

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

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**H.S., Appellant**

**and**

**DEPARTMENT OF THE NAVY, NORFOLK  
NAVAL SHIPYARD, Portsmouth, VA, Employer**

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**Docket No. 10-482  
Issued: October 25, 2010**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On November 30, 2009 appellant filed a timely appeal from a November 23, 2009 merit decision of the Office of Workers' Compensation Programs regarding an overpayment of compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the overpayment issue.

**ISSUES**

The issues are: (1) whether the Office properly determined that appellant received an overpayment of compensation in the amount of \$82,065.04 during the period March 21, 2006 through June 7, 2008; and (2) whether the Office properly denied waiver of the overpayment.

**FACTUAL HISTORY**

This case has previously been before the Board. On June 5, 2009 the Board issued an order remanding the case.<sup>1</sup> The Board set aside the Office's August 13, 2008 decision which

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<sup>1</sup> Docket No. 08-2322 (issued June 5, 2009).

found appellant received an overpayment of compensation in the amount of \$87,153.54 for the period March 21, 2006 through June 7, 2008 and denied waiver of recovery of the overpayment. The Board noted that the payment record for the stated period was incomplete such that it could not make an informed decision as to the fact or amount of the overpayment. The Office was directed to obtain compensation payment logs for the period March 21, 2006 to June 7, 2008 and any other relevant period it deemed necessary and then issue an appropriate decision. The relevant facts of the case are set forth.

The Office accepted that appellant, an electrician leader, sustained a binaural hearing loss due to his federal employment. It developed the medical evidence regarding permanent impairment of appellant's hearing and determined that he had an eight percent binaural hearing loss. On April 14, 2006 the Office granted appellant a schedule award for eight percent binaural hearing loss. The period of the award was for 16 weeks from November 29, 2005 to March 20, 2006.<sup>2</sup> The Office noted that appellant was to receive \$11,068.55 for the period November 29, 2005 to March 18, 2006 as well as continuing compensation of \$2,817.45 every four weeks.

In a May 30, 2008 compensation termination sheet, the Office stated that, while appellant's schedule award covered the period November 29, 2005 to March 20, 2006, he continued to receive payment after the end of the period. The record reflects that appellant received compensation payments through June 7, 2008.

In a June 11, 2008 preliminary determination, the Office found that appellant received an \$87,153.54 overpayment from March 21, 2006 through June 7, 2008 due to schedule award payments that were in error. It found that appellant was not at fault due to computer "glitches" that indicated that payments would continue. In an August 13, 2008 decision, the Office finalized its overpayment finding and also found that appellant was not eligible for waiver of the overpayment. Thereafter, appellant appealed to the Board.

In an October 15, 2009 compensation payment history, the Office determined that appellant received total payments under the schedule award of \$94,334.84 from November 29, 2005 to June 7, 2008. In an October 21, 2009 payment worksheet, it determined that, for an eight percent schedule award for loss of hearing totaling 16 weeks, appellant was entitled to receive \$11,269.80 in compensation from November 29, 2005 through March 20, 2006.

The Office issued an October 21, 2009 preliminary determination that appellant was overpaid \$82,065.04 from March 21, 2006 through June 7, 2008. It found that appellant was supposed to receive a schedule award for the period November 29, 2005 through March 20, 2006, but because of a glitch in the Office's computer system, he received monthly payments until June 7, 2008.<sup>3</sup> The Office found appellant was overpaid compensation benefits from

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<sup>2</sup> The Office decision had a typographical error which noted the period of the award ran to March 20, 2005 as opposed to March 20, 2006.

<sup>3</sup> The preliminary overpayment finding erroneously indicated that the total amount of compensation paid from November 29, 2005 through June 7, 2008 was \$93,334.84 instead of \$94,334.84 as documented by Office payment records. It determined the amount of the overpayment by subtracting the amount appellant was owed, \$11,269.80, from \$93,334.84.

March 21, 2006 through June 7, 2008 in the amount of \$82,065.04. It found appellant was without fault in the matter. The Office asked appellant to submit an attached overpayment recovery questionnaire, which would allow it to consider waiving the overpayment and determine, if necessary, a reasonable method for collection. It notified appellant that failure to submit the requested financial information within 30 days would result in a denial of waiver. Appellant did not respond.

In a decision dated November 23, 2009, the Office finalized the overpayment determination. As it received no response from appellant, it denied waiver and determined that the overpayment would be collected in full. It requested that appellant forward payment for the full amount within 30 days or make arrangements with the Office regarding recovery of the overpayment.

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

Section 8102(a) of the Federal Employees' Compensation Act<sup>4</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 duty.<sup>5</sup> Section 8129(a) of the Act provides, in pertinent part, that 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>6</sup> The Office's procedure manual identifies various situations when overpayments of compensation may occur, including when a claimant receives schedule award compensation after the expiration of the award.<sup>7</sup>

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

Appellant has not submitted any evidence contesting the fact or amount of the overpayment. He received schedule award compensation from November 29, 2005 through June 7, 2008 in the amount of \$94,334.84, but was only entitled to receive schedule award compensation of \$11,269.80 for the period November 29, 2005 through March 20, 2006, representing 16 weeks of compensation for an eight percent bilateral impairment of his hearing.<sup>8</sup> For the period March 21, 2006 through June 7, 2008, appellant received schedule award compensation that he was not entitled to receive.

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<sup>4</sup> 5 U.S.C. §§ 8101-8193.

<sup>5</sup> *Id.* at § 8102(a).

<sup>6</sup> *Id.* at § 8129(a).

<sup>7</sup> Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(c) (May 2004).

<sup>8</sup> Sixteen weeks of compensation is derived by taking appellant's percentage of hearing loss in both ears, eight percent, and multiplying this by the number of weeks of compensation allowed for complete, or 100 percent, loss of hearing in both ears. Under 5 U.S.C. § 8107(c)(13)(B), 200 weeks of compensation is paid for 100 percent loss of hearing in both ears. Eight percent of 200 weeks (.08 times 200) is 16 weeks.

The Office's preliminary overpayment finding of October 21, 2009 compared compensation appellant actually received from November 29, 2005 through June 7, 2008, \$94,334.84, with the compensation he should have received for the period November 29, 2005 through March 20, 2006, \$11,269.80, and it found that the difference, \$82,065.04, is the amount of overpayment. However, it made a \$1,000.00 mathematical error regarding the total amount of schedule award compensation paid to appellant from November 29, 2005 through June 7, 2008. The Office's preliminary overpayment finding erroneously indicated that appellant received \$93,334.84 in compensation instead of \$94,334.84 as documented by Office records. This error was not corrected in the November 23, 2009 final overpayment decision. Thus, in calculating the amount of the overpayment, it incorrectly subtracted the amount owed to appellant, \$11,269.80, from \$93,334.84 instead of the correct amount, \$94,334.84. Subtracting \$11,269.80, the amount to which appellant was entitled, from the amount he actually received, \$94,334.84, yields \$83,065.04, which is the actual amount of the overpayment of compensation. The Board will affirm the Office's November 23, 2009 decision regarding the fact of the overpayment and will modify the decision regarding the amount of the overpayment to reflect that the amount of the overpayment is \$83,065.04.

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

Section 8129 of the Act provides that an overpayment in compensation shall be recovered by the Office unless 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>9</sup> Waiver of an overpayment is not permitted unless the claimant is without fault in creating the overpayment.<sup>10</sup> The guidelines for determining whether recovery of an overpayment would defeat the purpose of the Act or would be against equity and good conscience are set forth in sections 10.434 to 10.437 of Title 20 of the Code of Federal Regulations.<sup>11</sup>

Office regulations, at 20 C.F.R. § 10.438, state 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. This information will also be used to determine the repayment schedule, if necessary. Failure to submit the requested information within 30 days of the request shall result in denial of waiver and no further request for waiver shall be considered until the requested information is furnished.<sup>12</sup>

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<sup>9</sup> 5 U.S.C. § 8129.

<sup>10</sup> *Steven R. Cofrancesco*, 57 ECAB 662 (2006).

<sup>11</sup> 5 U.S.C. §§ 10.434-10.437.

<sup>12</sup> 20 C.F.R. § 10.438. *See Madelyn Y. Grant*, 57 ECAB 533 (2006).

## ANALYSIS -- ISSUE 2

The Office properly notified appellant of its preliminary determination on October 21, 2009 and explained that failure to submit the requested financial information within 30 days would result in a denial of waiver. As it did not receive a completed overpayment recovery questionnaire from appellant prior to issuance of its November 23, 2009 decision, the Office properly denied waiver of the overpayment pursuant to its regulations. Appellant failed to submit the requested information, as required by section 10.438 of its regulations and he is not entitled to a waiver of the overpayment.<sup>13</sup> The Board finds that the Office properly denied waiver of the overpayment.

The Board notes that the record contains a July 2, 2008 overpayment recovery questionnaire. However, appellant's financial circumstances in the year 2008 have no bearing on his current financial status.<sup>14</sup> Appellant submitted copies of financial documents to the Board. Included in these documents is a copy of a November 19, 2009 overpayment recovery questionnaire. The Board, however, is precluded from reviewing this evidence for the first time on appeal as it was not before the Office at the time it issued the final decision.<sup>15</sup>

## CONCLUSION

The Board finds that the Office properly determined that appellant received an overpayment of compensation during the period March 21, 2006 through June 7, 2008. The Board modifies the amount of this overpayment to be \$83,065.04. The Board further finds that the Office properly denied waiver of the overpayment.<sup>16</sup>

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<sup>13</sup> See *T.S.*, 60 ECAB \_\_\_ (Docket No. 08-1604, issued March 13, 2009).

<sup>14</sup> See 20 C.F.R. § 10.436(a) (contemplates that financial information pertain to current income and expenses).

<sup>15</sup> 20 C.F.R. § 501.2(c). Appellant may submit this new evidence to the Office with a request for reconsideration.

<sup>16</sup> Regarding repayment of the overpayment, the Board's jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation benefits under the Act. *Ronald E. Ogden*, 56 ECAB 278 (2005).

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 23, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 25, 2010  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board