

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

C.H., Appellant)

and)

DEPARTMENT OF THE INTERIOR, BUREAU)
OF RECLAMATION, Grand Coulee, WA,)
Employer)

**Docket No. 16-0968
Issued: August 8, 2016**

Appearances:
Stephanie N. Leet, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 6, 2016 appellant, through counsel, filed a timely appeal from January 5, 2016 merit decisions of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

ISSUES

The issues are: (1) whether OWCP properly rescinded the schedule award granted to appellant on January 16, 2014; (2) whether appellant received a \$62,032.20 overpayment of compensation; and (3) whether OWCP abused its discretion by refusing to waive recovery of the overpayment.

FACTUAL HISTORY

On August 13, 2008 appellant, then a 56-year-old mechanic, filed a traumatic injury claim (Form CA-1) alleging that he sustained injury to his right knee that day when he slipped on a cleaner hose and twisted his right knee. On September 22, 2008 OWCP accepted that appellant sustained a tear of the medial meniscus of his right knee and a sprain of the medial collateral ligament of his right knee.³

On October 21, 2008 appellant underwent OWCP-authorized right knee surgery, including a partial medial meniscectomy, partial lateral meniscectomy, and medial and lateral femoral condyle chondroplasty. He stopped work on October 21, 2008 and returned to work on a full-time basis on December 8, 2008. On January 23, 2012 appellant underwent OWCP-authorized right total knee arthroplasty. He stopped work on January 23, 2012 and returned to work on a full-time basis on July 2, 2012.

On August 20, 2009 appellant filed a claim for compensation (Form CA-7) requesting a schedule award due to his accepted work conditions.

By decision dated November 3, 2009, OWCP granted appellant a schedule award for 26 percent permanent impairment of his right lower extremity. The award ran for 74.88 weeks from September 15, 2009 to February 21, 2011 and was based on an October 7, 2009 impairment rating by Dr. Kenneth D. Sawyer, a Board-certified internist serving as an OWCP medical adviser. Dr. Sawyer applied the standards of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009) (A.M.A., *Guides*) to the September 15, 2009 examination findings of Dr. James W. Lamberton, an attending osteopath and Board-certified orthopedic surgeon.⁴

On November 25, 2013 appellant filed a claim for compensation (Form CA-7) requesting additional schedule award compensation benefits. He submitted a September 20, 2013 report in which Dr. Lamberton determined that he had a total right leg impairment of 21 percent under the standards of the sixth edition of the A.M.A., *Guides*. On December 12, 2013 Dr. L.J. Weaver, a Board-certified orthopedic surgeon serving as an OWCP medical adviser, indicated that he

³ OWCP later accepted that appellant also sustained trochanteric bursitis of his right hip due to the August 13, 2008 injury.

⁴ Dr. Sawyer calculated appellant's right lower extremity impairment using the diagnosis-basis method and chose appellant's right total knee replacement as the primary diagnosis under Table 16-3 (Knee Regional Grid). See A.M.A., *Guides* 511, Table 16-3.

agreed with Dr. Lamberton's opinion that appellant had 21 percent permanent impairment of his right lower extremity.⁵

By decision dated January 16, 2014, OWCP granted appellant a schedule award for 21 percent permanent impairment of his right lower extremity. The award ran for 60.48 weeks from September 20, 2013 to November 17, 2014 and was based on the impairment rating of Dr. Lamberton as confirmed by Dr. Weaver.

In a letter dated February 5, 2015, OWCP advised appellant that it proposed to rescind the schedule award it granted him on January 16, 2014 because it was duplicative of the award he received on November 3, 2009. It provided him 30 days to challenge the proposed rescission action and indicated, "[A] review of your file shows that previously you were compensated for a right leg impairment at 26 percent, therefore [OWCP] proposes to rescind your schedule award decision dated January 16, 2014 as you were previously paid for your permanent impairment."

Appellant sent OWCP a letter indicating that he was obtaining additional medical evidence, but he did not submit such evidence within the time allotted by OWCP.

By decision dated March 9, 2015, OWCP rescinded the January 16, 2014 schedule award for which appellant received \$62,032.20 in schedule award compensation. It indicated:

"[OWCP] finds that at the time of your first schedule award, the medical evidence properly supported the first schedule award decision dated November 3, 2009, awarding 26 percent for the right leg, and therefore this decision was correctly issued and is not being revisited. However subsequently, you were paid an additional 21 percent impairment for your right leg per the schedule award decision letter dated January 16, 2014.... Accordingly, [OWCP] finds that you have been overcompensated by 21 percent for your right leg (a total of \$62,032.20) as you were previously and properly compensated for a 26 percent right leg impairment on November 3, 2009. Therefore [OWCP] is rescinding the schedule award decision dated January 16, 2014."

In a March 24, 2015 notice, OWCP advised appellant of its preliminary determination that he received a \$62,032.20 overpayment of compensation because he was paid this amount for the January 16, 2014 schedule award which was rescinded as being issued in error.⁶ It also made a preliminary determination that he was not at fault in the creation of the overpayment. OWCP advised appellant that he could submit evidence challenging the fact, amount, or finding of fault and request waiver of the overpayment. It informed him that he could submit additional evidence in writing or at precoupment hearing, but that a precoupment hearing must be requested within 30 days of the date of the written notice of overpayment. OWCP requested that

⁵ Dr. Lamberton and Dr. Weaver calculated appellant's right lower extremity impairment using the diagnosis-basis method and chose appellant's right total knee replacement as the primary diagnosis under Table 16-3.

⁶ The record contains evidence showing that appellant received \$62,032.20 in connection with the January 16, 2014 schedule award.

appellant complete and return an enclosed financial information questionnaire within 30 days even if he was not requesting waiver of the overpayment.

On April 23, 2015 appellant requested a telephonic prerecoument hearing with an OWCP hearing representative.⁷ He submitted an April 12, 2015 report in which Dr. Lamberton opined that appellant had 40 percent permanent impairment of his right lower extremity under the sixth edition of the A.M.A., *Guides*. Appellant also submitted a Form OWCP-20 and numerous documents, including account statements and bills, documenting his monthly expenses, monthly income, and assets.

During the hearing held on October 16, 2015, counsel argued that the rescission action was improper because Dr. Lamberton had now determined that appellant sustained a greater impairment than previously specified. He again argued that appellant detrimentally relied upon the overpayment because he spent monies on a family trip to Germany and a loan to his son and would not have spent these monies if he had not received the schedule award. A discussion was held regarding appellant's monthly income, monthly expenses, and assets.

In a November 13, 2015 letter, counsel advised that appellant's son had passed away on August 16, 2015. Additional documentation, including records regarding income, expenses, and assets, was submitted. The documentation of record shows that after August 16, 2015 appellant was married with no dependents.

In a January 5, 2016 decision, the OWCP hearing representative denied modification of OWCP's March 9, 2015 decision rescinding the schedule award appellant received on January 16, 2014. The hearing representative noted that OWCP properly found that the January 16, 2014 schedule award was duplicative of the schedule award appellant previously received on November 3, 2009. The hearing representative indicated that Dr. Lamberton produced an April 12, 2015 report opining that appellant had 40 percent right lower extremity impairment, but that this report was received after OWCP's March 9, 2015 rescission decision and did not show that the decision was erroneous when made.

In another January 5, 2016 decision, OWCP's hearing representative determined that appellant received a \$62,032.20 overpayment of compensation and that appellant was not at fault in the creation of the overpayment, but that the overpayment was not subject to waiver of recovery. The hearing representative conducted an itemized evaluation of appellant's claimed finances and identified which of the claimed figures were supported by the submitted documentation and which were not. The hearing representative concluded that appellant had \$7,663.51 in monthly income, \$3,851.79 in monthly expenses, and \$77,976.20 in assets (from checking and savings bank accounts and his Thrift Savings Plan account). The hearing representative noted that appellant's monthly income exceeded his monthly expenses by more than \$50.00 and that his assets were well above the \$8,000.00 threshold for a married claimant and that, therefore, appellant did not qualify for waiver of recovery of the overpayment on the basis that he would undergo hardship in repaying the overpayment. The hearing representative

⁷ In an April 20, 2015 letter, counsel argued that appellant detrimentally relied upon the overpayment because he spent monies on a family trip to Germany and a loan to his son and would not have spent these monies if he had not received the schedule award.

also noted that appellant did not show detrimental reliance because he did not substantiate that the overpaid amount was spent on a vacation. The hearing representative concluded that appellant had not established a basis for allowing waiver of recovery of the \$62,032.20 overpayment of compensation.⁸

LEGAL PRECEDENT -- ISSUE 1

Section 8128 of FECA provides that the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.⁹ The Board has upheld OWCP's authority to reopen a claim at any time on its own motion under section 8128 of FECA and, where supported by the evidence, set aside or modify a prior decision and issue a new decision.¹⁰ The Board has noted, however, that the power to annul an award is not an arbitrary one and that an award for compensation can only be set aside in the manner provided by the compensation statute.¹¹

Workers' compensation authorities generally recognize that compensation awards may be corrected, in the discretion of the compensation agency and in conformity with statutory provision, where there is good cause for so doing, such as mistake or fraud. It is well established that, once OWCP accepts a claim, it has the burden of justifying the termination or modification of compensation benefits. This holds true where, as here, OWCP later decides that it erroneously accepted a claim. In establishing that its prior acceptance was erroneous, OWCP is required to provide a clear explanation of the rationale for rescission.¹²

ANALYSIS -- ISSUE 1

On September 22, 2008 OWCP accepted that on August 13, 2008 appellant sustained a tear of the medial meniscus of his right knee and a sprain of the medial collateral ligament of his right knee.¹³ By decision dated November 3, 2009, it granted him a schedule award for 26 percent permanent impairment of his right lower extremity. The award ran for 74.88 weeks from September 15, 2009 to February 21, 2011 and was based on an October 7, 2009 impairment

⁸ OWCP directed that appellant repay the overpayment by making monthly payments of \$2,000.00. With respect to the recovery of an overpayment, the Board's jurisdiction is limited to those cases where OWCP seeks recovery from continuing compensation benefits. *D.R.*, 59 ECAB 148 (2007); *Miguel A. Muniz*, 54 ECAB 217 (2002). As appellant was not in receipt of continuing compensation at the time of OWCP's overpayment determination, the Board does not have jurisdiction over the method of recovery of the overpayment in this case. *See Lorenzo Rodriguez*, 51 ECAB 295 (2000); 20 C.F.R. § 10.441.

⁹ 5 U.S.C. § 8128.

¹⁰ *John W. Graves*, 52 ECAB 160, 161 (2000).

¹¹ *See* 20 C.F.R. § 10.610.

¹² *Supra* note 10.

¹³ OWCP later accepted that appellant also sustained trochanteric bursitis of his right hip due to the August 13, 2008 incident. On October 21, 2008 appellant underwent OWCP-authorized right knee surgery, including a partial medial meniscectomy, partial lateral meniscectomy, and medial and lateral femoral condyle chondroplasty. On January 23, 2012 he underwent OWCP-authorized right total knee arthroplasty.

rating by Dr. Sawyer, an OWCP medical adviser. Dr. Sawyer applied the standards of the sixth edition of the A.M.A., *Guides* and chose appellant's right total knee replacement as the primary diagnosis for rating appellant's impairment using the diagnosis-basis method. By decision dated January 16, 2014, OWCP granted appellant a schedule award for 21 percent permanent impairment of his right lower extremity. The award ran for 60.48 weeks from September 20, 2013 to November 17, 2014 and was based on the impairment ratings of Dr. Lamberton, an attending physician, and Dr. Weaver, an OWCP medical adviser. Both physicians applied the standards of the sixth edition of the A.M.A., *Guides* and chose appellant's right total knee replacement as the primary diagnosis for rating appellant's impairment using the diagnosis-basis method.

The Board finds that OWCP, in a decision dated March 9, 2015, properly rescinded appellant's January 16, 2014 schedule award for which he received \$62,032.20 in schedule award compensation. OWCP provided justification for this rescission action by explaining that the January 16, 2014 schedule award for 21 percent right leg impairment was a duplicate of the November 3, 2009 schedule award for 26 percent right leg impairment.¹⁴ On appeal, counsel argued that the rescission action was improper because appellant had submitted subsequent evidence showing that he had more than 26 percent right lower extremity impairment. However, the OWCP hearing representative properly explained that, although Dr. Lamberton produced an April 12, 2015 report opining that appellant had 40 percent right lower extremity impairment, this report was received after OWCP's March 9, 2015 rescission decision and did not show that the decision was erroneous when made.¹⁵ For these reasons, OWCP properly rescinded appellant's January 16, 2014 schedule award.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

LEGAL PRECEDENT -- ISSUE 2

Section 8102(a) of FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty.¹⁶ Section 8129(a) of FECA provides, in pertinent part:

“When an overpayment has been made to an individual under this subchapter because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.”¹⁷

¹⁴ See *supra* note 12.

¹⁵ Moreover, no adjudication has been carried out showing that appellant has more than 26 percent right lower extremity impairment.

¹⁶ 5 U.S.C. § 8102(a).

¹⁷ *Id.* at § 8129(a).

Section 8116(a) of FECA provides that while an employee is receiving compensation or if he has been paid a lump sum in commutation of installment payments until the expiration of the period during which the installment payments would have continued, the employee may not receive salary, pay or remuneration of any type from the United States, except in limited specified instances.¹⁸

ANALYSIS -- ISSUE 2

The Board finds that appellant received a \$62,032.20 overpayment of compensation. For the reasons described above, OWCP properly rescinded the schedule award granted to appellant on January 16, 2014 because it was duplicative of the schedule award granted to him on November 3, 2009. Therefore, appellant would not be entitled to receive schedule award compensation related to the January 16, 2014 schedule award. The record contains evidence which shows that appellant received \$62,032.20 in connection with his January 16, 2014 schedule award despite the fact that he was not entitled to receive such monies. Therefore, OWCP properly determined that appellant received a \$62,032.20 overpayment.

LEGAL PRECEDENT -- ISSUE 3

The waiver or refusal to waive an overpayment of compensation by OWCP is a matter that rests within OWCP's discretion pursuant to statutory guidelines.¹⁹ These statutory guidelines are found in section 8129(b) of FECA which states: "Adjustment or recovery [of an overpayment] 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 this subchapter or would be against equity and good conscience."²⁰ If OWCP finds a claimant to be without fault in the matter of an overpayment, then, in accordance with section 8129(b), OWCP may only recover the overpayment if it determined that recovery of the overpayment would neither defeat the purpose of FECA nor be against equity and good conscience.

According to 20 C.F.R. § 10.436, recovery of an overpayment would defeat the purpose of FECA if recovery would cause hardship because the beneficiary needs substantially all of his income (including compensation benefits) to meet current ordinary and necessary living expenses, and also, if the beneficiary's assets do not exceed a specified amount as determined by OWCP from data provided by the Bureau of Labor Statistics.²¹ According to 20 C.F.R. § 10.437, recovery of an overpayment is considered to be against equity and good conscience

¹⁸ *Id.* at § 8116(a).

¹⁹ *See Robert Atchison*, 41 ECAB 83, 87 (1989).

²⁰ 5 U.S.C. § 8129(b).

²¹ 20 C.F.R. § 10.436. An individual is deemed to need substantially all of his or her monthly income to meet current and ordinary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. Assets must not exceed a resource base of \$4,800.00 for an individual or \$8,000.00 for an individual with a spouse or dependent plus \$960.00 for each additional dependent. *See* Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a) (October 2004); *B.F.*, Docket No. 13-785 (issued September 20, 2013).

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 position for the worse.²² To establish that a valuable right has been relinquished, it must be shown that the right was in fact valuable, that it cannot be regained and that the action was based chiefly or solely in reliance on the payments or on the notice of payment.²³

ANALYSIS -- ISSUE 3

Appellant has not established that recovery of the overpayment would defeat the purpose of FECA because he has not shown both that he needs substantially all of his current income to meet ordinary and necessary living expenses and that his assets do not exceed the allowable resource base.²⁴ The record reflects that appellant has assets of \$77,976.20 from checking and savings bank accounts and his Thrift Savings Plan account.²⁵ Therefore, appellant has not shown that his assets do not exceed the resource base relevant for his circumstance, *i.e.*, \$8,000.00 for an individual with a spouse.²⁶ Because appellant has not met the second prong of the two-prong test of whether recovery of the overpayment would defeat the purpose of FECA, it is not necessary for OWCP to consider the first prong of the test, *i.e.*, whether appellant needs substantially all of his current income to meet ordinary and necessary living expenses.²⁷

Appellant has not established that recovery of the overpayment would be against equity and good conscience as he has not shown, for the reasons noted above, that he would experience severe financial hardship in attempting to repay the debt or that he relinquished a valuable right or changed his position for the worse in reliance on the payment which created the overpayment.²⁸ On appeal, counsel argued that appellant detrimentally relied upon the overpayment because he spent monies on a family trip to Germany and a loan to his son and would not have spent these monies if he had not received the schedule award. The hearing representative properly found that appellant did not show detrimental reliance because he did not substantiate that the overpaid amount was spent on a vacation and that, even if the loan to appellant's son were substantiated, the granting of such an intra-family loan would not qualify as detrimental reliance under OWCP procedure.²⁹

²² 20 C.F.R. § 10.437(a), (b).

²³ *Id.* at § 10.437(b)(1).

²⁴ The Board notes that OWCP determined that appellant was not at fault in the creation of the overpayment.

²⁵ The Board has held that that a claimant's contributions to a Thrift Savings Plan and earnings from these contributions are assets which OWCP may consider in determining waiver. *C.W.*, Docket No. 11-1338 (issued December 19, 2011).

²⁶ *See supra* note 21.

²⁷ *Id.*

²⁸ *See William J. Murphy*, 41 ECAB 569, 571-72 (1989).

²⁹ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6.b(3), Example 6 (June 2009).

Because appellant has failed to establish that recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience, he has failed to show that OWCP abused its discretion by refusing to waive the overpayment.

CONCLUSION

The Board finds that OWCP properly rescinded the schedule award granted to appellant on January 16, 2014. The Board further finds that appellant received a \$62,032.20 overpayment of compensation and that OWCP did not abuse its discretion by refusing to waive recovery of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the January 5, 2016 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 8, 2016
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board