

her traumatic injury claim for right knee lateral meniscus tear (ICD-9 836.1). On November 14, 2003 appellant underwent an arthroscopic right knee partial lateral meniscectomy with limited debridement. By decision dated June 3, 2004, OWCP granted a schedule award for 10 percent permanent impairment of the right lower extremity.² On April 14, 2006 appellant underwent a second right knee arthroscopic procedure, which OWCP authorized. This time she had partial medial and partial lateral meniscectomies with limited debridement. Ultimately, OWCP expanded appellant's claim to include unspecified right knee internal derangement (ICD-9 717.9) and permanent aggravation of right knee osteoarthritis (ICD-9 715.36). Additionally, it authorized a January 11, 2012 right total knee arthroplasty. Following her latest surgery, appellant received wage-loss compensation for temporary total disability. On April 30, 2012 she returned to work in a full-time, limited-duty capacity with no loss in pay.³

On January 10, 2013 appellant filed a claim for a schedule award (Form CA-7). She did not identify any dependents on her claim form.

In a report dated January 10, 2013, Dr. Marc J. Mihalko, a Board-certified orthopedic surgeon and appellant's treating physician, advised that she reached maximum medical improvement following her right total knee replacement. Based on the results of appellant's January 11, 2012 surgery, Dr. Mihalko found that she had 25 percent right lower extremity impairment (RLE) under Table 16-3, Knee Regional Grid (LEI), A.M.A., *Guides* 511 (6th ed. 2009).

On January 14, 2013 the DMA reviewed the record, including Dr. Mihalko's January 10, 2013 report, and concurred with his 25 percent RLE impairment rating under Table 16-3, A.M.A., *Guides* 511. The DMA noted the rating was based on the "good results" of appellant's total knee arthroplasty.

On January 16, 2013 OWCP granted a schedule award for 25 percent permanent RLE impairment.⁴ The award covered a 72-week period from January 10, 2013 through May 28, 2014. OWCP paid appellant at the augmented (¾) compensation rate.

Effective January 31, 2013, appellant voluntarily retired and subsequently received a nondisability retirement annuity from the Office of Personnel Management (OPM).⁵

On March 6, 2013 OWCP issued a loss of wage-earning capacity determination finding that appellant's May 22, 2012 limited-duty, sedentary work assignment fairly and reasonably

² In an April 8, 2004 report, OWCP's district medical adviser (DMA) found 10 percent right lower extremity impairment under the fifth edition of the American Medical Association, *Guides to the Evaluation of permanent Impairment* (A.M.A., *Guides*) (2001). See Table 17-33, A.M.A., *Guides* 546 (5th ed. 2001).

³ Appellant was limited to sedentary work only. On May 8, 2012 the employing establishment offered her a limited-duty assignment performing sedentary work, sitting for eight hours daily, which she accepted on May 22, 2012.

⁴ For complete loss of use of a leg, an employee shall receive 288 weeks' compensation. 5 U.S.C. § 8107(c)(2).

⁵ During a February 21, 2013 telephone conversation (CA-110 notes), appellant advised OWCP that she retired on January 31, 2013 "because [appellant] was eligible and for no other reason."

represented her wage-earning capacity. The decision noted that the position was considered suitable to her partially disabled condition, and further noted that she performed the position for at least two months prior to her voluntary retirement effective January 31, 2013.

On February 26, 2014 appellant submitted a financial disclosure (EN/CA-1032) form indicating, that she was unmarried and had no other eligible dependents.

On October 16, 2014 OWCP issued an amended schedule award. The decision explained that OWCP previously failed to take into account appellant's prior 10 percent RLE award when issuing its January 16, 2013 schedule award for 25 percent. In light of the prior award, appellant was only entitled to an additional 15 percent, representing a total right lower extremity permanent impairment of 25 percent. OWCP further explained that the January 16, 2013 schedule award was based on the augmented compensation rate ($\frac{3}{4}$) despite her having no eligible dependents. The October 16, 2014 amended award (15 percent) represented 43.2 weeks of compensation, which covered the period January 10 through November 8, 2013.⁶ Additionally, OWCP recalculated the schedule award based on the regular ($\frac{2}{3}$) compensation rate.

On October 27, 2014 OWCP issued a preliminary finding of overpayment in the amount \$27,558.81 covering the period January 10, 2013 through May 28, 2014. It reiterated that appellant was only entitled to an additional 15 percent for her right lower extremity impairment. She was also not entitled to receive compensation at the augmented ($\frac{3}{4}$) rate. OWCP further explained that appellant was not at fault in creating the overpayment.

Appellant requested a prerecoupment hearing, which was held before an OWCP hearing representative on June 16, 2015. Prior to the hearing, she submitted an overpayment recovery questionnaire (OWCP-20) with supporting documentation. Appellant initially reported monthly OPM retirement income (net) of \$2,249.03 and monthly expenses of \$2,059.65. She also reported assets totaling \$10,829.00.⁷ At the prerecoupment hearing appellant indicated that her monthly OPM retirement annuity increased to \$2,286.72 as of December 2014. She also indicated that her previously reported savings (\$4,073.00) had been reduced by \$2,000.00. Additionally, appellant testified that she had \$4,800.00 in her Thrift Savings Plan (401(k)) account, which she had not previously reported. Lastly, she testified that her previously reported monthly expenses remained the same.

By decision dated September 2, 2015, the OWCP hearing representative determined that appellant received an overpayment of compensation in the amount of \$27,558.81 for the period January 10, 2013 through May 28, 2014. She also found that appellant was not at fault in creating the overpayment. As to the issue of waiver, the hearing representative determined that appellant's monthly income (\$2,286.72) exceeded her monthly expenses (\$2,059.65) by more than \$225.00 per month. She also noted that appellant had sufficient assets such that recovery of the overpayment would not defeat the purpose of FECA. The hearing representative further found that recovery of the overpayment would not be against equity and good conscience. Based

⁶ See *supra* note 4.

⁷ Appellant's reported assets included a vacant parcel of land with a tax assessed value of \$5,850.00.

on the documented monthly surplus, appellant would not experience severe financial hardship in attempting to repay the debt. Also, she had not alleged, nor did the record support that she relinquished a valuable right or changed her position for the worse based on notice or receipt of the January 16, 2013 schedule award. Consequently, the hearing representative denied waiver of recovery of the overpayment.⁸

LEGAL PRECEDENT -- ISSUE 1

FECA and its implementing regulations provide for the reduction of compensation for subsequent injury to the same scheduled member.⁹ Benefits payable under 5 U.S.C. § 8107(c) shall be reduced by the period of compensation paid under the schedule for an earlier injury if: (1) compensation in both cases is for impairment of the same member or function or different parts of the same member or function; and (2) the latter impairment in whole or in part would duplicate the compensation payable for the preexisting impairment.¹⁰

Compensation for impairment is computed based on the employee's effective pay rate and whether he or she has any eligible dependents.¹¹ Depending on whether the employee has at least one eligible dependent, compensation will be paid at either $\frac{2}{3}$ or $\frac{3}{4}$ of the effective pay rate.¹² For purposes of entitlement to augmented ($\frac{3}{4}$) compensation, a dependent includes: (1) a wife or husband; (2) an unmarried child under 18 years of age; (3) an unmarried child over 18 who is incapable of self-support; (4) a student, until he/she reaches 23 years of age or completes four years of school beyond the high school level; and (5) a wholly dependent parent.¹³

ANALYSIS -- ISSUE 1

Appellant does not challenge OWCP's latest finding of 25 percent permanent impairment of the right lower extremity. In January 2013, her then-treating physician, Dr. Mihalko, found 25 percent permanent right lower extremity impairment based on appellant's status post right total knee arthroplasty. Moreover, the DMA concurred with Dr. Mihalko's rating under Table 16-3, A.M.A., *Guides* 511.

In June 2004, appellant received a schedule award for 10 percent permanent impairment based on an earlier right knee arthroscopic procedure. Her latest rating of 25 percent due to the January 11, 2012 right total knee arthroplasty established an additional impairment of 15 percent of the right lower extremity. However, OWCP failed to offset the current rating by the prior

⁸ The hearing representative found that appellant was capable of repaying the debt in regular monthly installments of \$175.00.

⁹ 5 U.S.C. § 8108; 20 C.F.R. § 10.404(c) (2014).

¹⁰ *Id.* at § 10.404(d)(1), (d)(2).

¹¹ *See* 5 U.S.C. §§ 8107 and 8110; *id.* at § 10.404(c).

¹² *Id.* at § 10.404(c); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.7(f) (February 2013).

¹³ 5 U.S.C. § 8110(a); 20 C.F.R. § 10.405(a) and (b).

award, and mistakenly paid appellant the full 25 percent impairment. After realizing its mistake, it issued an amended award on October 16, 2014 finding her entitled to only an additional 15 percent permanent impairment of the right lower extremity. Thus, instead of the 72 weeks of compensation (25 percent) previously paid, appellant was only entitled to 43.2 weeks of compensation (15 percent). The Board finds that her current rating of 25 percent permanent impairment of the right lower extremity was appropriately reduced based on the June 3, 2004 schedule award for 10 percent permanent right lower extremity impairment.¹⁴

The Board also finds that appellant was not entitled to receive compensation at the augmented ($\frac{3}{4}$) rate. When appellant filed her claim (Form CA-7) for a schedule award in January 2013, she did not list any dependents,¹⁵ and her latest financial disclosure (EN/CA-1032) form indicates appellant is unmarried and has no other eligible dependents.¹⁶ Accordingly, appellant's schedule award beginning January 10, 2013 should have been paid at the regular/basic compensation rate ($\frac{2}{3}$) rather than the augmented ($\frac{3}{4}$) rate.¹⁷

By the time OWCP realized both errors, the January 16, 2013 schedule award had been paid in full. OWCP's fiscal records reflect schedule award disbursements totaling \$60,062.73 for the 72-week period beginning January 10, 2013 and ending May 28, 2014. When recalculated based on a 43.2-week period (January 10 through November 8, 2013) at the basic rate ($\frac{2}{3}$), appellant was entitled to \$32,503.92 for her additional 15 percent permanent impairment. The difference between what she received and what she was entitled to receive represented an overpayment of compensation in the amount of \$27,558.81. Accordingly, the record establishes that appellant received an overpayment of compensation in the amount of \$27,558.81 for the period January 10, 2013 through May 28, 2014. As such, the Board affirms OWCP's findings with respect to the fact and amount of overpayment. The Board also affirms OWCP's determination that appellant was without fault in either creating or accepting the overpayment.

LEGAL PRECEDENT -- ISSUE 2

An individual who is without fault in creating or accepting an overpayment is nonetheless subject to recovery of the overpayment unless adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.¹⁸ Recovery of an overpayment will defeat the purpose of FECA if such recovery would cause hardship to a current or former beneficiary because the beneficiary from whom OWCP seeks recovery needs substantially all of her current income, including compensation benefits, to meet current ordinary and necessary

¹⁴ *Supra* note 10.

¹⁵ Appellant previously claimed her son as an adult dependent college student, but based on his February 17, 1983 date of birth, any period of eligibility has long since expired.

¹⁶ Appellant's February 26, 2014 (EN/CA-1032) covers the prior 15-month period dating back to November 2012.

¹⁷ 20 C.F.R. § 10.404(c).

¹⁸ 5 U.S.C. § 8129(b); *id.* at §§ 10.433, 10.434, 10.436, 10.437.

living expenses, and the beneficiary's assets do not exceed a specified amount as determined by OWCP.¹⁹ Additionally, 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 in attempting to repay the debt or when an individual, in reliance on such payment or on notice that such payments would be made, relinquished a valuable right or changed her position for the worse.²⁰

The individual who received the overpayment is responsible for providing information about income, expenses, and assets as specified by OWCP.²¹ This information is necessary for determining whether a waiver of recovery of the overpayment is warranted.²² The information is also used to determine an appropriate repayment schedule, if necessary.²³ Failure to submit the requested information within 30 days of the request shall result in denial of waiver.²⁴

ANALYSIS -- ISSUE 2

Appellant requested waiver of recovery of the above-noted overpayment. She submitted an overpayment recovery questionnaire (OWCP-20) and provided documentation regarding her income, assets, and various expenses. At the precoupment hearing, appellant indicated that her monthly OPM retirement annuity was \$2,286.72. She did not identify any additional sources of income. On her November 20, 2014 OWCP-20 appellant reported total monthly expenses of \$2,059.65. At the subsequent precoupment hearing, she indicated that her previously reported monthly expenses had not changed. Based on the reported income and expenses, the OWCP hearing representative correctly noted that appellant had a monthly surplus in excess of \$225.00.

An individual is deemed to need substantially all of his or her current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.²⁵ Because appellant has a monthly surplus of approximately \$225.00, recovery of the overpayment would not defeat the purpose of FECA.²⁶ For the same

¹⁹ *Id.* at § 10.436(a), (b). For an individual with no eligible dependents the asset base is \$4,800.00. The base increases to \$8,000.00 for an individual with a spouse or one dependent, plus \$960.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6a(1)(b) (June 2009).

²⁰ *Id.* at § 10.437(a), (b).

²¹ *Id.* at § 10.438(a).

²² *Id.*

²³ *Id.*

²⁴ 20 C.F.R. § 10.438(b).

²⁵ *Supra* note 19 at Chapter 6.200.6a(1)(b).

²⁶ 20 C.F.R. § 10.436(a).

reason, recovery would not be against equity and good conscience. The record does not support that appellant would experience severe financial hardship in attempting to repay the debt.²⁷

Although appellant had not previously alleged detrimental reliance, on appeal she claimed that her decision to retire effective January 31, 2013 was based on OWCP's January 16, 2013 schedule award. Notwithstanding the temporal relationship between the erroneous schedule award and the effective date of her voluntary retirement, there is no evidence to substantiate her claim of detrimental reliance. Specifically, other than her statements there is no evidence that appellant chose to retire once she learned of the January 16, 2013 schedule award. Moreover, the record contradicts her recent claim of detrimental reliance. According to the February 21, 2013 CA-110 notes, appellant advised OWCP that she retired on January 31, 2013 "because she was eligible and for no other reason." The Board finds that the record does not support her claim of detrimental reliance. There is no evidence that appellant changed her position for the worse or relinquished a valuable right based "chiefly or solely" in reliance on the January 16, 2013 schedule award.²⁸ As such, she failed to establish that recovery of the overpayment would be against equity and good conscience. Accordingly, the Board finds that OWCP properly denied waiver of recovery of the overpayment.

CONCLUSION

Appellant received an overpayment of compensation in the amount of \$27,558.81 for the period January 10, 2013 through May 28, 2014. Although she was not at fault in creating the overpayment, she is not entitled to waiver of recovery.

²⁷ *Id.* at § 10.437(a).

²⁸ *Id.* at § 10.437(b).

ORDER

IT IS HEREBY ORDERED THAT the September 2, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 10, 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