

FACTUAL HISTORY

On August 20, 2004 appellant, then a 51-year-old nursing assistant, filed a traumatic injury alleging that she slipped in liquid and injured her knees and thigh in the performance of duty on August 5, 2004. OWCP accepted her claim for strain/sprain of the lateral collateral ligament in his right knee. On June 21, 2005 Dr. John Tsu-Yuan Wey, a Board-certified orthopedic surgeon, performed a right knee arthroscopy with partial medial and lateral meniscectomy and chondroplasty of the patella and lateral compartment of the right knee. He performed a left knee arthroscopy with a partial lateral meniscectomy and chondroplasty of the patella and lateral tibial plateau of the left knee on August 9, 2005. OWCP accepted the additional conditions of tear of the right medial meniscus, tear of the left lateral meniscus and primary osteoarthritis bilaterally. Appellant returned to light-duty work on October 3, 2005.

In a decision dated January 22, 2007, OWCP granted appellant schedule awards for 10 percent impairment of the right lower extremity and 2 percent impairment of the left lower extremity.

Appellant underwent a magnetic resonance imaging (MRI) scan of her left knee on January 28, 2010, which demonstrated stage 3 chondromalacia patella, stage 2 chondromalacia involving the lateral compartment, mild tricompartmental osteoarthritis and acute grade 1 strain. An MRI scan of her right knee on January 18, 2010 demonstrated moderate lateral compartment osteoarthritis with extensive articular cartilage thinning with an area of bone absence and concavity and mild acute irritation of the medial collateral ligament complex. On March 2, 2010 Dr. Wey performed a left knee arthroscopy with partial lateral meniscectomy and tricompartmental chondroplasty. He performed a right knee arthroscopy on May 4, 2010 for a partial lateral meniscectomy and tricompartmental chondroplasty of the right knee. Appellant returned to light-duty work on July 26, 2010 as a nursing assistant earning wages of \$763.83 per week.

In a preliminary notice of overpayment dated July 28, 2010, OWCP found that appellant returned to work on July 26, 2010 but was paid compensation through July 31, 2010 resulting in an overpayment in the amount of \$384.66 for which she was at fault. It administratively terminated this debt in an August 17, 2010 decision as it was less than \$600.00 and not cost efficient to pursue. By decision dated October 1, 2010, OWCP found that appellant's actual earnings as a nursing assistant fairly and reasonably represented her wage-earning capacity.

On September 7, 2011 OWCP granted appellant a schedule award for an additional six percent impairment of her left lower extremity.

Dr. Diane S. Litke, a Board-certified orthopedic surgeon, examined appellant on November 15, 2011 for bilateral knee pain. She noted appellant's history of employment injury and medical treatment. Dr. Litke found that both knees showed mild valgus, positive lateral malt racking of the patellas, positive patellofemoral crepitus and lateral joint line tenderness. X-rays demonstrated complete loss of lateral joint space and significant patellofemoral arthritis in both knees. Dr. Litke diagnosed degenerative joint disease, bilateral knees. She performed a right knee total arthroplasty on April 9, 2012.

OWCP paid wage-loss benefits during appellant's surgeries and recovery. It placed her on the periodic rolls on April 17, 2012.

In a note dated July 19, 2012, Dr. Litke stated that appellant's right knee showed no instability and excellent range of motion with no pain. Appellant returned to work on July 30, 2012.

OWCP authorized a left total knee arthroplasty, which Dr. Litke performed on May 6, 2013 due to degenerative joint disease of the left leg. It again placed appellant on the periodic rolls on May 22, 2013. Appellant returned to full duty on August 12, 2013. Her weekly pay rate in May 2013 was \$794.53. In a note dated August 27, 2013, Dr. Litke stated that appellant had no pain in either knee or that her range of motion was from 0 to 130 degrees bilaterally.

In a letter dated August 28, 2013, OWCP informed appellant of the preliminary determination that she had received an overpayment of compensation in the amount of \$897.94 as she returned to full duty on August 12, 2013 but received compensation benefits through August 24, 2013. It found that she was not at fault in the creation of the overpayment.

On September 6, 2013 appellant requested a prerecoupment hearing before an OWCP hearing representative on the issues of fact of overpayment and waiver. She stated that she reported her planned return to work two weeks before it occurred. Appellant completed the overpayment recovery questionnaire and noted that her monthly income was \$2,100.00. She listed her rent or mortgage as \$857.00 per month, her food as \$400.00 per month, her clothing as \$120.00 per month, her utilities as \$600.00 per month and her miscellaneous expenses as \$200.00 per month. Appellant also had monthly debts of \$84.00 for total monthly expenses of \$2,261.00. She stated that she had no bank balances, real estate or personal property. Appellant stated that she was not at fault in the creation of the overpayment as she reported her return to work. She noted that she was planning to retire on October 31, 2013 due to her knee surgeries.

Appellant requested a schedule award on September 23, 2013. Dr. Litke applied the sixth edition of the A.M.A., *Guides* to appellant's right knee finding of mild decrease in motion in the right knee with 125 degrees of flexion. Applying the appropriate formula Dr. Litke based functional history grade modifier 0, physical examination grade modifier 0 and clinical studies grade modifier 3, she concluded that appellant had a class 2 impairment of her right knee due to total knee replacement reduced to grade A or 21 percent impairment.

Dr. Litke found low grade aching in the left knee, mild-to-moderate decrease in left knee range of motion with 100 degrees of flexion and mild limp in the left leg. She determined that appellant had a class 3 fair result of her left total knee replacement with functional history grade modifier 1, physical examination grade modifier 1 and clinical studies grade modifier 3 for grade B for 34 percent impairment.² There was moderate decrease in left knee range of motion with 100 degrees of flexion and mild limp in the left leg.

² American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), 511, Table 16-3.

Dr. Ronald Blum, a medical adviser, reviewed the medical evidence on October 21, 2013. He found that appellant's right knee had a default value of 25 with a functional history grade modifier 0, a physical examination grade modifier 0 and a clinical studies grade modifier 3 for a net adjustment of -3 after applying the appropriate formula of the A.M.A., *Guides*. Dr. Blum agreed with the 21 percent impairment rating found by Dr. Litke, which he noted was a class 2, grade A impairment. He concluded that appellant had an additional 11 percent impairment of her right lower extremity.

In considering appellant's left lower extremity impairment, Dr. Blum found that she had class 3 impairment due to a fair result of her total knee replacement with a default value of 37 percent. He further found that her functional history grade modifier was 1, her physical examination grade modifier was 1 and that her clinical studies grade modifier was 3 for a net adjustment of -4 for 31 percent impairment, class 3, grade A. Dr. Blum noted that Dr. Litke recommended 34 percent impairment but found that application of the appropriate formula to the findings resulted in 31 percent. He concluded that appellant had an additional 23 percent impairment to her left leg.

OWCP's Branch of Hearings and Review provided appellant with a notice dated December 18, 2013 and stated that her prerecoupment hearing was scheduled for February 3, 2014 at 11:15 am Eastern time. The notice included the toll free number and the pass code.

On January 16, 2014 OWCP granted appellant schedule awards for an additional 11 percent impairment of her right leg and an additional 23 percent impairment of her left leg. Appellant requested a lump-sum payment on January 16, 2014. She accepted a lump-sum payment of \$38,666.37 for her schedule awards on January 23, 2014. OWCP made the payment on February 14, 2014.

Appellant telephoned OWCP on February 3, 2014 and stated that she missed her oral hearing due to the time difference. The hearing representative informed her that he would conduct a review of the written record and provided her with 15 days to submit additional evidence, confirmed by letter dated February 5, 2014. Appellant responded on February 10, 2014 and restated that she missed the call due to the time difference. She provided documentation that her social security benefits were \$1,461.70 a month beginning December 2013. Appellant also provided rent checks in the amount of \$595.00 and utility bills for \$161.88 and \$18.13.

By decision dated March 21, 2014, the hearing representative found that appellant returned to full-duty work on August 12, 2013 but received wage-loss benefits through August 24, 2013 resulting in an overpayment of compensation in the amount of \$897.94 for which she was not at fault. He further found that she had income in the amount of \$4,908.00 per month including wages³ and social security income and expenses in the amount of \$1,417.00 based on rent of \$595.00, energy bills of \$18.00, food \$400.00, clothing, \$120.00, credit card debt of \$84.00 and miscellaneous expenses of \$200.00. The hearing representative determined that appellant had an excess of \$3,491.00 per month. He further noted that she had recently received a lump-sum schedule award in the amount of \$38,666.37. The hearing representative

³ The hearing representative based this calculation on appellant's pay rate for compensation purposes.

determined that recovering the overpayment would not defeat the purpose of FECA as appellant did not need substantially all of her income to meet ordinary and necessary living expenses. He noted that recovery would not be against equity and good conscience as there was no evidence that she had relinquished a valuable right or changed her position for the worse. The hearing representative determined that appellant should make the repayment in full.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of FECA⁴ and its implementing regulations⁵ set forth the number of weeks of compensation payable to employees sustaining permanent impairment for loss of use, of scheduled members or functions of the body. FECA, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which rests in the discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. OWCP evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*.⁶

In addressing upper extremity impairments, the sixth edition requires identification of the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE) and Clinical Studies (GMCS). The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).⁷

ANALYSIS -- ISSUE 1

Appellant underwent bilateral total knee replacements. The A.M.A., *Guides* provided that a total knee replacement with a good result is a class 2 impairment with a default rating of 25 percent.⁸ Dr. Litke determined that appellant had functional history grade modifier 0 with no gait derangement,⁹ physical examination grade modifier 0 with no problems¹⁰ and clinical studies grade modifier 3 based on her lost cartilage interval.¹¹ Applying the appropriate formula, appellant's physicians concluded that appellant had class 2 impairment of her right knee due to

⁴ 5 U.S.C. §§ 8101-8193, 8107.

⁵ 20 C.F.R. § 10.404.

⁶ For new decisions issued after May 1, 2009 OWCP began using the sixth edition of the A.M.A., *Guides*. A.M.A., *Guides*, (6th ed. 2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.6a (January 2010); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

⁷ A.M.A., *Guides* 411.

⁸ *Id.*

⁹ *Id.* at 516, Table 16-6.

¹⁰ *Id.* at 517, Table 16-7.

¹¹ *Id.* at 519, Table 16-8.

total knee replacement reduced to grade A or 21 percent impairment. Dr. Blum agreed with this rating in his October 21, 2013 report. There is no evidence in the record that appellant has more than 21 percent impairment of her right lower extremity. Appellant previously received schedule awards totaling 10 percent impairment of the right lower extremity and therefore properly received an additional schedule award for 11 percent impairment.

In regard to appellant's left lower extremity, Dr. Litke determined that she had a class 3 fair result for her total knee replacement.¹² She reported low grade aching in appellant's left knee, mild-to-moderate decrease in left knee range of motion with 100 degrees of flexion and mild limp in the left leg. Applying the A.M.A., *Guides*, Dr. Litke found a functional history grade modifier 1 due to appellant's limp,¹³ physical examination grade modifier 1 due to tenderness¹⁴ and clinical studies grade modifier 3 due a cartilage interval loss¹⁵ for grade B for 34 percent impairment after application of the appropriate formula.¹⁶ The medical adviser agreed with class and modifiers of appellant's left lower extremity impairment, but found that application of the appropriate formula to the findings $(1-3) + (1-3) + (3-3) = -4$ resulted in 31 percent the lowest grade within the class, grade A. The A.M.A., *Guides* provide that if the formula results in a -4 adjustment the rating would move to the lowest grade within a class.¹⁷ The lowest grade in class 3 total knee replacement is A for a 31 percent impairment.¹⁸ It is well established that, when the attending physician fails to provide an estimate of impairment conforming to the A.M.A., *Guides*, his or her opinion is of diminished probative value in establishing the degree of permanent impairment and OWCP may rely on the opinion of its medical adviser to apply the A.M.A., *Guides* to the findings of the attending physician.¹⁹ The Board finds that Dr. Litke's application of the formula did not fully conform to the A.M.A., *Guides* and that OWCP properly relied on Br. Blum's rating to determine appellant's left leg impairment of 31 percent, an additional 23 percent impairment to the left leg.

Appellant may request a schedule award or increased schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

¹² *Id.* at 511, Table 16-3.

¹³ *Id.* at 516, Table 16-6.

¹⁴ *Id.* at 517, Table 16-7.

¹⁵ *Id.* at 519, Table 16-8.

¹⁶ *Id.* at 511, Table 16-3.

¹⁷ *Id.* at 521.

¹⁸ *Id.* at 511, Table 16-3.

¹⁹ *Linda Beale, 57 ECAB 429 (2006).*

LEGAL PRECEDENT -- ISSUE 2

Section 8102 of FECA provides that the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.²⁰

Section 8116 of FECA defines the limitations on the right to receive compensation benefits. This section of FECA provides that, while an employee is receiving compensation, he or she may not receive salary, pay or remuneration of any type from the United States, except in limited circumstances.²¹ OWCP's regulations provide that compensation for wage loss due to disability is available only for any periods during which an employee's work-related medical condition prevents his or her from earning the wages earned before the work-related injury.²² OWCP's procedures provide that an overpayment in compensation is created when a claimant returns to work but continues to receive wage-loss compensation.²³

ANALYSIS -- ISSUE 2

The Board finds that appellant received an overpayment of compensation in the amount of \$897.94 for the period August 12 through 24, 2013. OWCP placed her on the periodic rolls on May 22, 2013 and she received wage-loss compensation for total disability. The record establishes that she returned to full duty on August 12, 2013. Appellant continued to receive wage-loss compensation for total disability through August 24, 2013. As noted, she is not entitled to receive wage-loss compensation for total disability after she has returned to work and earned her regular salary. Accordingly, the Board finds that appellant received an overpayment of compensation.

OWCP determined that from August 12 to 24, 2010 appellant received \$847.94 in total net compensation, but was not entitled to any compensation during this period. Appellant has not contested the amount of the overpayment. The Board finds that OWCP properly determined that she received an overpayment of compensation in the amount of \$847.94 from August 12 through 24, 2013 for working with no loss of wages.

LEGAL PRECEDENT -- ISSUE 3

Section 8129(a) of FECA provides that when an overpayment of compensation occurs "because of an error of fact or law," adjustment or recovery shall be made by decreasing later

²⁰ 5 U.S.C. § 8102.

²¹ *Id.* at § 8116(a).

²² 20 C.F.R. § 10.500(a).

²³ *R.A.*, Docket No. 14-539 (issued June 24, 2014); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(a) (May 2004).

payment to which the individual is entitled.²⁴ The only exception to this requirement that an overpayment must be recovered is set forth in section 8129(b):

“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 FECA or would be against equity and good conscience.”

Thus, a finding that appellant was without fault is not sufficient, in and of itself, for OWCP to waive the overpayment. OWCP must exercise its discretion to determine whether recovery of the overpayment would “defeat the purpose of FECA or would be against equity and good conscience,” pursuant to the guidelines provided in the implementing federal regulations.

Section 10.436 of the implementing regulations²⁵ provides that recovery of an overpayment will defeat the purpose of FECA if recovery would cause hardship by depriving a presently or formerly entitled beneficiary of income and resources needed for ordinary and necessary living expenses and outlines the specific financial circumstances under which recovery may be considered to defeat the purpose of FECA.

Section 10.437 provides that recovery of an overpayment is considered to be against equity and good conscience when an individual who received an overpayment would experience severe financial hardship attempting to repay the debt and when an individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.²⁶

Section 10.438(a) provides that the individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by OWCP, as this information is needed to determine whether or not recovery of an overpayment would defeat the purpose of FECA or be against equity and good conscience.²⁷ This information would also be used to determine the repayment schedule, if necessary. Section 10.438(b) provides that failure to submit the requested information within 30 days of the request shall result in denial of waiver.²⁸

ANALYSIS -- ISSUE 3

OWCP determined that appellant was not at fault in the creation of the overpayment and proceeded to determine whether the overpayment was subject to waiver. Appellant completed the overpayment recovery questionnaire and indicated that she had income of \$2,100.00. She

²⁴ 5 U.S.C. § 8129(a).

²⁵ 20 C.F.R. § 10.436.

²⁶ *Id.* at § 10.437.

²⁷ *Id.* at § 10.438(a).

²⁸ *Id.* at § 10.438(b).

later indicated that she received social security benefits in the amount of \$1,461.70 a month beginning December 2013. Appellant listed her rent or mortgage as \$857.00 per month, her food as \$400.00 per month, her clothing as \$120.00 per month, her utilities as \$600.00 per month and her miscellaneous expenses as \$200.00 per month. She also indicated that she had monthly debts of \$84.00 for total monthly expenses of \$2,261.00. The hearing representative found that appellant had income in the amount of \$4,908.00 per month including wages and social security income. He noted that she did not provide documentation of her all her listed expenses resulting a reduction of her expenses to \$1,417.00.²⁹ The hearing representative determined that appellant's monthly income exceeded her monthly expenses by more than \$50.00 and that therefore she did not need substantially all of her current income to meet her ordinary and necessary living expenses. As appellant's income exceeds expenses by more than \$50.00, the Board finds that OWCP properly determined that recovery of the overpayment would not defeat the purpose of FECA.

Appellant does not argue and the record does not establish that recovery of the debt would be against equity and good conscience. She did not show that she gave up a valuable right or changed her position for the worse in reliance on the overpayment.³⁰ Appellant failed to establish that recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience. The Board finds that she has failed to establish that OWCP abused its discretion by refusing to waive the \$897.94 overpayment. With respect to the recovery of the overpayment, the Board notes its jurisdiction on appeal is limited to reviewing those cases where OWCP seeks recovery from continuing compensation benefits under FECA.³¹

CONCLUSION

The Board finds that appellant has no more than 21 percent impairment of her right lower extremity and 31 percent impairment of her left lower extremity for which she has received schedule awards. The Board further finds that she received an overpayment of compensation in the amount of \$897.94 and that OWCP did not abuse its discretion in denying waiver of recovery of the overpayment.

²⁹ The Board notes that appellant's earnings and social security income would exceed all her listed expenses of \$2,261.00 by \$2,647.00 per month, more than \$50.00.

³⁰ *D.S.*, Docket No. 14-378 (issued June 11, 2014).

³¹ *D.R.*, 59 ECAB 148 (2007).

ORDER

IT IS HEREBY ORDERED THAT the March 21 and January 16, 2014 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: September 19, 2014
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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