

**United States Department of Labor  
Employees' Compensation Appeals Board**

---

A.G., Appellant )

and )

**DEPARTMENT OF HOMELAND SECURITY,** )  
**CUSTOMS & BORDER PROTECTION,** )  
**Las Vegas, NV, Employer** )

---

**Docket No. 12-563**  
**Issued: September 10, 2012**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

RICHARD J. DASCHBACH, Chief Judge  
PATRICIA HOWARD FITZGERALD, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On January 17, 2012 appellant filed a timely appeal from the January 10, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP), which found him at fault in creating an overpayment. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUE**

The issue is whether appellant was at fault in creating a \$78,124.61 overpayment.

**FACTUAL HISTORY**

On July 7, 2001 appellant, a 46-year-old area port director, sustained a traumatic injury in the performance of duty when he stepped down to a ship's ladder. His left ankle twisted and his

---

<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

right knee buckled, he heard a pop.<sup>2</sup> OWCP accepted appellant's claim for left ankle sprain/strain and aggravated dislocation of the right knee. Appellant received a schedule award for a 26 percent permanent impairment of his right lower extremity due to a two-millimeter cartilage interval combined with a total lateral meniscectomy.

On June 23, 2005 appellant, then a 50-year-old supervisor officer, sustained a traumatic injury in the performance of duty when he caught his right leg on a carpet and he felt his right knee twist and pop.<sup>3</sup> OWCP accepted his claim for a right lateral collateral ligament sprain/strain, a torn right lateral meniscus and localized primary osteoarthritis of the right lower extremity. X-rays now revealed no joint space remaining in the knee, a condition described as "bone on bone." Appellant received a schedule award for a 25 percent permanent impairment of his right lower extremity due to residual degenerative joint disease of the knee with complete loss of joint space, a rating that was said to take into account mild lateral ligament laxity and a tear of the lateral meniscus. An OWCP medical adviser explained that the 25 percent rating was the sole impairment of the right lower extremity resulting from the accepted work injury of June 23, 2005.

OWCP made a preliminary determination that appellant was overpaid \$78,124.61, the amount of his second schedule award. It found him at fault in creating the overpayment because he accepted a payment that he knew or should have known was incorrect, since he was previously paid a schedule award for a 26 percent impairment of the right lower extremity and was then paid a schedule award for a 25 percent impairment of the same extremity. "The evidence did not support an increase in the impairment already compensated. In fact your impairment had decreased. Therefore, you were not entitled to an increased additional schedule award."

In a January 10, 2012 decision, OWCP found that appellant was at fault in creating a \$78,124.61 overpayment, as he knowingly accepted a duplicate schedule award.

On appeal, appellant argues that OWCP did not show how he knew accepting compensation was incorrect. He argues that he, as a layman, did not possess the necessary knowledge of OWCP rules and regulations regarding claims to the same extremity. Appellant argues that the only people who possess this knowledge are professionals who deal with such on a daily basis.

### **LEGAL PRECEDENT**

Section 8107 of FECA authorizes the payment of schedule awards for the loss or loss of use of specified members, organs or functions of the body.<sup>4</sup> Such loss or loss of use is known as permanent impairment. OWCP evaluates the degree of permanent impairment according to the

---

<sup>2</sup> OWCP File No. xxxxxx937.

<sup>3</sup> OWCP File No. xxxxxx064.

<sup>4</sup> 5 U.S.C. § 8107.

standards set forth in the specified edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.<sup>5</sup>

OWCP 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 received from OWCP 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 knew or should have known to be incorrect; or (2) Failed to provide information which he knew or should have known to be material; or (3) Accepted a payment which he knew or should have known to be incorrect (this provision applies only to the overpaid individual).<sup>6</sup>

Whether or not OWCP 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 is being overpaid.<sup>7</sup>

### ANALYSIS

Appellant received a schedule award for a 26 percent impairment of his right lower extremity. He later received a schedule award for a 25 percent impairment of the same extremity. At first glance, it appeared to OWCP that appellant's impairment actually improved by one percent and that he was therefore not entitled to an additional schedule award.

A closer examination of the record shows this is not the case. Appellant received his first award for a two-millimeter cartilage interval and a total lateral meniscectomy. According to Table 17-31, page 544 of the fifth edition of the A.M.A., *Guides*, which was the edition in effect at the time, a two-millimeter cartilage interval in the knee represents a 20 percent impairment of the lower extremity. According to Table 17-33, page 546, a total lateral meniscectomy represents a seven percent impairment. Table 17-2, page 526, allows these two impairments to be combined. Using the Combined Values Chart on page 604, the two impairments combine for a total lower extremity impairment of 26 percent, which appellant received.

Appellant's second schedule award was for complete loss of joint space. Referring once again to Table 17-31, page 544, zero cartilage interval in the knee, described as bone on bone, represents a 50 percent impairment of the lower extremity. Mild laxity of the lateral collateral ligament -- for which appellant previously received no award -- represents a seven percent impairment of the lower extremity, again under Table 17-33, page 546. These two diagnosis-based estimates combine under the fifth edition of the A.M.A., *Guides* for a total lower extremity

---

<sup>5</sup> 20 C.F.R. § 10.404. Effective February 1, 2001, OWCP began using the A.M.A., *Guides* (5<sup>th</sup> ed. 2001).

<sup>6</sup> *Id.* at § 10.433(a).

<sup>7</sup> *Id.* at § 10.433(b).

impairment of 54 percent, only 20 percent of which appellant previously received compensation (for arthritis). It thus appears that he should have received an additional schedule award of 34 percent.

As these details show, it is not enough simply to compare the final impairment ratings of the two schedule awards. OWCP must examine the basis of the impairment ratings and determine whether appellant has previously received compensation for the impairments found.

Accordingly, the Board finds that OWCP has not established fact of overpayment. The record does not support OWCP's finding that appellant was not entitled to an additional schedule award. The Board will therefore set aside OWCP's January 10, 2012 overpayment decision.

### **CONCLUSION**

The Board finds that OWCP has failed to establish that appellant received an overpayment of compensation. Related overpayment issues such as amount and fault are therefore moot. As no debt is established, OWCP has no basis for recovery.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the January 10, 2012 decision of the Office of Workers' Compensation Programs is reversed.

Issued: September 10, 2012  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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