

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

T.S., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Cincinnati, OH, Employer**

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**Docket No. 13-1539
Issued: January 6, 2014**

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

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 18, 2013 appellant filed a timely appeal from a May 16, 2013 decision of the Office of Workers' Compensation Programs (OWCP) regarding an overpayment of compensation. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether OWCP properly found a \$46,888.88 overpayment of compensation for the period September 30, 2008 to January 4, 2010 as he received a duplicate schedule award; (2) whether OWCP properly denied waiver of the overpayment; and (3) whether OWCP properly directed recovery of the overpayment by deducting \$1,000.00 every 28 days from appellant's continuing compensation payments.

¹ 5 U.S.C. § 8101 *et seq.*

On appeal, appellant contends that he cannot repay the overpayment due to financial hardship. He also argued that, as the overpayment was not his fault, he should not be obligated to repay it.

FACTUAL HISTORY

OWCP accepted that on or before September 14, 2001 appellant, then a 38-year-old tractor trailer operator, sustained bilateral sensorineural hearing loss due to hazardous noise exposure in the performance of duty. It accepted the claim under File No. xxxxxx962 and authorized binaural hearing aids.

By decision dated April 3, 2002 under File No. xxxxxx962, OWCP granted appellant a schedule award for a 33 percent binaural hearing impairment. The period of the award ran from January 24, 2002 to April 30, 2003.

Appellant continued working at the employing establishment after 2002. He was exposed to hazardous noise from truck engines. On October 3, 2007 appellant filed a second claim for hearing loss and tinnitus. OWCP assigned the claim File No. xxxxxx131.

On March 3, 2008 appellant claimed an augmented schedule award based on additional occupational exposure to hazardous noise. On March 25, 2008 OWCP accepted that he had sustained an additional hearing loss. By decision dated May 14, 2008 under File No. xxxxxx131, it granted him a schedule award for a 50 percent binaural hearing loss, representing a 17 percent increase in addition to the 33 percent previously awarded. The period of the award ran from February 5, 2008 to January 4, 2010.

Under File No. xxxxxx324, OWCP also accepted that appellant sustained a lumbar strain and an aggravation of degenerative lumbar disc disease. Appellant stopped work on July 20, 2011 and did not return. His case was placed on the periodic rolls. Appellant received \$3,411.00 every 28 days under File No. xxxxxx324.

On January 23, 2012 appellant claimed an augmented schedule award. On March 28, 2012 he filed a claim for tinnitus related to his previously accepted hearing loss. OWCP assigned the claim File No. xxxxxx726. On July 26, 2012 it doubled appellant's claims under File Nos. xxxxxx962, xxxxxx131 and xxxxxx726 under master File No. xxxxxx962.

By decision dated September 18, 2012, OWCP denied appellant's claim for tinnitus on the grounds that fact of injury was not established. It found that he had not been exposed to additional noise at work after he stopped work on July 20, 2011.²

In a November 1, 2012 memorandum, OWCP noted that appellant had received duplicate schedule awards for hearing loss for the period February 5, 2008 to January 4, 2010. Under File No. xxxxxx962, appellant received a schedule award for a 33 percent binaural hearing loss, paid

² On October 10, 2012 under File No. xxxxxx962 appellant claimed a recurrence of total disability commencing November 9, 2011 regarding an accepted lumbar injury. As there is no final decision of record regarding this claim, the recurrence issue is not before the Board on the present appeal.

from January 24, 2002 to April 30, 2003. In File No. xxxxxx131, he received an additional 17 percent award for binaural hearing loss paid from February 5, 2008 to January 4, 2010, but was also mistakenly paid \$71,043.76 for the entire 50 percent total hearing loss. Using serial payment logs, OWCP determined that the \$46,888.88 paid for a 33 percent hearing impairment to which appellant was not entitled, beyond the additional 17 percent impairment to which he was entitled, created an overpayment of compensation in the amount of \$24,154.88.

By notice dated November 2, 2012, OWCP advised appellant of its preliminary determination that a \$46,888.88 overpayment of compensation was created as he was paid a duplicate schedule award for the period September 30, 2008 to January 4, 2010. It found that he should have received a 17 percent additional award from February 5 to September 29, 2008, but was instead paid for an additional 50 percent from February 5, 2008 to January 4, 2010. OWCP determined that, from February 5, 2008 to January 4, 2010, appellant received \$71,043.76 in schedule award compensation but was only entitled to compensation in the amount of \$24,154.88.³ It subtracted his \$24,154.88 entitlement from the \$71,043.76, paid, resulting in a \$46,888.88 overpayment of compensation. OWCP further found that appellant was not at fault as he was unaware that he accepted payments that exceeded his schedule award entitlement. It afforded him 30 days in which to request a prerecoupment hearing and submit an enclosed overpayment recovery questionnaire with current financial information regarding his income, assets and expenses.

In an overpayment recovery questionnaire (Form OWCP-20) dated November 27, 2012, appellant disagreed that the overpayment occurred and requested waiver. He also requested a prerecoupment hearing. Appellant listed monthly household income of \$3,838.00, noting that his wife, with whom he lived, was employed. He listed monthly expenses of \$1,000.00 for food, \$975.00 for rent, \$740.00 in utilities, \$324.00 in loan repayments and \$540.00 in miscellaneous expenses. Appellant noted \$9,100.00 in financial assets, comprised of \$9,000.00 in a savings account and \$100.00 available cash. He did not submit supporting financial documentation.

On March 14, 2013 an OWCP hearing representative conducted a telephonic prerecoupment hearing. Appellant agreed with the amount and period of the overpayment and that he was not at fault in its creation. He stated that his wife worked two jobs but he did not know her monthly income. Appellant noted that he had legal custody of two step-grandchildren. He contended that he had submitted adequate financial documentation. OWCP advised appellant that there was no financial information in any of his claim files and instructed him to submit additional documentation regarding the custody of the minor children and two monthly bills or statements for each expense claimed. It advised him that the asset threshold for waiver of the overpayment based on financial hardship was \$8,000.00 based on his wife being his sole dependent. OWCP afforded appellant 30 days to submit such evidence.

By decision dated May 16, 2013, the hearing representative finalized the fact and amount of the overpayment. He found that appellant was without fault in creating the overpayment, but that waiver could not be granted as he failed to submit any financial documentation. The hearing representative directed recovery of the overpayment by deducting \$1,000.00 from appellant's

³ This represents 100 weeks of compensation, one half (or 50 percent) of the maximum 200 weeks allowed for a complete loss of hearing in both ears under 5 U.S.C. § 8107(c)(13)(B).

continuing compensation payments every 28 days. He noted that, as appellant did not provide adequate documentation of his expenses or clarify his household income as requested, he had “very limited information upon which to establish a repayment plan.”

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of FECA 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 duty.⁴ Section 8129(a) of FECA 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 OWCP’s procedure manual identifies various situations when overpayments of compensation may occur, including when a claimant receives schedule award compensation after the expiration of the award.⁶

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$46,888.88. The record reflects that from February 5, 2008 to January 4, 2010, he received compensation pursuant to a May 14, 2008 schedule award issued under File No. xxxxxx131 for a 50 percent binaural hearing loss. This was intended to represent a 17 percent increase over a 33 percent schedule award for hearing loss issued on April 3, 2002 under File No. xxxxxx362. OWCP however erroneously paid appellant schedule award compensation for the entire 50 percent impairment, without subtracting the 33 percent previously paid from January 24, 2002 to April 30, 2003.

OWCP provided payment logs and calculations demonstrating that appellant received a total of \$71,043.76 in compensation for the period February 5, 2008 to January 4, 2010 for a 50 percent binaural hearing loss whereas he was properly entitled to receive only \$24,154.88 for that period for the additional 17 percent binaural hearing loss. Therefore, the \$46,888.88 difference between the amount paid and the correct amount of compensation constitutes an overpayment.

There is no contrary evidence regarding the fact and the amount of the overpayment. Also, appellant does not contest the fact or amount of the overpayment. The Board finds that he received an overpayment of \$46,888.88 of compensation for the period September 30, 2008 to January 4, 2010.

⁴ *Id.* at § 8102(a).

⁵ *Id.* at § 8129(a).

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

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of FECA⁷ provides that, where an overpayment of compensation has been made because of an error of fact or law, adjustments shall be made by decreasing later payments to which an individual is entitled.⁸ The only exception to this requirement is found in section 8129(b) of FECA, which provides that adjustments or recovery may not be made when incorrect payments have been made to an individual who is without fault and when such adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.⁹

Thus, a finding that appellant was without fault is not sufficient, in and of itself, for OWCP to waive the overpayment.¹⁰ OWCP must exercise its discretion to determine whether recovery of the overpayment would “defeat the purpose of FECA or would be against equity and good conscience,” pursuant to the guidelines provided in sections 10.434-10.437 of the implementing federal regulations.¹¹

Section 10.438 of FECA’s implementing regulations provide that the individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by OWCP. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of FECA or be against equity and good conscience. Failure to submit the requested information within 30 days of the request shall result in the denial of waiver and no further request for waiver shall be considered until the requested information is furnished.¹²

As the only limitation on OWCP’s authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deductions from known facts.¹³

ANALYSIS -- ISSUE 2

Appellant was found to be without fault in creation of the overpayment. Accompanying the November 2, 2012 preliminary notice of overpayment, OWCP provided him an overpayment recovery questionnaire to obtain accurate financial information about his monthly income, assets and expenses. Appellant listed only limited information regarding his monthly expenses and assets. Also, he did not provide financial documentation to support his financial information as

⁷ 5 U.S.C. § 8129(a).

⁸ *Id.*

⁹ 5 U.S.C. § 8129(b).

¹⁰ *James Lloyd Otte*, 48 ECAB 334, 338 (1997); *see William J. Murphy*, 40 ECAB 569, 571 (1989).

¹¹ 20 C.F.R. §§ 10.434-37 (1999).

¹² *Id.* at § 10.438; *Linda Hilton*, 52 ECAB 476 (2001).

¹³ *Daniel J. Perea*, 42 ECAB 214 (1990).

requested. At the March 14, 2013 prerecoupment hearing, an OWCP hearing representative emphasized the need to document his household income and expenses. The Board notes that appellant did not provide the requested financial documentation or complete information about his household income. OWCP could not determine whether or not recovery of the overpayment could defeat the purpose of FECA or be against equity and good conscience. Therefore, it properly denied waiver of recovery.¹⁴

On appeal, appellant contends that he cannot repay the overpayment due to financial hardship. He argued that as the overpayment was not his fault he should not be obligated to repay it. Under the implementing federal regulations OWCP may not grant waiver of the overpayment as appellant failed to provide the financial information necessary for consideration of waiver.

LEGAL PRECEDENT -- ISSUE 3

When an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to OWCP the amount of the overpayment as soon as the error is discovered or his or her attention is called to same. If no refund is made, OWCP 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.¹⁵

ANALYSIS -- ISSUE 3

In its May 16, 2013 decision, OWCP's hearing representative found that, as appellant did not provide the requested documentation of his household income and expenses, he had "very limited information upon which to establish a repayment plan." The Board finds that OWCP gave due regard to the financial information appellant did submit. The hearing representative did not abuse his discretion in setting the rate of recovery at \$1,000.00 every 28 days. The Board will affirm OWCP's May 16, 2013 decision on the issue of the rate of recovery.

CONCLUSION

The Board finds that OWCP properly found a \$46,888.88 overpayment of compensation as he received a duplicate schedule award. The Board further finds that OWCP properly denied waiver as appellant submitted no financial documentation. The Board further finds that OWCP did not abuse its discretion by requiring recovery of the overpayment by deducting \$1,000.00 every 28 days from appellant's continuing compensation payments.

¹⁴ 20 C.F.R. § 10.438; *Linda Hilton*, *supra* note 12.

¹⁵ *Id.* at § 10.441(a) (2003).

ORDER

IT IS HEREBY ORDERED THAT the May 16, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 6, 2014
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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