United States Department of Labor
Employees' Compensation Appeals Board

P.M., Appellant	)	
and	)	**Docket No. 18-1215**
	)	**Issued: June 18, 2020**
DEPARTMENT OF HOMELAND SECURITY, U.S. CUSTOMS & BORDER PROTECTION, Santee, CA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 29, 2018 appellant filed a timely appeal from a January 5, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.[2]

ISSUES

The issues are: (1) whether OWCP properly found an overpayment of compensation in the amount of $12,715.23 for the period November 6, 2012 through January 5, 2013 as the

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that following the January 5, 2018 decision, OWCP received additional evidence, and appellant submitted evidence to the Board on appeal. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

current schedule award duplicated compensation previously paid; and (2) whether OWCP properly denied waiver of recovery of the overpayment.

FACTUAL HISTORY

On July 28, 2015 appellant, then a 38-year-old border patrol agent, filed a traumatic injury claim (Form CA-1) alleging that he injured his right knee that day when hiking on rough terrain while in the performance of duty. OWCP accepted the claim for right knee sprain and tear of the right medial meniscus. Appellant stopped work on September 12, 2015. Dr. Michael R. Lenihan, Board-certified in orthopedic surgery, performed OWCP-authorized right knee arthroscopic surgery on September 23, 2015. He returned to limited-duty work on October 9, 2015 and to full-duty work on May 31, 2016. OWCP paid appellant wage-loss compensation on the supplemental rolls from September 12 through October 8, 2015.

The record indicates that appellant had a prior claim for a July 19, 2010 injury when his foot was trapped between two rocks. OWCP adjudicated that claim under OWCP File No. xxxxxx041 and accepted right lower extremity conditions of fracture of the metatarsal bone, other enthesopathy of the knee, tear of the lateral meniscus, and other enthesopathy of the ankle and tarsus. Dr. Lenihan had performed right knee arthroscopic surgery on April 20 and December 14, 2011 and appellant returned to full duty on March 13, 2012. Under that claim, by decision dated October 31, 2012, OWCP granted appellant a schedule award for 11 percent permanent impairment of the right lower extremity. It noted that it based the award on the opinions of Dr. Lenihan and Dr. Mark D. Chodos, a Board-certified orthopedist, and that of its district medical adviser (DMA), Dr. Leonard A. Simpson, an orthopedic surgeon, each of whom utilized the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (A.M.A., *Guides*).[3] The period of the award was from May 29, 2012 to January 5, 2013.

Under the current claim, OWCP File No. xxxxxx916, on April 6, 2017 appellant filed a claim for a schedule award (Form CA-7). He submitted a June 28, 2016 report in which Dr. Lenihan described his September 23, 2015 right knee surgery. Dr. Lenihan's postoperative right knee diagnoses were medial meniscal tear plus reactive synovitis and chondral flaps in the femoral groove. He noted that appellant was permanent and stationary and that his current right knee diagnoses arose out of and in the course of his usual and customary duties at work. Dr. Lenihan described appellant's previous right knee injury, noting that for that injury appellant was permanent and stationary on April 24, 2012 at which time he had 10 percent permanent impairment of the right lower extremity, based on the knee alone.

[3] A.M.A., *Guides* (6th ed. 2009). Dr. Lenihan provided an April 24, 2012 impairment evaluation in which he rated appellant's right knee. He indicated that, under Table 16-3, Knee Regional Grid, for a diagnosis of partial medial and lateral meniscal tears, appellant had 10 percent right lower extremity permanent impairment. In a report signed by Dr. Chodos on June 2, 2012, he indicated that he evaluated appellant on May 29, 2012. He utilized Table 16-2, Foot and Ankle Regional Grid, and determined that appellant had one percent permanent impairment for a diagnosis of peroneal tendinitis. Dr. Simpson agreed with these assessments. He combined the knee rating of 10 percent with the ankle rating of 1 percent for a total 11 percent right lower extremity impairment.

In May 2017 OWCP referred appellant to Dr. Frederick W. Close, a Board-certified orthopedic surgeon, for a second opinion examination. It asked that he provide an opinion on appellant's work-related conditions and any resulting permanent impairment. In a June 27, 2017 report, Dr. Close noted his review of the statement of accepted facts (SOAF) and medical record, the history of injury, and appellant's current complaints of continued right knee pain, swelling, and locking. Right knee physical examination demonstrated subtle subpatellar crepitance on flexion and extension and tenderness over the medial ridge. Dr. Close diagnosed status post arthroscopic surgery for recurrent tear medial meniscus of the right knee, traumatic osteoarthritis of the right knee, and chronic synovitis and effusion of the right knee. He advised that appellant had reached maximum medical improvement on June 28, 2016. Dr. Close advised that, in accordance with Table 16-3 of the sixth edition of the A.M.A., *Guides*, for a diagnosis of mild medial and collateral ligament laxity, appellant had a class 1 impairment, noting a default value of 10 percent. He found no grade modifiers for functional history or physical examination and a modifier of 1 for clinical studies which, when applying the net adjustment formula, yielded a net adjustment of -2, for seven percent right lower extremity permanent impairment.

On August 29, 2017 OWCP referred the record, including Dr. Close's report, to its DMA for review. In a September 1, 2017 report, Dr. Jovito Estaris, Board-certified in occupational medicine, acting as a DMA, utilized the findings in Dr. Close's June 27, 2017 report. He advised that, under Table 16-3 of the A.M.A., *Guides*, for a class of diagnosis (CDX) of collateral ligament injury with mild laxity, appellant had a class 1 impairment with a default value of 10 percent. Dr. Estaris found a grade modifier for functional history (GMFH) of zero, noting no abnormal gait, a grade modifier for physical examination (GMPE) of one, noting mild laxity of medial collateral ligament, and found that a grade modifier for clinical studies (GMCS) was not applicable as a magnetic resonance imaging scan did not support a medical collateral ligament injury. The DMA applied the net adjustment formula and found a net adjustment of -1, which yielded eight percent right lower extremity impairment. In conclusion, he noted that appellant previously received a schedule award for 10 percent permanent impairment and was now entitled to 8 percent permanent impairment of the right lower extremity.

By decision dated September 11, 2017, OWCP denied appellant's claim for a schedule award. It noted that appellant had previously received a schedule award for 11 percent permanent impairment of the right lower extremity on October 31, 2012, under File No. xxxxxx041. OWCP noted that Dr. Lenihan did not provide an impairment rating, that Dr. Close found seven percent permanent impairment of the right lower extremity, and that based upon his review of the medical record, its DMA found eight percent right lower extremity permanent impairment. It concluded that the current medical evidence did not support an additional schedule award because it established only eight percent right lower extremity permanent impairment.

On September 27, 2017 OWCP issued a preliminary overpayment determination, finding that appellant was overpaid $12,715.23 in compensation because he previously received a schedule award for 11 percent permanent impairment of the right lower extremity under File No. xxxxxx041, but the current impairment rating under File No. xxxxxx916 was determined to be 8 percent impairment of the right lower extremity. It therefore found that appellant had been erroneously paid an additional three percent impairment for the right lower extremity for the period May 29, 2012 to January 5, 2013. OWCP determined that appellant was not at fault in the creation of the overpayment. It forwarded an overpayment action request and an overpayment recovery

questionnaire (Form CA-20). OWCP explained its calculation of the overpayment, informed appellant of the actions he could take, and afforded him 30 days to respond.[4]

On October 27, 2017 appellant requested a telephone conference with the district office. He disagreed with the amount of the overpayment, maintained that the overpayment occurred through no fault of his own, and requested waiver of recovery of the overpayment. Appellant asserted that the prior schedule award for the July 19, 2010 employment injury was for the right knee and for a fractured right foot.

On October 31, 2017 OWCP received appellant's completed Form CA-20 overpayment recovery questionnaire. Appellant listed no monthly income and reported monthly expenses of $5,653.18, cash on hand of $55.00, and checking and savings account balances of $153.00.[5] He submitted federal and state income tax returns for 2016, bank account statements, and his earnings and leave statements from August 6 to October 14, 2017.

In a memorandum of telephone conference dated November 27, 2017, appellant asserted that he did not know about the overpayment beforehand and believed it was incorrect. He indicated that the prior schedule award for 11 percent impairment of the right lower extremity included his foot and knee. OWCP informed appellant that impairment ratings were for the entire lower extremity and included his foot, knee, and leg. It agreed that he was not at fault in the creation of the overpayment, and appellant agreed to a recovery at the rate of $50.00 a month.

By decision dated January 5, 2018, OWCP finalized the overpayment determination. It found that appellant was not at fault in the creation of the overpayment, but denied waiver of the overpayment. Recovery of the overpayment was set at $50.00 per month.

LEGAL PRECEDENT -- ISSUE 1

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. 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. The implementing regulations have adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule

[4] OWCP indicated that three percent permanent impairment of the lower extremities was equal to 60.48 days or 8.64 weeks of compensation. It noted that appellant's weekly compensation amount was $1,471.67, which it multiplied by 8.64 weeks to yield an overpayment of compensation totaling $12,715.23.

[5] Appellant reported the following monthly expenses: rent or mortgage $1,254.00; food $1,600.00; clothing $300.00; utilities $470.00; other expenses $880.00; car loan payment $349.09 and credit cards debt $809.00.

losses.[6] Effective May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).[7]

A claimant has the burden of proof under FECA to establish permanent impairment of a scheduled member or function as a result of his or her employment injury entitling him or her to a schedule award.[8] In determining impairment for the lower extremities under the sixth edition of the A.M.A., *Guides*, an evaluator must establish the appropriate diagnosis for each part of the lower extremity to be rated. With respect to the knee, reference is made to Table 16-3 (Knee Regional Grid). After the CDX is determined from the Knee Regional Grid (including identification of a default grade value), the net adjustment formula is applied using the grade modifiers in the following formula: (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[9]

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to a DMA for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides* with the DMA providing rationale for the percentage of impairment specified.[10]

The sixth edition of the A.M.A., *Guides* provides for a possibility that two conditions are present within a limb and that there could be multiple lower extremity impairments.[11] These impairments should be combined to reach the total lower extremity impairment. It is well established that benefits payable under 5 U.S.C. § 8107(c) are 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.[12]

OWCP's procedures provide that claims for an increased schedule award based on the same edition of the A.M.A., *Guides* are subject to overpayment.[13]

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[6] 20 C.F.R. § 10.404.

[7] *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 2.808.6a (March 2017).

[8] *L.L.*, Docket No. 19-0097 (issued March 20, 2020).

[9] A.M.A., *Guides*, *supra* note 3 at 515-22.

[10] *Supra* note 7 at Chapter 2.808.6f.

[11] A.M.A., *Guides*, *supra* note 3 at 529.

[12] *See* 5 U.S.C. § 8108; 20 C.F.R. § 10.404(d); *R.K.*, Docket No. 19-0247 (issued August 1, 2009); *J.S.*, Docket No. 15-1252 (issued January 19, 2016); *T.S.*, Docket No. 09-1308 (issued December 22, 2009).

[13] *Supra* note 7 at Chapter 2.808.9(e) (February 2013).

ANALYSIS -- ISSUE 1

The Board finds that OWCP did not establish that an overpayment of compensation in the amount of $12,715.23 had been created. Therefore, this case must be reversed.

The Board initially finds that OWCP did not resolve the issue of appellant's right lower extremity impairment in its September 11, 2017 decision. OWCP based its determination that appellant was not entitled to a schedule award greater than the 11 percent permanent impairment of the right lower extremity previously awarded on the opinion of its DMA who advised that at present, he was only entitled to 8 percent right lower extremity permanent impairment. It then declared an overpayment of compensation, finding that appellant had erroneously been paid for an additional three percent permanent impairment to which he was not entitled.

The Board has previously held that simply comparing the prior percentage of permanent impairment awarded to the current impairment for the same member is not always sufficient to deny an increased schedule award claim. The issue is not whether the current permanent impairment rating is greater than the prior impairment ratings, but whether it duplicates in whole or in part the prior impairment rating.[14]

The Board notes that appellant previously filed a schedule award claim under OWCP File No. xxxxxx041. Under that claim, on October 31, 2012 OWCP granted a schedule award for a total 11 percent permanent impairment of the right lower extremity impairment, with 10 percent for the right knee and 1 percent for right peroneal tendinopathy. In the present case, File No. xxxxxx916, on September 11, 2017, OWCP denied appellant's claim for an increased schedule award. The DMA calculated 8 percent permanent impairment of the right knee; however, because appellant had previously received schedule award compensation for 11 percent permanent impairment of the right lower extremity, OWCP found that he was not entitled to an increased schedule award. OWCP, however, failed to take into account that these right lower extremity ratings were not based on the same accepted conditions. Therefore, the underlying schedule award issue is not resolved.

The Board finds that the overpayment issue cannot be addressed until the schedule award issue is properly addressed.[15] Therefore, the January 5, 2018 decision must be reversed.[16]

In light of the Board's disposition of the first issue, the issue of waiver of recovery is rendered moot.

[14] *See Richard Saldibar*, 51 ECAB 585 (2000).

[15] *Id.*

[16] Upon return of the case record, OWCP should consider combining File No. xxxxxx041 and File No. xxxxxx916.

CONCLUSION

The Board finds that as fact of overpayment has not been established, the January 5, 2018 decision must be reversed.

ORDER

IT IS HEREBY ORDERED THAT the January 5, 2018 decision of the Office of Workers' Compensation Programs is reversed.

Issued: June 18, 2020
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

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