

**United States Department of Labor
Employees' Compensation Appeals Board**

_____)
D.P., Appellant)

and)

DEPARTMENT OF THE AIR FORCE, 402ND)
MAINTENANCE WING, ROBINS AIR FORCE)
BASE, GA, Employer)
_____)

Docket No. 08-843
Issued: September 5, 2008

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 28, 2008 appellant filed a timely appeal from a December 3, 2007 decision of the Office of Workers' Compensation Programs regarding an overpayment of compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.

ISSUES

The issues are: (1) whether the Office properly determined that appellant received an overpayment of \$95,692.87 of compensation for the period May 23, 2006 to September 29, 2007; (2) whether the Office properly determined that appellant was at fault in creating the overpayment and therefore it was not subject to waiver.

FACTUAL HISTORY

The Office accepted that on or before October 11, 2005 appellant, then a 62-year-old industrial production manager, sustained a bilateral high frequency sensorineural hearing loss

due to hazardous noise exposure at work.¹ He continued working at the employing establishment through his retirement on January 2, 2007.

In an April 17, 2006 letter, the Office advised appellant that the medical evidence demonstrated that he had a four percent bilateral hearing loss. It instructed appellant to claim a schedule award and obtain his pay rate for March 27, 2006, the date of his maximum medical improvement. Appellant claimed a schedule award on April 24, 2006, noting that he was married. On April 27, 2006 he authorized the electronic direct deposit of compensation into his bank account.

In a September 21, 2006 telephone memorandum, the Office noted that appellant called as he was receiving electronic payments. It advised him that these were schedule award payments. However, the Office had not yet issued a schedule award decision.

By decision dated September 21, 2006, the Office granted appellant a schedule award for a four percent bilateral sensorineural hearing loss. The period of the award ran from March 28 to May 22, 2006. The Office explained that appellant would be entitled to receive \$14,498.92 in compensation for that period, with a payment of \$5,412.93 every four weeks. This amount was calculated based on multiplying appellant's weekly pay rate of \$1,804.31 as of March 27, 2006 by the three-fourths augmented compensation rate, to equal \$1,353.23 a week. The Office noted that payment of the schedule award would end on May 22, 2006.

Compensation payment logs demonstrated that appellant received electronic funds transfers in the amount of \$5,412.93 on May 13, 2006 and every four weeks from July 8, 2006 to September 29, 2007. Appellant also received an electronic funds transfer in the amount of \$14,498.92 on June 16, 2006. In October 3, 2007 worksheets, the Office calculated that appellant was entitled to receive \$10,825.86 for the period March 28 to May 22, 2006. Subtracting this amount from the total \$106,518.73 paid from March 28, 2006 to September 29, 2007 resulted in a \$95,692.87 overpayment of compensation.

By notice dated October 5, 2007, the Office advised appellant of its preliminary determination that an overpayment of \$95,692.07 was created in his case as he erroneously received schedule award payments from March 28, 2006 to September 29, 2007, after the expiration of the schedule award on March 27, 2006. The Office made the preliminary determination that appellant was at fault in creation of the overpayment as he knew or reasonably should have known that he was not entitled to payments after March 27, 2006.

In an October 18, 2007 letter, appellant requested that the Office make a decision regarding the overpayment based on the written record. He requested waiver, contending that he was not at fault in creation of the overpayment. Appellant explained that, within 30 days of the Office's April 17, 2006 letter advising him to claim a schedule award, he "received an additional direct deposit and a Benefit Statement" indicating a schedule award. He consulted Kim Barbee,

¹ The Office initially denied the claim by decision dated December 8, 2005. Following appellant's request for reconsideration, the Office referred appellant for a second opinion examination, conducted on April 3, 2006. Based on this opinion, the Office accepted the claim on April 17, 2006.

an employing establishment compensation unit official, to verify his entitlement. Ms. Barbee advised that she would contact the Office. She then called appellant and told him the Office verified that the payment was correct. This resulted in the Office mailing appellant the formal schedule award decision on September 21, 2006. Appellant realized he had “already received additional payments beyond the dates specified in the award.” He again contacted Ms. Barbee, who assured him that the payments were correct. Appellant enclosed a cashier’s check for \$10,000.00 as partial repayment. He asserted that repayment of the additional amount would create extreme financial hardship. Appellant provided financial information showing a household monthly income of \$3,028.71, monthly expenses of \$1,500.54 and \$24,320.00 in bank accounts and valuable property.

In a December 3, 2007 memorandum, the Office noted that it contacted the employing establishment to investigate appellant’s account of Ms. Barbee’s statements. The results of this inquiry are not of record.

By decision dated December 3, 2007, the Office finalized its preliminary determination of a \$95,692.87 overpayment of compensation. It found that appellant was at fault in creation of the overpayment as he should have contacted the Office and not Ms. Barbee to verify his entitlement to payments. The Office also noted that appellant did contact the Office to request verification. It noted that there was no verification that appellant spoke to Ms. Barbee or that Ms. Barbee contacted the Office. The Office found that, even if appellant were found without fault, his asset base exceeded the eligibility for waiver. It directed recovery of the overpayment through monthly payments.²

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of the Federal Employees’ Compensation Act³ 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.⁴ Section 8129(a) of the Act 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.”⁵ The Office’s procedure manual identifies various situations when overpayments of compensation may occur, including when a schedule award expires but compensation continued to be paid.⁶

² As the Office did not direct recovery of the overpayment from continuing compensation, the Board has no jurisdiction to review the issue of recovery. See *Albert Pineiro*, 51 ECAB 310 (2000); *Lorenzo Rodriguez*, 51 ECAB 295 (2000).

³ 5 U.S.C. §§ 8101-8193.

⁴ 5 U.S.C. § 8102(a).

⁵ 5 U.S.C. § 8129(a).

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

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained a four percent bilateral hearing loss in the performance of duty. It granted appellant a schedule award on September 21, 2006. The Office stated that appellant was entitled to \$14,498.92 in schedule award compensation for the period March 28 to May 22, 2006. This was based on multiplying appellant's weekly pay rate of \$1,804.31 by the 75 percent augmented compensation rate, resulting in a payment of \$5,412.93 every four weeks.

Instead of ending appellant's compensation at the expiration of the schedule award, the Office erroneously issued schedule award payments through September 29, 2007. On October 3, 2007 the Office calculated that appellant had received a total of \$106,518.73 from March 28, 2006 to September 29, 2007, whereas he was only entitled to receive \$10,825.86 for the period March 28, 2006 to May 22, 2006. This resulted in a \$95,692.87 overpayment of compensation.

The Board finds that the Office correctly found an overpayment of compensation for the period May 23, 2006 to September 29, 2007 as he received schedule award payments for that period after the expiration of his award. However, there is a discrepancy as to the amount of the overpayment. The September 21, 2006 schedule award found appellant entitled to \$14,498.92. The October 3, 2007 overpayment calculation found appellant entitled to \$10,835.26 for that period. The case will be remanded to clarify the amount of the overpayment.

LEGAL PRECEDENT -- ISSUE 2

Under section 8129 of the Act and the implementing regulation, an overpayment must be recovered unless incorrect payment has 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.⁷ Section 10.433 of the implementing regulation specifically provides that the Office may consider waving an overpayment if the individual to whom it was made was not at fault in accepting or creating the overpayment.⁸ The regulation further provides that each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from the Office are proper.⁹ Under the regulation, a recipient will be found to be at fault with respect to creating an overpayment if the recipient on the issue of fault, section 10.433 of the Office's regulation, provides that an individual will be found at fault if he or she has done any of the following: (1) made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; (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 was incorrect.¹⁰

⁷ 5 U.S.C. § 8129(b); 20 C.F.R. §§ 10.433, 10.434, 10.436, 10.437.

⁸ 20 C.F.R. § 10.433(a).

⁹ *Id.*

¹⁰ 20 C.F.R. § 10.433(a)(3).

In determining fault under section 10.433(a)(3), where the claimant receives compensation through direct deposit, the payment goes directly from the U.S. Treasury to the claimant's account. The Office may not deposit compensation into a claimant's account without authorization. The claimant must first complete a form authorizing the electronic transfer of payment to a named financial institution to be deposited to a designated account. It is only with the claimant's intent that these payments are deposited to his or her account which is something more than receipt; it is acceptance. When control of the funds passes to the claimant upon deposit, the acceptance necessary under section 10.433(a)(3) is established.¹¹

ANALYSIS -- ISSUE 2

The Office found that appellant was at fault in creating the overpayment under the third standard noted above, because he accepted payments after May 23, 2006 that he knew or should have known were incorrect. It asserted that appellant wrongfully relied on an employing establishment injury compensation official to determine his entitlement to benefits. However, under the circumstances of this case, the Board finds that appellant was not at fault in creation of the overpayment for the period May 23 to September 21, 2006.

Appellant claimed a schedule award on April 24, 2006. Within one month of April 17, 2006, appellant noted that he received an electronic transfer benefits' statement indicating that he received a schedule award payment. It was therefore reasonable for appellant to believe he was entitled to a benefit he had so recently claimed. Appellant continued to receive payments until September 29, 2007, after the schedule award ended on May 22, 2006. However, the Office did not advise appellant until September 21, 2006 of the period or amount of the schedule award. It did not realize this omission until appellant called the Office on September 21, 2006. Appellant's inquiry refutes the Office's assertion that he relied only on the injury compensation official to determine his entitlement to benefits.

The Board finds that appellant had no reason to believe he was not entitled to payments made after May 23, 2006 until he received the September 21, 2006 schedule award decision.¹² Therefore, he was not at fault in creating the overpayment from May 23 to September 21, 2006. As appellant was not at fault for this period, the case will be remanded to determine if the compensation paid for this period is subject to waiver. Following this development, the Office will issue an appropriate decision.

The Board finds that appellant was at fault in creation of the overpayment from September 22, 2006 to September 29, 2007. The September 21, 2006 schedule award clearly set forth the period of the overpayment, noting that the schedule award ended on May 22, 2006. In appellant's October 18, 2007 letter, he stated that, when he reviewed the September 21, 2006

¹¹ *Tammy Craven*, 57 ECAB 689 (2006).

¹² The Board has found claimants to be at fault in cases where he or she received compensation payments through direct deposit which involve a series of payments over several months with clear knowledge that the payments were incorrect. See *Karen Dixon*, 56 ECAB 145 (2004). In this case, however, there is no indication of record that the benefits statement appellant received contained the May 22, 2006 schedule award end date or otherwise indicated that he would not be entitled to compensation after May 22, 2006.

schedule award decision, he realized he had “already received additional payments beyond the dates specified in the award.” Therefore, the Office correctly found appellant at fault in creation of the overpayment from September 22, 2006 to September 29, 2007. The case will be remanded to the Office to calculate the amount of compensation paid during this period and for issuance of an appropriate decision.

CONCLUSION

The Board finds that the Office properly found an overpayment of compensation. The Board further finds that the case is not in posture regarding the amount and period of the overpayment. The Board further finds that appellant was not at fault in creation of the overpayment for the period May 23 to September 21, 2006. The case will be remanded to the Office for appropriate development on the issues of period, amount and fault. The Board further finds that the Office correctly found appellant at fault in creation of the overpayment for the period September 22, 2006 to September 29, 2007.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers’ Compensation Programs dated December 3, 2007 is affirmed in part and denied in part. The case is remanded for further action consistent with this opinion.

Issued: September 5, 2008
Washington, DC

Alec J. Koromilas, Chief Judge
Employees’ Compensation Appeals Board

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

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