



frequency noise in his job duties.<sup>1</sup> On April 29, 2004 the Office accepted his claim for binaural hearing loss and paid appropriate benefits.

By decision dated October 15, 2004, the Office granted appellant a schedule award for a 65 percent binaural hearing loss. The period of the award ran for 130 weeks from February 24, 2004 to August 21, 2006.

On February 23, 2007 the Office notified appellant of its preliminary determination that he received an overpayment in the amount of \$1,374.13 for the period August 22 to November 25, 2006. The Office noted that he received schedule award payments in the amount of \$71,549.64 for the period February 24, 2004 to November 25, 2006, when he was only entitled to receive \$70,175.51 for the period February 24, 2004 to August 21, 2006, when his schedule award entitlement of 130 weeks of compensation ended. The Office subtracted \$71,549.64 from \$70,175.51 and determined that appellant received an overpayment of \$1,374.13 for the period August 22 to November 25, 2006. The Office further informed him of its preliminary determination that he was without fault in creating the overpayment and requested that he submit an enclosed overpayment recovery questionnaire and supporting financial information within 30 days. It noted that waiver would be denied if appellant failed to furnish the information requested on the enclosed overpayment recovery questionnaire or any other information needed to address a request for waiver within the 30 days.

In a March 16, 2006 letter, appellant requested additional time to repay the overpayment and asserted that the overpayment should be waived. No financial evidence or request for a prerecoupment hearing accompanied the letter.

In a letter dated March 31, 2007 and postmarked May 14, 2007, appellant requested a prerecoupment hearing on the issues that an overpayment had occurred and waiver of the overpayment. His daughter indicated that appellant had invested in a parcel of real estate while in receipt of the schedule award and stated that repaying the overpayment would cause undue hardship as he had put down a large cash down payment. No financial information was submitted.

By decision dated June 15, 2007, the Office denied appellant's request for a prerecoupment hearing on the grounds that it was not submitted within 30 days of the February 23, 2007 preliminary overpayment determination.

In a letter dated July 5, 2007, appellant indicated that he should be entitled to waiver as the Office had previously found him to be without fault in the creation of the overpayment. No financial information was submitted.

By decision dated July 19, 2007, the Office determined that appellant was not entitled to waiver of the \$1,374.13 overpayment of compensation. It directed that appellant either repay the overpayment in full or contact the Office to arrange a repayment plan.<sup>2</sup>

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<sup>1</sup> Appellant retired on July 3, 1996. He had previously filed a hearing loss claim on April 11, 1975.

<sup>2</sup> The Office's memorandum explaining the reasons for its denial of the waiver of overpayment is not of record.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 10.432 of the Office's regulations provides that, in response to a preliminary notice of an overpayment, a claimant may request a prerecoument hearing within 30 days of the written notice of overpayment. Failure to request the hearing within this 30-day time period shall constitute a waiver of that right.<sup>3</sup>

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

In a letter postmarked May 14, 2007, appellant requested a prerecoument hearing of the Office's February 23, 2007 preliminary overpayment determination. By decision dated June 15, 2007, the Office denied his request for a prerecoument hearing on the grounds that it was not timely filed within 30 days of the February 23, 2007 preliminary overpayment determination. Appellant did not file his request for a prerecoument hearing within 30 days of the February 23, 2007 preliminary overpayment determination. Therefore, his right to a hearing is deemed waived.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8107 of the Federal Employees' Compensation Act<sup>4</sup> provides that, if there is a permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function. The Office's procedure manual provides that an overpayment of compensation can occur under various circumstances, including when a schedule award expires, but compensation continues to be paid.<sup>5</sup>

### **ANALYSIS -- ISSUE 2**

The Office accepted that appellant sustained binaural hearing loss as a result of his employment activities. On October 15, 2004 the Office granted appellant a schedule award for a 65 percent binaural hearing loss, with the award covering 130 weeks and running from February 24, 2004 to August 21, 2006. However, the Office paid him compensation of \$71,549.64 for the period February 24, 2004 to November 25, 2006, although appellant was only entitled to receive \$70,175.51 in compensation, or 130 weeks of compensation, for the period February 24, 2004 to August 21, 2006, as stated in his schedule award decision. The Office subtracted \$71,549.64 from \$70,175.51 and determined that appellant received an overpayment of \$1,374.13 for the period August 22 to November 25, 2006. The record substantiates that an overpayment of \$1,374.13 resulted during the period August 22 to November 25, 2006.

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<sup>3</sup> 20 C.F.R. § 10.432.

<sup>4</sup> 5 U.S.C. §§ 8101-8193.

<sup>5</sup> Federal (FECA) Procedure Manual, Part 6 -- Initial Overpayment Actions, *Identification of Overpayments and Debts*, Chapter 6.200.2(c) (May 2004).

### LEGAL PRECEDENT -- ISSUE 3

The waiver or refusal to waive an overpayment of compensation by the Office is a matter that rests within the Office's discretion pursuant to statutory guidelines.<sup>6</sup> The statutory guidelines are found in section 8129(b) of the Act which states: Adjustment recovery of an overpayment by the United States may not be made when an incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience.<sup>7</sup>

Section 10.436 of the implementing regulations<sup>8</sup> provides that recovery of an overpayment would defeat the purpose of the Act if such recovery would cause hardship to a currently or formerly entitled beneficiary because: the beneficiary from whom the Office seeks recovery needs substantially all of his or her current income (including compensation benefits) to meet current or ordinary and necessary living expenses; and (b) the beneficiary's assets do not exceed a specified amount as determined by the Office from data furnished by the Bureau of Labor Statistics.<sup>9</sup> An individual is deemed to need substantially all of his or her income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.<sup>10</sup>

Section 10.437 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 in 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.<sup>11</sup>

Section 10.438 of the regulations provide that the individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by the Office. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of the Act or be against equity and good conscience. Failure to submit the requested information within 30 days of the request shall result in the denial of waiver.<sup>12</sup>

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<sup>6</sup> See *Robert Atchison*, 41 ECAB 83, 87 (1989).

<sup>7</sup> See 5 U.S.C. § 8129(b); *Carroll R. Davis*, 46 ECAB 361, 363 (1994).

<sup>8</sup> 20 C.F.R. § 10.436.

<sup>9</sup> An individual assets must exceed a resource based on \$4,800.00 for an individual or \$8,000.00 for an individual with a spouse or one dependent plus \$960.00 for each additional dependent. This base includes all of the individual's assets not exempt from recoupment. See Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.6(a)(1), (b) (December 23, 2004).

<sup>10</sup> See *Sherry A. Hunt*, 49 ECAB 467, 473 (1998).

<sup>11</sup> 20 C.F.R. § 10.437.

<sup>12</sup> *Id.* at § 10.438.

### **ANALYSIS -- ISSUE 3**

The Office found appellant to be without fault and eligible for consideration of waiver with regard to its finding that he received an overpayment in the amount of \$1,374.13. Although appellant argued that, repayment of the overpayment would cause undue hardship, he did not timely submit any information regarding his financial situation. The applicable regulations provide that the individual who receives an overpayment is responsible for providing financial information. Failure to submit the requested financial information within 30 days of the request shall result in the denial of the waiver.<sup>13</sup> As appellant failed to submit the requested financial evidence, the Office, pursuant to its regulations, properly denied waiver of recovery of the overpayment amount of \$1,374.13.<sup>14</sup>

### **CONCLUSION**

The Board finds that appellant received an overpayment of compensation in the amount of \$1,374.13 for the period August 22 through November 25, 2006 and that the Office properly denied waiver of such overpayment.

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<sup>13</sup> See *id.*; *R.W., (J.T.)*, 59 ECAB \_\_\_\_ (Docket No. 07-1845, issued December 7, 2007).

<sup>14</sup> As the Office is not seeking recovery from continuing compensation, the Board does not have jurisdiction to review the manner of recovery of the overpayment. See *Miguel A. Muniz*, 54 ECAB 217 (2002).

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 19 and June 15, 2007 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: February 7, 2008  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board