

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

J.E., Appellant

and

**DEPARTMENT OF THE ARMY, RED RIVER
ARMY DEPOT, Texarkana, TX, Employer**

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**Docket No. 11-395
Issued: September 16, 2011**

Appearances:
Charles H. Allenberg, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

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

JURISDICTION

On December 7, 2010 appellant filed a timely appeal from a July 12, 2010 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying his request for a prerecoupment hearing. Since more than 180 days elapsed since the most recent merit decision of April 22, 2010 to the filing of this appeal on December 7, 2010, the Board lacks jurisdiction to review the merits of the claim pursuant to the Federal Employees' Compensation Act (FECA)¹ and 20 C.F.R. §§ 501.2(c) and 501.3.²

ISSUE

The issue is whether OWCP properly denied appellant's request for a prerecoupment hearing.

¹ 5 U.S.C. §§ 8101-8193.

² For final adverse OWCP decisions issued prior to November 19, 2008, a claimant had up to one year to appeal to the Board. *See* 20 C.F.R. § 501.3(d)(2). For final adverse OWCP decisions issued on and after November 19, 2008, a claimant has 180 days to file an appeal with the Board. *See* 20 C.F.R. § 501.3(e).

FACTUAL HISTORY

On March 23, 2009 appellant, then a 46-year-old industrial equipment mechanic leader, filed an occupational disease claim alleging that he sustained hearing loss due to factors of his employment. OWCP found appellant was exposed to noise hazards 8 hours to 10 hours a day, 5 days a week and that he used hearing protection equipment.

OWCP referred appellant to Dr. Charles E. Hollingsworth, II, a Board-certified otolaryngologist, for a second opinion evaluation. In a July 8, 2009 report, Dr. Hollingsworth reviewed the statement of accepted facts and appellant's audiograms. He noted appellant's earliest audiogram of September 1984 had normal hearing on the right side and moderate to severe high frequency loss on the left side. The most recent audiogram of July 8, 2009 demonstrated mild high frequency hearing loss on the right side and moderate mid frequency and severe high frequency loss on the left side. Dr. Hollingsworth opined that the right-sided high frequency loss was consistent with appellant's noise exposure at work, while the left-sided change in hearing was due to presbycusis and was a progressive loss as opposed to work noise exposure. Under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*), he opined that appellant had no right ear hearing loss and 16.9 percent left ear hearing loss. Dr. Hollingsworth advised that appellant did not need hearing aids. A copy of the July 8, 2009 audiometric testing, hearing evaluation worksheet and verification of audiometric testing was attached.

In an October 19, 2009 report, an OWCP medical adviser reviewed the record and opined that maximum medical improvement was reached July 8, 2009. Using the audiogram obtained by Dr. Hollingsworth, the medical adviser found 16.9 percent left ear hearing loss and zero percent hearing loss in the right ear under the sixth edition of the A.M.A., *Guides*. He agreed that the left-side hearing loss was the result of presbycusis and not related to noise exposure on the job; thus, there was no ratable job-related hearing loss in the left ear. Dr. Hollingsworth noted that appellant's noise exposure on the job was sufficient to implicate his hearing loss on the right side. He opined that hearing aids were not authorized.

By decision dated November 4, 2009, OWCP accepted that appellant had work-related hearing loss to the left ear. Hearing aids were not authorized.

On January 14, 2010 appellant requested a schedule award for his work-related hearing loss. On March 30, 2010 OWCP processed a schedule award for 17 percent monaural hearing loss of the left ear. The period of the award ran for 8.84 weeks during the period July 8 to September 7, 2009, for a total amount of \$6,482.02.

By decision dated April 19, 2010, OWCP issued a corrected decision accepting right-sided hearing loss. It found that Dr. Hollingsworth and OWCP's medical adviser opined that the high frequency hearing loss in the left ear was not work related. Therefore, there was no ratable job-related hearing loss in the left ear. OWCP advised that the schedule award payment for the left ear would be declared an overpayment. Hearing aids were not authorized.

On April 20, 2010 OWCP issued a preliminary notice of overpayment finding that appellant received a \$6,482.02 in compensation under a schedule award for 17 percent

permanent impairment to the left ear from July 8 through September 7, 2009. It found him without fault in creating the overpayment. OWCP informed appellant of the options he could take, including requesting a prerecoupment hearing within 30 days. On April 21, 2010 it sent appellant a copy of the overpayment recovery questionnaire.

By decision dated April 22, 2010, OWCP denied appellant's claim for a schedule award to the right ear on the basis there was no ratable impairment.

On May 20, 2010 appellant requested a telephonic prerecoupment hearing before OWCP's hearing representative on the issues of fault and a possible waiver of overpayment. The envelope was postmarked May 21, 2010. In a July 12, 2010 decision, OWCP denied appellant's request for a prerecoupment hearing as untimely.

LEGAL PRECEDENT

In response to a preliminary notice of overpayment, the individual may present evidence to OWCP in writing or at a prerecoupment hearing. The evidence must be presented or the hearing requested within 30 days of the date of the written notice of overpayment. Failure to request the hearing within this 30-day time period shall constitute a waiver of that right.³

ANALYSIS

OWCP issued its preliminary overpayment notice on April 20, 2010 and informed appellant that he had 30 days to request a prerecoupment hearing. Appellant did not make his request until May 21, 2010, as determined by the postmark on the envelope.⁴ May 21, 2010 was the 31st day after April 20, 2010. Appellant's failure to request a prerecoupment hearing within 30 days constitutes a waiver of that right. The Board will therefore affirm OWCP's July 12, 2010 decision denying his request.

On appeal, appellant's attorney argues that the overpayment should be waived. Section 501.2(c) of the Board's regulations provide that the Board has jurisdiction to consider and decide appeals from the final decision of OWCP in any case arising under FECA.⁵ As OWCP did not issue a final decision with respect to the overpayment by the time that the appeal was filed, the Board does not have jurisdiction over the matter.

CONCLUSION

The Board finds that OWCP properly denied appellant's untimely request for a prerecoupment hearing.

³ 20 C.F.R. § 10.432.

⁴ *See id.* at § 10.439 (prerecoupment hearings shall be conducted in exactly the same manner as provided for hearings under 5 U.S.C. § 8124(b)); *id.* at § 10.616(a) (the hearing request must be sent within 30 days as determined by postmark or other carrier's date marking).

⁵ 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the July 12, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 16, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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

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