

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of PETER J. GALLIPOLI and DEPARTMENT OF THE NAVY,  
NAVAL STATION, Staten Island, NY

*Docket No. 98-956; Submitted on the Record;  
Issued October 5, 1999*

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DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,  
WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that an overpayment of \$1,361.80 was created; and (2) whether the Office properly denied waiver of the overpayment.

In a decision dated March 18, 1994, the Office issued a schedule award for a 14 percent binaural hearing loss. The period of the award was 28 weeks of compensation from August 5, 1993 to February 16, 1994, totaling \$19,065.20. The record indicates that appellant was issued a payment for \$20,427.00, which represented 30 weeks of compensation. The Office advised appellant by letter dated May 2, 1994, that a preliminary determination had been made that an overpayment of compensation in the amount of \$1,361.80 had occurred. The Office explained that appellant was entitled to a schedule award for a 14 percent binaural hearing loss, but had received a payment for a 15 percent binaural hearing loss. The Office determined that appellant was not at fault in creating the overpayment. Appellant requested waiver of the overpayment and submitted financial information regarding his monthly income and expenses.

By letter dated April 21, 1997, the Office indicated that the financial information submitted in May 1994 would not be sufficient to establish waiver of the overpayment. The Office advised appellant that he could submit current financial information within 30 days.<sup>1</sup>

In a decision dated January 5, 1998, the Office determined that an overpayment of \$1,361.80 had been created and that appellant was not entitled to waiver of recovery of the overpayment.

The Board has reviewed the record and finds that an overpayment of \$1,361.80 was created.

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<sup>1</sup> By letter dated April 30, 1997, the Office indicated that it was sending appellant an OWCP-20 overpayment recovery questionnaire.

In this case, the Office determined that appellant had a 14 percent binaural hearing loss, based on a January 20, 1994 memorandum from an Office medical adviser. The Office evaluates industrial hearing loss in accordance with the standards contained in the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A.) using the frequencies of 500, 1,000, 2,000 and 3,000 Hertz (Hz). The threshold levels at each frequency are added up and averaged to determine the estimated hearing level for speech. A “fence” of 25 decibels (dBs) is deducted since, as the A.M.A., *Guides* points out, losses below 25 dBs result in no impairment in the ability to hear everyday speech in everyday conditions. The remaining amount is multiplied by 1.5 to arrive at the percentage of monaural hearing loss. The binaural loss is determined by multiplying the lesser monaural loss by five, adding the greater monaural loss and dividing the total by six. The Board has concurred in the Office’s use of this standard for evaluating hearing losses for schedule award purposes.<sup>2</sup>

The Office medical adviser properly applied the A.M.A., *Guides* to the audiometric results of a July 21, 1993 audiogram: for the right ear, the decibel losses of 20, 20, 35 and 60 are averaged (33.75), the fence of 25 deducted and the remaining 8.75 is multiplied by 1.5 for a 13.125 percent monaural loss in the right ear. For the left ear, the same formula applied to the decibel losses of 30, 20, 35 and 70 results in a 20.625 percent monaural hearing loss. Applying the binaural hearing loss formula to the monaural losses results in a 14.375 binaural hearing loss.

The 14.375 binaural hearing loss is properly rounded down to 14 percent in accord with Office procedures.<sup>3</sup> The Board notes that the number of weeks of compensation for a schedule award is determined by the compensation schedule at 5 U.S.C. § 8107(c). For complete binaural hearing loss, the maximum number of weeks of compensation is 200 weeks. Since appellant’s binaural hearing loss was 14 percent, he is entitled to 14 percent of 200 weeks, or 28 weeks of compensation.<sup>4</sup>

In this case, the record indicates and appellant does not contest, that he was paid for 30 weeks of compensation, totaling \$20,427.00. The actual amount of compensation for 28 weeks should have been \$19,065.20, resulting in an overpayment of \$1,361.80.

The Board further finds that the Office properly denied waiver of the overpayment.

Section 8129(b) of the Federal Employees’ Compensation Act<sup>5</sup> provides: “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 the

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<sup>2</sup> See *Daniel C. Goings*, 37 ECAB 781 (1986).

<sup>3</sup> FECA Program Memorandum No.49 (issued May 1, 1967) provides that fractions less than five are rounded down to nearest whole number, while five and above are rounded up to the next whole number.

<sup>4</sup> The Board notes that the maximum for monaural hearing loss is 52 weeks. With a 13.125 monaural loss in the right ear and 20.625 in the left, the total number of weeks of compensation for monaural loss would be 18. Since the binaural loss results in a greater number of weeks, the Office properly based the award on binaural hearing loss.

<sup>5</sup> 5 U.S.C. §§ 8101-8193.

Act or would be against equity and good conscience.”<sup>6</sup> Since the Office found appellant to be without fault in the creation of the overpayment, the Office may only recover the overpayment if recovery would neither defeat the purpose of the Act nor be against equity and good conscience. 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, respectively, in sections 10.322 and 10.323 of Title 20 of the Code of Federal Regulations.

Section 10.322(a) provides, generally, that recovery of an overpayment would defeat the purpose of the Act if recovery would cause hardship by depriving the overpaid individual of income and resources needed for ordinary and necessary living expenses and, also, if the individual’s assets, those which are not exempt from recovery, do not exceed a resource base of \$3,000.00 (or \$5,000.00 if the individual has a spouse or one dependent).<sup>7</sup> Section 10.323 provides that recovery of an overpayment would be against equity and good conscience if: (1) the overpaid individual would experience severe financial hardship in attempting to repay the debt, with “severe financial hardship” determined by using the same criteria set forth in 20 C.F.R. § 10.322; or the individual, in reliance on the payment which created the overpayment, relinquished a valuable right or changed his position for the worse.

In the present case, appellant submitted financial information regarding his monthly expenses and income, as well as other assets and liabilities, in May 1994. Although there was a significant period of time between the preliminary determination of the overpayment and the final decision, the Office did provide appellant an opportunity to submit additional financial information relevant to waiver of the overpayment. There is no indication that appellant submitted any additional financial information to the Office. Based on the information provided in May 1994, appellant has not established that recovery of the overpayment would defeat the purpose of the Act. Appellant reported assets that included \$33,000.00 in a savings account and \$3,000.00 equity in nonexempt real estate. This exceeds the resource base provided in section 10.322(a) and therefore recovery would not defeat the purpose of the Act. Appellant has not provided evidence that he relinquished a valuable right or changed his position for the worse in reliance on the overpayment. Accordingly, the Board finds that appellant has not established that recovery of the overpayment would be against equity and good conscience.

As noted above, appellant is not entitled to waiver of the overpayment unless he can show that recovery would defeat the purpose of the Act or be against equity and good conscience. Based on the evidence of record, appellant has not established entitlement to waiver of the \$1,361.80 overpayment in this case.

The decision of the Office of Workers’ Compensation Programs dated January 5, 1998 is affirmed.

Dated, Washington, D.C.

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<sup>6</sup> 5 U.S.C. § 8129(b).

<sup>7</sup> To establish that recovery would defeat the purpose of the Act, appellant must show both that he needs substantially all his income to meet ordinary and necessary living expenses, and that his assets do not exceed the established resource base; *see Robert E. Wenholtz*, 38 ECAB 311 (1986).

October 5, 1999

Michael J. Walsh  
Chairman

George E. Rivers  
Member

Willie T.C. Thomas  
Alternate Member