

FACTUAL HISTORY

This is the second appeal in this case.¹ By decision dated September 21, 2006, the Board affirmed an October 13, 2005 Office decision denying appellant's request for a review of the written record as untimely. The Board also affirmed a March 9, 2006 decision denying his request for reconsideration on the grounds that it was untimely and failed to establish clear evidence of error. The facts of the case are more fully set forth in the previous Board decision and are incorporated herein by reference.

By decision dated July 27, 2004, the Office granted a schedule award based on 31 percent binaural hearing loss, for 62 weeks, from April 16, 2004 to June 23, 2005, with an effective pay rate date of May 15, 1998.²

On June 3, 2008 the Office advised appellant of its preliminary determination that there was an overpayment of compensation in the amount of \$5,073.53 because the Office based his schedule award on the weekly pay rate on the date of appellant's last exposure to noise at the employing establishment, May 15, 1998, the date his temporary appointment expired, but incorrectly used that same date as the effective date of the pay rate, thereby including consumer price index (CPI) increases through June 16, 2004 to the schedule award. The Office stated that the effective date of the schedule award should have been April 16, 2004, the date of maximum medical improvement (the date of the audiogram upon which the schedule award was based). Appellant received \$30,268.16 for April 16, 2004 to June 23, 2005, based on 434 days at a weekly pay rate of \$541.82, effective May 15, 1998 and an augmented three-fourths compensation rate (for employees with dependents).³ The \$30,268.16 included CPI increases based on the incorrect May 15, 1998 effective pay rate date. The Office explained that appellant was not entitled to CPI increases because he did not lose any time from work due to his accepted binaural hearing loss and his exposure to industrial noise stopped on May 15, 1998.⁴ Appellant should have received \$25,194.63 for 434 days at his \$541.82 weekly pay rate effective April 16, 2004, his date of maximum medical improvement. The Office calculated the amount of the overpayment based on copies of appellant's compensation payment history, which included the dates and amounts of checks issued to him between April 16, 2004 and June 23, 2005 totaling \$30,268.16, and worksheets which showed that he was entitled to receive only \$25,194.63 for

¹ See Docket No. 06-1218 (issued September 21, 2006). On January 7, 2004 appellant, then a 55-year-old heavy mobile mechanic, filed an occupational disease claim alleging that he sustained hearing loss in the performance of his federal job. The Office accepted his claim for bilateral sensorineural hearing loss.

² The Federal Employees' Compensation Act provides for 200 weeks of compensation for 100 percent bilateral hearing loss. 5 U.S.C. § 8107(c)(13)(B). Multiplying 200 weeks by 31 percent equals 62 weeks of compensation.

³ An injured employee with dependents receives compensation based on three-fourths of his monthly pay. See 5 U.S.C. §§ 8105, 8110.

⁴ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Consumer Price Index (CPI) Adjustments*, Chapter 2.901.12(a) (October 2005) which states that the 1966 Amendments to the Act provide for increases in compensation based upon the CPI. Under 5 U.S.C. § 8146(a), CPI increases are granted where the disability occurred more than one year before the effective date of the increase. See also *Anthony M. Kowal*, 49 ECAB 222 (1997). In this case, appellant had no period of disability due to his accepted bilateral hearing loss and was not entitled to receive CPI increases.

that period because he was not eligible for CPI increases. The Office made a preliminary determination that he was without fault in the creation of the overpayment. Appellant was advised to submit evidence or argument if he disagreed with the fact or amount of the overpayment or if he wished to request a waiver of recovery of the overpayment.

On June 6, 2008 appellant submitted an overpayment recovery questionnaire. Instead of providing information regarding his monthly income as requested, he provided a yearly income amount of \$43,046.00, a yearly “benefits” amount of \$26,075.00 and a yearly income of \$52,000.00 for his wife. He indicated that his monthly expenses included \$372.00 for rent or mortgage, \$250.00 for food, \$500.00 for utilities and \$1,222.00 for other expenses. Appellant left blank the section requesting the amount of his cash on hand, the balances of checking or savings accounts or any other assets.

By decision dated July 16, 2008, the Office finalized the determination that appellant received an overpayment of \$5,073.53 because the Office based his schedule award on an incorrect pay rate effective date. It found that appellant was without fault in the creation of the overpayment. The Office found that the circumstances in appellant’s case did not warrant waiver of recovery of the overpayment. Because his monthly income exceeded his expenses by more than the \$50.00 minimum, recovery of the overpayment would not defeat the purpose of the Federal Employees’ Compensation Act or be against equity and good conscience.⁵ The Office requested that appellant repay the overpayment in one lump sum of \$5,073.53.⁶

LEGAL PRECEDENT -- ISSUE 1

Section 8107 of the Act provides that compensation for a schedule award shall be based on the employee’s “monthly pay.”⁷ For all claims under the Act, compensation is to be based on the pay rate as determined under section 8101(4) which defines “monthly pay” as:

“The monthly pay at the time of injury or the monthly pay at the time disability begins or the monthly pay at the time compensable disability recurs, if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater....”⁸

The Board has held that where an injury is sustained over a period of time, the date of injury is the date of last exposure to those work factors causing injury.⁹ In schedule award claims, wherein injury is sustained over a period of time, to determine the “date of injury” the

⁵ See *infra* note 16.

⁶ Subsequent to the July 16, 2008 decision, additional evidence was associated with the file. The Board’s jurisdiction is limited to the evidence that was before the Office at the time it issued its final decision. See 20 C.F.R. § 501.2(c). The Board may not consider this evidence for the first time on appeal.

⁷ 5 U.S.C. § 8107(a).

⁸ *Id.* at § 8101(4).

⁹ See *Patricia K. Cummings*, 53 ECAB 623 (2002); *Sherron A. Roberts*, 47 ECAB 617 (1996).

Office must ascertain the date of last exposure to employment factors, if the exposure has ceased.¹⁰

The period covered by a schedule award commences on the date that the employee reaches maximum medical improvement from the residuals of the employment injury. Maximum medical improvement means that the physical condition of the injured member of the body has stabilized and will not improve further. The question of when maximum medical improvement has been reached is a factual one which depends on the medical findings in the record. The determination of such date in each case is to be made based upon the medical evidence in that case.¹¹

ANALYSIS -- ISSUE 1

The Board finds that the Office properly determined that appellant received a \$5,073.53 overpayment of compensation because of inappropriate application of CPI increases to the July 27, 2004 schedule award. In a case such as this, when a claimant loses no time from work due to his accepted work injury, and his exposure to the employment factor that caused his condition has ceased, the Office bases payment of the schedule award on the weekly pay rate as of the date exposure ceased. That is the date of injury. The Office correctly based the schedule award on the weekly pay rate as of the date of last exposure, May 15, 1998, the date his temporary appointment ceased, but incorrectly used the same date as the effective date of the pay rate. The effective date of a schedule award, that is the date following which the schedule award is payable is the date of maximum medical improvement. The pay rate for compensation purposes is the greatest of the pay rates set forth in § 8107 of the Act, not the pay rate in effect on the date of maximum medical improvement.¹² This resulted in incorrect application of CPI increases to the schedule award. In its July 16, 2008 decision, the Office correctly determined that the effective date of the schedule award in this case was April 16, 2004, the date of the audiogram which substantiated appellant's degree of permanent hearing loss, rather than the date of last exposure, May 15, 1998. It properly calculated the amount of the overpayment based on copies of his compensation payment history, which included the dates and amounts of checks issued to him between April 16, 2004 and June 23, 2005 totaling \$30,268.16, and worksheets which showed that he was entitled to receive only \$25,194.63 for that period because he was not eligible for CPI increases. The difference between the amount paid, \$30,268.16, and the amount due, \$25,194.63, equals the overpayment amount, \$5,073.53.

LEGAL PRECEDENT -- ISSUE 2

Under section 8129 of the Act and the implementing regulations, 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

¹⁰ *Id.*

¹¹ *Joseph R. Waples*, 44 ECAB 936 (1993).

¹² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Computation of Compensation*, Chapter 2.900.5(a)(6) (February 2007).

good conscience.¹³ Section 10.433 of the implementing regulations provide that the Office may consider waiving an overpayment if the individual to whom it was made was not at fault in accepting or creating the overpayment.¹⁴ Section 10.434 provides that, if the Office finds the recipient of an overpayment was not at fault, repayment will be required unless:

“(a) Adjustment or recovery of the overpayment would defeat the purpose of the [Act], or

“(b) Adjustment or recovery of the overpayment would be against equity and good conscience.”¹⁵

These terms are further defined in sections 10.436 and 10.437. Section 10.436 provides that recovery would defeat the purpose of the Act if the beneficiary needs substantially all of his current income to meet current ordinary and necessary living expenses and the beneficiary’s assets do not exceed a specified amount as determined by the Office. Section 10.437 provides that a recovery of an overpayment would be against equity and good conscience when an individual would experience severe financial hardship in attempting to repay the debt or when any individual in reliance in such payments gives up a valuable right or changes his or her position for the worse.¹⁶

The individual who received the overpayment is responsible for providing information concerning income, expenses and assets as specified by the Office.¹⁷ This information is needed to determine whether recovery of an overpayment would defeat the purpose of the Act or be against equity and good conscience.¹⁸ This information will also be used to determine the repayment schedule, if necessary.¹⁹

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

¹⁴ 20 C.F.R. § 10.433(a).

¹⁵ *Id.* at § 10.434. Recovery of an overpayment will defeat the purpose of the Act if such recovery would cause hardship to a currently or formerly entitled beneficiary because: (a) the beneficiary from whom the Office seeks recovery needs substantially all of his or her current income (including compensation benefits) to meet current ordinary and necessary living expenses; and (b) the beneficiary’s assets do not exceed a specified amount as determined by the Office from data furnished by the Bureau of Labor Statistics. A higher amount is specified for a beneficiary with one or more dependents. *Id.* at § 10.436. Recovery of an overpayment is considered to be against equity and good conscience when any individual who received an overpayment would experience severe financial hardship in attempting to repay the debt. *Id.* at § 10.437(a). Recovery of an overpayment is also considered to be against equity and good conscience when any individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse. *Id.* at § 10.437(b).

¹⁶ 20 C.F.R. § 10.437.

¹⁷ *Id.* at § 10.438(a).

¹⁸ *Id.*

¹⁹ *Id.*

ANALYSIS -- ISSUE 2

The record establishes that appellant received an overpayment of \$5,073.53 which occurred because the Office based his schedule award on an incorrect pay rate effective date. The Office determined that appellant was without fault in the creation of the overpayment because he could not reasonably be expected to know that the Office had paid compensation using an incorrect pay rate effective date. Therefore, the issue is whether the Office properly denied waiver of recovery of the \$5,073.53 overpayment.

The Board finds that the Office properly found that the circumstances in appellant's case did not warrant waiver of recovery of the overpayment. Appellant provided financial information showing that his annual income was \$12,121.00 or \$10,093.42 per month. He reported that his monthly expenses totaled \$2,344.00. Because appellant's monthly income exceeded his expenses by more than the \$50.00 minimum and there were sufficient assets from which the debt could be paid, the Office properly found that recovery of the overpayment would not defeat the purpose of the Act or be against equity and good conscience.²⁰

The Board does not have jurisdiction over the method of recovery in this case. Section 10.441(a) of the Office's regulations provides that if an overpayment has been made to an individual who is entitled to further payments and no refund is made, the Office "shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize any hardship."²¹ In this case, the Office is not seeking recovery from continuing compensation benefits. The Board's jurisdiction is limited to instances in which recovery is sought against continuing compensation benefits under the Act.²²

On appeal, appellant submitted additional financial information and stated that it would be a hardship for him to repay the overpayment because his monthly expenses had increased. However, the Board lacks jurisdiction to review evidence which was not before the Office at the time of its May 22, 2008 decision. The Board cannot consider this evidence for the first time on appeal.²³

CONCLUSION

The Board finds that the Office properly determined that appellant received a \$5,073.53 overpayment of compensation. The Board further finds that the Office properly denied waiver of recovery of the overpayment of compensation.

²⁰ See *supra* note 16.

²¹ 20 C.F.R. § 10.441(a).

²² See *Desiderio Martinez*, 55 ECAB 245, 251 (2004).

²³ See 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 16, 2008 is affirmed.

Issued: April 21, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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