

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CHARLES MYRICK and TENNESSEE VALLEY AUTHORITY,
BELLEFONTE NUCLEAR PLANT, Hollywood, AL

*Docket No. 02-2113; Submitted on the Record;
Issued February 28, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether appellant has more than a 56 percent binaural loss of hearing for which he received schedule awards; (2) whether the Office of Workers' Compensation Programs properly determined that appellant received an overpayment in compensation in the amount of \$48,367.67; and (3) whether the Office abused its discretion by denying waiver of the overpayment.

On October 18, 1997 appellant, then a 79-year-old retired steamfitter, filed an occupational disease claim, alleging that factors of employment caused hearing loss. He had retired from federal employment in April 1985. On September 30, 1998 appellant filed a schedule award claim and submitted a February 11, 1997 report from Dr. John J. Shea, Jr., a Board-certified otolaryngologist, who advised that appellant had complete loss of hearing in his left ear due to Meniere's disease and severe nerve-type hearing loss in the right ear due to noise exposure at work. Dr. Shea also submitted an audiogram dated February 3, 1997.

By letter dated June 26, 1998, the Office referred appellant to Dr. Jay J. Quilligan, a Board-certified otolaryngologist, for audiometric testing and otologic evaluation. Dr. Quilligan submitted a report detailing his examination, with an accompanying audiogram. The audiogram performed on July 14, 1998 reflected testing at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second which revealed the following: right ear decibels 35, 40, 65 and 80; left ear 110, 120, no response and no response, respectively. Dr. Quilligan diagnosed sensorineural hearing loss of the right ear and Meniere's disease of the left ear and advised that appellant's hearing loss on the right was employment related while that on the left was not.

By letter dated August 21, 1998, the Office accepted that appellant sustained an employment-related hearing loss in his right ear. An Office medical adviser reviewed Dr. Quilligan's report and audiometric test results and concluded that appellant had a right sensorineural hearing loss of 45 percent and that appellant's date of maximum medical improvement was July 14, 1998.

On January 22, 1999 the Office granted appellant a schedule award for a 45 percent monaural loss of hearing in the right ear in an amount of \$10,030.18. The period of the award

ran for 23.4 weeks, from July 14 to December 24, 1998. In a letter received by the Office on March 17, 1999, appellant requested reconsideration and submitted a January 28, 1999 report from an audiologist. By decision dated August 19, 1999, the Office found that appellant's hearing loss in the left ear was not causally related to employment. In a letter received by the Office on November 29, 1999, appellant again requested reconsideration and submitted additional medical evidence, including a February 20, 1998 report from Dr. Shea. By decision dated December 29, 2000, the Office denied modification of the prior decision, noting that both Drs. Shea and Quilligan had advised that appellant's hearing loss in his left ear was not employment related.

On September 11, 2001 appellant, through his attorney, requested reconsideration and submitted additional medical evidence, including an August 1, 2001 report in which Dr. Shea advised that appellant's hearing loss in his left ear was caused by noise exposure. The Office medical adviser reviewed the new evidence and determined that appellant was entitled to 56 percent binaural hearing loss. By decision dated October 18, 2001, the Office vacated its prior decisions and found that appellant's hearing loss on the left was employment related. The Office found that appellant was entitled to an additional 11 percent schedule award for the right ear, totaling 56 percent and a 56 percent schedule award for the left ear.¹

An Office medical adviser again reviewed the previous Office medical adviser's report and concluded that appellant was to be awarded a total of 56 percent binaural hearing loss. The Office medical adviser noted that the period of time during which appellant received his previous monaural award for the right ear needed to be subtracted from the period for the 56 percent binaural award. On February 14, 2002 the Office granted appellant a schedule award for a 56 percent binaural loss of hearing. The schedule award was to run for 88.6 weeks, or a total of 784 days less the 163.80 days already paid for the schedule award in 1999 for the right ear. This totals an additional schedule award of 620.20 days or \$38,289.65. The appropriate period of the award was from December 25, 1998 to September 5, 2000. Due to an error, the Office paid the award for a period from December 25, 1998 to July 19, 2001. The Office awarded appellant compensation in the amount of \$86,657.32, based on this extended period. The amount received by appellant, \$86,657.32 less the appropriate amount of the award of \$38,289.65 leaving an overpayment of \$48,367.67.

By letter dated February 14, 2002, the Office issued a preliminary determination that an overpayment of compensation in the amount of \$48,367.67 occurred in appellant's case because the amount award to appellant on January 22, 1999 should have been deducted from the amount awarded on February 14, 2002 minus the 88.6 weeks of compensation. Appellant was found to be without fault. The Office requested that appellant indicate whether he wished to contest the existence or amount of the overpayment or to request waiver of the overpayment on an attached Office form.² The Office also asked him to complete an attached overpayment recovery questionnaire (Form OWCP-20) and submit financial documents in support thereof. The Office

¹ This decision was in error. The award was to have been a schedule award in the total amount of 56 percent binaural hearing loss.

² The form provides a claimant with three choices: (1) a request of waiver and a telephone conference; (2) a request of waiver with the Office making the decision on the written record; and (3) a request of waiver with a hearing before the Branch of Hearings and Review. With each of these choices, a claimant is to provide supporting financial documents.

indicated that the financial information would be used to determine whether appellant was entitled to waiver and that failure to submit the requested financial information within 30 days would result in a denial of waiver of the overpayment. On March 13, 2002 appellant repaid the overpayment in compensation. By decision dated March 28, 2002, the Office finalized the overpayment decision. In a letter dated June 17, 2002, the Office acknowledged that the overpayment in compensation had been paid in full. The instant appeal follows.

The Board finds that appellant has no more than a 56 percent binaural loss of hearing for which he received schedule awards.

The Office evaluates industrial hearing loss in accordance with the standards contained in the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.³ Using the frequencies of 500, 1,000, 2,000 and 3,000 cycles per second, the losses at each frequency are added up and averaged.⁴ Then, the “fence” of 25 decibels is deducted because, as the A.M.A., *Guides* points out, losses below 25 decibels result in no impairment in the ability to hear everyday speech under everyday conditions.⁵ The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.⁶ 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.⁷ The Board has concurred in the Office’s adoption of this standard for evaluating hearing loss.⁸

³ A.M.A., *Guides* (5th ed. 2001). At the time of the January 22, 1999 decision, the 4th edition of the A.M.A., *Guides* (1993) was utilized in determining entitlement to schedule award claims. The provisions under the 4th and 5th editions, in regard to hearing loss claims, are essentially the same. In addition to these standards, by which it computes the percentage of hearing loss, the Office has delineated requirements for the type of medical evidence used in evaluating hearing loss. The requirements, as set forth in the Office’s Federal (FECA) Procedure Manual, are, *inter alia*, that the employee undergo both audiometric and otologic examination; that the audiometric testing precede the otologic examination; that the audiometric testing be performed by an appropriately certified audiologist; that the otologic examination be performed by an otolaryngologist certified or eligible for certification by the American Academy of Otolaryngology; that the audiometric and otologic examination be performed by different individuals as a method of evaluating the reliability of the findings; that all audiological equipment authorized for testing meet the calibration protocol contained in the accreditation manual of the American Speech and Hearing Association; that the audiometric test results include both bone conduction and pure tone air conduction thresholds, speech reception thresholds and monaural discrimination scores; and that the otolaryngologist’s report must include: date and hour of examination, date and hour of employee’s last exposure to loud noise, a rationalized medical opinion regarding the relation of the hearing loss to the employment-related noise exposure and a statement of the reliability of the tests. See Federal (FECA) Procedure Manual, Part 3 -- Requirements for Medical Reports, *Special Conditions*, Chapter 3.600.8(a) (September 1995); *Raymond VanNett*, 44 ECAB 480 (1993). The procedural requirements were met in the instant case.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Donald E. Stockstad*, 53 ECAB ____ (Docket No. 01-1570, issued January 23, 2002).

In reviewing appellant's July 14, 1998 audiogram,⁹ the frequency levels recorded at 500, 1,000, 2,000 and 3,000 hertz for the right ear revealed decibel losses of 35, 40, 65 and 80, respectively, for a total of 220 decibels. When divided by 4, the result is an average hearing loss of 55 decibels. The average loss of 55 is reduced by 25 decibels to equal 30 which, when multiplied by the established factor of 1.5, results in a 45 percent monaural hearing loss for the left ear. Testing for the left ear at the frequency levels of 500, 1,000, 2,000 and 3,000 hertz revealed decibel losses of 100, 100, 100 and 1000 respectively, for a total of 400 decibels.¹⁰ Utilizing the same above-noted formula results in a 112.5 percent monaural hearing loss for the left ear. The 45 percent hearing loss for the right ear (the ear with the lesser loss), when multiplied by 5, yields a product of 225. The 225 is then added to the 112.5 percent hearing loss for the left ear (the ear with the greater loss) to obtain a total of 337.5. The 337.5 is then divided by 6, in order to calculate a binaural loss of hearing of 56 percent. Consequently, the reliable evidence of record does not establish that appellant has greater than a 56 percent binaural loss of hearing.¹¹

A schedule award under the Federal Employees' Compensation Act¹² is paid for permanent impairment involving the loss or loss of use of certain members of the body. The schedule award provides for the payment of compensation for a specific number of weeks as prescribed in the statute.¹³ With respect to the schedule awards for hearing impairments, the pertinent provision of the Act provides that for a total, or 100 percent loss of hearing in both ears, an employee shall receive 200 weeks of compensation.¹⁴ In the instant case, appellant does not have a total, or 100 percent binaural hearing loss, but rather a 56 percent binaural hearing loss. As such, he is entitled to 56 percent of the 200 weeks of compensation, which is 88.6 weeks. The Office, therefore, properly determined the number of weeks of compensation for which appellant is entitled under the schedule award.

The Board further finds that appellant received an overpayment of compensation in the amount \$48,367.67.

The record in this case reflects that on February 14, 2002 the Office granted appellant a schedule award for a 56 percent binaural hearing loss. This amounted to 112 weeks of compensation, less the previous awarded period of 23.4 weeks, for a total of 88.6 weeks. The

⁹ The Board notes that, while the record contains a number of audiograms, that of July 14, 1998 demonstrates the most significant hearing loss.

¹⁰ The Board further notes that section 11.2 of the A.M.A., *Guides*, provides that, if the hearing level at a given frequency is greater than 100 decibels or is beyond the range of the audiometer, the level should be taken as 100 decibels. A.M.A., *Guides*, *supra* 2 at 247.

¹¹ The Board notes that the opinion of the Office hearing representative dated October 2, 2001 contained a computation error. The hearing representative, in correcting a prior computation error made by the Office in its May 24, 2001 decision, indicated that, in determining the hearing loss in the left ear, 6.25 times 1.5 equaled 7.125. However, 6.25 times 1.5 equals 9.375. The Board further notes that, in calculating schedule awards, the Office procedure manual provides that Fractions should be rounded down from .49 or up from .50. Federal (FECA) Procedure Manual, Part 3 -- Schedule Awards, *Special Determinations*, Chapter 3.700.4.b(2) (b) (September 1995).

¹² 5 U.S.C. §§ 8101-8193.

¹³ 5 U.S.C. § 8107.

¹⁴ 5 U.S.C. § 8107(c) (13)(B).

correct amount was \$38,289.65. This Office erroneously awarded him compensation for 134 weeks in the amount of \$86,657.32. Therefore, an overpayment in compensation in the amount of \$48,367.67 was created.

The Board further finds that, while appellant was not at fault in the creation of the overpayment, he is not entitled to a waiver.

Section 8129(a) of the Act¹⁵ provides that, where an overpayment of compensation has been made “because of an error of fact or law” adjustments shall be made by decreasing later payments to which an individual is entitled.¹⁶ The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): “Adjustments or recovery by the United States may not be made when incorrect payments have 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.”¹⁷

Thus, a finding that appellant was without fault is not sufficient, in and of itself, for the Office to waive the overpayment.¹⁸ The Office must exercise its discretion to determine whether recovery of the overpayment would “defeat the purpose of the Act or would be against equity and good conscience,” pursuant to the guidelines provided in sections 10.434-437 of the implementing federal regulations.¹⁹ Furthermore, section 10.438 of the federal regulations provides:

“(a) 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.

“(b) 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.”²⁰

In its letter dated February 14, 2002, the Office clearly instructed appellant that he should return the requested information within 30 days. Appellant did not comply. Without an accurate and complete breakdown of appellant’s monthly income, monthly expenses and assets, supported by financial documentation, the Office was not able to calculate whether appellant’s assets

¹⁵ 5 U.S.C. §§ 8101-8193.

¹⁶ 5 U.S.C. § 8129(a).

¹⁷ 5 U.S.C. § 8129(b).

¹⁸ *James Lloyd Otte*, 48 ECAB 334, 338 (1997); see *William J. Murphy*, 40 ECAB 569, 571 (1989).

¹⁹ 20 C.F.R. § 10.434-10.437 (1999).

²⁰ 20 C.F.R. § 10.438 (1999).

exceeded the specified resource base. The Office therefore properly found that appellant was not entitled to waiver on the grounds that recovery would defeat the purpose of the Act.²¹

Recovery of an overpayment is considered to be against equity and good conscience if an individual who was never entitled to benefits would experience severe financial hardship in attempting to repay the debt,²² or if the individual, in reliance on the overpaid compensation, relinquished a valuable right or changed his or her position for the worse.²³ In this case, appellant submitted no evidence to establish that he relinquished a valuable right or changed her position for the worse in reliance on the overpaid compensation. The Office, therefore, properly found that recovery of the overpayment would not be against equity or good conscience.²⁴

The decisions of the Office of Workers' Compensation Programs dated March 28 and February 14, 2002 are hereby affirmed.

Dated, Washington, DC
February 28, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

²¹ See *Gail M. Roe*, 47 ECAB 268 (1995).

²² 20 C.F.R. § 10.437(a) (1999).

²³ 20 C.F.R. § 10.437(b) (1999).

²⁴ The Board, however, recognizes that appellant has fully repaid the overpayment in compensation.