

FACTUAL HISTORY

OWCP accepted that on or before July 16, 2009 appellant, then a 58-year-old high voltage electrician, sustained a bilateral sensorineural hearing loss due to hazardous noise exposure at work. He submitted annual employing establishment audiograms from 1992 to 2004 obtained as part of an industrial hygiene program. The audiograms did not demonstrate a ratable hearing loss.

OWCP obtained a second opinion from Dr. Ronald Blumenfeld, a Board-certified otolaryngologist. A January 6, 2010 audiogram performed for Dr. Blumenfeld at the frequency levels of 500, 1,000, 2,000 and 3,000 cycles per second (cps) revealed decibel (dB) losses of 5, 10, 5 and 20 in the right ear and 5, 5, 5 and 20 in the left ear. Referring to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), Dr. Blumenfeld found that appellant did not have a ratable hearing loss in either ear as the thresholds in each ear at 500, 1000, 2000 and 3,000 cps totaled less than 100 dB. He noted that appellant complained of tinnitus. Dr. Blumenfeld diagnosed a bilateral high-frequency hearing loss.

OWCP referred Dr. Blumenfeld's report and the medical record to an OWCP medical adviser for an impairment rating. In a February 8, 2010 report, the medical adviser found that appellant had a zero percent hearing loss under the A.M.A., *Guides*, plus five percent for tinnitus, "yielding five percent sensorineural hearing loss."

In a February 11, 2010 letter, OWCP advised appellant that he was entitled to a schedule award for hearing loss. On February 17, 2010 appellant claimed a schedule award. On March 26, 2010 OWCP issued him a schedule award for five percent binaural hearing loss due to tinnitus. The period of the award ran from January 6 to March 14, 2010. The total amount of the award was \$6,616.87.

In an April 16, 2013 memorandum, OWCP found that the March 26, 2010 schedule award for tinnitus was issued in error as appellant had no ratable hearing loss. It noted that there was no basis for paying a schedule award for tinnitus unless the condition caused or contributed to a ratable hearing loss.² OWCP therefore found that the entire \$6,616.87 schedule award constituted an overpayment of compensation.

By notice dated April 16, 2013 and reissued June 10, 2013,³ OWCP advised appellant of its preliminary determination that he was overpaid \$6,616.87 in compensation because the March 26, 2010 schedule award was issued in error. It made the preliminary finding that he was not at fault in creating the overpayment. OWCP provided appellant an overpayment recovery questionnaire (Form OWCP-20) and afforded him 30 days to provide financial information about his income, assets and expenses.

² OWCP cited to *Charles H. Potter*, 39 ECAB 645 (1988) and *Royce L. Chute*, 36 ECAB 202 (1984).

³ The April 16, 2013 notice was returned to OWCP as undeliverable.

In response, appellant submitted a July 2, 2013 letter requesting that OWCP decide his case based on the written record. He disagreed with the fact and amount of the overpayment. Appellant also requested waiver as he was not at fault in creation of the overpayment. He asserted that he continued to have a work-related hearing loss. Appellant submitted the overpayment recovery questionnaire, listing \$3,865.00 in monthly income, \$2,430.00 in monthly expenses and \$26,000.00 in savings and checking accounts.

By decision dated July 24, 2013 and reissued August 15, 2013,⁴ OWCP finalized the fact and amount of the overpayment and the finding that appellant was not at fault in its creation. It denied waiver of recovery as his financial information did not establish that recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience. OWCP found that appellant had sufficient income and assets to repay the \$6,616.87 overpayment without financial hardship. It directed recovery by submitting a check for the full amount of the overpayment.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provisions of FECA provide for compensation to employees sustaining permanent impairment from loss or loss of use of specified members of the body. It, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which rests in the sound discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by OWCP as a standard for evaluation of schedule losses and the Board has concurred in such adoption.⁵ For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition of the A.M.A., *Guides*, published in 2008.⁶ If a claimant received a schedule award and the medical evidence does not support the degree of permanent impairment awarded, an overpayment of compensation may be created.⁷

OWCP evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.⁸ Using the frequencies of 500, 1,000, 2,000 and 3,000 cps the losses at each frequency are added up and averaged. 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 and the total is divided by six to arrive at the amount of the binaural

⁴ The July 24, 2013 decision was returned to OWCP as undeliverable due to a recent change of address.

⁵ *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.6a (January 2010); *see also id.*, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

⁷ *W.M.*, Docket No. 13-291 (issued June 12, 2013). *See Richard Saldibar*, 51 ECAB 585 (2000).

⁸ A.M.A., *Guides*, (6th ed. 2008) p. 250. *See supra* note 6 at Chapter 3.700, Exhibit 1 (January 2010); *see supra* note 6 at Chapter 2.808.6a (January 2010).

hearing loss.⁹ The Board has concurred in OWCP's adoption of this standard for evaluating hearing loss.¹⁰

Regarding tinnitus, the A.M.A., *Guides* provide that tinnitus is not a disease but rather a symptom that may be the result of disease or injury.¹¹ The A.M.A., *Guides* state that, if tinnitus interferes with activities of daily living, including sleep, reading (and other tasks requiring concentration), enjoyment of quiet recreation and emotional well-being, up to five percent may be added to a measurable binaural hearing impairment.¹² A schedule award for tinnitus is not payable unless the medical evidence establishes that the condition caused or contributed to a ratable hearing loss.¹³

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained a bilateral sensorineural hearing loss due to hazardous noise exposure at work. Appellant claimed a schedule award on February 17, 2010. OWCP obtained a second opinion from Dr. Blumenfeld, a Board-certified otolaryngologist, who found a nonratable bilateral sensorineural hearing loss and noted appellant's complaint of tinnitus. The medical adviser concurred with Dr. Blumenfeld's finding that appellant did not have a ratable hearing loss, but erroneously added five percent impairment for tinnitus. On March 26, 2010 OWCP issued a schedule award for five percent binaural hearing loss, equivalent to \$6,616.87 in compensation. It later found that the March 26, 2010 schedule award was issued in error, as a claimant is only entitled to a schedule award for tinnitus if there is also a ratable hearing loss. As appellant did not have a ratable hearing loss, he was not entitled to a schedule award for tinnitus.

OWCP correctly determined that appellant was not entitled to a schedule award for tinnitus as he had no ratable hearing loss.¹⁴ The entire amount of the March 26, 2010 schedule award constituted an overpayment of compensation. Therefore, OWCP's August 15, 2013 decision finding a \$6,616.87 overpayment of compensation was proper under the law and facts of this case.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of FECA¹⁵ 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

⁹ *Id.*

¹⁰ *C.C.*, Docket No. 11-731 (issued October 11, 2011).

¹¹ *See A.M.A., Guides* 249.

¹² *Id. K.B.*, Docket No. 13-443 (issued May 10, 2013); *Robert E. Cullison*, 55 ECAB 570 (2004).

¹³ *See Juan A. Trevino*, 54 ECAB 358 (2003); *Charles H. Potter*, *supra* note 2.

¹⁴ *Charles H. Potter*, *supra* note 2.

¹⁵ 5 U.S.C. § 8129(a).

payments to which an individual is entitled.¹⁶ 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.¹⁷

Thus, a finding that appellant was without fault is not sufficient, in and of itself, for OWCP to waive the overpayment.¹⁸ 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 10.434-37 of the implementing federal regulations.¹⁹ Recovery of an overpayment will defeat the purpose of FECA if such recovery would cause hardship to a currently or formerly entitled beneficiary because: (a) the beneficiary from whom OWCP 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 OWCP from data furnished by the Bureau of Labor Statistics.²⁰ A higher amount is specified for a beneficiary with one or more dependents.²¹ 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.²² 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.²³

Section 10.438 of the 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.²⁴

¹⁶ *Id.* at § 8129(a).

¹⁷ *Id.* at § 8129(b).

¹⁸ *James Lloyd Otte*, 48 ECAB 334, 338 (1997); *see William J. Murphy*, 40 ECAB 569, 571 (1989).

¹⁹ 20 C.F.R. §§ 10.434-37.

²⁰ *See* Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6a(1)(b) (June 2009).

²¹ 20 C.F.R. § 10.436.

²² *Id.* at § 10.437(a).

²³ *Id.* at § 10.437(b).

²⁴ *Id.* at § 10.438; *Linda Hilton*, 52 ECAB 476 (2001).

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.²⁵

ANALYSIS -- ISSUE 2

In this case, appellant was found to be without fault in creation of the overpayment. Accompanying the June 10, 2013 preliminary notice of overpayment, OWCP provided him an overpayment recovery questionnaire to obtain information about his income, assets and expenses. Appellant provided information regarding his income, assets and expenses. Although he did not submit supporting documentation, OWCP accepted his responses.

In the August 15, 2013 decision, OWCP found that, although appellant was without fault in creation of the overpayment, waiver could not be granted as he had sufficient assets and income to repay the overpaid compensation without incurring financial hardship. It found that he did not need substantially all of his income to cover ordinary and necessary living expenses. Appellant's discretionary income exceeded his expenses by \$1,430.00 a month, well above the \$50.00 amount used to determine this element. Also, he had \$26,000.00 in bank accounts, above the \$4,800.00 asset base for an individual.²⁶ Therefore, recovery of the overpayment would not defeat the purpose of FECA. OWCP further found that recovery would not be against equity and good conscience as appellant had not changed his position for the worse as a result of the overpaid funds. It directed recovery of the overpayment by lump-sum check for the entire \$6,616.87 overpayment.²⁷

Because appellant has failed to establish that recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience, he has failed to show that OWCP abused its discretion by refusing to waive the overpayment.²⁸

On appeal, appellant contends that OWCP should have waived recovery of the overpayment as he was not at fault in its creation. However, the overpayment was not subject to waiver as appellant had sufficient income and assets to repay it without defeating the purpose of FECA or being against equity and good conscience.

CONCLUSION

The Board finds that OWCP properly found an overpayment of \$6,616.87 was created. The Board further finds that OWCP properly denied waiver of recovery.

²⁵ *Daniel J. Perea*, 42 ECAB 214 (1990).

²⁶ *See supra* note 20.

²⁷ The Board does not have jurisdiction over the recovery of the overpayment as OWCP did not direct recovery from continuing compensation payments. *See Desiderio Martinez*, 55 ECAB 245 (2004) (the Board's jurisdiction is limited to reviewing those cases where OWCP seeks recovery from continuing compensation benefits under FECA).

²⁸ *M.C.*, Docket No. 13-1147 (issued July 18, 2013).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 15, 2013 is affirmed.

Issued: May 20, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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