

<sup>2</sup> Accompanying his request for appeal, counsel submitted new evidence. The Board may not consider evidence for the first time on appeal that was not before OWCP at the time it issued the final decision in the case. 20 C.F.R. § 501.2(c). The new evidence may be submitted to OWCP pursuant to a valid request for reconsideration.

On appeal, counsel does not contest the fact or amount of the overpayment. He asserts that appellant was not at fault as he did not understand how schedule awards were paid. Counsel also contended that recovery of the overpaid compensation would cause financial hardship.

### **FACTUAL HISTORY**

OWCP accepted that on or before February 1, 1988 appellant, then a 41-year-old automotive mechanic, sustained bilateral high frequency hearing loss due to hazardous noise exposure at work. On January 4, 1991 it issued a schedule award for a 43 percent binaural hearing loss under File No. xxxxxx621, paid from August 26, 1997 to December 14, 1998. On December 4, 1997 OWCP issued a schedule award for an additional 34 percent binaural hearing loss, paid from May 22, 1990 to January 11, 1992. Appellant continued working at the employing establishment through 2002 and onward. He continued to be exposed to hazardous noise.

On February 21, 2002 appellant filed a third schedule award claim for hearing loss. OWCP conducted medical development demonstrating that he had a 54 percent binaural hearing loss. On April 18, 2002 it granted appellant a schedule award for a 54 percent binaural hearing loss. The period of the award ran 108 weeks, from January 22, 2002 through February 16, 2004. OWCP advised appellant that following an initial payment of \$9,545.50 for the period January 22 to April 20, 2002, he would receive \$3,003.08 each four weeks. Appellant completed an electronic funds transfer authorization form on October 8, 2002.

In a June 30, 2005 letter, appellant advised OWCP that he filed the 2002 schedule award claim as he needed new hearing aids.

On December 16, 2005 OWCP doubled appellant's hearing loss claims under File Nos. xxxxxx621, xxxxxx159, xxxxxx398 and xxxxxx369 under File No. xxxxxx462.

In a May 27, 2010 letter, the employing establishment advised OWCP that the April 18, 2002 schedule award appeared to be a duplicate of the two prior schedule awards, as appellant had received compensation for a 131 percent hearing loss or more than a 100 percent loss.

By notice dated July 26, 2010, OWCP advised appellant of its preliminary determination that an \$81,989.83 overpayment of compensation occurred in his case as he received a duplicate schedule award from January 22, 2002 to February 16, 2004. It found that it had issued a schedule award on January 4, 1991 for a 43 percent bilateral hearing loss under File No. xxxxxx621, paid from May 22, 1990 to January 11, 1992 and a second award on December 4, 1997 for an additional 34 percent hearing loss, paid from August 26, 1997 to December 14, 1998. There was no medical evidence to establish that appellant sustained more than the 77 percent bilateral hearing loss. However, OWCP issued the April 18, 2002 schedule award under File No. xxxxxx898 for an additional 54 percent hearing loss, to total 131 percent impairment. It found appellant at fault in creation of the overpayment as he knew or should have known that he was not entitled to the additional schedule award because there was no medical

evidence establishing a greater percentage of impairment than the 77 percent previously awarded.<sup>3</sup>

By decision dated September 13, 2010, OWCP finalized its preliminary determination, finding an \$81,989.83 overpayment of compensation for the period January 22, 2002 to February 16, 2004. It further found that the overpayment was not subject to waiver as appellant was at fault in its creation. OWCP directed recovery of the overpayment at the rate of \$1,000.00 a month.

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

Section 8102(a) of FECA 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 duty.<sup>4</sup> Section 8129(a) of FECA 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>5</sup> OWCP’s procedure manual identifies various situations when overpayments of compensation may occur, including when a schedule award expires but compensation continued to be paid.<sup>6</sup>

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

The Board finds that appellant received an overpayment of compensation in the amount of \$81,989.83 from January 22, 2002 to February 16, 2004. The April 18, 2002 schedule award for a 54 percent binaural hearing loss duplicated the 77 percent previously awarded, 43 percent on January 4, 1991 and 34 percent on December 4, 1997. There is no medical evidence of record indicating that appellant sustained greater than the 77 percent binaural hearing loss. Therefore, the April 18, 2002 schedule award was duplicative and erroneous. The \$81,989.83 paid under that award constitutes an overpayment of compensation.

There is no contrary evidence regarding the fact and the amount of the overpayment. Also, appellant does not contest the fact or amount of the overpayment. The Board finds that he received an overpayment of \$81,989.83 for the period January 22, 2002 to February 16, 2004.

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<sup>3</sup> In response to OWCP’s July 26, 2010 request, appellant submitted financial information regarding his income, assets and expenses. He listed \$4,177.95 in savings, \$5,376.85 in monthly household income and \$2,956.39 in ordinary and necessary living expenses.

<sup>4</sup> 5 U.S.C. § 8102(a).

<sup>5</sup> *Id.* at § 8129(a).

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

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

Under section 8129 of FECA and the implementing regulations, an overpayment must be recovered unless incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.<sup>7</sup> Section 10.433 of the implementing regulations specifically provide that OWCP may consider waving an overpayment if the individual to whom it was made was not at fault in accepting or creating the overpayment.<sup>8</sup> The regulations further provide that each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from OWCP are proper.<sup>9</sup> Under the regulations, a recipient will be found to be at fault with respect to creating an overpayment if the recipient on the issue of fault, section 10.433 of OWCP's regulations, provide that an individual will be found at fault if he or she has done any of the following: (1) made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; (2) failed to provide information which he or she knew or should have known to be material; or (3) accepted a payment which he or she knew or should have known was incorrect.<sup>10</sup>

## **ANALYSIS -- ISSUE 2**

OWCP found that appellant was at fault in creating the overpayment under the third standard noted above, because he accepted payments from April 20, 2002 to February 16, 2004 that he knew or should have known were incorrect. In order for it to establish that he was at fault in creating the overpayment of compensation, OWCP must establish that, at the time he received the compensation payments in question, he knew or should have known that the payments were incorrect.<sup>11</sup>

The April 18, 2002 schedule award decision stated on its face that it was for a 54 percent binaural hearing loss. Appellant knew or should have known that he had already received a January 4, 1991 schedule award for a 43 percent binaural hearing loss and a December 4, 1997 schedule award for an additional 34 percent binaural hearing loss or a total of 77 percent. The 54 percent awarded on April 18, 2002 represented total schedule award compensation of 131 percent. Appellant knew or should have known that it was impossible to have more than a 100 percent loss of hearing. He did not assert and the medical evidence does not support, that he had a total loss of hearing, indicating that the correct percentage of loss was less than 100 percent. OWCP correctly found appellant at fault in creation of the overpayment from January 22, 2002 through February 16, 2004.

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<sup>7</sup> 5 U.S.C. § 8129(b); 20 C.F.R. §§ 10.433, 10.434, 10.436, 10.437.

<sup>8</sup> 20 C.F.R. § 10.433(a).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at § 10.433(a)(3).

<sup>11</sup> *Diana L. Booth*, 52 ECAB 370, 373 (2001).

The Board notes that, with respect to the 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.<sup>12</sup> As appellant is no longer receiving wage-loss compensation, the Board does not have jurisdiction with respect to recovery of the overpayment under the Debt Collection Act.<sup>13</sup>

On appeal, counsel stated that appellant was not at fault as he did not understand how schedule awards were paid. As stated, the April 18, 2002 schedule award clearly stated the percentage and period of the award. Counsel also contended that recovery of the overpaid compensation caused severe financial hardship. As noted, the Board does not have jurisdiction over the recovery of compensation in this case as appellant is not in receipt of continuing compensation benefits.

### **CONCLUSION**

The Board finds that OWCP properly found an \$81,989.83 overpayment of compensation from January 22, 2002 to February 16, 2004 due to payment of a duplicate schedule award. The Board further finds that OWCP properly determined that appellant was at fault in creating the overpayment and therefore it was not subject to waiver.

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<sup>12</sup> *Terry A. Keister*, 56 ECAB 559 (2005); *see also Cheryl Thomas*, 55 ECAB 610 (2004).

<sup>13</sup> *Cheryl Thomas*, *id.*

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated September 13, 2010 is affirmed.

Issued: November 23, 2011  
Washington, DC

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

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

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