

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

D.M., Appellant	)	
	)	
and	)	Docket No. 21-1124
	)	Issued: July 7, 2022
U.S. POSTAL SERVICE, POST OFFICE,	)	
Clayton, MO, Employer	)	
	)	

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chief Judge  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
JANICE B. ASKIN, Judge

**JURISDICTION**

On July 16, 2021 appellant filed a timely appeal from January 26, March 22 and two May 7, 2021 merit decisions of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>2</sup>

**ISSUES**

The issues are: (1) whether appellant has met his burden of proof to establish greater than 13 percent permanent impairment of his left lower extremity; (2) whether appellant received an overpayment of compensation in the amount of \$32,333.74 for the period April 15, 2016 through September 11, 2017 for which he was without fault, as he received schedule award compensation

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> The Board notes that following the May 7, 2021 decision, 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 caserecord 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.*

at a percentage greater than to which he was entitled; (3) whether OWCP properly denied appellant's request for waiver of recovery of the overpayment; (4) whether OWCP properly denied appellant's request for a precoupment hearing as untimely filed pursuant to 5 U.S.C. § 8124(b); and (5) whether OWCP properly denied appellant's request for an oral hearing of his schedule award as untimely filed pursuant to 5 U.S.C. § 8124(b).

### **FACTUAL HISTORY**

On December 24, 1999 appellant, then a 43-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that he developed arthritis in his ankles and knees caused or aggravated by factors of his federal employment, including excessive walking on concrete steps and rough terrain in all types of weather. He noted that he first became aware of his condition on July 28, 1999. OWCP accepted the claim for aggravation bilateral ankle osteoarthritis and right ankle arthrodesis/other acquired deformities of right ankle and foot. Appellant underwent surgery for right ankle arthrodesis on October 1, 1999, which OWCP subsequently authorized. He returned to work with permanent restrictions in February 2000.

By decision dated October 17, 2000, OWCP granted appellant a schedule award for 29 percent permanent impairment of the right lower extremity. The period of the award ran for 83.52 weeks from September 30, 2000 through May 7, 2002.

Appellant stopped work on January 30, 2015 and on February 2, 2015 he underwent an OWCP-approved right ankle subtalar fusion, and removal of broken retrograde fusion nails and screws. He returned to full-time regular duty on August 6, 2015.

On October 5, 2015 appellant filed a claim for an increased schedule award.

By decision dated October 11, 2016, OWCP granted appellant a schedule award for 26 percent permanent impairment of the left lower extremity. No additional schedule award was issued for the right lower extremity as the current 13 percent permanent impairment was less than the 29 percent permanent impairment previously awarded on October 17, 2000. The period of the award ran for 74.88 weeks from April 5, 2016 through September 11, 2017. OWCP accorded the weight of the medical opinion evidence to Dr. Morley Slutsky, a physician Board-certified in occupational medicine serving as OWCP's district medical adviser (DMA), dated August 12, 2016, who reviewed the second opinion medical reports of Dr. Richard T. Katz, a Board-certified physiatrist, dated April 5, June 9 and July 30, 2016.

On November 7, 2016 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review, which was held on June 14, 2017.

On January 20, 2017 appellant underwent a left ankle open arthrodesis/ankle fusion.

By decision dated August 1, 2017, OWCP's hearing representative affirmed the October 11, 2016 decision, finding that there was no basis for an increased schedule award for the right lower extremity. However, the hearing representative remanded the case for further development and issuance of a *de novo* decision with regard to appellant's left lower extremity permanent impairment. Specifically, the hearing representative noted that after OWCP's October 11, 2016 decision appellant had undergone a left ankle surgery on January 20, 2017 and

it was necessary to obtain clarification from Dr. Katz to determine whether such surgery was medically necessary to treat an accepted injury and to provide the percentage of left lower extremity impairment in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).<sup>3</sup>

In a January 11, 2018 report, Dr. Katz opined that appellant had 13 percent permanent impairment of the left lower extremity. He noted that the January 20, 2017 operative report was not found in the case record.

OWCP subsequently received a copy of the January 20, 2017 operative report. It then referred the report and the file back to Dr. Katz for his opinion regarding the surgery.

In a December 26, 2018 addendum report, Dr. Katz advised that there was no change in his permanent impairment rating regarding appellant's left lower extremity. He indicated that the surgical procedure was reasonable based on end-stage arthritis. Dr. Katz, however, noted that there was no credible scientific evidence supporting that the ankle arthritis was work related. Thus, he concluded that the surgical procedure was not a work-related intervention.

In a January 30, 2019 report, the DMA concurred with Dr. Katz' rating of 13 percent permanent impairment of the left lower extremity based on Table 16-2, pages 501-508 of the A.M.A., *Guides* for the diagnosis of triple arthrodesis within neutral position.

By decision dated February 25, 2019, OWCP denied appellant's claim for an additional schedule award, finding that he had not established greater than the 26 percent left lower extremity permanent impairment previously awarded. OWCP noted that, as he only had 13 percent permanent impairment of the left lower extremity, but was paid a schedule award for 26 percent permanent impairment of the left lower extremity, he received an overpayment of compensation.

By separate decision dated February 25, 2019, OWCP also informed appellant of its preliminary overpayment determination that he had received a \$32,333.74 overpayment of compensation for the period April 15, 2016 through September 11, 2017 for which he was without fault. It explained that he had previously received \$64,649.56 for 26 percent permanent impairment of the left lower extremity when he was only entitled to \$32,323.82 for 13 percent, thereby creating an overpayment of compensation for the period April 15, 2016 through September 11, 2017. OWCP also preliminarily determined that appellant was without fault in the creation of the overpayment. It provided appellant with an overpayment action request and overpayment recovery questionnaire (Form OWCP-20) and requested that appellant provide supporting financial documentation, including income tax returns, bank account statements, bills and cancelled checks, pay slips, and any other records to support her reported income and expenses. Additionally, OWCP further notified appellant that, within 30 days of the date of the letter, she could request a telephone conference, a final decision based on the written evidence, or a prerecoupment hearing.

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<sup>3</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

On March 23, 2019 appellant requested a prerescoupment hearing before a representative of OWCP's Branch of Hearings and Review. The telephonic hearing was held on July 1, 2019.

By decision dated August 26, 2019, OWCP's hearing representative vacated and remanded both the schedule award and overpayment determinations. The hearing representative indicated that Dr. Katz failed to follow the SOAF in opining that appellant's arthritis was work related, as OWCP had already accepted aggravation of bilateral ankle and foot arthritis as employment related. Furthermore, the SOAFs dated March 3, 2016, December 4, 2017 and December 20, 2018 inaccurately noted that the 1999 right ankle surgery was not authorized. Thus, to further develop the claim, the hearing representative ordered OWCP to issue a corrected SOAF and refer appellant for an examination with an appropriate Board-certified specialist to offer an opinion on whether the January 20, 2017 surgery was medically necessary to treat an accepted injury. The hearing representative also found that, as there was evidence in the record that appellant's right ankle impairment led to an altered gait with hyperextension of the knee, the selected specialist should also offer an opinion as to whether appellant's claimed knee condition is causally related to the accepted ankle conditions. The selected specialist was then provided the percentage of appellant's bilateral lower extremity permanent impairment in accordance with the A.M.A., *Guides*. Following a *de novo* schedule award decision, OWCP was then, if appropriate, to issue an overpayment decision.

In a December 5, 2019 developmental letter, OWCP afforded appellant 15 days to provide all medical records concerning his knees, including operative reports. It also advised that he would be referred for an examination with a Board-certified specialist pursuant to the hearing representative's August 26, 2019 decision.

OWCP received numerous records pertaining to appellant's knees, including an August 30, 2014 operative report.

OWCP issued an updated SOAF dated February 14, 2020 and referred appellant for a second opinion medical examination with Dr. Katz.

In a June 22, 2020 report, Dr. Katz reviewed appellant's history of injury, the February 14, 2020 SOAF, and the medical records. He presented detailed examination findings regarding appellant's knees, feet, and ankles. For the left ankle, Dr. Katz opined that the January 20, 2017 left lower extremity surgical intervention was beneficial and was necessary as a result of the employment-related injury. For the diagnosis of triple arthrodesis, he calculated 13 percent permanent impairment of the left lower extremity under Table 16-2, page 508 of the A.M.A., *Guides*. Dr. Katz further opined that appellant did not acquire a right knee condition as a result of the accepted left and right ankle medical conditions as appellant was predisposed to degenerative joint disease, which was largely a hereditary condition.

By decision dated January 26, 2021, OWCP again denied appellant's claim for an additional schedule award for the left lower extremity. It explained that appellant was previously granted a schedule award for 26 percent permanent impairment to the left lower extremity, but was entitled to only 13 percent left lower extremity impairment based on Dr. Katz' June 22, 2020 report. OWCP found that "this calculated impairment rating for the left lower extremity represents a 13 percent decrease in permanent impairment previously compensated."

On January 27, 2021 OWCP informed appellant of its preliminary overpayment determination that he had received a \$32,333.74 overpayment of schedule award compensation for the period April 15, 2016 through September 11, 2017 for which he was without fault. It explained that he had received \$64,649.56 for 26 percent permanent impairment when he was only entitled to \$32,323.82 for 13 percent permanent impairment following a nonwork-related surgery, thereby creating an overpayment for the period April 15, 2016 through September 11, 2017. OWCP also made the preliminary determination that he was without fault in the creation of the overpayment. It provided an overpayment action request form and a Form OWCP-20 overpayment recovery questionnaire and requested that appellant provide supporting financial documentation, including income tax returns, bank account statements, bills and cancelled checks, pay slips, and any other records to support her reported income and expenses. Additionally, OWCP further notified appellant that, within 30 days of the date of the letter, she could request a telephone conference, a final decision based on the written evidence, or a prerecoumment hearing.

In an undated letter, which OWCP received March 5, 2021, appellant requested both an oral hearing and a prerecoumment hearing before an OWCP hearing representative. He noted his disagreement with Dr. Katz' impairment rating, and further indicated that his accepted conditions were worsening and that he had new medical conditions. Appellant also requested waiver of the overpayment and/or a repayment plan due to financial hardship.

By decision dated March 22, 2021, OWCP's hearing representative finalized the preliminary overpayment determination, finding that appellant was overpaid compensation in the amount of \$32,333.74 for the period April 15, 2016 through September 11, 2017 because he received a schedule award for compensation for 26 permanent impairment of the left lower extremity when he was only entitled to 13 percent. The hearing representative denied waiver of recovery of the overpayment as he had not submitted evidence to substantiate that adjustment or recovery would defeat the purpose of FECA or be against equity and good conscience. The hearing representative required recovery of the overpayment by payment in full.

On April 1, 2021 appellant requested a telephonic prerecoumment hearing before an OWCP hearing representative. He indicated that he disagreed with the fact of the overpayment and requested waiver because he was found to be without fault in the creation of the overpayment. Appellant submitted a completed Form OWCP-20 and supporting financial documentation.

By decision dated May 7, 2021, OWCP denied appellant's request for a prerecoumment hearing as untimely filed. It found that, because it had not received a request for hearing within 30 days of the January 27, 2021 preliminary overpayment determination, it issued the final overpayment decision on March 22, 2021. OWCP advised that the final overpayment decision of March 22, 2021 was not subject to the hearing provisions of 5 U.S.C. § 8124(b).

By separate decision dated May 7, 2021, OWCP denied appellant's request for an oral hearing as untimely, finding that his request, which was received on March 5, 2021, was not made within 30 days of the January 26, 2021 schedule award decision. It further exercised discretion and determined that the issue in this case could equally well be addressed by a request for reconsideration before OWCP along with the submission of new evidence.

## LEGAL PRECEDENT -- ISSUE 1

The schedule award provisions of FECA,<sup>4</sup> and its implementing federal regulations,<sup>5</sup> 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 sixth edition of the A.M.A., *Guides* as the uniform standard applicable to all claimants.<sup>6</sup> As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.<sup>7</sup>

The sixth edition of the A.M.A., *Guides* provides a diagnosis-based method of evaluation utilizing the World Health Organization's *International Classification of Functioning Disability and Health (ICF): A Contemporary Model of Disablement*.<sup>8</sup> Under the sixth edition, the evaluator identifies the class of diagnosis (CDX), which is then adjusted by a grade modifier for functional history (GMFH), grade modifier or physical examination (GMPE), and/or grade modifier for clinical studies (GMCS).<sup>9</sup> The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).<sup>10</sup> Evaluators are directed to provide reasons for their impairment choices, including the choices of diagnoses from regional grids and calculations of modifier scores.<sup>11</sup>

OWCP's procedures provide that, if the claimant's physician or a second opinion physician provides an impairment report, the case should be referred to the district medical adviser (DMA) for review.<sup>12</sup>

It is well established that benefits payable under 5 U.S.C. § 8107(c) are reduced by the period of compensation previously paid under the schedule if: (1) compensation in both cases is for impairment of the same member or function or different parts of the same member or function;

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<sup>4</sup> 5 U.S.C. § 8107.

<sup>5</sup> 20 C.F.R. § 10.404.

<sup>6</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

<sup>7</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017); *see also* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

<sup>8</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009), p.3, section 1.3.

<sup>9</sup> *Id.* at 494-531.

<sup>10</sup> *Id.* at 521.

<sup>11</sup> *A.R.*, Docket No. 21-0346 (issued July 1, 2021); *R.R.*, Docket No. 17-1947 (issued December 19, 2018); *R.V.*, Docket No. 10-1827 (issued April 1, 2011).

<sup>12</sup> *Supra* note 7 at Chapter 2.808.6e and 2.806.6f(1).

and (2) the latter impairment in whole or in part would duplicate the compensation payable for the preexisting impairment.<sup>13</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that this case is not in posture for decision with regard to the denial of appellant's claim for an increased schedule award.

In his June 22, 2020 report, Dr. Katz opined that the January 20, 2017 left lower extremity surgical intervention was beneficial and was necessary as a result of the employment-related injury. He then determined that appellant had 13 percent permanent impairment of the left lower extremity for the diagnosis of triple arthrodesis. Dr. Katz further opined that appellant did not acquire a right knee condition as a result of the accepted medical conditions, as appellant was predisposed to degenerative joint disease, which was largely a hereditary condition. He, however, did not provide sufficient rationale for his conclusory opinion.

It is well established that proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter. While the claimant has the burden of proof to establish entitlement to compensation, OWCP shares the responsibility in the development of the evidence to see that justice is done.<sup>14</sup> Once it undertakes development of the record, it must do a complete job in procuring medical evidence that will resolve the relevant issues in the case.<sup>15</sup>

The case must, therefore, be remanded to OWCP for a supplemental opinion from Dr. Katz. OWCP shall then refer the medical record to a DMA for review in accordance with the sixth edition of the A.M.A., *Guides*. Following this and other such further development, OWCP shall issue a *de novo* decision.<sup>16</sup>

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<sup>13</sup> 20 C.F.R. § 10.404(d). See *A.R.*, *supra* note 11; *D.P.*, Docket No. 19-1514 (issued October 21, 2020); *S.M.*, Docket No. 17-1826 (issued February 26, 2018).

<sup>14</sup> *K.R.*, Docket No. 21-0083 (issued June 3, 2021); *C.R.*, Docket No. 20-1102 (issued January 8, 2021); *K.P.*, Docket No. 18-0041 (issued May 24, 2019).

<sup>15</sup> *K.R.*, *id.*; see *F.K.*, Docket No. 19-1804 (issued April 27, 2020); *B.W.*, Docket No. 19-0965 (issued December 3, 2019).

<sup>16</sup> In light of the Board's disposition of Issue 1, Issue 5 is rendered moot.

## LEGAL PRECEDENT -- ISSUE 2

Section 8102(a) of FECA<sup>17</sup> 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.<sup>18</sup> 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.”<sup>19</sup>

If a claimant received a schedule award and the medical evidence does not support the degree of permanent impairment awarded, an overpayment of compensation may be created.<sup>20</sup> Claims for an increased schedule award based on the same edition of the A.M.A., *Guides* are subject to overpayment.<sup>21</sup>

## ANALYSIS -- ISSUE 2

In light of the Board’s disposition of Issue 1, the Board finds that OWCP improperly determined that an overpayment of compensation in the amount of \$32,333.74 was created for the period April 15, 2016 through September 11, 2017. Therefore, the February 27, 2020 decision must be reversed.<sup>22</sup>

## CONCLUSION

The Board finds that this case is not in posture for decision with regard to whether appellant has met his burden of proof to establish greater than 13 percent permanent impairment of his left lower extremity. The Board further finds that OWCP improperly determined that an overpayment of compensation in the amount of \$32,333.74 was created for the period April 15, 2016 through September 11, 2017.

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<sup>17</sup> *Supra* note 1.

<sup>18</sup> 5 U.S.C. § 8102(a).

<sup>19</sup> *Id.* at § 8129(a).

<sup>20</sup> *Supra* note 7 at Chapter 2.808.9(e) (February 2013).

<sup>21</sup> *Id.* See also *W.M.*, Docket No. 13-0291 (issued June 12, 2013).

<sup>22</sup> In light of the Board’s disposition of Issue 2, Issues 3 and 4 are rendered moot.

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 26 and May 7, 2021 decisions of the Office of Workers' Compensation Programs regarding the denial of an increased schedule award and denial of oral hearing as untimely are set aside. The March 22, 2021 decision of the Office of Workers' Compensation Programs regarding the overpayment is reversed. The May 7, 2021 decision of the Office of Workers' Compensation Programs regarding denial of a prerecouplement hearing is set aside as moot. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: July 7, 2022  
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Janice B. Askin, Judge  
Employees' Compensation Appeals Board