

correspondence from OWCP. She further contends that he was not at fault for the first incorrect payment by direct deposit.

FACTUAL HISTORY

On January 30, 1991 appellant, then a 58-year-old printing management branch chief, filed an occupational disease claim (Form CA-2) alleging hearing loss as a result of exposure to loud noises in the course of his federal employment. OWCP accepted his claim for noise-induced hearing loss on May 29, 1991. Appellant did not stop work. He subsequently retired on December 31, 1993.

On April 6, 2009 appellant filed a claim for a schedule award. OWCP accepted his claim for bilateral sensorineural hearing loss on April 23, 2009.

OWCP obtained an impairment evaluation from Dr. Stephen Bane, a Board-certified otolaryngologist, on July 2, 2009. An OWCP medical adviser reviewed the report and opined that appellant had 38.72 percent binaural hearing loss according to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

By decision dated September 29, 2009, OWCP granted appellant a schedule award for 39 percent permanent binaural hearing loss. The period of the award was for 78 weeks from July 2, 2009 through December 29, 2010. The first payment for the period July 2 through September 26, 2009 was for \$9,390.41. Appellant's continuing payment each four weeks was \$3,022.20. This decision specifically noted that payment of the award would end on December 29, 2010.

The payments were made by direct deposit. OWCP erroneously continued to issue schedule award payments from December 30, 2010 through June 29, 2013.

In a report dated August 1, 2012, Dr. Michael Arenstein, a Board-certified otolaryngologist, removed impacted cerumen from appellant's ears and noted that he still had bilateral sensorineural hearing loss, but that his hearing appeared to be stable.

By letters dated June 28, 2012 and June 26, 2013, OWCP requested periodic medical reports from appellant's physician.

In a form dated June 27, 2013, OWCP requested financial information from appellant in connection with his receipt of benefits. The Form CA-1032 noted an expiration date of April 30, 2014.

By notice dated July 17, 2013, OWCP advised appellant of its preliminary determination that an overpayment of \$102,055.87 occurred for the period December 30, 2010 through June 29, 2013, as it paid compensation under a schedule award after it expired on

December 29, 2010.² It made the preliminary finding that he was at fault in the creation of the overpayment, as he accepted payments he knew or should have known to be incorrect. OWCP afforded appellant 30 days to submit additional evidence and argument and to request a hearing.

On August 14, 2013 appellant requested a prerecoupment hearing. He asserted that he disagreed that the overpayment occurred and believed that it occurred through no fault of his own and requested a waiver, but did not assert that he disagreed with the amount of the overpayment.

At the prerecoupment hearing held on February 24, 2014, appellant contended that OWCP required him to submit to annual hearing examinations and that each time he went in for an examination his physicians found additional loss of hearing. He stated that he thought that he was being paid for increased hearing loss. Appellant's counsel noted that appellant received a letter dated June 26, 2013 requesting information in connection with his workers' compensation benefits and that the letter stated an expiration date of April 30, 2014. She stated that OWCP had led him to believe that his compensation was continuing. Appellant's counsel further noted that appellant was 81 years old and he lived with his wife, who was 85.

Appellant submitted financial information and documentation demonstrating \$7,659.14 in monthly household income and \$8,535.15 in monthly expenses.³ He noted assets of \$400.00 in cash on hand; \$69,944.00 in a checking account; and \$60,723.09 in stocks and bonds.

By decision dated May 7, 2014, a hearing representative finalized appellant's overpayment of \$102,055.87. He found that appellant was at fault in the creation of the overpayment, as the September 29, 2009 schedule award decision stated that the schedule award expired on December 29, 2010, but he continued to receive benefits through June 29, 2013. As appellant was at fault, the overpayment was not subject to waiver. The hearing representative noted, "Although [appellant] has indicated that he continued to have medical examinations which reflected additional impairment, the only examination of record was performed on August 1, 2012, [1.5] years after expiration of the scheduled award, and although [he] indicated

² OWCP noted that for the period December 19, 2010 through January 15, 2011, appellant received an overpayment in the amount of \$1,834.91, as he was only entitled to payment for the period December 19 through 29, 2010. From January 16, 2011 through June 29, 2013, appellant received payments totaling \$100,220.96. OWCP added these amounts to equal \$102,055.87.

³ Appellant listed the following monthly expenses: gasoline for two vehicles, \$283.47; auto repairs and service for two vehicles, \$321.76; AAA emergency road service, \$14.58; insurance for two vehicles, \$295.23; charity, \$50.00; credit card debt, \$78.71; maintenance for nursing home care for a cousin, \$140.00; church dues, \$300.00; food, \$750.00; home care and supplies, \$245.00; lawn service, \$29.00; house cleaning, \$150.00; yard service (including snow removal), \$200.00; long-term care insurance, \$384.46; mortgage payment, \$1,456.95; large appliance contract, \$13.50; air conditioning and hearing contract, \$14.17; a new roof in 2012, \$236.86; prescription copay for seniors, \$91.50; Medicare for two people, \$209.80; unreimbursed supplements and health nutrients, \$350.00; Blue Cross/Blue Shield for two people, \$372.28; Mutual of Omaha insurance, \$3.75; travel insurance, \$11.66; AARP membership, \$20.90; AAA accident insurance, \$32.00; dry cleaning, \$145.00; dining out, \$150.00; social outings and activities, \$200.00; personal hygiene and grooming, \$225.00; personal allowance, \$350.00; a 4 Sails time share maintenance fee, \$48.75; a Hawaii time share maintenance fee, \$176.67; an RCI membership fee, \$6.67; annual travel and vacation expenses, \$416.67; daily delivery of the Washington Post, \$22.89; WSSC, \$64.51; payment to Washington Gas, \$117.00; payment to PEPCO, \$184.00; and a payment to Verizon, \$372.41.

[that] he was advised by CA-1032 [form] of June 26, 2013, that his expiration date was April 30, 2014, this was [3.5] years after expiration of his scheduled award, was shortly before [OWCP] terminated his payments, and did not reflect expiration of scheduled award. There were no other scheduled award letters issued.” OWCP directed recovery of the overpaid amount by paying \$30,000.00 immediately and \$900.00 per month thereafter.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of FECA⁴ 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.⁵ 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.⁶ OWCP’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.⁷

ANALYSIS -- ISSUE 1

Appellant claimed a schedule award for binaural hearing loss on April 6, 2009. On September 29, 2009 OWCP granted him a schedule award for 39 percent permanent binaural hearing loss. The period of the award was for 78 weeks from July 2, 2009 through December 29, 2010. The first payment for the period July 2 through September 26, 2009 was for \$9,390.41. Appellant’s continuing payment each four weeks was \$3,022.20. The payments were made by direct deposit. OWCP erroneously continued to issue schedule award payments from December 30, 2010 through June 29, 2013.

The evidence reflects that appellant received \$102,055.87 in compensation from December 30, 2010 through June 29, 2013. He did not contest the amount of the overpayment. The Board therefore finds that OWCP correctly determined that appellant received an overpayment of compensation in the amount of \$102,055.87 for the period in question.⁸

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of FECA provides that adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against

⁴ 5 U.S.C. §§ 8101-8193.

⁵ *Id.* at § 8102(a).

⁶ *Id.* at § 8129(a).

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

⁸ *See Alberto Pineiro*, 51 ECAB 310 (2000).

equity and good conscience.⁹ No waiver of an overpayment is possible if the claimant is at fault in creating the overpayment.¹⁰

On the issue of fault, 20 C.F.R. § 10.433(a) provides that an individual is with fault in the creation of an overpayment who: (1) made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; (2) failed to furnish information which the individual knew or should have known to be material; or (3) with respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect.¹¹

With respect to whether an individual is without fault, section 10.433(b) of OWCP's regulations provide that whether or not OWCP determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid.¹²

ANALYSIS -- ISSUE 2

OWCP found that appellant was at fault in the creation of the \$102,055.87 overpayment because he accepted compensation benefits that he knew or should have known to be incorrect.

The September 29, 2009 decision stated that the schedule award was to expire on December 29, 2010. OWCP, however, continued to issue compensation by direct deposit from December 30, 2010 through June 29, 2013. The Board finds that OWCP failed to establish that, at the time appellant accepted the first incorrect payment of compensation after December 29, 2010, he knew or should have known that the payments were incorrect. However, OWCP properly established that he was at fault for the portion of the overpayment resulting from subsequent payments.

In cases where a claimant receives compensation through direct deposit, the Board has held that OWCP must establish that at the time a claimant received the direct deposit in question that he or she knew or should have known that the payment was incorrect.¹³ The Board has held that an employee who receives payments from OWCP in the form of a direct deposit may not be at fault for the first incorrect deposit into his or her account, since the acceptance of the overpayment, at the time of receipt of the direct deposit, lacks the requisite knowledge.¹⁴ Because the fault is defined by what the claimant knew or should have known at the time of acceptance, one of the consequences of electronic fund transfers is that the claimant lacks the

⁹ 5 U.S.C. § 8129(b).

¹⁰ *Gregg B. Manston*, 45 ECAB 344, 354 (1994).

¹¹ 20 C.F.R. § 10.433(a). *See Kenneth E. Rush*, 51 ECAB 116, 118 (1999).

¹² *Id.* at § 10.433(b).

¹³ *See C.K.*, Docket No. 12-746 (issued May 1, 2012).

¹⁴ *See Tammy Craven*, 57 ECAB 689, 692 (2006).

requisite knowledge at the time of the first incorrect payment.¹⁵ Whether or not OWCP determines that an individual is at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment.¹⁶ It is not appropriate, however, to make a finding that a claimant has accepted an overpayment by direct deposit until such time as a reasonable person would have been aware that this overpayment had occurred. This awareness could be established either through documentations such as a bank statement or notification from OWCP or where a reasonable period of time has passed during which a claimant could have reviewed independent confirmation of the incorrect payment.¹⁷

The Board finds that appellant was not at fault in the creation of the overpayment for the period from December 19, 2010 through January 15, 2011. For this period, appellant received an overpayment in the amount of \$1,834.91, as he was only entitled to payment for the period from December 19 through 29, 2010. This check was deposited electronically into his account and this was the first incorrect payment made to him. There is no documentation or other evidence to demonstrate that appellant had clear knowledge at the time he received a direct deposit from OWCP on January 15, 2011, covering the period December 19, 2010 through January 15, 2011, that a portion of the payment was incorrect or that a reasonable period of time passed during which he could have reviewed bank statements or been informed of the incorrect payment. Accordingly, OWCP improperly determined that he was at fault in the creation of this portion of the overpayment.

However, the Board finds that OWCP correctly determined that appellant was at fault in the creation of all subsequent overpayments, for the period from January 16, 2011 through June 29, 2013. After the first incorrect payment, a reasonable period of time had passed during which appellant could have reviewed his bank statements and realized that he was receiving payments from OWCP in error. The decision of September 29, 2009 clearly indicated that the schedule award expired on December 29, 2010. Hence, OWCP properly found appellant at fault in the creation of overpayments from January 16, 2011 through June 29, 2013. The fact that OWCP may have been negligent in issuing the payments does not mitigate this finding.¹⁸ Appellant's counsel contends that a letter dated June 27, 2013, requesting financial information from appellant, confused him because it stated an expiration date of April 30, 2014. The Board notes that this expiration date referred to the form itself, not to his schedule award payments. The form did not state that appellant's schedule award was to expire on April 30, 2014.

As appellant was never found to be permanently disabled due to the accepted injury, he had no reasonable expectation of receiving disability wage-loss compensation after the termination of the schedule award. As to OWCP's requests for submission of periodic medical reports, the Board notes that these requests had no bearing on the clearly-stated expiration date of her schedule award by decision dated September 29, 2009. Appellant contends that he was informed by physicians that his hearing loss had worsened and therefore he believed that he was

¹⁵ *J.S.*, Docket No. 12-1707 (issued June 10, 2013).

¹⁶ *Id.*, see also *K.D.*, Docket No. 13-451 (issued April 12, 2013).

¹⁷ See *K.H.*, Docket No. 13-451 (issued April 12, 2013).

¹⁸ 20 C.F.R. § 10.435(a); *William E. McCarty*, 54 ECAB 525 (2003).

in receipt of an additional award. The medical report of record from Dr. Arenstein, dated August 1, 2012, stated that appellant's hearing was stable. There is no evidence of record that appellant was informed that his hearing loss had increased and that he was entitled to an additional schedule award.

Hence, OWCP followed proper procedures in determining whether appellant was at fault for this portion of the overpayment.

The Board finds that this case is not in posture for decision regarding the issue of waiver of recovery of overpayment for the direct deposit on January 15, 2011, covering the overpayment from December 30, 2010 through January 15, 2011. The Board will set aside the May 7, 2014 decision regarding the issue of fault as to the January 15, 2011 direct deposit and remand the case to OWCP to determine whether appellant is entitled to waiver of recovery for this payment. The Board finds that OWCP properly determined that he was at fault for subsequent payments between January 16, 2011 and June 29, 2013 and therefore not entitled to waiver of the recovery.

The Board notes that it does not have jurisdiction to review OWCP's determination that the overpayment would be recovered by paying \$30,000.00 immediately and \$900.00 per month thereafter. The Board's jurisdiction is limited to reviewing those cases where OWCP seeks recovery from continuing compensation under FECA.¹⁹ Appellant is not in receipt of continuing compensation.

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$102,055.87 from December 30, 2010 through June 29, 2013. The Board further finds that he was without fault for the first incorrect payment by direct deposit for the period December 19, 2010 through January 15, 2011, but that OWCP properly determined that he was at fault for subsequent payments between January 16, 2011 and June 29, 2013. The case will be remanded for consideration of waiver of the recovery of the overpayment from December 19, 2010 through January 15, 2011.

¹⁹ *Judith A. Cariddo*, 55 ECAB 348, 353 (2004).

ORDER

IT IS HEREBY ORDERED THAT the May 7, 2014 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part and the case is remanded for further action consistent with this decision of the Board.

Issued: April 3, 2015
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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

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