

record indicates that he had filed a prior claim on July 23, 1997 alleging hearing loss as a result of his federal employment. OWCP accepted the 1997 claim for binaural hearing loss and by decision dated December 12, 1997, issued a schedule award for a 45 percent binaural hearing loss.²

In the present case, OWCP referred appellant for a second opinion evaluation by Dr. H. Loveless, Jr., an otolaryngologist. The record contains a September 27, 2004 audiogram showing decibel levels at frequencies of 500, 1,000, 2,000 and 3,000 Hertz (Hz): for the right ear 55, 55, 75 and 85 and for the left ear 40, 45, 60 and 75. In a report dated September 27, 2004, Dr. Loveless opined that appellant had sustained binaural hearing loss causally related to his federal employment.

On February 10, 2005 OWCP accepted the present claim for bilateral hearing loss. By report dated March 30, 2007, an OWCP medical adviser reviewed the audiometric results from the September 27, 2004 audiogram and found that appellant had a 48 percent binaural hearing loss.

OWCP issued a schedule award on May 29, 2007 for a 48 percent binaural hearing loss. The period of the award was 96 weeks commencing September 27, 2004.

By letter dated August 23, 2011, OWCP advised appellant that it had made a preliminary determination that an overpayment of \$48,618.95 had occurred. It explained that he had previously received a schedule award of 45 percent for binaural hearing loss and though he was entitled to an additional 3 percent based on medical evidence, he had been paid an additional 48 percent. A memorandum indicated that appellant had received \$51,832.95 from the schedule award paid from September 27, 2004 to July 30, 2006, but should have received \$3,214.00 from September 27 to November 27, 2004 pursuant to a three percent additional binaural hearing loss. OWCP also advised that he was found not to be at fault in creating the overpayment.

On September 19, 2011 appellant requested a prerecoupment hearing. He submitted an overpayment recovery questionnaire (OWCP-20) reporting \$3,186.96 in monthly income. With respect to monthly expenses, appellant reported \$1,699.96 for mortgage, food, clothing and utilities. He also indicated that he had \$1,037.93 in other expenses (medical or dental, automobile, transportation, personal and miscellaneous household). In addition, appellant reported \$200.00 for a credit card and \$200.38 for an overdraft line of credit. As to assets, he reported \$3,976.92 in cash, bank and stock accounts.

A hearing was held on December 20, 2011. At the hearing appellant's representative indicated that some expenses, such as medical and dental, were paid with a credit card. The representative also indicated that appellant used the overpayment funds for an addition and remodeling of their home.

On January 18, 2012 appellant submitted a January 10, 2012 letter from his representative stating that the medical and dental expenses listed on the OWCP-20 form did not include medicine, which was charged to the credit card. The representative stated that the line of

² The period of the award was 90 weeks commencing October 21, 1997.

credit was for overdraft protection charges and resulted in a monthly minimum payment. Appellant also submitted an April 28, 2010 audiogram. In a note received on February 9, 2012, he indicated that his mortgage payment was now \$695.55 per month. Appellant also included a list of medications and indicated that the cost was approximately \$200.00 per month.

By decision dated March 21, 2012, the hearing representative finalized the overpayment determinations. The hearing representative found that an overpayment of \$48,618.95 was created and appellant was not at fault in creating the overpayment. Waiver of the overpayment was denied as it was found that recovery of the overpayment would not defeat the purpose of FECA or be against equity and good conscience. The hearing representative found that appellant's expenses were \$2,775.66 per month, which did not include the credit card and overdraft charges as these were for expenses covered by other and miscellaneous expenses previously listed.

LEGAL PRECEDENT -- ISSUE 1

Section 8107 of FECA provides that, if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.³ Neither FECA nor the regulations specify the manner in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal justice for all claimants OWCP has adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the uniform standard applicable to all claimants.⁴ For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition.⁵

Hearing loss impairments are determined using the frequencies of 500, 1,000, 2,000 and 3,000 cycles per second, with the levels at each frequency are added up and averaged.⁶ Then, the "fence" of 25 decibels is deducted because, as the A.M.A., *Guides* points out, losses below 25 decibels result in no impairment in the ability to hear everyday speech under everyday conditions.⁷ The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss. The binaural loss is determined by calculating the loss in each ear using the formula for monaural loss; the lesser loss is multiplied by five, then added to the greater loss

³ 5 U.S.C. § 8107. This section enumerates specific members or functions of the body for which a schedule award is payable and the maximum number of weeks of compensation to be paid; additional members of the body are found at 20 C.F.R. § 10.404(a).

⁴ A. *George Lampo*, 45 ECAB 441 (1994).

⁵ FECA Bulletin No. 09-03 (March 15, 2009).

⁶ A.M.A. *Guides* 250.

⁷ *Id.*

and the total is divided by six to arrive at the amount of the binaural hearing loss.⁸ The Board has concurred in OWCP's adoption of this standard for evaluating hearing loss.⁹

FECA's implementing regulations prohibit the payment of duplicative schedule awards for the same member by the following provision:

“(c) The period of compensation payable under 5 U.S.C. § 8107(c) shall be reduced by the period of compensation paid or payable under the schedule for an earlier injury if--

(1) Compensation in both cases is for impairment of the same member or function or different parts of the same member or function or for disfigurement; and

(2) [OWCP] finds that compensation payable for the later impairment in whole or in part, would duplicate the compensation payable for the preexisting impairment.”¹⁰

If a claimant receives a schedule award and the medical evidence does not support the degree of permanent impairment awarded, an overpayment of compensation may be created.¹¹

ANALYSIS -- ISSUE 1

The record indicates that appellant had received a schedule award on December 12, 1997 for a 45 percent binaural hearing loss pursuant to a July 23, 1997 claim for compensation. Appellant filed another claim for hearing loss and OWCP further developed the medical evidence. A September 27, 2004 audiogram performed for a second opinion evaluation by Dr. Loveless revealed binaural hearing loss. Applying the formula noted above, the decibel levels for the left ear are added (220) and then averaged (55), with the fence of 25 deducted resulting in 30. The result is multiplied by 1.5 for a 45 percent monaural hearing loss. For the right ear, the same formula applied to the results on the September 27, 2004 audiogram result in an average of 67.50 or 42.50 after the fence is deducted and a monaural loss of 63.75. The binaural loss is 5 times 45 (225) plus 63.75 (288.75), divided by 6 for a 48.13 binaural hearing

⁸ *Id.* at 251.

⁹ *Donald E. Stockstad*, 53 ECAB 301 (2002); *petition for recon. granted (modifying prior decision)*, Docket No. 01-1570 (issued August 13, 2002).

¹⁰ 20 C.F.R. § 10.404(c).

¹¹ *See L.C.*, Docket No. 09-2274 (issued July 7, 2010); *M.S.*, Docket No. 08-2070 (issued September 11, 2009); *see also Richard Saldibar*, 51 ECAB 585 (2000) (the Board found that the overpayment issue was not in posture because OWCP had not properly resolved the schedule award issue).

loss. As an OWCP medical adviser noted, 48.13 is rounded down to 48 percent in accord with OWCP's procedures.¹²

Therefore, based on the probative medical evidence appellant's total binaural hearing loss was 48 percent. Although appellant submitted an April 28, 2010 audiogram, this is not probative medical evidence regarding hearing loss unless accompanied by a physician's report.¹³ Since he had already received a schedule award for a 45 percent binaural hearing loss, he was entitled to only a 3 percent additional schedule award. OWCP indicated that appellant had received \$51,832.95 pursuant to the May 29, 2007 schedule award, but should have received \$3,214.00 for a three percent binaural hearing loss. The difference between the amount received and the amount owed, \$48,618.95, represents an overpayment of compensation.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of FECA¹⁴ provides: "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 [FECA] or would be against equity and good conscience."¹⁵ Since OWCP found appellant to be without fault in the creation of the overpayment, OWCP may only recover the overpayment if recovery would neither defeat the purpose of OWCP nor be against equity and good conscience. The guidelines for determining whether recovery of an overpayment would defeat the purpose of OWCP or would be against equity and good conscience are set forth in sections 10.434 to 10.437 of Title 20 of the Code of Federal Regulations.

According to 20 C.F.R. § 10.436, recovery of an overpayment would defeat the purpose of FECA if recovery would cause hardship because the beneficiary "needs substantially all of his or her current income (including compensation benefits) to meet current ordinary and necessary living expenses," and, also, if the beneficiary's assets do not exceed a specified amount as determined by OWCP from data provided by the Bureau of Labor Statistics.¹⁶ For waiver under the "defeat the purpose of [FECA]" standard, appellant must show that he needs substantially all of his current income to meet current ordinary and necessary living expenses and that his assets do not exceed the resource base.¹⁷

¹² See *Laura Heyen*, 57 ECAB 435 (2006). As the OWCP's Procedure Manual explains with respect to hearing loss, the number is rounded up from .50 and down from .49. Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.4(b)(2) (January 2010).

¹³ See *Raymond H. Vanntett*, 44 ECAB 480 (1993); *George A. Cooper*, 40 ECAB 296 (1988); Federal (FECA) *supra* note 12, *Requirement for Medical Reports*, Chapter 3.600.8(a) (September 1994).

¹⁴ *Supra* note 1.

¹⁵ 5 U.S.C. § 8129(b).

¹⁶ OWCP's procedures provide that the assets must not exceed a resource base of \$4,800.00 for an individual or \$8,000.00 for an individual with a spouse or dependent plus \$960.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a) (October 2004).

¹⁷ See *Robert E. Wenzholz*, 38 ECAB 311 (1986).

Section 10.437 of Title 20 of the Code of Federal Regulations provide that recovery of an overpayment would be against equity and good conscience if the overpaid individual would experience severe financial hardship in attempting to repay the debt or the individual, in reliance on the payment which created the overpayment, relinquished a valuable right or changed his position for the worse. To establish that a valuable right has been relinquished it must be shown that the right was in fact valuable, that it cannot be regained and that the action was based chiefly or solely in reliance on the payments or on the notice of payment. To establish that an individual's position has changed for the worse, it must be shown that the decision made would not otherwise have been made but for the receipt of benefits and that this decision resulted in a loss.

ANALYSIS -- ISSUE 2

The hearing representative denied waiver on the grounds that recovery of the overpayment would not defeat the purpose of FECA or be against equity or good conscience. The hearing representative found that appellant did not need substantially all of his current income to meet ordinary and necessary living expenses. OWCP's procedures discuss the expenses that would constitute ordinary and necessary living expenses. Based on the OWCP-20 submitted by appellant, the monthly income was reported as \$3,186.96. With respect to expenses, the hearing representative accepted his reported expenses, but found the \$200.00 in credit card payments and bank account overdraft protection were not included, as they were already calculated in the general "other" expenses reported by appellant that included medical, dental, automobile and miscellaneous household expenses. OWCP's procedures indicate that expenses such as credit card debt payments may be excluded if already accounted for in the fixed and miscellaneous monthly expenses.¹⁸

The Board does note that appellant alleged that he had approximately \$200.00 in expenses for medication that had not been credited against his OWCP-20 statement. Appellant did not submit any financial documentation to substantiate the total medical expenses per month. Moreover, even if an additional \$200.00 is allotted to the previously accepted expenses, this results in monthly expenses of \$2,975.66 per month. Appellant would still have over \$200.00 per month in income over expenses. An individual is deemed to need substantially all of her current income to meet ordinary and necessary living expenses if monthly income does not exceed expenses by more than \$50.00.¹⁹ The Board accordingly finds that the evidence of record supports a finding that appellant did not need substantially all current income to meet ordinary and necessary living expenses and therefore recovery would not defeat the purpose of FECA.

In addition, the evidence of record does not establish that recovery of the overpayment would be against equity and good conscience. The evidence noted above does not support a severe financial hardship in repaying the debt. There is no probative evidence that appellant relinquished a valuable right or changed position for the worse. Appellant indicated that he used the overpayment for an addition and remodeling of his home. OWCP's procedures indicate that

¹⁸ *Supra* note 16, Chapter 6.200.6(a)(3) (June 2009).

¹⁹ *Jorge O. Diaz*, 51 ECAB 124, 128 (1999); *Marlon G. Massey*, 49 ECAB 650 (1998); *Carroll R. Davis*, 46 ECAB 361, 363 (1994).

the conversion of a liquid asset into real or personal property is not sufficient to meet the “against equity and good conscience” standard.²⁰

The Board accordingly finds that the evidence of record supports a denial of waiver of the overpayment. The evidence does not establish that recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.

On appeal, appellant’s representative argues that the hearing representative erred in discounting the credit card debt and overdraft protection debt. The representative argues that the credit card debt included medical expenses that were not previously included. As noted above, under OWCP’s procedures the hearing representative may make a determination that a claimed expense is not considered ordinary and necessary or has been included in other expenses. The hearing representative has discretion in determining ordinary and necessary living expenses.²¹ There is no probative evidence that a banking overdraft payment represents a separate ordinary and necessary living expense. With respect to additional medical expenses, as noted above, even if \$200.00 in additional medical expenses were included, it would not be sufficient to establish that recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.

CONCLUSION

The Board finds that OWCP properly determined an overpayment of \$48,618.95 was created and properly denied waiver of the overpayment.

²⁰ *Supra* note 16, Chapter 6.200.6 (June 2009).

²¹ *See S.W.*, Docket No. 11-1687 (issued July 23, 2012); *T.P.*, Docket No. 12-97 (issued July 19, 2012).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 21, 2012 is affirmed.

Issued: January 11, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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