

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

J.M., Appellant

and

**DEPARTMENT OF ENERGY, BONNEVILLE
POWER ADMINISTRATION, Portland, OR,
Employer**

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**Docket No. 08-1944
Issued: March 16, 2009**

Appearances:
Harold J. Moburg, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 27, 2008 appellant, through counsel, filed a timely appeal from the Office of Workers' Compensation Programs' March 14, 2008 merit decision concerning an overpayment of compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this overpayment case.

ISSUES

The issues are: (1) whether the Office properly determined that appellant received a \$92,131.97 overpayment of compensation for the period October 1, 2005 to October 28, 2007; and (2) whether the Office properly determined that he was at fault in creating the overpayment of compensation, thereby precluding waiver of recovery.

FACTUAL HISTORY

On January 16, 2004 appellant, then a 65-year-old physical electrician, filed an occupational disease claim alleging that on January 13, 2004 he first realized that he sustained an

employment-related binaural hearing loss.¹ On May 9, 2005 the Office accepted appellant's claim for a binaural hearing loss.

In a September 19, 2005 decision, it granted appellant a schedule award for an 11 percent binaural hearing loss. The period of the award ran from April 30 to September 30, 2005. The Office explained that appellant would be paid \$15,339.79 for the period April 30 to September 3, 2005 and \$3,382.00 for the period September 4 to 30, 2005. This amount was calculated based on multiplying appellant's weekly pay rate of \$1,268.65 as of April 30, 2005 by the two-thirds compensation rate, to equal \$845.50 a week. The Office noted that payment of the schedule award would end on September 30, 2005. It advised appellant that, after the ending date of the award, his entitlement to compensation would be based solely on any disability for work resulting from his accepted injury.

Compensation payment logs establish that appellant received electronic funds transfers in the amount of \$3,382.00 every four weeks from October 1, 2005 to October 27, 2007. In November 6, 2007 worksheets, the Office calculated that appellant received an overpayment in the amount of \$92,082.70 for the period October 1, 2005 to October 27, 2007.

By notice dated November 13, 2007, the Office advised appellant of its preliminary determination that an overpayment of \$92,131.97 was created as he erroneously received compensation from October 1, 2005 to October 27, 2007 after his schedule award ended on September 30, 2005. It made a 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 his schedule award ceased.

On November 17, 2007 appellant requested a telephone hearing before the Office. He disagreed with the Office's finding of an overpayment and that he was at fault in the creation of the overpayment. In a Form OWCP-20, completed on December 20, 2007, appellant indicated that he had \$3,500.00 in monthly income (comprised of \$1,500.00 in social security benefits and \$2,000.00 in private employment earnings) and \$1,182.30 in monthly expenses.

The Office conducted telephonic conferences with appellant on January 23 and February 8, 2008. It noted that appellant's total monthly income was \$2,712.00 with total monthly expenses of \$2,463.00. Appellant submitted financial information regarding a 2004 divorce from his wife and stated that he paid his wife \$122,292.00 after his schedule award began. He also spent \$30,000.00 on having a pacemaker implanted as his health insurance would not cover this.

In a March 14, 2008 decision, the Office found that appellant received a \$92,131.97 overpayment of compensation because he received compensation for the period October 1, 2005 to October 28, 2007 when only entitled to the period April 30 to September 30, 2005. It also determined that he was at fault in creating the overpayment, thereby precluding waiver of recovery. The Office considered appellant's financial information and determined that the overpayment was due in full.

¹ Appellant retired from the employing establishment effective April 30, 2005 and began receiving retirement from the Office of Personnel Management (OPM).

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of the Federal Employees' Compensation Act² 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.³ 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.⁴ 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.⁵

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained an 11 percent binaural hearing loss in the performance of duty. It granted him a schedule award on September 19, 2005. The Office explained that appellant would be paid \$15,339.79 for the period April 30 to September 3, 2005 and \$3,382.00 for the period September 4 to 30, 2005.⁶ This was based on multiplying appellant's weekly pay rate of \$1,268.65 by the 66 2/3 percent compensation rate, resulting in a payment of \$845.50 every four weeks.

On November 6, 2007 the Office calculated that appellant had received an overpayment in the amount of \$92,082.70 for the period October 1, 2005 to October 27, 2007 as he received compensation after his schedule award ended on September 30, 2005. The Board notes that the period of the overpayment was October 1, 2005 to October 27, 2007 and the overpayment amount is \$92,082.70 as determined by the Office in its overpayment worksheet and supporting documentation. The Board will affirm, the fact, period and the amount of the overpayment in this case.

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 good conscience.⁷ Section 10.433 of the implementing regulations specifically provide that the Office may consider waiving an overpayment if the individual to whom it was made was not at

² 5 U.S.C. §§ 8101-8193.

³ 5 U.S.C. § 8102(a).

⁴ 5 U.S.C. § 8129(a).

⁵ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2 (May 2004).

⁶ Checks in the amount of \$15,339.79 and \$3,382.00 were mailed to appellant.

⁷ 5 U.S.C. § 8129.

fault in accepting or creating the overpayment.⁸ The regulations further provide 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 regulations, 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 regulations provide 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

Section 10.433(b) of the Office's regulations provide, in relevant part, that the determination of fault 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.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 September 30, 2005 that he knew or should have known were incorrect.

The Board finds that appellant was at fault in creation of the overpayment from October 1, 2005 to October 27, 2007. The September 19, 2005 schedule award clearly set forth the period of the overpayment and the amount of the payments to be issued, noting that the schedule award ended on September 30, 2005. Therefore, the Office correctly found appellant at fault in creation of the overpayment from October 1, 2005 to October 27, 2007. Appellant knew or should have reasonably known that the payments he received following the expiration of the schedule award were incorrect. As he was at fault in the creation of the overpayment, he is not eligible for waiver of recovery of the overpayment. The Office is required by law to recover this overpayment.¹²

CONCLUSION

The Board finds that appellant received an overpayment in compensation in the amount of \$92,082.79 during the period October 1, 2005 through October 27, 2007. The Board further

⁸ 20 C.F.R. § 10.433(a).

⁹ *Id.*

¹⁰ *Id.* at §10.433(a)(3).

¹¹ *Id.* at § 10.433(b).

¹² Recovery of the overpayment is not an issue in this case, as appellant is not in receipt of continuing total disability payments. With respect to the recovery of the overpayment, the Board's jurisdiction is limited to those cases where the Office seeks recovery from continuing compensation benefits under the Act. 20 C.F.R. § 10.441(a); *see Albert Pineiro*, 51 ECAB 310 (2000); *Lorenzo Rodriguez*, 51 ECAB 295 (2000).

finds that appellant was at fault in the creation of the overpayment and, therefore, is ineligible for waiver of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 14, 2008 is affirmed, as modified.

Issued: March 16, 2009
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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