

FACTUAL HISTORY

The Office accepted in January 2006 that appellant, then a retired 57-year-old physical security specialist, sustained an employment-related binaural hearing loss.¹ In a January 10, 2006 decision, it granted appellant a schedule award for a six percent binaural hearing loss. The award ran for 11.6 weeks from October 27, 2005 to January 18, 2006.² The Office advised appellant that, after the ending date of the award, his entitlement to compensation would be based solely on disability for work resulting from his accepted injury. Appellant could claim continuing compensation by submitting evidence establishing that his accepted injury prevented him from performing the kind of work he was doing when injured and prevented him from earning comparable wages.

In an August 27, 2007 letter, the Office advised appellant of its preliminary determination that he received a \$47,914.22 overpayment of compensation. It noted that the January 10, 2006 schedule award entitled appellant to compensation for a six percent binaural hearing loss from October 27, 2005 to January 18, 2006. However, appellant received monies under the schedule award from October 27, 2005 to August 4, 2007.³ The Office made a preliminary determination that he was at fault in creating the overpayment, thereby precluding waiver of recovery of the overpayment. It found that appellant knew or should have known he accepted payments which incorrect. The Office informed appellant that he could contest the fact and amount of the overpayment as well as the findings regarding fault and waiver. Appellant was instructed to complete an enclosed overpayment questionnaire (Form OWCP-20) and other financial information.

In a September 4, 2007 letter, appellant argued that he was not at fault in the creation of the \$47,914.22 overpayment and requested waiver. He indicated that he contacted the Office when his payments continued after January 18, 2006 because he was concerned they were incorrect. Appellant was told that someone would contact him when he was no longer entitled to receive payments from the Office. He also thought that the payments he received after January 18, 2006 were for disability from work.⁴ In a Form OWCP-20, completed on September 20, 2007, appellant indicated that he had \$3,323.00 in monthly income (comprised of \$1,523.00 in OPM disability retirement payments and \$1,800.00 in private employment earnings) and \$1,540.00 in monthly expenses.

Appellant requested a precoupment hearing with an Office hearing representative in connection with the overpayment matter. In a December 4, 2007 letter sent to his current

¹ Appellant retired from federal service effective September 3, 2002 and began receiving disability retirement from the Office of Personnel Management (OPM).

² Appellant's weekly pay was identified as \$597.11 (or \$2,388.44 every 28 days).

³ The Office attached documents showing that appellant was entitled to receive \$7,101.21, (for the period October 27, 2005 to January 18, 2006) but actually received \$55,015.43 (for the period October 27, 2005 to August 4, 2007).

⁴ Appellant also asserted that he should not have to repay the overpayment because it was the Office's fault that he received payments after January 18, 2006.

address, the Office advised appellant that a telephonic hearing with an Office hearing representative would take place on January 9, 2008 at 11:00 a.m. Eastern Standard Time. The Office informed appellant how to contact the Office hearing representative *via* telephone at that time.⁵

In a February 5, 2008 decision, the Office found that appellant received a \$47,914.22 overpayment of compensation because he received schedule award compensation for the period October 27, 2005 to August 4, 2007 when only entitled to the period October 27, 2005 to January 18, 2006. The Office also determined that he was at fault in creating the overpayment, thereby precluding waiver of recovery.⁶ It considered appellant's financial information and determined that the overpayment would be recovered through \$250.00 payments every 28 days.⁷

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of the Act⁸ 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.⁹ Section 8129(a) of the Act provides, in pertinent part:

“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.”¹⁰

Section 8116(a) of the Act provides that while an employee is receiving compensation or if he has been paid a lump sum in commutation of installment payments until the expiration of the period during which the installment payments would have continued, the employee may not receive salary, pay or remuneration of any type from the United States, except in limited specified instances.¹¹

⁵ The record shows that appellant did not request postponement, that he failed to appear for the scheduled hearing by making himself available *via* telephone and that he failed to provide any notification for such failure within 10 days of the scheduled date of the hearing.

⁶ The Office noted that appellant claimed he thought the compensation payments he received after January 18, 2006 were for disability from work, but indicated that the Office's January 10, 2006 decision explicitly indicated that he would have to apply for disability compensation if he felt he was entitled to such compensation after January 18, 2006.

⁷ As recovery from continuing compensation benefits under the Federal Employees' Compensation Act is not involved in this case, the Board has no jurisdiction over the amount the Office determined that appellant should repay each month. *Levon H. Knight*, 40 ECAB 658, 665 (1989).

⁸ 5 U.S.C. §§ 8101-8193.

⁹ 5 U.S.C. § 8102(a).

¹⁰ 5 U.S.C. § 8129(a).

¹¹ 5 U.S.C. § 8116(a).

ANALYSIS -- ISSUE 1

In a January 10, 2006 decision, the Office granted appellant a schedule award for a six percent binaural hearing loss. The award ran for 11.6 weeks from October 27, 2005 to January 18, 2006. However, appellant received schedule award payments for the period October 27, 2005 to August 4, 2007, a period of more than one and half years longer than the schedule award allowed. The record establishes that appellant was entitled to receive \$7,101.21 for the period October 27, 2005 to January 18, 2006 but actually received \$55,015.43 for the period October 27, 2005 to August 4, 2007. The difference between the amount appellant was entitled to receive and the amount he actually received is \$47,914.22. Therefore, the Office properly determined that he received a \$47,914.22 overpayment.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of the Act¹² provides that where an overpayment of compensation has been made “because of an error of fact or law,” adjustment shall be made by decreasing later payments to which an individual is entitled.¹³ The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): “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 equity and good conscience.”¹⁴ No waiver of payment is possible if the claimant is not “without fault” in helping to create the overpayment.

In determining whether an individual is not “without fault” or alternatively, “with fault,” section 10.433(a) of Title 20 of the Code of Federal Regulations provides in relevant part:

“An individual is with fault in the creation of an overpayment who:

- (1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or
- (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 to be incorrect....”¹⁵

¹² 5 U.S.C. §§ 8101-8193.

¹³ 5 U.S.C. § 8129(a).

¹⁴ 5 U.S.C. § 8129(b).

¹⁵ 20 C.F.R. § 10.433(a).

With regard to the standards for evaluating fault, section 10.433(c) of the Office's regulations provides:

“Whether or not [the Office] 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.”¹⁶

ANALYSIS -- ISSUE 2

The Board finds that the Office properly applied the third standard of 20 C.F.R. § 10.433(a) in determining that appellant was at fault in creating the overpayment, *i.e.*, he accepted payments which he knew or should have known to be incorrect.¹⁷ The Office's January 10, 2006 schedule award decision explicitly advised that the award ran for only 11.6 weeks from October 27, 2005 to January 18, 2006 and of the amount of the periodic payments he would receive. However, appellant continued to receive schedule award payments for more than one and half years after the expiration date of January 18, 2006. The fact that he was specifically advised of when his entitlement to schedule award compensation would end and that he accepted incorrect payments for such an extended period shows that he knew or should have known that the continuing payments were incorrect. Appellant claimed that he thought the compensation payments he received after January 18, 2006 were for disability from work, but the Office's January 10, 2006 decision explicitly advised him that he would have to apply for disability compensation if he felt he sought such compensation after January 18, 2006. He did not apply for Office disability compensation. There was no basis for appellant to believe he could receive compensation following the expiration of the schedule award.¹⁸

Appellant also asserted that he was not at fault in the creation of the overpayment as it was the Office's fault that he received payments after January 18, 2006. The Board has held that the fact that the Office might have been negligent in making compensation payments does not excuse a claimant's acceptance of payments he knew or should have known to be incorrect and returned to the Office.¹⁹ The Board notes that the Office properly applied the standards of section 10.433(c) of its implementing regulations in determining that appellant knew or should

¹⁶ 20 C.F.R. § 10.433(c).

¹⁷ See *supra* note 15 and accompanying text.

¹⁸ Appellant was receiving disability retirement payments from the OPM. Moreover, he indicated that he contacted the Office when his payments continued after January 18, 2006 because he was concerned the payments were incorrect. Appellant suggested that he was told someone would contact him when he was no longer entitled to receive payments from the Office, but his statements about what Office employees told him were vague in nature.

¹⁹ *Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

have known that he received incorrect payments of compensation.²⁰ Because appellant is at fault in creating the \$47,914.22 overpayment, it is not subject to waiver.²¹

LEGAL PRECEDENT -- ISSUE 3

The authority governing abandonment of hearings rests with the Office's procedure manual. Chapter 2.1601.6(e) of the procedure manual, dated January 1999, provides as follows:

"e. Abandonment of Hearing Requests.

"(1) A hearing can be considered abandoned only under very limited circumstances. All three of the following conditions must be present: the claimant has not requested a postponement; the claimant has failed to appear at a scheduled hearing; and the claimant has failed to provide any notification for such failure within 10 days of the scheduled date of the hearing.

"Under these circumstances, H&R [Branch of Hearings and Review] will issue a formal decision finding that the claimant has abandoned his or her request for a hearing and return the case to the DO [district Office]. In cases involving prerecoupment hearings, H&R will also issue a final decision on the overpayment, based on the available evidence, before returning the case to the DO.

"(2) However, in any case where a request for postponement has been received, regardless of any failure to appear for the hearing, H&R should advise the claimant that such a request has the effect of converting the format from an oral hearing to a review of the written record.

"This course of action is correct even if H&R can advise the claimant far enough in advance of the hearing that the request is not approved and that the claimant is, therefore, expected to attend the hearing and the claimant does not attend."²²

ANALYSIS -- ISSUE 3

The Office scheduled a prerecoupment hearing with an Office hearing representative on January 9, 2008 at 11:00 a.m. Eastern Standard Time. The record shows that the Office mailed appropriate notice to the claimant at his last known address. The record also supports that appellant did not request postponement, that he failed to appear for the scheduled hearing by making himself available *via* telephone and that he failed to provide any notification for such failure within 10 days of the scheduled date of the hearing. As this meets the conditions for

²⁰ See *supra* note 16 and accompanying text.

²¹ See *supra* note 14 and accompanying text.

²² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6(e) (January 1999).

abandonment specified in the Office's procedure manual, it properly found that appellant abandoned his request for a hearing before an Office hearing representative.²³

CONCLUSION

The Board finds that the Office properly determined that appellant received \$47,914.22 overpayment of compensation. The Board further finds that the Office properly determined that appellant was at fault in creating the overpayment and that, therefore, the overpayment was not subject to waiver. The Board also finds that the Office properly determined that appellant abandoned his request for a hearing before an Office hearing representative.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' February 5, 2008 decision is affirmed.

Issued: December 18, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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

²³ See also *Claudia J. Whitten*, 52 ECAB 483, 485 (2001).