

ISSUES

The issues are: (1) whether OWCP properly found an overpayment of \$24,599.22; and (2) whether it properly denied waiver of the overpayment.³

FACTUAL HISTORY

On August 11, 2000 appellant, then a 57-year-old electronics mechanic, filed an occupational disease claim (Form CA-2) alleging that he sustained hearing loss and slurred speech as a result of noise exposure in federal employment. He indicated that he had worked as an electronics mechanic since February 1983. The record indicates that appellant had previously filed a claim for hearing loss on December 28, 1994. Pursuant to that claim, OWCP had issued a schedule award dated October 12, 1995 for a 23 percent binaural hearing loss. The period of the award was 46.00 weeks from August 15, 1995.

In a second claim, OWCP had previously referred appellant for a second opinion examination by Dr. Robert Sciacca, a Board-certified otolaryngologist. In a form report (CA-1332) dated January 16, 2001, Dr. Sciacca diagnosed bilateral sensorineural hearing loss and indicated that it was due to noise exposure in federal employment. The report contained results on audiological examination at 500, 1,000, 2,000, and 3,000 cycles per second. For the right ear, the results were 25, 35, 75, and 70 respectively. For the left ear, the results were 20, 65, 70, and 75.

OWCP accepted mild-to-severe bilateral sensorineural hearing loss. In a report dated April 20, 2001, its medical adviser found that appellant had a 41 percent binaural hearing loss based on the report from the second opinion physician.

By decision dated December 11, 2001, OWCP issued a schedule award for a 41 percent binaural hearing loss. The period of the award was 82.00 weeks from January 16, 2011 to August 12, 2012.

Appellant requested reconsideration on December 11, 2002, arguing that 41 percent did not adequately represent his hearing loss. He submitted a September 20, 2002 audiogram from an audiologist. In a report dated January 10, 2003, the medical adviser opined that the audiogram was unreliable. By decision dated April 23, 2003, OWCP denied modification of the schedule award decision.

Appellant filed an additional claim for an employment-related hearing loss on July 11, 2012. By decision dated August 20, 2013, OWCP issued a schedule award for an additional seven percent bilateral hearing loss. It indicated that the award represented a 48 percent binaural hearing loss, after deducting the previous schedule award for a 41 percent hearing loss. The period of the award was 14 weeks from February 28, 2013.

³ On appeal, appellant has submitted additional evidence. The Board cannot consider new evidence on appeal. The Board's review of a case is limited to the evidence that was before OWCP at the time of the decision on appeal. Appellant may submit such evidence to OWCP to request waiver of the overpayment.

In a letter dated April 4, 2013, the employing establishment noted that appellant had initially received a hearing loss schedule award in 1995, but the 2001 schedule award did not deduct the 23 percent hearing loss previously paid to appellant. OWCP determined that an overpayment of compensation had been created and advised appellant by letter dated August 27, 2013 that it had made a preliminary determination of an overpayment of \$24,599.22. It explained that he had been incorrectly paid a schedule award on December 11, 2001 for a 41 percent binaural hearing loss, when he should have only been paid for an additional 18 percent, since he had previously received a schedule award for 23 percent binaural hearing loss. As to the amount, OWCP submitted worksheets indicating that appellant had been paid \$43,844.54 in compensation from January 16, 2011 to August 12, 2012, pursuant to the December 11, 2001 schedule award. According to OWCP calculations, appellant should have been paid \$19,245.32 from January 16 to September 24, 2001 based on an 18 percent binaural hearing loss. In addition, OWCP found he was not at fault in creating the overpayment.

Appellant requested a preresoupment hearing before an OWCP hearing representative. The request was dated September 24, 2013 and received by OWCP on October 21, 2013. Appellant submitted an OWCP-20 overpayment questionnaire form indicating that he had \$3,069.96 in household monthly income. As to expenses, he claimed a total of \$5,710.00 in monthly expenses.⁴ Appellant listed \$45.00 for assets, including bank accounts, stocks, cash, or personal property. He also submitted two bank statements and a 2009 tax return.

By decision dated September 30, 2013, OWCP finalized its overpayment determination that an overpayment of \$24,599.22 was created. It denied waiver of the overpayment. In a decision dated November 5, 2013, OWCP vacated the September 30, 2013 decision. It indicated that appellant had requested a preresoupment hearing, and although not received until October 21, 2013, it was considered as timely. The case was remanded for a preresoupment hearing, which was held on July 18, 2014.

At the hearing, appellant indicated that his income was still the same as reported. The hearing representative indicated that appellant needed to document his expenses with current information.

By decision dated October 7, 2014, the hearing representative found an overpayment of \$24,599.22 was created. He denied waiver of the overpayment, noting that appellant failed to provide current documentation regarding expenses.

LEGAL PRECEDENT -- ISSUE 1

5 U.S.C. § 8107 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.⁵ Neither FECA nor the regulations

⁴ Appellant listed \$4,045.00 in monthly expenses that included housing, food, clothing, utilities, and miscellaneous expenses. He also listed \$1,665.00 with respect to monthly payments for debt.

⁵ 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).

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.⁶

OWCP evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.⁷ Using the frequencies of 500, 1,000, 2,000, and 3,000 cycles per second, the losses at each frequency are added up and averaged.⁸ 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.⁹ The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.¹⁰ 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 hearing loss.¹¹ The Board has concurred in OWCP’s adoption of this standard for evaluating hearing loss.¹²

According to 5 U.S.C. § 8108, the period of compensation payable for a schedule award is reduced by the period of compensation paid for an earlier injury if it is for the same member or function, and the current impairment in whole or in part duplicates the preexisting impairment. 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.¹³

ANALYSIS -- ISSUE 1

In the present case, OWCP has found that an overpayment occurred due to a duplicate payment for permanent impairment. The medical evidence of record showed that appellant had a 41 percent binaural hearing loss, based on the report and accompanying audiogram provided by the second opinion physician Dr. Sciacca. The medical adviser applied the above formula to the January 16, 2001 audiometric results and properly determined that appellant had a 41 percent binaural hearing loss. In his April 20, 2001 report, he added the decibel losses at the appropriate frequencies, deducted the fence of 25, and multiplied by 1.5 to determine the monaural hearing

⁶ A. George Lampo, 45 ECAB 441 (1994).

⁷ A.M.A., *Guides* 250 (5th ed. 2001). At the time of the December 11, 2001 decision, OWCP used the fifth edition of the A.M.A., *Guides*.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² Donald E. Stockstad, 53 ECAB 301 (2002); *petition for recon. granted*, Docket No. 01-1570 (issued August 13, 2002).

¹³ R.R., Docket No. 14-2031 (issued March 9, 2015).

loss. The medical adviser then applied the above formula and found appellant had a 41 percent binaural hearing loss.

The record indicated, however, that appellant had previously received a schedule award based on a 23 percent binaural hearing loss. Pursuant to 5 U.S.C. § 8108, OWCP should have deducted the previously paid 23 percent from the current 41 percent hearing loss. The December 11, 2001 schedule award should have been for an additional 18 percent binaural hearing loss. When OWCP issued a schedule award for a 41 percent binaural hearing loss, an overpayment was created.

As to the amount of the overpayment, OWCP calculated that appellant was paid \$43,844.54 in compensation from January 16, 2011 to August 12, 2012 pursuant to the December 11, 2001 schedule award. If it had properly issued a schedule award for an 18 percent binaural hearing loss, appellant would have received \$19,245.32 from January 16 to September 24, 2001. Therefore the difference between the two amounts, \$24,599.22 represented an overpayment of compensation. No contrary evidence or argument was provided. The Board accordingly finds the evidence of record establishes a \$24,599.22 overpayment in this case.¹⁴

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of FECA¹⁵ 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.”¹⁶ 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 FECA nor be against equity and good conscience. The guidelines for determining whether recovery of an overpayment would defeat the purpose of FECA 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.¹⁷ For waiver under

¹⁴ Even though appellant received an additional hearing loss schedule award on August 13, 2013, that does not offset the overpayment amount in this case. It is well established that OWCP should not attempt to offset an overpayment amount with amounts owed to appellant, as they are separate issues. *Robert L. Curry*, 54 ECAB 675 (2003). If a claimant pursues waiver and the adjusted overpayment is waived, the claimant will have lost due process rights with respect to recovery of the offset amount.

¹⁵ *Supra* note 1.

¹⁶ *Id.* at § 8129(b).

¹⁷ OWCP 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) (June 2009).

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.¹⁸

20 C.F.R. § 10.437 provides that recovery of an overpayment would be against equity and good conscience if: (a) the overpaid individual would experience severe financial hardship in attempting to repay the debt; (b) the 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.

With respect to the submission of financial evidence, OWCP’s regulations at 20 C.F.R. § 10.438 provide:

“(a) 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. This information will also be used to determine the repayment schedule, if necessary.

“(b) Failure to submit the requested information within 30 days of the request shall result in denial of waiver, and no further request for waiver shall be considered until the requested information is furnished.”

ANALYSIS -- ISSUE 2

In the present case, OWCP found that appellant was not at fault in creating the overpayment. Appellant may seek waiver of the overpayment, but he must submit the relevant financial evidence in order for OWCP to properly make a determination on the issue. He submitted an OWCP-20 form asserting significantly more monthly expenses than monthly income, but he provided no documentation supporting the monthly expenses. At the July 18, 2014 hearing, the hearing representative clearly asked appellant to submit additional documentation regarding his monthly expenses.

Appellant failed to provide any additional financial documentation prior to the October 7, 2014 decision. The hearing representative was unable to make a proper determination as to whether appellant needed substantially all of his current income to meet current ordinary and necessary living expenses. This is a necessary determination under 20 C.F.R. § 10.436 to establish whether recovery of the overpayment would defeat the purpose of FECA, and under 20 C.F.R. § 10.437 to determine whether recovery would be against equity and good conscience.

As noted above, appellant has the responsibility to submit the necessary information regarding income, expenses, and assets. The failure to submit the requested information shall result in denial of waiver, and no further request is considered until the requested information is furnished. The Board accordingly finds that OWCP properly denied waiver in this case.

¹⁸ See *Robert E. Wenholz*, 38 ECAB 311 (1986).

CONCLUSION

The Board finds that OWCP properly found an overpayment of \$24,599.22 was created, and properly denied waiver of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 7, 2014 is affirmed.

Issued: July 13, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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