing sedentary duties only. Thus, appellant must show a material change in the nature and extent of the injury-related condition, that he had been retrained or

[8] *See Sharon C. Clement*, 55 ECAB 552 (2004).

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment*: *Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995).

[10] *Sue A. Sedgwick*, 45 ECAB 211 (1993).

[11] *Id.*

otherwise vocationally rehabilitated, or that the original April 16, 2002 wage-earning capacity determination was, in fact, erroneous.

According to the evidence, appellant returned to work as a modified mail processor on October 27, 2001 and a loss of wage-earning capacity decision was issued on April 16, 2002. On March 9, 2005 appellant filed a Form CA-7 for 2 hours of wage loss commencing January 8 to March 4, 2005 for a total of 76 hours and submitted reports from Dr. Fishalow, which the Office advised were insufficient to support his claim for employment-related disability. It is clear that the claim in this case was that appellant's right knee condition had deteriorated such that he had difficulty working or was unable to work in his permanent light-duty position. The employing establishment had accommodated his doctor's request by offering a light-duty position involving sedentary duties casing mail from November 2004. The Board has held that, when a wage-earning capacity determination has been issued, and appellant submits evidence with respect to disability for work, the Office must evaluate the evidence to determine if modification of wage-earning capacity is warranted.[12]

As noted above, the Office procedure manual directs the claims examiner to consider the criteria for modification when the claimant requests resumption of compensation for total wage loss. This section of the procedure manual covers the situation when a claimant has stopped working, but the principle is equally applicable to a claim of increased disability. The Board finds that the Office should have considered the issue as a request for modification of the wage-earning capacity determination.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of the Federal Employees' Compensation Act[13] provides in pertinent part:

> "When an overpayment has been made to an individual under this subchapter 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."

Section 8116(a) of the Act provides that an employee who is receiving compensation for an employment injury may not receive wages for the same time period.[14]

[12] *See Sharon C. Clement*, *supra* note 8. The Board notes that consideration of the modification issue does not preclude the Office from acceptance of a limited period of employment-related disability, without a formal modification of the wage-earning capacity determination. *Id.* at n.10, slip op. at 5; *Cf. Elsie L. Price*, 54 ECAB 734 (2003) (acceptance of disability for an extended period was sufficient to establish that modification of the wage-earning capacity determination was warranted).

[13] 5 U.S.C. § 8129(a).

[14] 5 U.S.C. § 8116(a).

ANALYSIS -- ISSUE 2

The record reveals that appellant returned to work on July 23, 2005 for four hours a day five days a week in a limited-duty position. He was entitled to compensation for four hours a day. During the claimed period of compensation from July 23 to September 3, 2005, the Office determined that appellant was only entitled to $2,024.05 for four hours of disability compensation per day. However, the Office paid him $4,010.79 for total disability wage loss during that period. Because appellant worked at the employing establishment for four hours a day and received regular wages for those hours during the period July 23 to September 3, 2005, he was not entitled to total disability compensation from the Office for the same period. The record establishes that he received an overpayment of compensation in the amount of $1,986.74.

LEGAL PRECEDENT -- ISSUE 3

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 the Act or would be against equity and good conscience.[15] No waiver of an overpayment is possible if the claimant is at fault in creating the overpayment.[16]

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. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from the Office are proper. The recipient must show good faith and exercise a high degree of care in reporting events which may affect entitlement to or the amount of, benefits. A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment: (1) made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or (2) failed to provide information which he or she knew or should have known to be material; or (3) accepted a payment which he or she knew or should have known to be incorrect (this provision applies only to the overpaid individual).[17]

Whether or not the Office determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid.[18]

[15] 5 U.S.C. § 8129(b).

[16] *Gregg B. Manston*, 45 ECAB 344 (1994).

[17] 20 C.F.R. § 10.433(a); *Kenneth E. Rush*, 51 ECAB 116 (1999).

[18] 20 C.F.R. § 10.433(b).

ANALYSIS -- ISSUE 3

The Office applied the third standard in determining that appellant was at fault in creating the overpayment. In order for the Office to establish that appellant was with fault in creating the overpayment of compensation, the Office must establish that, at the time appellant received the compensation check in question, he knew or should have known that the payments were incorrect.[19] The record establishes such knowledge.

The Board notes that, where an overpayment resulted from negligence on the part of the Office, this does not excuse the employee from accepting payments he knew or should have known were incorrect.[20] Appellant returned to work for four hours a day on July 23, 2005. The Office, however, continued to pay him temporary total disability compensation during the period July 23 to September 3, 2005. The September 8, 2005 preliminary determination stated that appellant should have realized he was not entitled to compensation for the period July 23 to September 3, 2005, as he was advised by the April 2, 2003 letter that, once he returned to work, he was not entitled to any further compensation and that he should return any compensation checks received after returning to work even if he worked for part of the period for which compensation was paid. The Office additionally noted that appellant's overpayment in 2003 was sufficient to have put appellant reasonably on notice to return to the Office any compensation checks he received after a return to work. Under the circumstances of this case, the Office provided a sufficient explanation for the fault determination. Appellant returned to work four hours a day on July 23, 2005. At the April 3, 2006, hearing, appellant acknowledged that he was aware of receiving wage-loss compensation after he returned to work on July 23, 2005. Although appellant remained entitled to four hours of disability compensation, he accepted payments he knew or should have known were incorrect as he returned to work and the checks were for temporary total disability. Moreover, the record contains evidence that appellant had a previous overpayment in 2003 which was similar to the present situation. This should have put appellant on notice that he could not accept compensation after he returned to work.

The Board finds that, under the circumstances of this case, the Office properly found that appellant knew or should have known that the checks issued from July 23 to September 3, 2005 were incorrect. As appellant was not without fault under the third standard outlined above, recovery of the overpayment of compensation in the amount of $1,986.74 may not be waived.

LEGAL PRECEDENT -- ISSUE 4

Section 10.441(a) of the Office's regulations provides:

> "When an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to [the Office] the amount of the overpayment as soon as the error is discovered or his or her attention is called to same. If no refund is made [the Office] shall decrease later payments of

[19] *Lorenzo Rodriguez*, 51 ECAB 295, 298 (2000); *Robin O. Porter*, 40 ECAB 421 (1989).

[20] *See Russell E. Wageneck*, 46 ECAB 653 (1995).

compensation, taking into account the probably extent of future payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize any hardship."[21]

ANALYSIS -- ISSUE 4

With respect to the $163.00 withheld from appellant's continuing compensation payments to recoup the amount of the outstanding payment, the Office's regulations note the factors to be considered in determining repayment from continuing compensation.[22] The implementing regulations provide that the Office must take into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize any hardship.[23] In this case, the Office hearing representative noted that since appellant did not provide a list of assets and failed to document all his expenses, recovery of the overpayment would be set at a minimal rate of 10 percent of the current four-week compensation payment or $163.00.

Prior to the Office's June 28, 2006 decision, appellant submitted an April 19, 2006 financial statement in which he indicated that his monthly income comprised of compensation payments from the Office as well as the Department of Veterans Affairs. He indicated that his monthly income prior to June 1, 2006 was $4,155.00 but would decrease to $2,023.00 as of June 1, 2006. Appellant additionally stated that his monthly expenses totaled $3,252.00. Thus, the record indicates that as of June 1, 2006 his monthly expenses exceeded his monthly income by approximately $1,229.00. No list of assets were provided. There is no indication in the Office's June 28, 2006 decision that the hearing representative took this information into consideration in setting the rate of recovery at $163.00 from his continuing compensation payment. Therefore, the Board finds that the Office abused its discretion in determining the rate of recovery in this case. The case will be remanded to determine the rate of recovery after considering the evidence of record concerning appellant's financial circumstances.[24]

CONCLUSION

The Board finds that appellant's claim for compensation for the period January 8 to March 4, 2005, due to his accepted right knee condition, raised the issue of whether a modification of the April 16, 2002 wage-earning capacity decision was warranted and the case must be remanded for an appropriate decision on this issue. The Board also finds that the Office properly determined that appellant received a $1,986.74 overpayment of compensation from July 23 to September 3, 2005 for which he was at fault in creating. The Board further finds that the case is set aside with respect to the rate of recovery from continuing compensation.

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[21] 20 C.F.R. § 10.441(a).

[22] *Id. See Fred A. Cooper, Jr.*, 44 ECAB 498 (1994).

[23] *Id.*

[24] *See Stephen A. Hund*, 47 ECAB 432 (1996) (where the Board found that the Office abused its discretion in determining the rate of adjustment without considering the evidence of record including an overpayment questionnaire).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs' hearing representative dated June 28, 2006 is set aside and remanded for further action consistent with this decision of the Board with respect to appellant's claim for wage-loss entitlement during the period January 8 to March 4, 2005 and the issue of rate of recovery. The decision regarding the fact and amount of overpayment and waiver is affirmed.

Issued: April 12, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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