

permanent impairment of the left lower extremity; and (2) whether OWCP properly denied waiver of recovery of the overpayment.

FACTUAL HISTORY

This case has previously been before the Board.³ The facts of the case as presented in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On April 13, 2007 appellant, then a 59-year-old tractor trailer operator, filed a traumatic injury claim (Form CA-1) alleging that he injured his left knee that same date while using the clutch to back up his truck while in the performance of duty. He stopped work on the date of injury. OWCP accepted the claim for left knee lateral collateral ligament sprain, and subsequently expanded acceptance of the claim to include left anterior cruciate ligament tear.

In an August 7, 2008 report, Dr. Nicholas Diamond, an examining osteopath, noted appellant's employment and medical histories. He diagnosed post-traumatic left knee anterior cruciate ligament, patellar tendon, and distal quadriceps tears. Dr. Diamond provided physical examination findings and applied the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)⁴ to determine that appellant had 38 percent permanent impairment of his left lower extremity.

On December 23, 2008 appellant filed a claim for a schedule award (Form CA-7).

On September 22, 2009 OWCP received a new report from Dr. Diamond in which he applied the sixth edition of the A.M.A., *Guides* and determined that appellant had 35 percent permanent impairment of his left lower extremity. Dr. Diamond used Table 16-23, on page 549 of the A.M.A., *Guides*, to calculate that impairment rating based on range of motion deficits.

OWCP subsequently referred appellant to Dr. Stanley Askin, a Board-certified orthopedic surgeon, for a second opinion. In a February 3, 2010 report, Dr. Askin reviewed appellant's medical history. He noted that appellant had pain complaints, but continued working as a tractor trailer operator on trucks without a clutch. Dr. Askin related that his examination of appellant's left knee revealed no knee effusion. Appellant reported some tenderness on palpation along the lateral patella side and anterolateral and anteromedial joint line areas. Dr. Askin noted no instability in the collateral ligaments, either medially or laterally and a negative Lachman's test. He applied the sixth edition of the A.M.A., *Guides* and determined that appellant had 20 percent permanent impairment of his left lower extremity.

OWCP referred Dr. Askin's report to a district medical adviser (DMA). In an August 5, 2010 report, a DMA concurred with Dr. Askin's 20 percent left lower extremity permanent impairment rating and date of maximum medical improvement.

³ Docket No. 12-0985 (issued December 19, 2012).

⁴ A.M.A., *Guides* (5th ed. 2001).

On September 1, 2010 OWCP granted appellant a schedule award for 20 percent permanent impairment of the left lower extremity. The award covered a period of 57.6 weeks and covered the period January 22, 2010 to March 1, 2011.

By letter dated September 10, 2010, appellant, through counsel, requested a hearing before an OWCP hearing representative, seeking increased impairment.

Following a preliminary review, by decision dated December 27, 2010, OWCP's hearing representative set aside the September 1, 2010 schedule award decision, finding that there was an unresolved conflict in the medical opinion evidence between Dr. Askin and Dr. Diamond regarding appellant's range of motion and permanent impairment rating. The hearing representative remanded the case for resolution of the conflict and a *de novo* decision.

On February 2 and March 7, 2011 OWCP referred appellant to Dr. James P. Taitsman, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence between Drs. Askin and Diamond regarding appellant's permanent impairment rating, as instructed by OWCP's hearing representative.

On March 25, 2011 Dr. Taitsman, based upon a physical examination, statement of accepted facts (SOAF), and review of the medical evidence, determined that appellant had no more than 13 percent left lower extremity permanent impairment using the sixth edition of the A.M.A., *Guides*.⁵

On April 18, 2011 OWCP referred Dr. Taitsman's report to the DMA for review. On April 30, 2011 the DMA concurred with Dr. Taitsman's permanent impairment rating of 13 percent.

By decision dated May 16, 2011, OWCP denied appellant's request for an increased schedule award. It found that, while appellant was previously paid a schedule award for 20 percent permanent impairment of the left lower extremity, the correct impairment rating is 13 percent based on the reports of Dr. Taitsman and the DMA. OWCP advised that, as the previous schedule award was paid in error, it is recoverable as an overpayment. A notice of overpayment would be provided under separate cover.

By letter dated May 23, 2011,⁶ appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative, which was held on September 20, 2011.

By decision dated December 19, 2011, OWCP's hearing representative affirmed the May 16, 2011 decision. Appellant subsequently appealed to the Board on April 4, 2012.

In December 19, 2012 decision,⁷ the Board set aside the December 19, 2011 hearing representative's decision, finding that OWCP had not properly selected Dr. Taitsman under the

⁵ A.M.A., *Guides* (6th ed. 2009).

⁶ The year was mistakenly written as 2010 instead of 2011.

⁷ *Supra* note 3.

Physicians Directory System (PDS). The Board remanded the case to OWCP for referral to another impartial medical specialist and issuance of a *de novo* decision.

On remand OWCP referred appellant, the case record, and a SOAF to Dr. Dean Carlson, a Board-certified orthopedic surgeon, for an impartial medical examination and impairment evaluation regarding the permanent impairment of appellant's left lower extremity.

In a November 7, 2013 report, Dr. Carlson, based upon a review of the medical evidence, SOAF, and physical examination, diagnosed resolved anterior cruciate ligament interstitial tear, resolved suprapatellar and infrapatellar interstitial tears, and left knee severe nonorganic loss of flexion. Using the sixth edition of the A.M.A., *Guides*, he determined that appellant had zero percent permanent impairment of the left lower extremity using a range of motion assessment. Dr. Carlson opined that appellant's range of motion deficit was nonorganic. He also determined the physical examination findings were inconsistent among the physicians of record and, thus, were invalid.

On May 19, 2014 an OWCP medical adviser reviewed Dr. Carlson's opinion and concurred with the finding of zero percent left lower extremity permanent impairment.

By decision August 11, 2014, OWCP denied appellant's claim for a schedule award, finding that appellant had not established permanent impairment of his left lower extremity. While appellant was previously awarded 20 percent permanent impairment of her left lower extremity, his impairment was found to be 0 percent. An overpayment therefore, occurred, and a notice of overpayment would be provided under separate cover.

On August 14, 2014 counsel disagreed with the August 11, 2014 decision and requested an oral hearing before an OWCP hearing representative, which was held on December 19, 2014.

On August 25, 2014 OWCP issued a preliminary notice of an overpayment of compensation in the amount of \$42,289.28. It found that the overpayment occurred because appellant had been paid a schedule award for 20 percent left lower extremity permanent impairment when his actual permanent impairment was 0 percent. OWCP further found that appellant was without fault in the creation of the overpayment.

On September 5, 2014 counsel requested a prerecoupment hearing before an OWCP hearing representative, which was held on February 24, 2015.

By decision dated March 11, 2015, OWCP's hearing representative vacated the August 11, 2014 decision, finding that OWCP had not properly selected Dr. Carlson under the PDS. The case was remanded to OWCP for a new impartial medical examiner to determine appellant's left lower extremity permanent impairment rating.

By decision dated May 15, 2015, OWCP's hearing representative found the issues of overpayment and waiver were not in posture for decision based on the March 11, 2015 hearing representative's decision. He, therefore, vacated the August 25, 2015 preliminary overpayment determination and remanded the case to OWCP. The hearing representative advised that once the schedule award issue was finalized, OWCP could then consider whether there was an overpayment of compensation.

On September 11, 2015 OWCP referred appellant to Dr. Jeffrey Lakin, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine an impairment rating. Dr. Lakin, in a report dated October 8, 2015, determined that appellant had zero percent left lower extremity permanent impairment using Table 16-3, page 510 of the A.M.A., *Guides* (6th ed.) based on a diagnosis of cruciate or collateral ligament injury with no instability or surgery. He found the date of maximum medical improvement (MMI) was October 8, 2015.

On November 12, 2015 a DMA reviewed Dr. Lakin's report, objective tests and medical reports and noted that it did not correlate with prior impairment ratings. The DMA found that appellant had 13 percent left lower extremity impairment based on the opinion of Dr. Taitsman, who the Board had previously found was not properly selected as an impartial medical examiner. The DMA determined that the date of MMI was March 25, 2011, the date of Dr. Taitsman's examination.

By decision dated December 18, 2015, OWCP denied appellant's schedule award claim, finding that appellant had not established permanent impairment of a scheduled member or function of the body. It further advised that, because appellant was previously awarded a schedule award for 20 percent permanent impairment, an overpayment of compensation had occurred. A notice of overpayment would be provided under separate cover.

In a letter dated December 29, 2015, counsel requested an oral hearing before an OWCP hearing representative. On April 4, 2016 he withdrew his request for an oral hearing.

On August 18, 2016 OWCP issued a preliminary determination that appellant received an overpayment of compensation in the amount of \$42,289.28 for the period August 11, 2014 through December 18, 2015. It explained that the overpayment occurred as appellant received a schedule award for 20 percent permanent impairment of the left lower extremity when he had no permanent impairment. OWCP further advised that appellant was without fault in the creation of the overpayment.

Appellant, through counsel, requested a prerecoupment hearing before an OWCP hearing representative, which was held on November 30, 2016.

Following the hearing, appellant submitted a completed overpayment recovery questionnaire (OWCP-20) dated November 29, 2016 with supporting financial documentation.

By decision dated February 28, 2017, an OWCP hearing representative affirmed OWCP's August 11, 2016 preliminary overpayment determination regarding the fact of the overpayment. She modified the amount of the overpayment from \$42,289.28 to \$14,801.21 as appellant was entitled to a schedule award for 13 percent permanent impairment of the left lower extremity, but had received a schedule award for 20 percent permanent impairment. The hearing representative also affirmed OWCP's finding that appellant was without fault in the creation of the overpayment, but denied waiver of recovery as the financial information submitted failed to establish that appellant would incur undue financial hardship.

LEGAL PRECEDENT -- ISSUE 1

Section 8149 of FECA delegates to the Secretary of Labor the authority to prescribe rules and regulations for the administration and enforcement of FECA. The Secretary of Labor has

vested the authority to implement FECA's program with the Director of OWCP.⁸ Section 8107 of FECA sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions, and organs of the body.⁹ FECA, however, does not specify the manner by which the percentage loss of a member, function, or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. Through its implementing regulations, OWCP adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.¹⁰

As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).¹¹ The Board has approved the use by OWCP of the A.M.A., *Guides* for the purpose of determining the percentage loss of use of a member of the body for schedule award purposes.¹²

If a claimant who has received a schedule award calculated under a previous edition of the A.M.A., *Guides* is entitled to additional benefits, the increased award will be calculated according to the current, sixth edition.¹³ Should the subsequent calculation result in a percentage of impairment lower than the original award, as sometimes occurs, a finding should be made that the claimant has no more than the percentage of impairment originally awarded, that the evidence does not establish an increased impairment, and that OWCP has no basis for declaring an overpayment.¹⁴ However, where both the prior and subsequent ratings were calculated under the sixth edition of the A.M.A., *Guides*, a subsequent determination that there is a lesser degree of impairment than previously awarded may support a finding of overpayment.¹⁵

ANALYSIS -- ISSUE 1

The Board finds that this case is not in posture for decision as the underlying schedule award determination remains not in posture for decision. Thus, the issues of fact of overpayment and waiver are premature.¹⁶

⁸ See 20 C.F.R. §§ 1.1-1.4.

⁹ For a complete loss of use of an arm, an employee shall receive 312 weeks' compensation. 5 U.S.C. § 8107(c)(1).

¹⁰ 20 C.F.R. § 10.404. See also *Ronald R. Kraynak*, 53 ECAB 130 (2001).

¹¹ See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (February 2013).

¹² *Isidoro Rivera*, 12 ECAB 348 (1961).

¹³ *Supra* note 7 at Chapter 2.808.9(d).

¹⁴ *Id.*

¹⁵ *Id.* at Chapter 2.808.9(e).

¹⁶ *C.S.*, Docket No. 16-0752 (issued April 19, 2017).

OWCP accepted appellant's claim for left lateral collateral ligament sprain and left anterior cruciate ligament tear. In the prior appeal, the Board, in a December 19, 2012 decision, set aside OWCP's December 19, 2011 decision as it found Dr. Taitsman had not been properly selected as an impartial medical examiner. The Board remanded the case for further development of the evidence and resolution of the unresolved conflict. By decision dated August 11, 2014, OWCP denied appellant's schedule award claim based upon the opinion of Dr. Carlson, an impartial medical examiner. On March 11, 2015 OWCP set aside the August 11, 2014 decision, as it found that Dr. Carlson had been improperly selected and remanded the case for referral to a new impartial medical examiner.

The Board finds that the conflict between appellant's treating physician and OWCP's referral physician has not been resolved.

While OWCP followed the Board's instructions on remand by referring appellant to Dr. Carlson for an impartial medical examination, OWCP's hearing representative found that Dr. Carlson had not been properly selected. The hearing representative vacated the August 25, 2015 schedule award determination and remanded the case to OWCP for referral to another impartial medical examination. Instead of referring appellant to an impartial medical examiner as instructed by the hearing representative, it referred him for a second opinion evaluation with Dr. Lakin, who found zero percent left lower extremity permanent impairment. A DMA reviewed Dr. Lakin's report, which he found failed to correlate with prior reports. The DMA determined that appellant had 13 percent left lower extremity permanent impairment based on the opinion of Dr. Taitsman, who the Board had previously found was properly selected as an impartial medical examiner. OWCP did not refer appellant to an impartial medical examiner as instructed by the hearing representative and the Board to resolve the conflict in medical opinion evidence.¹⁷

Because there is an unresolved conflict in medical opinion, pursuant to 5 U.S.C. § 8123(a), the case will be remanded to OWCP for referral of appellant, together with the medical record and an updated SOAF, to an appropriate Board-certified specialist for an impartial medical examination to determine the extent and degree of appellant's left lower extremity permanent impairment in accordance with the sixth edition of the A.M.A., *Guides*. After such further development as OWCP deems necessary, it shall issue a *de novo* decision.¹⁸

CONCLUSION

The Board finds that this case is not in posture for decision.

¹⁷ See Federal (FECA) Procedure Manual, Part 3 -- Medical, *OWCP Directed Medical Examinations, Referee Examinations*, Chapter 3.500.4 (July 2011).

¹⁸ As the case is not in posture for a decision regarding the appropriate percentage of appellant's left lower extremity permanent impairment, the finding of \$18,801.21 overpayment of compensation and denial of waiver of recovery of the overpayment must be set aside as moot. It is premature for the Board to address the issue of any overpayment of compensation until the proper percentage of permanent impairment is determined. See *A.M.*, Docket No. 16-0530 (issued December 21, 2016); *Lee Z. Watson*, Docket No. 04-2176 (issued March 1, 2005) (finding that when the decision providing the basis for the overpayment is reversed or set aside, the resulting overpayment issues are moot). The Board also finds counsel's arguments on appeal moot in light of the Board's disposition of this case.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 28, 2017 is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: February 15, 2018
Washington, DC

Patricia H. Fitzgerald, Deputy 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