

FACTUAL HISTORY

On September 28, 1991 appellant, then a 45-year-old aircraft mechanic, sustained a right patella contusion when he slipped and struck a railing with his right knee.¹ On October 17, 1994 appellant underwent arthroscopic surgery consisting of chondroplasty of the medial and lateral femoral condyles, lateral tibial plateau, patella and patellofemoral sulcus and synovectomy for plica.

In an April 17, 1995 report, Dr. Bernard M. Seger, an attending orthopedic surgeon, stated that appellant had a 2 millimeter (mm) cartilage level of the patellofemoral joint as shown on x-ray. Based on Table 62 at page 83 of the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (A.M.A., *Guides*), he had a ten percent impairment of the right lower extremity.

By decision dated October 18, 1995, the Office granted appellant a schedule award for 28.80 weeks from January 4 to July 24, 1995 for a ten percent impairment of the right lower extremity under OWCP file number 160243565. The award was based on a two mm cartilage level of the patellofemoral joint and Table 62 at page 83 of the fourth edition of the A.M.A., *Guides*. The amount of the schedule award was \$14,636.16.

On March 28, 1998 appellant sustained a right knee sprain and meniscus tear while cleaning an aircraft engine. On June 2, 1998 he underwent arthroscopic chondroplasty of the medial femoral condyle and partial medial meniscectomy of the right knee.

In a December 3, 1998 report, Dr. Seger stated that appellant had a seven percent impairment due to joint space narrowing of his right knee as shown on x-ray. On February 2, 1999 an Office medical adviser indicated that appellant had a nine percent impairment of the right lower extremity which included seven percent for arthritis based on a 3 mm cartilage level of the knee joint, according to Table 62 at page 83 of the A.M.A., *Guides*, and two percent for a partial meniscectomy, according to Table 64 at page 85.

By decision dated February 12, 1999, the Office granted appellant a schedule award for 25.92 weeks from December 3, 1998 to June 2, 1999 for a nine percent impairment of the right lower extremity under file number 160313429. The impairment included seven percent for arthritis (a 3 mm cartilage level of the knee joint) based on Table 62 at page 83 of the A.M.A., *Guides* and two percent for a partial meniscectomy based on Table 64 at page 85. The amount of the schedule award was \$14,387.10.

On January 14, 2002 appellant sustained a contusion of the right knee when he slipped and his right leg struck a chair. In a September 26, 2002 report, Dr. Charles W. Breckenridge, an orthopedic surgeon, indicated that appellant had a nine percent impairment of the right lower

¹ The case record on appeal is a combined file which includes the files for OWCP file number 160243565 for the September 28, 1991 injury, file number 160313429 for a March 28, 1998 right knee injury and file number 162032007 for a January 14, 2002 right knee injury. The master file number is 160243565. This is the second appeal in this case. By order dated July 18, 2005, the Board set aside a January 10, 2005 Office overpayment decision as improperly issued because appellant's copy of a December 10, 2004 preliminary overpayment notice, as well as the final overpayment decision, were sent to an incorrect address.

extremity, including seven percent for a 3 mm medial cartilage level of the knee joint and two percent for a partial medial meniscectomy.²

By decision dated January 10, 2003, the Office granted appellant a schedule award for 25.92 weeks from September 26 to December 28, 2002 for a nine percent impairment of the right lower extremity under file number 162032007. The schedule award included seven percent for arthritis and two percent for a partial medial meniscectomy. The amount of the schedule award was \$8,650.15.

By letter dated August 9, 2005, the Office advised appellant of its preliminary determination that he received a \$25,613.89 overpayment of compensation. It found that schedule awards granted on February 12, 1999 for \$14,387.10 based on a nine percent impairment of the right lower extremity, and on January 10, 2003 for \$11,226.79 based on a nine percent impairment of the right lower extremity, were issued in error because appellant had received a schedule award for a 10 percent impairment of his right lower extremity on October 18, 1995. The Office notified appellant of its preliminary determination that he was not without fault in the creation of the overpayment because he knew or should have known that he was not entitled to receive the schedule awards in 1999 and 2003 for the right lower extremity. Appellant was given 30 days in which to submit additional evidence or argument or request a telephone conference, a precouplement hearing before the branch of hearings and review or a final decision.

On August 17, 2005 appellant requested an oral hearing that was held on April 12, 2007.

By decision dated June 22, 2007, the Office hearing representative finalized the determination that appellant received an overpayment of \$25,613.89 because he accepted schedule awards in 1999 and 2003 for the same part of the body covered by his 1995 schedule award. The Office determined that he was not without fault in the creation of the overpayment because he knew or should have known that he was not entitled to additional schedule awards for the same body part. The Office hearing representative found that appellant received a \$25,613.89 overpayment of compensation and that appellant was at fault in the creation of the overpayment, thus precluding waiver of the overpayment.

LEGAL PRECEDENT -- ISSUE 1

Section 8129(a) of the Federal Employees' Compensation Act provides that when an overpayment has been made to an individual because of an error of fact or law, adjustment shall be made under regulations prescribed by the Office by decreasing later payments to which the individual is entitled.³

² The fifth edition of the A.M.A., *Guides* (2001) was in effect at the time of Dr. Breckenridge's evaluation. However, the arthritis table, Table 17-31 at page 544, and the diagnosed-based estimate table for the partial meniscectomy, Table 17-33 at page 546 of the fifth edition, were unchanged from the fourth edition.

³ 5 U.S.C. § 8129.

ANALYSIS -- ISSUE 1

The Board finds that this case is not in posture for decision. There are several errors in the Office's calculation of the overpayment of compensation. The October 18, 1995 schedule award was granted for a ten percent impairment of appellant's right lower extremity based on a two mm cartilage level of the patellofemoral joint,⁴ according to Table 62 at page 83 of the fourth edition of the A.M.A., *Guides*. The second schedule award issued on February 12, 1999 included seven percent for a 3 mm cartilage level of the knee joint and two percent for a partial meniscectomy (performed subsequent to the 1995 schedule award) based on Table 64 at page 85 of the fourth edition of the A.M.A., *Guides*. The A.M.A., *Guides* provides for separate impairment ratings for the knee joint and the patellofemoral joint for reduced cartilage level due to arthritis. Because the 1999 schedule award was based on arthritis impairment of the knee joint, not the patellofemoral joint, the seven percent granted for impairment of appellant's right lower extremity is not a duplication of the 1995 schedule award. Appellant is therefore entitled to the seven percent impairment for arthritis of the knee joint, in addition to impairment for arthritis of the patellofemoral joint.⁵ On remand, the Office should also determine whether appellant is entitled to an additional schedule award for his partial meniscectomy.⁶ Further development of the medical evidence is necessary to correctly determine appellant's right lower extremity impairment. A calculation of any overpayment caused by issuance of the three schedule awards cannot be made until the correct right lower extremity impairment is determined. On remand the Office should recalculate appellant's right lower extremity impairment based on correct application of the A.M.A., *Guides*. Following determination of the schedule award to which appellant is entitled for his right lower extremity impairment, the Office should determine the amount of any overpayment created by the 1999 and 2003 schedule awards. In addition to the errors in calculating appellant's right lower extremity impairment, the Office erred in its determination that the amount of the 2003 schedule award was \$11,226.79. An Office computer printout shows that the amount of the check issued for the 2003 schedule award, covering the period September 26 to December 28, 2002, was \$8,650.15. The Office erroneously included, in the \$11,226.79 amount for the 2003 schedule award, \$2,576.64 which was paid for lost wages for disability following the final date covered by the schedule award, December 28, 2002. The \$2,576.64 payment covered lost wages for the period of disability from December 29, 2002 to January 25, 2003. Therefore, the \$2,576.64 should not be included in the

⁴ The patellofemoral joint includes the patella (kneecap) and the femur (the leg bone that extends from the pelvis to the knee). See DORLAND'S, *Illustrated Medical Dictionary* (30th ed. 2003) 1384, 682.

⁵ The 2003 schedule award was granted for the same impairments and body parts as the 1999 schedule award, a three mm cartilage level of the right knee joint and a partial meniscectomy. Therefore, the 2003 schedule award is a duplication of the 1999 schedule award and the amount appellant received from the 2003 schedule award constitutes an overpayment.

⁶ The fourth edition of the A.M.A., *Guides* states at page 75, section 3.2, "The Lower Extremity," that anatomic, diagnostic and functional methods are used in evaluating permanent impairments of the lower extremity. In general, only one evaluation method should be used to evaluate a specific impairment. However, in some instances, a combination of two or three methods may be required. Section 3.2i, "Diagnosis-based Estimates," at page 84 states that the evaluating physician must determine whether diagnostic or examination criteria best describe the impairment of a specific individual. There may be some instances in which elements from both diagnostic and examination approaches will apply to a specific situation.

calculation of the overpayment due to issuance of the 2003 schedule award for appellant's right upper extremity impairment.

CONCLUSION

The Board finds that this case is not in posture for a decision. On remand, the Office should recalculate appellant's right lower extremity impairment due to arthritis in his patellofemoral joint (ten percent) and in his knee joint (seven percent). The Office should also determine whether he is entitled to an additional impairment in his 1999 schedule award due to his partial meniscectomy. Following the recalculation of appellant's total right knee impairment, the Office should determine the correct amount of the overpayment created by the 1999 schedule award (if it determines that he is not entitled to impairment due to a partial meniscectomy in addition to the impairment due to arthritis of the right knee joint), and by the 2003 schedule award. The second issue on appeal, whether the Office properly found that appellant was not without fault in the creation of the overpayment, thus precluding waiver of the overpayment, is rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 22, 2007 is set aside and the case remanded for further action consistent with this decision.

Issued: May 8, 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