

FACTUAL HISTORY

On January 7, 2016 appellant, then a 62-year-old mail handler, filed an occupational disease claim (Form CA-2) alleging that he developed degenerative knee joint arthritis due to repetitive movements performing the duties of his federal employment. He indicated that he first realized his condition was causally related to factors of his federal employment on November 19, 2015. OWCP accepted the claim for aggravation of osteoarthritis of the right knee. Appellant underwent OWCP-authorized right total knee arthroplasty.

Appellant previously filed an occupational disease claim (Form CA-2) for degenerative arthritis of the left knee, which OWCP assigned OWCP File No. xxxxxx349. It accepted that claim for aggravation of osteoarthritis, subtalar joint left ankle/foot, and aggravation of osteoarthritis of the left knee. On March 24, 2016 appellant underwent an OWCP-authorized left total knee arthroplasty. On October 11, 2017 OWCP granted him a schedule award for 23 percent permanent impairment for the left leg. The period of the award ran from September 17, 2017 through December 24, 2018. On March 11, 2019 OWCP granted appellant an additional schedule award for 10 percent permanent impairment of the left leg. The period of the award ran from March 3 through September 20, 2019.²

On January 15, 2020 Dr. Patrick K. Denton, a Board-certified orthopedist, diagnosed primary osteoarthritis of the right knee. He noted an x-ray of the right knee revealed a stable total knee arthroplasty with no signs of loosening. Dr. Denton noted range of motion of the right knee was -3 degrees to 115 degrees. He opined that appellant reached maximum medical improvement (MMI). Dr. Denton indicated that under the standards of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)³ appellant had 25 percent permanent impairment of his right lower extremity.

On February 13, 2020 appellant filed a claim for compensation (Form CA-7) for a schedule award.

In a February 24, 2020 development letter, OWCP requested that Dr. Denton submit an impairment evaluation addressing whether appellant had reached MMI and, if so, the extent of any permanent impairment in accordance with the A.M.A., *Guides*.⁴ It afforded him 30 days to submit the necessary evidence.

In a report dated March 12, 2020, Dr. Denton noted that appellant was status post right total knee arthroscopy from August 2018. He treated appellant on January 15, 2020 and advised that he presented with no complaints, the incision was well-healed, and range of motion of the right knee was -3 degrees to 115 degrees. Dr. Denton further noted that x-rays revealed a stable total knee arthroplasty. He diagnosed right knee osteoarthritis status post total knee arthroplasty

² OWCP administratively combined OWCP File Nos. xxxxxx915 and 349, with OWCP File No. xxxxxx349 designated as the master file.

³ A.M.A., *Guides* (6th ed. 2009).

⁴ *Id.*

and noted that appellant reached MMI. Pursuant to Table 16-3 (Knee Regional Grid), page 511, of the A.M.A., *Guides* he opined that appellant had 25 percent permanent impairment of the right lower extremity.

On April 8, 2020 OWCP referred appellant's case to Dr. Jovito B. Estaris, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA). It requested that he review Dr. Denton's March 12, 2020 report and provide an opinion on permanent impairment under the standards of the A.M.A., *Guides*.⁵ On April 22, 2020 Dr. Estaris reviewed the impairment rating performed by Dr. Denton. He found the date of MMI to be January 15, 2020, the date of Dr. Denton's examination. Utilizing the diagnosis-based impairment (DBI) method, the DMA found that under Table 16-3⁶ (Knee Regional Grid), page 511, the class of diagnosis (CDX) for appellant's unilateral primary osteoarthritis of the right knee resulted in a class 2 impairment with a default value of 25. He found a grade modifier for functional history (GMFH) was not applicable due to no complaints of pain and no difficulty with ambulation. The DMA assigned a grade modifier for physical examination (GMPE) of one due to minimal motion deficits of the right knee. He found that a grade modifier for clinical studies (GMCS) was not applicable. The DMA utilized the net adjustment formula (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX) and calculated that appellant had a net adjustment of (0 - 2) + (1 - 2) = -3, for a grade A impairment. Based on these calculations, he concluded that appellant had 21 percent permanent impairment of the right lower extremity. The DMA determined that using the Range of Motion (ROM) method resulted in a lesser impairment rating of zero percent. He referred to Table 16-23⁷ and found that for 15 degrees of flexion, appellant would have received zero percent permanent impairment of the lower extremity. The DMA noted that extension of three degrees also did not support impairment. He noted the main discrepancy between his rating and Dr. Denton's was that Dr. Denton failed to use the grade modifiers and merely chose a default value and provided the impairment rating of 25 percent.

By decision dated June 12, 2020, OWCP granted appellant a schedule award for 21 percent permanent impairment of the right lower extremity. The period of the award ran from January 15, 2020 through March 13, 2021.⁸

In a preliminary overpayment determination dated April 16, 2021, OWCP notified appellant of its preliminary finding that he had received an overpayment of compensation in the

⁵ A.M.A., *Guides* (6th ed. 2009).

⁶ *Id.* at 510.

⁷ *Id.* at 549.

⁸ OWCP noted a payment of \$15,345.53 for the period of January 15 through May 23, 2020. A review of appellant's compensation records shows further schedule award payments of \$3,305.19 for the period of May 24 through June 20, 2020, \$3,305.19 for the period of June 21 through July 18, 2020, \$3,305.19 for the period of July 19 through August 15, 2020, \$3,305.19 for the period of August 16 through September 12, 2020, \$3,305.19 for the period of September 13 through October 10, 2020, \$3,305.19 for the period of October 11 through November 7, 2020, \$3,305.19 for the period of November 8 through December 5, 2020, \$3,305.19 for the period of December 6, 2020 through January 2, 2021, \$3,305.19 for the period of January 3 through January 30, 2021, \$3,305.19 for the period of January 31 through February 27, 2021, \$3,349.36 for the period of February 28 through March 27, 2021, and a supplemental payment of \$1,598.92 from February 28 through March 13, 2021.

amount of \$3,349.36 for the period February 28 through March 27, 2021, because he was overpaid for his schedule award. It explained that he received a full periodic roll payment of \$3,349.36 for the period February 28 through March 27, 2021 when he should have received a supplemental payment for the number of days of his approved schedule award for the month of March 2021. OWCP also made a preliminary overpayment determination that he was without fault in the creation of the overpayment. It advised appellant that he could submit evidence challenging the fact or amount of the overpayment, or request waiver of recovery of the overpayment. OWCP informed him that he could submit additional evidence in writing or at a precoupment hearing, but that a precoupment hearing must be requested within 30 days of the date of the written notice of overpayment. It requested that appellant complete and return an overpayment recovery questionnaire (Form OWCP-20) within 30 days even if he was not requesting waiver of recovery of the overpayment. OWCP requested that he submit supporting financial documentation, 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 of recovery of the overpayment if he failed to furnish the requested financial information within 30 days.

On May 6, 2021 OWCP received an April 28, 2021 overpayment action request form. Appellant requested that OWCP make a decision based on the written evidence regarding possible waiver of recovery of the overpayment. He submitted a signed Form OWCP-20 on April 28, 2021. Appellant reported monthly income from social security benefits of \$2,780.00, a pension of \$1,183.00. He reported \$2,651.53 in the monthly expenses consisting of \$767.53 for rent/mortgage, \$300.00 for food, \$300.00 for clothing, \$300.00 for utilities, \$62.00 for installment debt, \$922.00 for miscellaneous expenses and monthly credit card payments of \$30.00 and \$32.00. Appellant noted \$100.00 of cash on hand, \$489.00 checking account balance, and \$80.00 savings account balance. He submitted a checking account statement from March 22 through April 27, 2021.

By decision dated September 1, 2021, OWCP finalized its preliminary overpayment determination, finding that appellant had received an overpayment of compensation in the amount of \$3,349.36 for the period February 28 through March 27, 2021, because he received “an extra full schedule award payment issued in addition to the final supplemental schedule award payment.” In the calculation of overpayment section of the decision it further noted that the overpayment amount was “\$3,305.19” due to the additional amount received after the award coverage date. OWCP determined that although appellant was not at fault in the creation of the overpayment, however, the overpayment was not subject to waiver because appellant did not provide the requested information regarding income, expenses, and assets necessary to determine whether recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience. It requested that recovery of the overpayment be in a lump-sum payment of \$3,349.36.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of FECA⁹ provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the

⁹ *Supra* note 1.

performance of his duty.¹⁰ 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.”¹¹

The schedule award provisions of FECA¹² and its implementing regulations¹³ 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. Section 10.404 of the regulations provides that compensation is provided for specified periods of time for the permanent loss or loss of use of certain members.¹⁴ FECA provides for 288 weeks of compensation for 100 percent loss or loss of use of a lower extremity¹⁵ and the implementing regulations provide that compensation for proportionate periods of time is payable for partial loss.¹⁶

OWCP’s procedures provide that an overpayment is created when a schedule award expires, but compensation continues to be paid.¹⁷

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation for which he was without fault, because he received compensation to which he was not entitled.

In the present case, appellant received a payment for the period February 28 through March 27, 2021 and another payment for the period February 28 through March 13, 2021 creating an overpayment of compensation for the period February 28 through March 27, 2021. However, for the reasons explained above, appellant was only entitled to receive compensation for the period February 28 through March 13, 2021. Therefore, the fact of overpayment is established.¹⁸

The Board further finds that this case is not in posture for decision regarding the amount of the overpayment.

¹⁰ 5 U.S.C. § 8102(a).

¹¹ *Id.* at § 8129(a).

¹² *Id.* at § 8107.

¹³ 20 C.F.R. § 10.404.

¹⁴ *Id.*

¹⁵ 5 U.S.C. § 8107(c)(2).

¹⁶ *Supra* note 13.

¹⁷ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Identifying and Calculating an Overpayment*, Chapter 6.200.1f.(1)(i) (September 2020).

¹⁸ *See K.H.*, Docket No. 18-0171 (issued August 2, 2018).

In the present case, in the cover letter and final overpayment memorandum, OWCP noted that appellant received a payment of \$3,349.36 for the period of February 28 through March 27, 2021. However, for the reasons explained above, appellant was only entitled to receive a payment for the number of days remaining in his approved schedule award. Without explanation, in the “calculation of overpayment” in its September 1, 2021 overpayment decision, OWCP stated that appellant was “paid an additional [schedule award of] \$3,305.19 for the period May 24, 2020-June 20, 2020” resulting in an overpayment in the amount of “\$3,305.19.” However, in its conclusion, OWCP found the period of overpayment was February 28 through March 27, 2021 in the amount of \$3,349.36.

A claimant is entitled to an overpayment decision that clearly explains how the amount was calculated.¹⁹ The Board will, therefore, remand the case to OWCP to further explain its calculation of the amount of the overpayment.

On remand, OWCP shall determine the exact amount of the overpayment of compensation. It shall then issue a new preliminary overpayment determination, with an overpayment action request form, an overpayment recovery questionnaire, and instructions for appellant to provide supporting financial information.²⁰ After this and other such further development as deemed necessary, it shall issue a *de novo* decision.²¹

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation from February 28 through March 27, 2021, for which he was without fault, because he received schedule award compensation to which he was not entitled. The Board further finds, however, that the case is not in posture for decision regarding the amount of the overpayment.

¹⁹ *R.B.*, Docket No. 20-0022 (issued October 28, 2020); *O.R.*, 59 ECAB 432 (2008).

²⁰ *See L.K.*, Docket No. 29-0416 (issued November 12, 2020).

²¹ In light of the Board’s disposition of Issue 2, Issue 3 is rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the September 1, 2021 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part, and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: September 2, 2022
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board