



accepted his claim for left ankle sprain/strain, contusion of the left shoulder, acute left shoulder sprain, acute left knee sprain and acute lumbar sprain.

Dr. David W. Miller, Sr., a Board-certified orthopedic surgeon, noted on September 1, 2005 that appellant had severe degenerative joint disease of his left knee with an acute exacerbation after his fall. He performed a total knee replacement on October 3, 2005. On the October 7, 2005 discharge summary Dr. Miller stated that the surgery was due to “long[-]standing severe degenerative joint disease of the left knee.”

In a report dated January 31, 2006, Dr. Bolling J. Feild, a Board-certified orthopedic surgeon, described appellant’s treatment following the employment injury. He noted that appellant had a prior history of surgeries on his left knee and that appellant was considering more surgery on the left knee before he sustained his additional employment injury of left knee sprain.

Dr. Miller completed a report on February 10, 2006 and stated that, prior to appellant’s injury on August 18, 2005, he had arthritis in his left knee. He noted that appellant was asymptomatic prior to his August 18, 2005 employment injury. Dr. Miller stated, “Certainly, people with arthritis in a joint can have arthritis that is asymptomatic, and some type of injury can cause this underlying problem to become symptomatic enough for them to require surgical intervention. I think that this is the case with [appellant]. I can only assume that the work injury on August 18, 2005 caused his underlying problem of left knee arthritis to become symptomatic requiring eventual knee replacement surgery.”

Appellant filed a claim for compensation on March 21, 2006 and requested leave buyback from August 18, 2005 through March 18, 2006. Dr. Miller completed a form report and indicated that appellant was totally disabled from August 18, 2005 to May 14, 2006. He attributed appellant’s disability to “left knee severe DJD [degenerative joint disease] with acute exacerbation due to his fall.”

On May 1, 2006 the Office referred the record to the district medical director to determine whether the left knee total replacement was caused or contributed to by appellant’s accepted employment injury of left knee strain. In a report dated May 11, 2006, the district medical director noted that the Office accepted appellant’s claim for a left knee strain and that appellant had preexisting nonwork-related degenerative joint disease of the left knee. He stated:

“Knee replacement surgery was performed for degenerative joint disease of the left knee, primarily in the form of osteoarthritis. The individual suffered nothing more than a sprain to the left knee which is a ligamentous injury and it in no way whatsoever contributes to any degenerative changes involving the joint. There is no documentation of any evidence that this individual’s injury of August 18, 2005 contributed to the progression or deterioration of the preexisting degenerative joint disease. The knee replacement surgery performed on October 4, 2005 is not related to the accepted condition.”

Appellant filed an additional claim for compensation for the period March 19 through May 13, 2006. The claims examiner discussed appellant’s claim with him by telephone on June 15, 2006 and informed him that she “would review and process any claims that the medical

adviser indicated supported disability as a result of the accepted work conditions.” In an additional telephone call on June 20, 2006, the claims examiner noted that appellant’s diagnosis had not been accepted. She informed him that a second opinion examination was necessary. In a letter dated June 21, 2006, the claims examiner noted that appellant had received continuation of pay from August 19 through October 2, 2005. She stated that, because appellant’s subsequent wage loss was the result of his total knee replacement, “no determination will be made on the issue, until the second opinion report has been received.” The Office referred appellant for a second opinion evaluation with Dr. Terry Whipple, a Board-certified orthopedic surgeon, on July 3, 2006.

In a letter dated July 13, 2006, the Office informed appellant that his application for “leave buyback” for the period August 18, 2005 through March 18, 2006 had been approved and that the amount of \$16,367.68 was issued to the employing establishment. The Office issued a second payment covering the period March 19 through May 13, 2006 in the amount of \$9,280.64 on July 12, 2006.

Dr. Whipple submitted a report dated July 26, 2006 and noted appellant’s history of injury as well as prior left knee injuries and treatment. He noted that appellant’s prognosis prior to his August 2005 employment injury included eventual total knee replacement which appellant had elected to defer until after his planned retirement in 2008. Dr. Whipple opined that appellant’s left knee total replacement and his disc protrusions in the lumbar spine were due to age and historical activities not his accepted employment injury. He stated, “His preexisting and end stage left knee arthritis became temporarily more symptomatic as a direct result of his fall, but neither his diagnosis, prognosis nor ultimate surgical treatment were causally related to the accident.”

By decision dated August 4, 2006, the Office found that there was no objective evidence to support that appellant’s degenerative joint disease was related to his August 18, 2005 injury. The Office found that further medical benefits and compensation for wage loss should be terminated as the medical evidence established that he had no continuing employment-related conditions or disability as a result of the August 18, 2005 employment injury. The Office terminated appellant’s compensation benefits effective August 3, 2006.

Appellant requested reconsideration of this decision on August 15, 2006. By decision dated October 10, 2006, the Office denied modification of the August 4, 2006 termination decision.<sup>1</sup>

In a letter dated August 25, 2006, the Office made a preliminary determination that appellant had received an overpayment of compensation in the amount of \$9,280.64 because he was erroneously issued a compensation check for the period March 19 through May 13, 2006 in the amount of \$9,280.64. The Office determined that appellant was at fault in the creation of the overpayment on the grounds that “he was advised verbally and in writing that he was not entitled to monetary compensation benefits.” The claims examiner referenced the June 15 and 20, 2006 telephone calls and the June 21, 2006 letter as the basis for appellant’s knowledge that he was not entitled to the \$9,280.64 payment.

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<sup>1</sup> Appellant’s attorney limited this appeal to the September 18, 2007 decision of the hearing representative.

In a letter dated August 25, 2006, the Office informed the employing establishment that appellant's leave buyback had been erroneously processed for the period August 18, 2005 through March 18, 2006 in the amount of \$16,367.68.

Appellant requested an oral hearing on September 12, 2006 and submitted an overpayment recovery questionnaire. He testified at the May 31, 2007 oral hearing contending that there was no overpayment as he was disabled due to the accepted employment injury during the period covered by the overpayment.

The Office referred appellant for an impartial medical examination with Dr. Baljit Sudhu, a Board-certified orthopedic surgeon, on May 31, 2007 to address the conflict of medical opinion regarding the causal relationship of his current left knee and back condition to his accepted employment injuries. In his June 18, 2007 report, Dr. Sudhu concluded that appellant's acute left knee sprain probably temporarily aggravated his preexisting degenerative joint disease. He opined that this sprain should have resolved within six to eight months time.

The Office issued a final overpayment decision on July 31, 2007, finding that appellant was at fault in the creation of the \$9,280.60 overpayment from March 19 through June 21, 2006. It noted that as he was verbally advised on June 15 and 20, 2006 that he was not entitled to any monetary compensation benefits until a second opinion evaluation could be obtained.

By decision dated September 18, 2007, the hearing representative set aside the July 31, 2007 overpayment decision as improperly issued. She found that the \$9,280.64 payment was made and received by appellant and, as the Office determined that this payment was not due, this amount was an overpayment. The hearing representative found that appellant was at fault in the creation of the overpayment as he was advised that he was not entitled to receive any payment until after the second opinion physician issued a report. The hearing representative found that appellant was capable of repayment in the amount of \$300.00 per month.

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

In an overpayment decision, the Board must first determine whether an overpayment occurred by examining the underlying decision of the Office.<sup>2</sup> In determining whether a claimant has discharged his or her burden of proof and is entitled to compensation benefits, the Office is required by its statute and regulations to make findings of fact. Section 8124(a) of the Federal Employees' Compensation Act provides: "The [Office] shall determine and make a finding of fact and make an award for or against payment of compensation...."<sup>3</sup> The Office's regulations require that a decision of the Office shall contain findings of fact and a statement of reasons.<sup>4</sup> Thus, a final decision must include findings of fact and a description of the basis for

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<sup>2</sup> *Russell E. Wageneck*, 46 ECAB 653, 659 (1995).

<sup>3</sup> 5 U.S.C. § 8124(a).

<sup>4</sup> 20 C.F.R. § 10.126.

the findings so that the parties of interest will have a clear understanding of the reasoning behind the decision.<sup>5</sup>

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

The Office accepted appellant's claim for sprain and strains of his left ankle, left shoulder, left knee and lumbar spine. Appellant filed claims for compensation covering the period August 18, 2005 through March 18, 2006 and from March 19 through May 13, 2006. The Office informed him on June 15 and 20, 2006 that additional development of the medical evidence through a second opinion evaluation was necessary prior to acceptance of appellant's alleged periods of disability. The Office issued payments to the employing establishment and appellant on July 13, 2006 in the amounts of \$16,367.68<sup>6</sup> and \$9,280.64, respectively. The Office then issued a termination decision on August 4, 2006 finding that appellant was not entitled to additional compensation or medical benefits on or after August 3, 2006 as he had no continuing employment-related conditions or disability due to the August 18, 2005 employment injury.

The Office made a preliminary finding of overpayment in the amount of \$9,280.64 on August 25, 2006 finding that appellant was erroneously issued a check in this amount covering the period March 19 through June 21, 2006. The Office did not offer any legal or factual basis for the determination that this check was erroneously issued and did not provide any statement of reasons for the finding that this check constituted an overpayment. The hearing representative affirmed the preliminary determination on the basis that the Office had determined that the payment was not due. The hearing representative also failed to provide any legal or factual basis for the statement that the payment was not due and that the payment therefore constituted an overpayment.<sup>7</sup> The Office has not issued a separate final decision addressing appellant's entitlement to disability for the period March 19 through June 21, 2006 nor any decision which addresses appellant's entitlement to compensation due to the August 2005 employment injury prior to the August 4, 2006 termination effective August 3, 2006. Due to the lack of a stated legal basis or statement of reasons for the determination that appellant received an overpayment in the amount of \$9,280.64 for the period March 19 through June 21, 2006, the Office has failed to meet its burden of proof in determining that appellant received such an overpayment.

### **CONCLUSION**

The Board finds that the Office has failed to meet its burden of proof in establishing that appellant received an overpayment of compensation.

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<sup>5</sup> *Paul M. Colosi*, 56 ECAB 294, 298 (2005).

<sup>6</sup> The Office has not issued a final decision addressing whether this constitutes an overpayment of compensation and the Board will not address this issue on appeal.

<sup>7</sup> *Avalon C. Bailey*, 56 ECAB 223 (2004).

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 18, 2007 decision of the Office of Workers' Compensation Programs is reversed.

Issued: July 1, 2008  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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

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