

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

P.H., Appellant)	
)	
and)	Docket No. 15-0153
)	Issued: October 8, 2015
DEPARTMENT OF VETERANS AFFAIRS,)	
VETERANS ADMINISTRATION MEDICAL)	
CENTER, Cleveland, OH, Employer)	

Appearances: *Case Submitted on the Record*
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

ORDER REMANDING CASE

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

On October 31, 2014 appellant, through counsel, filed a timely appeal from an October 8, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP) which finalized a preliminary determination that appellant received an overpayment of compensation in the amount of \$1,244.16. The Board docketed the appeal as No. 15-0153.

The Board has duly considered the matter and finds that the case is not in posture for decision.

On October 3, 2007 appellant, a 50-year-old tractor operator, filed a traumatic injury claim (Form CA-1) alleging that he sustained a right leg injury on August 15, 2007 as a result of tripping and twisting his right knee during removal of scrap operation equipment. OWCP accepted the claim for right knee sprain and lateral and medial meniscus tears of the right knee. On April 11, 2012 appellant, through counsel, filed a claim for a schedule award. By decision dated September 17, 2012, OWCP granted appellant a schedule award for 12 percent permanent impairment to the right lower extremity.

In a decision dated January 8, 2014, OWCP expanded appellant's accepted conditions to include localized secondary osteoarthritis of the lower right leg. By decision dated February 21, 2014, it rescinded appellant's schedule award because it was "calculated based on incorrect

information and mathematical calculations, resulting in an incorrect schedule award determination.” By decision dated August 21, 2014, OWCP granted appellant a schedule award for 10 percent permanent impairment to the right lower extremity.

In a September 3, 2014 letter, OWCP advised appellant of its preliminary determination that he received a \$1,244.16 overpayment of compensation due to an incorrect payment of a schedule award. It found that he had received \$22,628.16 in compensation for 12 percent permanent impairment to the right lower extremity when he was only entitled to \$21,384.00 in compensation for a 10 percent permanent impairment. OWCP also made a preliminary determination that appellant was not at fault in the creation of the overpayment of compensation as he had not accepted a payment that he knew or should have known was incorrect. By decision dated October 8, 2014, it finalized its preliminary determination that appellant received an overpayment of compensation in the amount of \$1,244.16. However, in a decision dated October 17, 2014, an OWCP hearing representative set aside OWCP’s schedule award decisions dated February 21 and August 21, 2014 and remanded the case to refer appellant for a new second opinion examination to determine the nature and extent of his right lower extremity impairment.

The Board finds that OWCP had jurisdiction to issue its October 17, 2014 decision vacating its prior schedule award decisions because appellant did not file her appeal to this Board until October 31, 2014.¹ Thus, the October 17, 2014 OWCP decision did not change the status of the decision on appeal because there was no Board appeal at the time of issuance.²

When OWCP makes a determination that an overpayment of compensation has occurred because the claimant received an erroneous schedule award, it must first calculate the schedule award.³ However, the percentage of impairment remains in question as per the October 17, 2014 decision of OWCP’s hearing representative who set aside the schedule award decisions. Because OWCP has not determined the correct extent of appellant’s right lower extremity impairment, it cannot show that he received an overpayment of compensation. Therefore, OWCP had no basis for issuing its October 8, 2014 overpayment decision. For this reason, the fact of overpayment is not in posture for decision pending further adjudication of appellant’s right lower extremity impairment. Accordingly, the case is remanded to OWCP for further development of the evidence regarding this matter. After such development as it deems necessary, OWCP shall issue a *de novo* decision regarding any overpayment issues.

¹ See *Douglas E. Billings*, 41 ECAB 880 (1990) (where the Board held that the only decisions of OWCP that are null and void because the case is on appeal to the Board are those which change the status of the decision on appeal).

² *Id.* The Board notes that had OWCP issued the schedule award decision after the Board had acquired jurisdiction, the decision would have been null and void as it would have changed the status on appeal. The Board and OWCP may not exercise simultaneous jurisdiction over the same issue in a case on appeal. See *id.*; see also 20 C.F.R. § 501.2(c)(3).

³ See *C.A.*, Docket No. 08-1076 (issued November 17, 2008) (where the Board found that the overpayment issue was not in posture for decision because OWCP had not properly resolved the schedule award issue).

IT IS HEREBY ORDERED THAT the October 8, 2014 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further development consistent with this order of the Board.

Issued: October 8, 2015
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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