

The issues are: (1) whether the Office properly denied appellant's request for a prerecoupment hearing on the grounds that the request was untimely; (2) whether appellant has more than six percent monaural hearing loss in the left ear; (3) whether the Office properly

determined that an overpayment of compensation in the amount of \$17,894.93 existed; and (4) whether the Office properly found that appellant was not eligible for waiver.<sup>1</sup>

### **FACTUAL HISTORY**

On October 5, 2006 appellant, then a 60-year-old electrician, filed an occupational disease claim alleging that he sustained a hearing loss in the performance of duty due to working around high voltage lines.

On March 15, 2007 appellant was sent for a second opinion evaluation with Dr. Jeffrey Kunkes, Board-certified in otolaryngology, to determine if he had a noise-induced hearing loss related to his employment.

An audiogram was completed on March 15, 2007 which reflected testing at frequency levels including those of 500, 1,000, 2,000 and 3,000 cycles per second (cps) and revealed decibel losses on the left of 15, 15, 20 and 65 respectively and on the right of 20, 15, 20 and 45 respectively. Dr. Kunkes diagnosed high frequency sensorineural hearing loss due to exposure in the workplace. The district medical adviser reviewed the audiogram and found appellant to have bilateral sensorineural hearing loss with a left monaural schedule award of six percent.

On April 19, 2007 the Office accepted appellant's claim for sensorineural hearing loss.

On April 24, 2007 appellant filed a claim for a schedule award.

By decision dated July 26, 2007, the Office granted appellant a schedule award for six percent impairment of bilateral hearing. The award covered a period of compensation from March 15 to September 29, 2007.

In an October 23, 2007 letter, the Office informed appellant that the July 26, 2007 decision was set aside as it erroneously paid compensation based on a binaural hearing loss instead of a monaural hearing loss.

In an October 25, 2007 decision, the Office granted a schedule award for six percent loss of hearing of the left ear. The award covered a period of compensation of 3.12 weeks from March 15 through April 5, 2007 for an award of \$2,206.06.

In a November 13, 2007 letter, the Office made a preliminary determination that appellant received an overpayment of \$17,894.93 and that he was not at fault in creation of the overpayment. Appellant was paid one payment of \$8,787.87 and four payments of \$2,828.28 for a total of \$20,100.99 during the period March 15 to September 29, 2007 but he should have been paid only \$2,206.06 for the period March 15 to April 5, 2007, resulting in an overpayment of \$17,894.93. The Office informed appellant that he needed to complete and submit the enclosed overpayment recovery questionnaire in order for the Office to consider the question of waiver.

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<sup>1</sup> The Board will not address manner of recovery in this case as the Board's jurisdiction over recovery of an overpayment is limited to reviewing those cases where the Office seeks recovery from continuing compensation under the Act. *Lorenzo Rodriguez*, 51 ECAB 295 (2000).

On December 19, 2007 appellant requested a prerecoupment hearing on the issues of fault and possible waiver.

In a January 14, 2008 decision, the Office denied appellant's request for a prerecoupment hearing on the grounds that the request was untimely and that the issue in the case could equally be addressed by requesting reconsideration and submitting evidence not previously considered.

In a February 11, 2008 decision, the Office found that appellant had been paid an overpayment in the amount of \$17,894.93, that he was not at fault in the creation of the overpayment and that he was not entitled to a waiver.

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

The Office's procedures on the recovery of overpayments are found in the Code of Federal Regulations at 20 C.F.R. § 10.321. The regulations provide that, before collecting an overpayment, the Office must provide the claimant with written notice of the fact and amount of overpayment, the finding of fault, the right to submit evidence challenging the fact, amount or finding of fact and the right to request waiver of the overpayment.<sup>2</sup> The regulations also provide that a claimant is entitled to submit additional evidence in writing or at prerecoupment hearing, that a prerecoupment hearing must be requested within 30 days of the date of the written notice of overpayment and that failure to request the hearing within this 30-day time period shall constitute a waiver of that right.<sup>3</sup>

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

The Office notified appellant of its preliminary determination that he received an overpayment of compensation in a letter dated November 13, 2007. It informed him that he could request a telephone conference, a prerecoupment hearing or a final decision based on the written evidence within 30 days of the date of the letter. Appellant requested a prerecoupment hearing by letter dated December 19, 2007. As his request was dated more than 30 days after the Office's notification of overpayment, it was untimely. Therefore under the regulations appellant waived his right to a prerecoupment hearing.<sup>4</sup> The Office determined that the issue could be addressed by requesting reconsideration and submitting evidence not previously considered. The Board finds that the Office properly denied his request for a prerecoupment hearing.

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

The schedule award provision of the Federal Employees' Compensation Act<sup>5</sup> provides for compensation to employees sustaining permanent loss, or loss of use, of specified members of the body. The Act, however, does not specify the manner in which the percentage loss of a

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<sup>2</sup> 20 C.F.R. § 10.431.

<sup>3</sup> 20 C.F.R. § 10.432.

<sup>4</sup> 20 C.F.R. § 10.432.

<sup>5</sup> 5 U.S.C. §§ 8101-8193.

member shall be determined. The method used in making such determination is a matter which results in the sound discretion of the Office. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. The American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (5<sup>th</sup> ed. 2001) (A.M.A., *Guides*), has been adopted by the Office for evaluating schedule losses and the Board has concurred in such adoption.<sup>6</sup>

The Office evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.<sup>7</sup> Using the frequencies of 500, 1,000, 2,000 and 3,000 cps, the losses at each frequency are added up and averaged.<sup>8</sup> The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.<sup>9</sup> The binaural loss is determined by calculating the loss in each ear using the formula for monaural loss; the lesser loss is multiplied by five, then added to the greater loss and the total is divided by six to arrive at the amount of the binaural hearing loss.<sup>10</sup> The Board has concurred in the Office's adoption of this standard for evaluating hearing loss.<sup>11</sup>

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

In reviewing appellant's March 15, 2007 audiogram, the frequency levels recorded at 500, 1,000, 2,000 and 3,000 hertz for the right ear reveal decibel losses of 20, 15, 20 and 45, respectively, for a total of 100 decibels. This amount, when divided by four, results in an average hearing loss of 25 decibels. The average loss of 25 is reduced by 25 decibels to 0, which is multiplied by 1.5 and represents a 0 percent ratable monaural hearing loss for the right ear. Testing for the left ear at the frequency levels of 500, 1,000, 2,000 and 3,000 hertz revealed decibel losses of 15, 15, 20 and 65 decibels respectively, for a total of 115 decibels. Utilizing the above-noted formula, results in a six percent monaural hearing loss for the left ear. To calculate the binaural loss, the lesser loss of zero percent is multiplied by five to total zero percent, which is then added to the greater loss of six percent to total six percent, which is then divided by six to reach one percent binaural impairment. Accordingly, appellant's most recent audiogram establishes a ratable binaural hearing loss of one percent.

Under the Act, the maximum award for binaural hearing loss is 200 weeks of compensation. Since the binaural hearing loss in this case is one percent, appellant would be entitled to one percent of 200 weeks or 2 weeks of compensation. Under the Act, the maximum award for monaural hearing loss is 52 weeks of compensation. As the monaural hearing loss in this case is six percent, appellant is entitled to six percent of 52 weeks or 3.12 weeks of

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<sup>6</sup> See 20 C.F.R. § 10.404; *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

<sup>7</sup> A.M.A., *Guides* 250.

<sup>8</sup> *Id.*

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

<sup>10</sup> *Id.*

<sup>11</sup> *Reynaldo R. Lichtenberger*, 52 ECAB 462 (2001).

compensation. Appellant is entitled to compensation for either binaural or monaural hearing loss, whichever is greater. The Office, therefore, properly determined the number of weeks of compensation, for which appellant is entitled under the schedule award.

### **LEGAL PRECEDENT -- ISSUE 3**

When an overpayment has been made to an individual 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 the individual is entitled.<sup>12</sup> When an overpayment has been made to an individual who is not entitled to further payments, the individual shall refund to the Office the amount of the overpayment as soon as the error is discovered or his or her attention is called to same.<sup>13</sup>

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

The issue is whether the Office correctly determined that an overpayment had been created. On July 26, 2007 it erroneously granted appellant a schedule award for six percent bilateral hearing loss. On October 23, 2007 the Office informed appellant that a mistake had been made and the July 26, 2007 decision was vacated. On October 25, 2007 it correctly determined that appellant was entitled to a schedule award for a six percent monaural hearing loss, or 3.12 weeks in the amount of \$2,206.06. The records reveal that appellant was erroneously paid \$20,100.99 during the period March 15 to September 29, 2007. The Office subtracted the amount appellant was entitled to, \$2,206.06, from the amount he received, \$20,100.99 to correctly determine an overpayment of \$17,894.93.

### **LEGAL PRECEDENT -- ISSUE 4**

When an overpayment has been made to an individual because of an error of fact or law, the Office may consider waiving the overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment.<sup>14</sup> If the Office finds that the recipient of an overpayment was not at fault, repayment will still be required unless adjustment of benefits or recovery of the overpayment would (1) defeat the purpose of the Act or (2) be against equity and good conscience.<sup>15</sup>

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

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<sup>12</sup> 5 U.S.C. § 8129(a).

<sup>13</sup> 20 C.F.R. § 10.441(b).

<sup>14</sup> *Id.* at § 10.433(a).

<sup>15</sup> *Id.* at § 10.434.

against equity and good conscience. This information will also be used to determine the repayment schedule, if necessary.<sup>16</sup>

According to 20 C.F.R. § 10.436, recovery of an overpayment would defeat the purpose of the Act if recovery would cause hardship because the beneficiary needs substantially all of his income (including compensation benefits) to meet current ordinary and necessary living expenses, and also, if the beneficiary's assets do not exceed a specified amount as determined by the Office from data provided by the Bureau of Labor Statistics.<sup>17</sup> An individual's total income includes any funds which may reasonably be considered available for his or her use, regardless of the source. A spouse's income will not be considered available to the individual, unless the spouse was living in the household both at the time the overpayment was incurred, and at the time waiver is considered.<sup>18</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 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>19</sup>

#### **ANALYSIS -- ISSUE 4**

The Office found that appellant was not at fault in the creation of the overpayment. Appellant is not at fault as he accepted an incorrect payment because the Office erred in calculating the schedule award.<sup>20</sup> Although he was not at fault in creating the overpayment appellant is still required to return the amount unless recovery of it would defeat the purpose of the Act or be against equity and good conscience.

In its November 13, 2007 preliminary determination, the Office informed appellant that he needed to complete the overpayment recovery questionnaire to determine the issue of waiver. No information was received. In such a situation, the Office's implementing federal regulations provide that the failure to submit requested financial information within 30 days shall result in the denial of waiver.<sup>21</sup> For this reason, the Office properly denied waiver and directed recovery of the overpayment.

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<sup>16</sup> *Id.* at § 10.438(a).

<sup>17</sup> 20 C.F.R. § 10.436, Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a) (October 2004).

<sup>18</sup> Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a)(2) (October 2004).

<sup>19</sup> 20 C.F.R. § 10.437.

<sup>20</sup> 20 C.F.R. § 10.435(b)(2).

<sup>21</sup> 20 C.F.R. § 10.438(b).

### **CONCLUSION**

The Board finds that the Office properly denied appellant's request for a prerecoupment hearing on the grounds that the request was untimely. The Board finds that appellant has a six percent monaural hearing loss in the left ear. The Board also finds that the Office properly determined the fact and amount of an overpayment of \$17,894.93, and properly denied waiver.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the February 11 and January 14, 2008 and October 25, 2007 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: November 24, 2008  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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