

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

L.L., Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
DURHAM VA MEDICAL CENTER,
Durham, NC, Employer**

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**Docket No. 19-0097
Issued: March 20, 2020**

Appearances:

*Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Deputy Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On October 16, 2018 appellant, through counsel, filed a timely appeal from September 4 and 5, 2018 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.³

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.*

³ The Board notes that, following the September 4 and 5, 2018 decisions, OWCP received additional evidence. 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.*

ISSUES

The issues are: (1) whether appellant has met her burden of proof to establish more than 13 percent permanent impairment of her right lower extremity; (2) whether appellant received an overpayment of compensation in the amount of \$11,898.49, for which she was without fault; and (3) whether OWCP properly denied appellant's request for waiver of recovery of the overpayment.

FACTUAL HISTORY

On August 14, 2014 appellant, then a 32-year-old program support assistant, filed a traumatic injury claim (Form CA-1) alleging that on the same date she sustained injury to her right upper extremity and both lower extremities when she stepped into an elevator at work whose platform was lower than the level of the floor from which she entered.⁴ OWCP accepted this claim for right knee contusion, medial meniscus tear of the right knee, left ankle sprain, left foot sprain, right shoulder sprain, and right elbow contusion. On April 27, 2015 appellant underwent OWCP-authorized right knee surgery, including partial medial and lateral meniscectomies, and chondroplasty of the lateral femoral condyle, lateral tibial plateau, patella, and femoral trochlea. She stopped work for the surgery and returned to full duty in December 2015.

Appellant previously filed a traumatic injury claim under OWCP File No. xxxxxx717, which OWCP accepted for closed fracture of the upper end of the right radius and lumbosacral sprain due to a December 12, 2007 motor vehicle accident. OWCP administratively combined OWCP File Nos. xxxxxx717 and xxxxxx631, with the later designated as the master file.⁵

On December 23, 2015 appellant filed a claim for a schedule award (Form CA-7) due to her accepted employment injuries.

Appellant subsequently submitted a December 16, 2015 report from Dr. Lyman Smith, Board-certified in orthopedic surgery, who reported physical examination findings and opined, without explanation, that appellant reached maximum medical improvement (MMI) and had 15 percent permanent impairment of her right lower extremity.

On January 27, 2016 OWCP referred appellant's case to Dr. Morley Slutsky, Board-certified in occupational medicine and serving as a district medical adviser (DMA). It requested that he review the medical evidence, including Dr. Smith's December 16, 2015 report, and provide an opinion on permanent impairment of appellant's right lower extremity under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).⁶

⁴ Appellant indicated that her body dropped without support and that she twisted her ankles when she impacted the elevator platform. She stopped work on August 14, 2014 and returned to limited-duty work on August 20, 2014. OWCP assigned the claim OWCP File No. xxxxxx631.

⁵ By decision dated September 25, 2009, OWCP granted appellant a schedule award for four percent permanent impairment of her right upper extremity due to the December 12, 2007 injury. The permanent impairment of appellant's right upper extremity is not a subject of the present appeal.

⁶ A.M.A., *Guides* (6th ed. 2009).

On February 1, 2016 the DMA conducted an impairment calculation under the diagnosis-based impairment (DBI) rating method and found that, under Table 16-3 (Knee Regional Grid) on page 509 of the sixth edition of the A.M.A., *Guides*, appellant's partial right medial and lateral meniscectomies fell under Class 1 for the class of diagnosis (CDX), a designation which warranted a default value of 10 percent permanent impairment of the right lower extremity. He determined that appellant had a grade modifier for functional history (GMFH) of 1 and a grade modifier for physical examination (GMPE) of 1, and that the grade modifier for clinical studies (GMCS) was not applicable. Application of the net adjustment formula resulted in no movement from the default value on Table 16-3 and therefore the DMA concluded that appellant had 10 percent permanent impairment of her right lower extremity under the sixth edition of the A.M.A., *Guides*.⁷

Payment records in the case record show that on April 4, 2016 OWCP certified a schedule award payment for 28.8 weeks to compensate appellant for 10 percent permanent impairment of her right lower extremity.⁸ Appellant received such schedule award compensation for the effective period December 17, 2015 to July 5, 2016. OWCP did not issue a formal decision in conjunction with this payment.

On November 14, 2016 in response to an inquiry from counsel, OWCP referred appellant's case to another DMA, Dr. Arthur S. Harris, Board-certified in orthopedic surgery, and requested that he provide an opinion regarding the extent of any permanent impairment of appellant's left lower extremity. In a November 16, 2016 report, the DMA did not evaluate appellant's left lower extremity, but rather determined that, under Table 16-3 of the sixth edition of the A.M.A., *Guides*, her partial right medial and lateral meniscectomies warranted a finding of 10 percent permanent impairment of the right lower extremity.

By decision dated December 6, 2016, OWCP granted appellant a schedule award for 10 percent permanent impairment of her right leg which ran for 28.8 weeks from July 7, 2016 to January 24, 2017.⁹ Its payment records show that she received a schedule award payment for 28.8 weeks (for 10 percent permanent impairment of the right lower extremity) which duplicated the payment which was certified on April 4, 2016 for the same right lower extremity permanent impairment.¹⁰

By decision dated August 21, 2017, OWCP vacated its December 6, 2016 decision and found that, with respect to both lower extremities, appellant had only established 10 percent permanent impairment of the right lower extremity which entitled her to 28.8 weeks of schedule award compensation. By separate decision dated August 21, 2017, it provided a corrected schedule award which reflected the proper amount of lower extremity permanent impairment, *i.e.*,

⁷ The DMA indicated that appellant reached MMI on December 16, 2015 the date of Dr. Smith's examination.

⁸ The payment records indicated that the 28.8 weeks of payments were for "Leg (Right), [10 percent]."

⁹ The award also referenced 10 percent permanent impairment of the left lower extremity, but there was no indication why reference was made to this degree of permanent impairment of the left lower extremity and no payment was made for this extremity.

¹⁰ The payment records again indicated that appellant was to receive 28.8 weeks of schedule award compensation for "Leg (Right) [10 percent]."

10 percent permanent impairment of the right lower extremity. OWCP did not pay appellant additional schedule award compensation at that time.

On August 30, 2017 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. Prior to a hearing being held, however, OWCP's hearing representative issued a December 15, 2017 decision vacating the August 21, 2017 decisions and remanded the case to OWCP for further development, including referral of appellant to a second opinion physician for an examination and evaluation of the permanent impairment of her right lower extremity.¹¹

On January 31, 2018 OWCP referred appellant and the case record to Dr. William A. Somers, Board-certified in orthopedic surgery, for a second opinion examination to evaluate the extent of any permanent impairment of her right lower extremity under the sixth edition of the A.M.A., *Guides*.

In a February 21, 2018 report, Dr. Somers reported physical examination findings that he obtained on February 20, 2018 for appellant's right lower extremity, noting that her right knee was stable with lateral joint/patellofemoral crepitus and tenderness. He obtained range of motion (ROM) findings for the right knee and indicated that she was able to flex her right knee to 100 degrees. Dr. Somers diagnosed, *inter alia*, status post partial medial and lateral meniscectomies of the right knee. He indicated that, under the DBI rating method of Table 16-3 of the sixth edition of the A.M.A., *Guides*,¹² appellant's partial meniscectomies fell under Class 2 with a default value of 22 percent of the right lower extremity. Dr. Somers maintained that appellant's grade modifiers did not warrant movement from the default value and concluded that she had 22 percent permanent impairment of the right lower extremity under the DBI rating method. He further found that appellant had 33 percent permanent impairment of the right lower extremity under the ROM rating method described in Chapter 16 of the A.M.A., *Guides*.

On March 9, 2018 OWCP referred appellant's case to DMA Dr. Harris and requested that he evaluate the extent of her right lower extremity permanent impairment. In a March 11, 2018 report, the DMA conducted an impairment calculation using the DBI rating method of Table 16-3 of the sixth edition of the A.M.A., *Guides*. He found that appellant's partial right medial and lateral meniscectomies (falling under Class 1 for the CDX with a default value of 10 percent permanent impairment) warranted a finding of 13 percent permanent impairment (after calculation of grade modifiers and application of the net adjustment formula). The DMA noted that Dr. Somers' rating of 33 percent permanent impairment under the ROM rating method was not allowed by the A.M.A., *Guides* because Table 16-3 does not include an asterisk allowing use of this rating method for her right knee diagnosis. Therefore, he concluded that appellant had 13 percent permanent impairment of her right lower extremity under the sixth edition of the A.M.A., *Guides*.¹³

¹¹ OWCP's hearing representative also directed further development regarding permanent impairment of the right upper extremity and left lower extremity, but these matters are not currently before the Board.

¹² Dr. Somers actually referenced Table 16-5, but the content and context of his report shows that he meant to refer to Table 16-3.

¹³ The DMA indicated that appellant reached MMI on February 20, 2018 the date of Dr. Somers' examination.

By decision dated April 6, 2018, OWCP found that, based on Dr. Harris' March 11, 2018 report, appellant had no more than 13 percent permanent impairment of her right lower extremity. It noted that she previously received schedule award compensation for 20 percent permanent impairment of her right lower extremity and indicated that a resulting overpayment of compensation would be addressed in a separate letter.

In an April 6, 2018 notice, OWCP advised appellant of its preliminary determination that she received an \$11,898.49 overpayment of compensation because she received schedule award compensation for 20 percent permanent impairment of the right lower extremity, but was only entitled to receive schedule award compensation for 13 percent permanent impairment. It explained that payment records and worksheets showed that she received \$36,832.85 in schedule award compensation, but that subtracting \$24,934.36 for her true entitlement to schedule award compensation for 13 percent permanent impairment yielded the \$11,898.49 figure for the overpayment.¹⁴ OWCP also made a preliminary determination that appellant was not at fault in the creation of the overpayment.¹⁵

In a Form OWCP-20, completed on May 7, 2018, appellant listed monthly income of \$2,824.00 comprised of two payments of \$1,412.00, and monthly expenses of \$2,899.00 comprised of \$1,060.00 for home rent, \$400.00 for food, \$100.00 for clothing, \$654.00 for utilities, and \$685.00 for miscellaneous expenses. She also listed assets of \$2,090.00 from checking/savings accounts.¹⁶

On April 13, 2018 appellant, through counsel, requested a telephonic hearing with a representative of OWCP's Branch of Hearings and Review regarding the April 6, 2018 schedule award decision and, on April 18, 2018 appellant requested a telephonic preresoupment hearing with such a representative regarding the April 6, 2018 preliminary overpayment determination. Appellant challenged the fact and amount of the overpayment, and she requested waiver of recovery of the overpayment.

On July 11, 2018 OWCP's hearing representative held a hearing which encompassed both the schedule award and overpayment matters. Counsel acknowledged that appellant received duplicate payments for 10 percent permanent impairment of the right lower extremity (which equaled payments for 20 percent permanent impairment) and that OWCP was entitled to recover monies equal to schedule award compensation for 7 percent permanent impairment given that she now had 13 percent permanent impairment. Appellant testified that she had an annual salary of approximately \$57,000.00. She also testified regarding her monthly expenses, noting that she paid \$800.00 for rent for her home, \$200.00 for food, \$100.00 for clothing, and \$585.00 for miscellaneous expenses. Appellant listed assets of between \$13,000.00 and \$14,000.00 from the Thrift Savings Plan (TSP). The hearing representative afforded appellant 30 days to submit

¹⁴ The case record contains OWCP payment records and worksheets detailing the prior payments and overpayment calculations.

¹⁵ OWCP advised appellant that she could submit evidence challenging the fact or amount of the overpayment, or request waiver of recovery of the overpayment. It informed her that she could submit additional evidence in writing or at preresoupment hearing, but that a preresoupment hearing must be requested within 30 days of the date of the written notice of overpayment. OWCP requested that appellant complete and return an overpayment recovery questionnaire (Form OWCP-20) within 30 days even if she was not requesting waiver of the overpayment.

¹⁶ Appellant indicated that she financially supported her mother.

documentation to support her claimed monthly expenses and other financial details. However, no documentation was received.

By decision dated September 4, 2018, OWCP's hearing representative determined that appellant had not met her burden of proof to establish more than 13 percent permanent impairment of her right lower extremity. The DMA's March 11, 2018 opinion was deemed to represent the weight of the medical evidence with respect to permanent impairment of the right lower extremity.

By decision dated September 5, 2018, OWCP's hearing representative determined that appellant received an \$11,898.49 overpayment of compensation, for which she was without fault, because she received schedule award compensation for 20 percent permanent impairment of the right lower extremity, but was only entitled to receive schedule award compensation for 13 percent permanent impairment of the right lower extremity. The hearing representative denied her request for waiver of recovery of the overpayment. Appellant was found to have monthly income of at least \$3,059.00,¹⁷ monthly expenses of \$2,339.00, and assets of between \$13,000.00 and \$14,000.00 from TSP monies. The hearing representative indicated that waiver of recovery of the overpayment was denied because appellant had not submitted documentation supporting her claimed monthly expenses, the evidence showed that her monthly income exceeded her monthly expenses by more than \$50.00, even in absence of complete documentation, and she testified to having at least \$13,000.00 in assets.¹⁸

LEGAL PRECEDENT -- ISSUE 1

The schedule award provisions of FECA,¹⁹ and its implementing federal regulations,²⁰ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members or functions of the body. However, FECA does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.²¹ As May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.²² A claimant has the

¹⁷ OWCP's hearing representative noted that the \$2,824.00 figure reported on appellant's Form OWCP-20 was for two biweekly periods, and indicated that converting this figure to a monthly figure yielded \$3,059.00 in monthly income. The hearing representative asserted that appellant's monthly income was likely higher as she testified to a gross salary of more than \$57,000.00 per year.

¹⁸ OWCP's hearing representative required appellant to make payments of \$170.00 every 28 days in order to recover the overpayment. 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. *A.B.*, Docket No. 18-0915 (issued October 24, 2018). As appellant was not in receipt of continuing wage-loss 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 Miguel A. Muniz*, 54 ECAB 217 (2002); *Lorenzo Rodriguez*, 51 ECAB 295 (2000); 20 C.F.R. § 10.441.

¹⁹ 5 U.S.C. § 8107.

²⁰ 20 C.F.R. § 10.404.

²¹ *Id.* at § 10.404(a).

²² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

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.²³

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, the relevant portion of the right lower extremity for the present case, reference is made to Table 16-3 (Knee Regional Grid) beginning on page 509.²⁴ 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).²⁵

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met her burden of proof to establish more than 13 percent permanent impairment of her right lower extremity.

The Board finds that, in a March 11, 2018 report, the DMA properly interpreted the findings of Dr. Somers, an OWCP referral physician, and determined that appellant had 13 percent permanent impairment of her right lower extremity. He conducted an impairment rating using the DBI rating method of Table 16-3 of the sixth edition of the A.M.A., *Guides*.²⁶ The DMA correctly found that appellant's partial right medial and lateral meniscectomies (falling under Class 1 for the CDX with a default value of 10 percent permanent impairment) warranted a finding of 13 percent permanent impairment (after calculation of grade modifiers and application of the net adjustment formula).²⁷ He noted that Dr. Somers' rating of 33 percent permanent impairment under the ROM rating method was not allowed by the A.M.A., *Guides* because Table 16-3 does not include an asterisk allowing use of this rating method for her right knee diagnosis, partial medial and lateral meniscectomies.²⁸ Therefore, the DMA properly concluded that appellant had 13 percent permanent impairment of her right lower extremity under the sixth edition of the A.M.A., *Guides*.

Appellant may request a schedule award or increased schedule award at any time based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

²³ *M.G.*, Docket No. 19-0823 (issued September 17, 2019); *I.T.*, Docket No. 18-1049 (issued December 31, 2018).

²⁴ See A.M.A., *Guides* (6th ed. 2009) 509-11.

²⁵ *Id.* at 515-22.

²⁶ *Id.* at 509, Table 16-3.

²⁷ See *id.* at 515-17. The Board further notes that Dr. Somers provided a 22 percent permanent impairment rating of the right lower extremity using the DBI method under Table 16-3, but that such a rating is not warranted under that table. Table 16-3 only allows for such a level of impairment rating for a Class 2 diagnosis of total medial and lateral meniscectomies, whereas appellant only underwent partial right medial and lateral meniscectomies which fall under class 1. *Id.* at 509.

²⁸ *Id.*

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 or her duty.²⁹ Section 8129(a) of FECA provides, in pertinent part, that when an overpayment has been made to an individual “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.”³⁰

OWCP’s procedures provide that if a schedule award decision is set aside (after a hearing or review by the Board or as part of OWCP’s reconsideration process), and additional development is undertaken to resolve the schedule award issue, a new schedule award decision should be issued that fully addresses the reasons for the change in rating. Declaring an overpayment thereafter is appropriate if the later decision substantiates a lesser degree of permanent impairment than previously awarded, so long as both ratings are based on the same edition of the A.M.A. *Guides*.³¹ FECA provides for 288 weeks of compensation for 100 percent loss or loss of use of a lower extremity³² and the implementing regulations provides that compensation for proportionate periods of time is payable for partial loss.³³

ANALYSIS -- ISSUE 2

The Board finds that appellant received an overpayment of compensation in the amount of \$11,898.49, for which she was without fault.

OWCP properly found that appellant received an \$11,898.49 overpayment of compensation because she received schedule award compensation for 20 percent permanent impairment of her right lower extremity, but was only entitled, for the reasons described above, to receive schedule award compensation for 13 percent permanent impairment of her right lower extremity.³⁴ It explained that payment records and worksheets in the case record showed that she received \$36,832.85 in schedule award compensation, and that subtracting \$24,934.36 for her true entitlement to schedule award compensation for 13 percent permanent impairment yielded the

²⁹ 5 U.S.C. § 8102(a).

³⁰ *Id.* at § 8129(a).

³¹ *See supra* note 22 at Chapter 2.1601.8 (October 2011).

³² 5 U.S.C. § 8107(c)(2).

³³ 20 C.F.R. § 10.404.

³⁴ On April 4, 2016 OWCP certified a schedule award payment for 28.8 weeks to compensate appellant for 10 percent permanent impairment of her right lower extremity and it then paid her such schedule award monies. FECA provides for 288 weeks of compensation for 100 percent loss or loss of use of a lower extremity and the implementing regulation provides that compensation for proportionate periods of time is payable for partial loss. *See supra* notes 32 and 33. By decision dated December 6, 2016, OWCP found that appellant had 10 percent permanent impairment of her right leg and it then mistakenly paid her 28.8 weeks of schedule award compensation which duplicated the payment which was certified on April 4, 2016 for the same right lower extremity permanent impairment.

\$11,898.49 figure for the overpayment. The Board therefore finds that OWCP has adequately explained the basis for the \$11,898.49 overpayment.³⁵

LEGAL PRECEDENT -- ISSUE 3

Section 8129 of FECA provides that an overpayment of compensation shall be recovered by OWCP unless incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.³⁶ Section 10.438 of OWCP's regulations provides that the individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by OWCP. Failure to submit the requested information within 30 days of the request shall result in denial of waiver of recovery of the overpayment.³⁷ The guidelines for determining whether recovery of an overpayment would defeat the purpose of FECA, or would be against equity and good conscience, are set forth in sections 10.434 to 10.437 of OWCP's regulations.³⁸

Section 10.436 provides that recovery of an overpayment would defeat the purpose of FECA if recovery would cause hardship because the beneficiary needs substantially all of his or her current 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.³⁹ For waiver under this standard, appellant must show both that she needs substantially all of her current income to meet current ordinary and necessary living expenses, and that her assets do not exceed the allowable resource base.⁴⁰ 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 \$50.00.⁴¹ OWCP's procedures provide that the assets must not exceed a resource base of \$6,200.00 for an individual or \$10,300.00 for an individual with a spouse or dependent plus \$1,200.00 for each additional dependent.⁴² An individual's liquid assets include, but are not limited to cash, the value of stocks, bonds, savings accounts, mutual funds, and certificate of deposits.⁴³

³⁵ See *supra* note 31.

³⁶ 5 U.S.C. § 8129.

³⁷ 20 C.F.R. § 10.438.

³⁸ *Id.* at §§ 10.434-10.437.

³⁹ *Id.* at § 10.436.

⁴⁰ *Id.*

⁴¹ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Final Overpayment Determinations*, Chapter 6.400.4a(3) (September 2018).

⁴² *Id.* at Chapter 6.400.4a(2).

⁴³ *Id.* at Chapter 6.400.4b(3)(a), (b). Nonliquid assets include, but are not limited to, the fair market value of an owner's equity in property such as a camper, boat, second home, furnishings/supplies, vehicle(s) above the two allowed per immediate family, retirement account balances (such as TSP or 401(k)), jewelry, and artwork. *Id.*

Recovery of an overpayment is also considered to be against equity and good conscience when any individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.⁴⁴ OWCP's procedures provide that, to establish that a valuable right has been relinquished, an individual must demonstrate that the right was in fact valuable, that he or she was unable to get the right back, and that his or her action was based primarily or solely on reliance on the payment(s) or on the notice of payment.⁴⁵

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly denied appellant's request for waiver of recovery of the overpayment.

Appellant has not established that recovery of the overpayment would defeat the purpose of FECA because she has not shown both that she needs substantially all of her current income to meet ordinary and necessary living expenses, and that her assets do not exceed the allowable resource base.⁴⁶ The Board finds that she has at least \$13,000.00 in assets, comprised of TSP monies, and therefore her assets exceed her allowable resource base of \$10,300.00 (for an individual with one dependent).⁴⁷ 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 her needs substantially all of her current income to meet current ordinary and necessary living expenses.

Appellant also has not established that recovery of the overpayment would be against equity and good conscience because she has not shown, for the reasons noted above, that she would experience severe financial hardship in attempting to repay the debt or that she relinquished a valuable right or changed her position for the worse in reliance on the payment which created the overpayment.⁴⁸ Because, she has failed to establish that, recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience, she has failed to show that OWCP improperly refusing to waive the overpayment.⁴⁹

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish more than 13 percent permanent impairment of her right lower extremity. The Board further finds that she received an overpayment of compensation in the amount of \$11,898.49, for which she was without fault, and that OWCP properly denied her request for waiver of recovery of the overpayment.

⁴⁴ 20 C.F.R. § 10.437; *see E.H.*, Docket No. 18-1009 (issued January 29, 2019).

⁴⁵ *Supra* note 41 at Chapter 6.400.4c(3) (September 2018).

⁴⁶ *See supra* notes 39 and 40.

⁴⁷ *See supra* note 42.

⁴⁸ *See L.D.*, Docket No. 18-1317 (issued April 17, 2019); *William J. Murphy*, 41 ECAB 569, 571-72 (1989).

⁴⁹ *See supra* note 36.

ORDER

IT IS HEREBY ORDERED THAT the September 5 and 4, 2018 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: March 20, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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