United States Department of Labor
Employees' Compensation Appeals Board

M.F., Appellant	)	
and	)	**Docket Nos. 21-0759 & 21-1037**
DEPARTMENT OF TRANSPORTATION, U.S. COAST GUARD, FIFTH DISTRICT HOUSING BRANCH, Portsmouth, VA, Employer	)	**Issued: May 4, 2022**

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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 7, 2021 appellant filed a timely appeal from a January 26, 2021 merit decision and a March 5, 2021 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) assigned Docket No. 21-0759. On April 26, 2021 she filed a timely appeal from a March 23, 2021 merit decision of OWCP, assigned Docket No. 21-1037. Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

[1] 5 U.S.C. § 8101 *et seq*.

[2] The Board notes that, following the issuance of the March 23, 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 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 greater than 37 percent permanent impairment of her right lower extremity, for which she previously received schedule award compensation; (2) whether OWCP properly denied appellant's request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a); (3) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of $14,371.24, for which she was without fault, for the period May 18 through December 25, 2018, as she received schedule award compensation at a percentage greater than to which she was entitled; and (4) whether OWCP properly denied waiver of recovery of the overpayment.

FACTUAL HISTORY

This case has previously been before the Board on another issue.[3] The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On December 9, 1994 appellant, then a 34-year-old leased housing contract specialist, filed a traumatic injury claim (Form CA-1) alleging that on November 23, 1994 she fractured her right leg when she slipped and missed a step as she descended stairs at work while in the performance of duty. She stopped work on November 28, 1994. OWCP accepted comminuted fracture of the right leg. On June 6, 2000 appellant underwent a right knee arthroscopic meniscectomy, and removal of intramedullary rod. OWCP, on October 16, 2006, accepted that she sustained a recurrence of disability on December 1, 2004 due to her accepted employment injury. On January 29, 2015 it expanded the acceptance of appellant's claim to include localized primary osteoarthritis of the right knee.

On March 26, 2015 appellant filed a claim for compensation (Form CA-7) for a schedule award.

In a July 7, 2015 medical report, Dr. Richard Layfield, III, a Board-certified orthopedic surgeon, noted that appellant had severe right knee medial arthritis and had reached maximum medical improvement (MMI). Utilizing Table 16-3, page 511, of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A. *Guides*),[4] he determined that she had 26 percent diagnosis-based impairment (DBI) of the right lower extremity.

On August 7, 2015 OWCP referred appellant's case to Dr. Lawrence A. Manning, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA). By letter dated August 7, 2015, Dr. Manning noted his review of the medical record, including Dr. Layfield's July 7, 2015 report. He agreed that appellant had 26 percent right lower extremity permanent impairment in accordance with the sixth edition of the A.M.A, *Guides*. and that she reached MMI on July 7, 2015, the date of Dr. Layfield's impairment evaluation.

[3] Docket No. 97-1034 (issued December 2, 1998).

[4] A.M.A., *Guides* (6th ed. 2009).

By decision dated August 27, 2015, OWCP granted appellant a schedule award for 26 percent permanent impairment of the right lower extremity. The period of the award ran for 74.88 weeks from July 7, 2015 through December 20, 2016 and was based on the opinions of Dr. Layfield, the attending physician, and Dr. Manning, the DMA.

Appellant underwent a right knee total arthroplasty on May 23, 2016.

On November 15, 2017 OWCP again expanded the acceptance of appellant's claim to include primary osteoarthritis of the right ankle and foot.

OWCP subsequently received an additional report dated April 17, 2018 from Dr. Layfield who referenced Table 16-2, page 506, and determined that appellant had 16 percent permanent impairment of the right lower extremity due to her accepted right ankle tibiotalar joint osteoarthritis.

On April 23, 2018 appellant filed a Form CA-7 for an additional schedule award.

On June 19, 2018 OWCP referred appellant's case to Dr. Todd Fellars, a Board-certified orthopedic surgeon serving as a DMA, to provide an opinion on permanent impairment under the standards of the A.M.A., *Guides*. In a June 26, 2018 letter, Dr. Fellars advised that the range of motion (ROM) rating method was not appropriate for impairment rating of appellant's accepted conditions of right knee and right ankle osteoarthritis. Utilizing the DBI method, under Table 16-2, page 506, he found that a cystic change of the right ankle as demonstrated by x-ray resulted in 16 percent permanent impairment. The DMA further found that appellant's total right knee replacement resulted in 25 percent permanent impairment under Table 16-3, page 511. Utilizing Table 16-6, page 516, he assigned a grade modifier for functional history (GMFH) of 2 due to ongoing pain and functional limitations associated with appellant's ankle arthritis. Using Table 16-7, page 517, the DMA assigned a grade modifier for physical examination (GMPE) of 2 due to moderate palpatory findings. He noted that there was no grade modifier for clinical studies (GMCS) under Table 16-8, page 519, as the studies were used to determine the class of impairment. The DMA found a net adjustment of 0, which resulted in a 25 percent right knee permanent impairment and 16 percent right ankle permanent impairment. Using the Combined Values Chart, page 604, he combined the 25 percent right knee impairment rating and 16 percent right ankle impairment rating, which yielded a total 37 percent permanent impairment of the right lower extremity.

By decision dated July 24, 2018, OWCP granted appellant a schedule award for an additional 11 percent permanent impairment of the right lower extremity, for a total 37 percent permanent impairment of the right lower extremity. The period of the award ran for 31.68 weeks from May 18 through December 25, 2018 and was based on the opinion of Dr. Fellars, the DMA.

On August 25, 2020 appellant filed another Form CA-7 for an additional schedule award.

On September 16, 2020 OWCP referred appellant to Dr. D. Burke Haskins, a Board-certified orthopedic surgeon, for a second opinion examination to determine the extent of employment-related permanent impairment of the right lower extremity in accordance with the sixth edition of the A.M.A., *Guides*.

Dr. Haskins, in an October 27, 2020 report, noted appellant's right knee complaints, and his review of the SOAF and the medical record, including a January 19, 2018 right ankle magnetic resonance imaging (MRI) scan. He noted that the January 19, 2018 MRI scan revealed subchondral cysts in the tibiotalar, subtalar, and talonavicular joints, which were believed to be degenerative. On physical examination, Dr. Haskins observed that appellant ambulated without an assistive device or brace and she had an antalgic gait. An inspection of the lower extremities revealed normal alignment with a healed midline surgical scar in the knee. Dr. Haskins provided ROM measurements which included 0 degrees of extension and 110 degrees of flexion measured three times with a goniometer. The left quadriceps measured 1.5 centimeters (cm) which was greater in circumference than the right. Strength was fair in knee extension and flexion with mild patellar crepitus in the right knee. There was no ligament laxity. The right calf was smaller than the left by 1 cm. There were surgical scars in the medial and lateral aspect of the right distal tibia. Leg lengths were symmetric. There was no deformity in the right ankle. There was no obvious effusion or increased warmth. There was also no laxity. Dr. Haskins also noted ROM measurements of the right tibioltalar joint which included 15 degrees of plantar flexion and 5 degrees of dorsiflexion beyond zero, measured three times with a goniometer. There was no restriction in subtalar motion. There was neutral alignment with mild varus of the right heel with weight-bearing. Dr. Haskins diagnosed healed tibial fracture, osteoarthritis of the right knee with knee replacement, and ankle and subtalar arthritis of the right foot. He determined that appellant reached MMI on October 26, 2020. Dr. Haskins noted that she had a prior schedule award for 37 percent permanent impairment of the right lower extremity, but advised that he could not comment on that impairment rating because he was not provided with a copy of the report referencing this impairment rating. Utilizing the ROM method, he determined that 0 degrees of extension and 100 degrees of flexion resulted in 0 percent impairment of the right knee. Dr. Haskins also utilized the DBI method to rate permanent impairment of the right knee and found that, under Table 16-3, page 511, a class of diagnosis (CDX) of right total knee replacement resulted in a class 2 impairment with a default value of 25 percent. Referring to Table 16-6, page 516, he assigned a GMFH of 1. Dr. Haskins assigned a GMPE of 1 due to atrophy demonstrated by measurement in the extremity under Table 16-7, page 517. He noted that GMCS was not utilized. Dr. Haskins applied the net adjustment formula (GMFH - CDX) + (GMPE - CDX) = (1 - 2) + (1 - 2) = -2, which shifted the default value of 25 percent to 21 percent permanent impairment due to right total knee replacement. He then referred to Table 16-2, page 502, to find that a CDX of appellant's right extraarticular tibia fracture resulted in a class 1 impairment with a default grade value of nine percent due to mild motion deficit. Dr. Haskins assigned a GMFH of 1 and GMPE of 1. He applied the net adjustment formula (GMFH - CDX) + (GMPE - CDX) = (1 - 2) + (1 - 2) = -2, which shifted the default value from nine percent to five percent permanent impairment due to right extraarticular tibial fracture. Regarding impairment to the right ankle and foot, Dr. Haskins noted that there was no ratable impairment for the subtler region under Table 16-2. He then found a CDX of right ankle arthritis resulted in a class 1 impairment with a default value of two percent due to mild osteophytes in accordance with Table 16-2. Dr. Haskins assigned a GMFH of 1 because appellant used custom orthotics. He assigned a GMPE of 1 due to atrophy. Dr. Haskins indicated that GMCS was not utilized. He applied the net adjustment formula (GMFH - CDX) + (GMPE - CDX) = (1 - 2) + (1 - 2) = -2, which shifted the impairment from two percent to one percent permanent impairment of the right ankle and foot. Dr. Haskins also used the ROM method for calculating right ankle impairment and found no permanent impairment to the ankle and subtalar joints. Utilizing the Combined Values Chart, pages 604, he combined the 21 percent right total knee replacement impairment rating, 5 percent right extraarticular tibia shaft fracture impairment rating, for a value

of 25 percent and 1 percent right ankle arthritis impairment rating, which yielded a total of 26 percent permanent impairment of the right lower extremity.

On December 17, 2020 OWCP referred appellant's case to Dr. Nathan Hammel, a Board-certified orthopedic surgeon serving as an OWCP DMA, to provide an opinion on permanent impairment under the standards of the A.M.A., *Guides*.

In a letter dated January 5, 2021, Dr. Hammel noted that he reviewed the SOAF, the medical record, and the October 27, 2020 report of Dr. Haskins. He utilized the ROM method to determine that appellant had no permanent impairment of the right knee, noting that ROM of the knee was normal. Utilizing the DBI method under Table 16-3, page 511, the DMA noted that a CDX of right total knee arthroplasty resulted in a class 2 impairment with a default value of C or 25 percent impairment. He assigned a GMFH of 1 due to ongoing pain. The DMA assigned a GMPE of 1 due to mild crepitus. He noted that GMCS was not applicable. The DMA applied the net adjustment formula which resulted in a net adjustment of -2, yielding 21 percent permanent impairment of the right lower extremity due to right total knee arthroplasty. He then advised that the ROM method could not be used to rate impairment due to appellant's right extraarticular tibia fracture. Utilizing the DBI method under Table 16-2, page 502, the DMA found that a CDX of right extraarticular tibia shaft fracture resulted in a class 1 impairment with a default value of C or nine percent impairment. He assigned a GMFH of 1 for continued symptoms. The DMA assigned a GMPE of 1 for tenderness. He advised that GMCS was not applicable because this was used to identify the CDX. The DMA applied the net adjustment formula which yielded nine percent permanent impairment of the right lower extremity due to right extraarticular tibia shaft fracture. Regarding permanent impairment to the right ankle, he advised that the ROM method yielded no permanent impairment. Using the DBI method under Table 16-2, the DMA found that a CDX of subtalar arthritis represented a class 1 impairment with a default value of C or two percent impairment. He assigned a GMFH of 1 for ongoing symptoms. The DMA assigned a GMPE of 1 for tenderness and mild decrease in ROM. He again advised that GMCS was not applicable because this was used to identify the CDX. The DMA applied the net adjustment formula which yielded two percent permanent impairment of the right lower extremity due to right ankle subtatlar arthritis. He utilized the Combined Values Chart to combine the 21 percent right total knee arthroplasty impairment rating, 9 percent right extraarticular tibia shaft fracture impairment rating, and 2 percent right ankle subtatlar arthritis impairment rating, which yielded a final 29 percent permanent impairment of the right lower extremity. The DMA opined that since his 29 percent impairment rating was less than the 37 percent impairment rating previously awarded, no additional impairment rating was warranted. He determined that appellant had attained MMI on October 26, 2020. The DMA agreed with the October 27, 2020 findings of Dr. Haskins[5] with the exception of his DBI impairment calculations. He noted that Dr. Haskins set the CDX of tibia fracture and ankle arthritis as class one impairments, but then he performed grade modifier

[5] The DMA related that he essentially agreed with the October 27, 2020 findings of Dr. James Schwartz, an orthopedic surgeon, rather than the October 27, 2020 findings of Dr. Haskins, the OWCP second opinion physician, as OWCP, in its December 17, 2020 memorandum referring appellant's case record to the DMA, requested that he review the purported report from Dr. Schwartz. The Board notes, however, that the case record does not contain an October 27, 2020 report from Dr. Schwartz. This appears to be a typographical error, as the record only contains an October 27, 2020 report from Dr. Haskins addressing appellant's right lower extremity permanent impairment under the sixth edition of the A.M.A., *Guides*.

calculations as if these diagnoses were class 2 impairments. The DMA noted, however, that they both found appellant had no additional right lower extremity permanent impairment.

OWCP, by decision dated January 26, 2021, denied appellant's claim for an increased schedule award for the right lower extremity based on the opinion of Dr. Hammel, the DMA.

In a preliminary overpayment determination dated February 4, 2021, OWCP notified appellant that she had received an overpayment of schedule award compensation in the amount of $14,371.24 for the period May 15 through December 25, 2018. It explained that she had received $19,760.44 for an additional 11 percent permanent impairment of the right lower extremity when she was only entitled to $5,389.20 for an additional 3 percent right lower extremity permanent impairment, creating an overpayment of compensation for the period May 15 through December 25, 2018. OWCP also made a preliminary determination that appellant was without fault in the creation of the overpayment. It requested that she submit a completed overpayment recovery questionnaire (Form OWCP-20) to determine a reasonable repayment method and advised her that she could request a waiver of recovery of the overpayment. OWCP further requested financial information, including copies of income tax returns, bank account statements, bills, pay slips, and any other records to support income and expenses. It advised appellant that it would deny waiver if she failed to furnish the requested financial information within 30 days. OWCP provided an overpayment action request form and further notified her that, within 30 days of the date of the letter, she could contest the overpayment and request a telephone conference, a final decision based on the written evidence, or a prerecoupment hearing.

On February 23, 2021 appellant requested reconsideration of the January 26, 2021 schedule award decision. She contended that, according to Dr. Layfield, Dr. Haskins' opinion was not based on a complete review of the medical records. Appellant asserted that Dr. Haskins did not review the January 19, 2018 right ankle MRI scan results.

OWCP also received on February 23, 2021 an overpayment action request form dated February 13, 2021, wherein appellant disagreed with the fact and amount of the overpayment and requested waiver of recovery of the overpayment. Appellant also submitted a completed Form OWCP-20 of even date and supporting financial documentation. She indicated that she had a dependent, adult son who was unemployed and lived at home with her, and that she was the sole provider for the household. Appellant reported monthly income of $6,000.00 and total monthly expenses of $4,100.00. She also reported that she had funds totaling $2,700.00.

By decision dated March 5, 2021, OWCP denied appellant's request for reconsideration of the merits of her schedule award claim pursuant to 5 U.S.C. § 8128(a).

By decision dated March 23, 2021, OWCP finalized the February 4, 2021 preliminary overpayment determination, finding that appellant was overpaid compensation in the amount of $14,371.24 during the period May 18 through December 25, 2018 because she received schedule award compensation for an additional 11 percent permanent impairment of the right lower extremity when the evidence established that she only had an additional 3 percent permanent impairment. It further found that she was without fault in the creation of the overpayment, but denied waiver of recovery of the overpayment as her monthly income of $6,000.00 exceeded her monthly expenses of $4,100.00 by more than $50.00. OWCP directed appellant to repay the overpayment by submitting monthly payments in the amount of $299.40.

LEGAL PRECEDENT -- ISSUE 1

It is the claimant's burden of proof to establish permanent impairment of a scheduled member or function of the body as a result of an employment injury.[6]

The schedule award provisions of FECA[7] and its implementing regulations[8] 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 to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be 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.[9] As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).[10] 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.[11]

The sixth edition of the A.M.A., *Guides* provides a DBI method of evaluation utilizing the World Health Organization's International Classification of Functioning, Disability and Health (ICF).[12] 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 foot/ankle and knee, the relevant portions of the lower extremity for the present case, reference is made to Table 16-2 through Table 16-4 beginning on page 501.[13] After the CDX is determined from each of these tables (including identification of a default grade value), the net adjustment formula is applied using the grade modifier for GMFH, grade modifier for GMPE and grade modifier for GMCS. The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[14] Under Chapter 2.3, evaluators are directed to provide reasons

[6] *See T.H.*, Docket No. 19-1066 (issued January 29, 2020); *D.F.*, Docket No. 18-1337 (issued February 11, 2019); *Tammy L. Meehan*, 53 ECAB 229 (2001).

[7] 5 U.S.C. § 8107.

[8] 20 C.F.R. § 10.404.

[9] *Id. See also Ronald R. Kraynak*, 53 ECAB 130 (2001).

[10] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5.a (March 2017).

[11] *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

[12] A.M.A., *Guides*, page 3, section 1.3, The International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement.

[13] *See* A.M.A., *Guides* 501-11 (6th ed. 2009).

[14] *Id.* at 515-22.

for their impairment rating choices, including choices of diagnoses from regional grids and calculations of modifier scores.[15]

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to an OWCP medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with OWCP's DMA providing rationale for the percentage of impairment specified.[16]

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met her burden of proof to establish greater than 37 percent permanent impairment of her right lower extremity.

OWCP accepted appellant's claim for nondisplaced fracture of the right leg, comminuted fracture of the right leg, and localized primary osteoarthritis of the right knee. In an August 27, 2015 decision, it granted her a schedule award for 26 percent permanent impairment of the right lower extremity. On November 15, 2017 OWCP expanded the acceptance of appellant's claim to include primary osteoarthritis of the right ankle and foot. By decision dated July 24, 2018, it granted her a schedule award for an additional 11 percent permanent impairment of the right lower extremity. On August 25, 2020 appellant filed another claim for an increased schedule award (Form CA-7).

OWCP properly referred appellant for a second opinion evaluation with Dr. Haskins who, in his October 27, 2020 report, diagnosed healed tibial fracture, osteoarthritis of the right knee with knee replacement, and ankle and subtalar arthritis of the right foot, and found that she had reached MMI. Utilizing the DBI rating method, Dr. Haskins found that, under Table 16-3, page 511, the CDX of right total knee replacement resulted in a class 2 impairment with a default value of 25 percent. He assigned a GMFH of 1 under Table 16-6, page 516, and a GMPE of 1 under Table 16-7, page 517, and he noted that GMCS was not utilized. Dr. Haskins utilized the net adjustment formula (GMFH - CDX) + (GMPE - CDX) = (1 - 2) + (1 - 2) = -2, which shifted the default value of 25 percent to 21 percent permanent impairment due to right total knee replacement. Utilizing the DBI method to rate permanent impairment to appellant's right leg, he found that, under Table 16-2, page 502, a CDX of an extraarticular tibial fracture resulted in a class 1 impairment with a default value of nine percent. Dr. Haskins assigned a GMFH of 1 and GMPE of 1 and noted that a grade modifier for GMCS was not used. Applying the net adjustment formula (GMFH - CDX) + (GMPE - CDX) = (1 - 2) + (1 - 2) = -2, moved the default value from nine percent to five percent permanent impairment due to a right tibial fracture. Regarding impairment to the right ankle and foot, Dr. Haskins referenced the DBI method and explained that, under Table 16-2, there was no ratable impairment for the subtler region. He found that a CDX of ankle arthritis resulted in a class 1 impairment with a default grade D value of two percent under Table 16-2. Dr. Haskins assigned a GMFH of 1 and a GMPE of 1, and again indicated that a grade modifier for GMCS was not utilized. Applying the net adjustment formula (GMFH - CDX) + (GMPE - CDX) = (1 - 2) + (1 - 2) = -2, shifted the default value from two percent to one percent permanent impairment of the right ankle. Dr. Haskins also used the ROM method and found no permanent

[15] *Id.* at 23-8.

[16] *See supra* note 11 at Chapter 2.808.6(f) (March 2017); *see D.J.*, Docket No. 19-0352 (issued July 24, 2020).

impairment to the ankle and subtalar joints. Using the Combined Values Chart, pages 604, he combined the 21 percent impairment rating for right total knee replacement, 5 percent impairment rating for right extraarticular tibia shaft fracture, and 1 percent impairment rating for right ankle arthritis, to calculate 26 percent permanent impairment of the right lower extremity.

In accordance with its procedures,[17] OWCP properly referred the evidence of record to Dr. Hammel, serving as a DMA. On January 5, 2021 the DMA reviewed the medical evidence of record, including Dr. Haskins' October 27, 2020 report, and determined that appellant had 29 percent permanent impairment of the right lower extremity based on the sixth edition of the A.M.A., *Guides*. Using the ROM method he found no permanent impairment of the right knee explaining that ROM of the knee was normal. Utilizing the DBI method, under Table 16-3, page 511, the DMA found that a CDX of right knee arthroplasty resulted in a class 2 impairment with a default value of C or 25 percent impairment. He assigned a GMFH of 1 and a GMPE of 1, and noted that a grade modifier for GMCS was not applicable. Applying the net adjustment formula (GMFH - CDX) + (GMPE - CDX) = (1 - 2) + (1 - 2) = -2 shifted the default value from C to A or 21 percent permanent impairment of the right knee. The DMA noted that the ROM method could not be used to rate impairment due to appellant's right extraarticular tibia fracture. Utilizing the DBI method under Table 16-2, page 502, he found that a CDX of extraarticular tibia shaft fracture resulted in a class 1 impairment with a default value of C or nine percent impairment. The DMA assigned a GMFH of 1 and a GMPE of 1, and advised that GMCS was not applicable because this was used to identify the CDX. He applied the net adjustment formula (GMFH - CDX) + (GMPE - CDX) = (1 - 1) + (1 - 1) = 0, which yielded nine percent permanent impairment due to extraarticular tibia shaft fracture. The DMA found that appellant had zero percent permanent impairment of the right ankle under the ROM method. Using the DBI method, under Table 16-2, he found that a CDX for subtalar arthritis represented a class 1 impairment with a default value of C of two percent impairment. The DMA assigned a GMFH of 1 and a GMPE of 1, and continued to advise that GMCS was not applicable because it was used to identify the CDX. He applied the net adjustment formula (GMFH - CDX) + (GMPE - CDX) = (1 - 1) + (1 - 1) = 0, which yielded two percent permanent impairment of the right ankle. Using the Combined Values Chart, page 604, the DMA combined the 21 percent impairment rating for right total knee replacement, 9 percent impairment rating for right extraarticular tibia shaft fracture, and 2 percent impairment rating for right ankle arthritis, to calculate 29 percent permanent impairment of the right lower extremity. He explained that since his 29 percent impairment rating was less than the 37 percent impairment rating previously awarded, no additional impairment rating was warranted. The DMA disagreed with the DBI impairment calculations of Dr. Haskins, although they both found appellant had no additional right lower extremity permanent impairment. He noted that Dr. Haskins identified the CDX of tibia fracture and ankle arthritis as class one impairments, but then he performed grade modifier calculations as if these diagnoses were class 2 impairments.

The Board finds that Dr. Hammel, serving as DMA, explained with rationale how he arrived at his conclusion that appellant sustained 29 percent permanent impairment of the right lower extremity under the A.M.A., *Guides*. Dr. Hammel explained that he had reached a greater permanent impairment rating as Dr. Haskins identified appellant's tibia fractures and ankle arthritis as class 1 impairments, but calculated appellant's impairment as if they were class 2 impairments. The Board also notes that under Table 16-2, Dr. Hammel's and Dr. Haskins' ratings

[17] *Id*.

differed as to the grade default placement value. However, this discrepancy in Dr. Hammel's explanation did not modify the final permanent impairment rating.

As the record contains no other probative, rationalized medical opinion that supports greater impairment of the right lower extremity based upon the A.M.A., *Guides*, the Board finds that appellant has not met her burden of proof.

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 permanent impairment.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. The Secretary of Labor may review an award for or against compensation at any time on his own motion or on application.[18]

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument which: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.[19]

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.[20] If it chooses to grant reconsideration, it reopens and reviews the case on its merits.[21] If the request is timely, but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.[22]

[18] 5 U.S.C. § 8128(a); *see T.K.*, Docket No. 19-1700 (issued April 30, 2020); *L.D.*, Docket No. 18-1468 (issued February 11, 2019); *W.C.*, 59 ECAB 372 (2008).

[19] 20 C.F.R. § 10.606(b)(3); *see M.T.*, Docket No. 21-0169 (issued October 14, 2021); *J.R.*, Docket No. 20-1224 (issued June 8, 2021); *L.D.*, *id.*; *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

[20] *Id.* at § 10.607(a); *see K.T.*, Docket No. 18-0927 (issued May 13, 2020). Timeliness is determined by the document receipt date (*i.e.*, "the received date" in OWCP's Integrated Federal Employees' Compensation System (iFECS)). If the request for reconsideration has a document received date greater than one year, the request must be considered untimely. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (September 2020).

[21] *Id.* at § 10.608(a); *see F.V.*, Docket No. 18-0230 (issued May 8, 2020); *M.S.*, 59 ECAB 231 (2007).

[22] *Id.* at § 10.608(b); *see B.S.*, Docket No. 20-0761 (issued January 29, 2021); *C.L.*, Docket No. 20-0385 (issued August 5, 2020); *C.C.*, Docket No. 19-1622 (issued May 28, 2020); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a).

In her February 23, 2021 request for reconsideration, appellant contended that Dr. Haskins' opinion was not based on a complete review of the medical records. She asserted that Dr. Haskins did not review the results of a January 19, 2018 right ankle MRI scan. The Board notes, however, that Dr. Haskins specifically reviewed the January 19, 2018 MRI scan and reported that it revealed subchondral cysts in the tibiotalar, subtalar, and talonavicular joints, that were believed to be degenerative. The Board finds that appellant's contention neither showed that OWCP erroneously applied or interpreted a specific point of law, nor did it advance a relevant legal argument not previously considered by OWCP. Thus, appellant is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).[23]

The Board further finds that appellant did not submit relevant and pertinent new evidence not previously considered by OWCP in support of her reconsideration request under 20 C.F.R. § 10.606(b)(3). In support of her February 23, 2021 reconsideration request, appellant submitted Dr. Layfield's February 5, 2021 progress note wherein he indicated that he would review her new impairment rating and provide his findings. However, Dr. Layfield neither provided an impairment rating nor a subsequent report indicating that she had greater than 29 percent permanent impairment of her right lower extremity. As his progress note did not provide any relevant and pertinent new evidence regarding permanent impairment of appellant's right lower extremity due to the November 23, 1994 employment injury, it is insufficient to require OWCP to reopen the claim for reconsideration of the merits.[24] As appellant did not provide relevant and pertinent evidence, she is not entitled to a merit review based on the third requirement under 20 C.F.R. § 10.606(b)(3).[25]

The Board accordingly finds that appellant has not met any of the requirements of 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.[26]

[23] 20 C.F.R. § 10.606(b)(3); *see B.B.*, Docket No. 20-1129 (issued December 31, 2020); *L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

[24] *See M.P.*, Docket No. 20-0814 (issued January 26, 2021); *S.M.*, Docket No. 18-1047 (issued February 13, 2019).

[25] *L.K.*, Docket No. 18-1183 (issued May 12, 2020); *M.O.*, Docket No. 19-1677 (issued February 25, 2020).

[26] *Id*.

LEGAL PRECEDENT -- ISSUE 3

Section 8102(a) of FECA[27] 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.[28] 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."[29]

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.[30] Claims for an increased schedule award based on the same edition of the A.M.A., *Guides* are subject to overpayment.[31]

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of $14,371.24, for which she was without fault, for the period May 18 through December 25, 2018, as she received schedule award compensation at a percentage greater than that to which she was entitled.

In the present case, appellant received $19,760.44 in schedule award compensation for an additional 11 percent permanent impairment of her right lower extremity. However, for the reasons explained above, she was only entitled to receive $5,389.20 in schedule award compensation for three percent additional permanent impairment of her right lower extremity. The difference between these two amounts, $14,371.24, constitutes an overpayment of compensation. As noted above, OWCP's procedures allow for the declaration of such an overpayment as both awards were calculated under the same edition of the A.M.A., *Guides*.[32] Therefore, OWCP properly determined that appellant received a $14,371.24 overpayment.

[27] *Supra* note 1.

[28] 5 U.S.C. § 8102(a).

[29] *Id*. at § 8129(a).

[30] *Supra* note 11 at Chapter 2.808.9(e) (February 2013).

[31] *Id*. *See also W.M.*, Docket No. 13-0291 (issued June 12, 2013).

[32] *F.P.*, Docket No. 20-1646 (issued August 3, 2021); *T.D.*, Docket No. 20-0972 (issued January 28, 2021).

LEGAL PRECEDENT -- ISSUE 4

Section 8129 of FECA provides that an individual who is without fault in creating or accepting an overpayment is still subject to recovery of the overpayment unless adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.[33]

Recovery of an overpayment will defeat the purpose of FECA when such recovery would cause hardship to a currently or formerly entitled beneficiary because the beneficiary from whom OWCP seeks recovery needs substantially all of his or her current income, including compensation benefits, to meet current ordinary and necessary living expenses, and the beneficiary's assets do not exceed a specified amount as determined by OWCP.[34] Section 10.437 of OWCP's implementing regulations provides that recovery of an overpayment is considered to be against equity and good conscience when an individual who received an overpayment would experience severe financial hardship attempting to repay the debt; and when an 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.[35] 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.[36]

ANALYSIS -- ISSUE 4

The Board finds that OWCP properly denied waiver of recovery of the overpayment.

As OWCP found appellant without fault in the creation of the overpayment, waiver must be considered, and repayment is still required unless adjustment or recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.[37]

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. Evidence of record reveals that she received an income of $6,000.00 per month and that she had monthly expenses of $4,100.00. As appellant's monthly income exceeds her monthly expenses by more than $50.00, in this case, $1,900.00, she has not shown that she needs

[33] 5 U.S.C. § 8129; 20 C.F.R. §§ 10.433, 10.434, 10.436, and 10.437; *see A.S.*, Docket No. 17-0606 (issued December 21, 2017).

[34] 20 C.F.R. § 10.436. OWCP's procedures provide that a claimant is deemed to need substantially all of his or her current net income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than $50.00. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Determinations*, Chapter 6.400.4a(3) (September 2020). OWCP's procedures further provide that, 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. *Id*. at Chapter 6.400.4a(2).

[35] 20 C.F.R. § 10.437; *see E.H.*, Docket No. 18-1009 (issued January 29, 2019).

[36] *Supra* note 35 at Chapter 6.400.4(c)(3) (September 2020).

[37] 20 C.F.R. § 10.436.

substantially all of her current income to meet current ordinary and necessary living expenses.[38] Because appellant has not met the first prong of the two-prong test of whether recovery of the overpayment would defeat the purpose of FECA, it is unnecessary for OWCP to consider the second prong of the test based on her assets.

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.[39]

Because appellant has not established that recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience, she has failed to establish that OWCP acted improperly by denying waiver of recovery of the $14,371.24 overpayment.[40]

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish greater than 37 percent permanent impairment of her right lower extremity for which she previously received schedule award compensation. The Board further finds that OWCP properly denied her request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a). The Board also finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of $14,371.24, for which she was without fault, for the period May 18 through December 25, 2018, as she received schedule award compensation at a percentage greater than that to which she was entitled. Additionally, the Board finds that OWCP properly denied waiver of recovery of the overpayment.

[38] *Id*. at § 10.437(a), (b).

[39] *T.D., supra* note 33; *William J. Murphy*, 41 ECAB 569, 571-72 (1989).

[40] With respect to recovery of the overpayment of compensation, the Board's jurisdiction is limited to reviewing those cases where OWCP seeks recovery from continuing compensation benefits under FECA. As appellant is no longer receiving wage-loss compensation, the Board does not have jurisdiction with respect to the recovery of the overpayment under the Debt Collection Act. *E.S.*, Docket No. 20-1018 (issued December 3, 2021); *R.W.*, Docket No. 18-1059 (issued February 6, 2019); *Cheryl Thomas*, 55 ECAB 610 (2004).

ORDER

IT IS HEREBY ORDERED THAT the January 26, and March 5 and 23, 2021 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: May 4, 2022
Washington, DC

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

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

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