

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

_____)	
J.M., Appellant)	
)	
and)	Docket No. 17-1285
)	Issued: October 12, 2017
DEPARTMENT OF THE NAVY,)	
PORTSMOUTH NAVAL SHIPYARD,)	
Portsmouth, NH, Employer)	
_____)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
 COLLEEN DUFFY KIKO, Judge
 ALEC J. KOROMILAS, Alternate Judge
 VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 24, 2017 appellant filed a timely appeal from a May 10, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

ISSUES

The issues are: (1) whether appellant has received an overpayment of compensation in the amount of \$2,110.15 for the period February 15 through March 4, 2017 for which he was not at fault; and (2) whether OWCP properly denied waiver of recovery of the overpayment.

FACTUAL HISTORY

On October 16, 2012 appellant filed an occupational disease claim (Form CA-2) alleging that on January 10, 2005 he became aware of his hearing loss and on June 1, 2006 realized that

¹ 5 U.S.C. § 8101 *et seq.*

this loss of hearing was caused or aggravated by his employment. He attributed his hearing loss to noises at the employing establishment with varying intensities. Appellant reported that the noises could be unexpected, constant, extreme, or short in duration on a daily basis. OWCP accepted his claim for bilateral sensorineural hearing loss on May 22, 2013.

Appellant filed a claim for a schedule award (Form CA-7) on February 4, 2014. By decision dated March 28, 2014, OWCP granted him a schedule award for 84 percent permanent binaural loss of hearing. The period of the award was from November 27, 2013 through February 14, 2017 totaling 168 weeks. Appellant retired from the employing establishment in May 2015.

OWCP continued to make a schedule award payment in the amount of \$2,110.15 through March 4, 2017.

In a March 10, 2017 preliminary determination, OWCP informed appellant that he had received a \$2,110.15 overpayment of compensation because it failed to terminate his schedule award payments on February 14, 2017 and continued to make an additional payment through March 4, 2017 in the amount of \$2,110.15. It found that he was not at fault in the creation of the overpayment. OWCP provided appellant with his appeal rights, an overpayment recovery questionnaire, OWCP-20, and allowed him 30 days to respond.

Appellant responded on March 27, 2017 and indicated that he disagreed that an overpayment had occurred and that he disagreed with the amount of the overpayment. He requested waiver of recovery of the overpayment. Appellant also requested that OWCP allow him to retain the overpayment as he could not regain his hearing.

By decision dated May 10, 2017, OWCP determined that appellant had received an overpayment of compensation in the amount of \$2,110.15 for which he was not at fault. It denied waiver of recovery as he failed to complete an overpayment recovery questionnaire. OWCP requested payment of the full amount of the overpayment within 30 days.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of FECA² and its implementing regulations³ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members or functions of the body. Section 10.404 states that compensation is provided for specified periods of time for the permanent loss or loss of use of certain members.⁴

² *Id.* at § 8107.

³ 20 C.F.R. § 10.404.

⁴ *Id.* Effective May 1, 2009, OWCP began using the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009). Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (February 2013). See *J.L.*, Docket No. 14-0898 (March 26, 2015).

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.⁵ When an overpayment has been made to an individual 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 the individual is entitled.⁶

FECA procedures identify various situations when overpayments of compensation may occur, including when a claimant receives schedule award compensation after the expiration of the award.⁷

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$2,110.15, for the period February 15, through March 4, 2017.

OWCP granted appellant a schedule award on March 28, 2014 for the period November 27, 2013 through February 14, 2017. The evidence of record establishes that he continued to receive schedule award payments from OWCP after February 14, 2017, the date the award was scheduled to expire, until March 4, 2017. Consequently, any concurrent payments appellant received from OWCP beginning February 15, 2017 constituted an overpayment of compensation benefits. OWCP properly calculated the \$2,110.15 overpayment by totaling the amount of compensation checks appellant received during the period February 15 through March 4, 2017. The Board affirms its finding of fact and amount of overpayment.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of FECA provides that when an overpayment of compensation occurs “because of an error of fact or law,” adjustment or recovery shall be made by decreasing later payment to which the individual is entitled.⁸ The only exception to this requirement that an overpayment must be recovered is set forth in section 8129(b):

“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 this subchapter or would be against equity and good conscience.”

Thus, a finding that appellant was without fault is not sufficient, in and of itself, for OWCP to waive the overpayment. OWCP must exercise its discretion to determine whether recovery of the overpayment would “defeat the purpose of [FECA] or would be against equity

⁵ 5 U.S.C. § 8102(a).

⁶ *Id.* at § 8129(a).

⁷ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(c) (May 2004); *see V.F.*, Docket No. 10-1394 (issued February 23, 2011).

⁸ *Supra* note 6.

and good conscience,” pursuant to the guidelines provided in the implementing federal regulations.

Section 10.436 of the implementing regulations⁹ provides that recovery of an overpayment will defeat the purpose of FECA if recovery would cause hardship by depriving a presently or formerly entitled beneficiary of income and resources needed for ordinary and necessary living expenses and outlines the specific financial circumstances under which recovery may be considered to defeat the purpose of FECA.

Section 10.437 provides that recovery of an overpayment is considered to be against equity and good conscience when an individual who received an overpayment would experience severe financial hardship attempting to repay the debt and when an 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.¹⁰

Section 10.438(a) provides that the individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by OWCP, as 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.¹¹ This information would also be used to determine the repayment schedule, if necessary. Section 10.438(b) provides that failure to submit the requested information within 30 days of the request shall result in denial of waiver.¹²

ANALYSIS -- ISSUE 2

As OWCP found appellant without fault in the creation of the overpayment, waiver must be considered, and repayment is still required unless adjustment or recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.¹³ In a March 10, 2017 preliminary notice of overpayment, it advised appellant of its preliminary determination and instructed appellant to complete the enclosed overpayment recovery questionnaire and submit supporting financial documents. Additionally, OWCP notified appellant that, within 30 days of the date of the letter, he could request a telephone conference, a final decision based on the written evidence, or a prerecoument hearing. Appellant did not submit an overpayment recovery questionnaire or supporting financial documents. Thus, it did not have the necessary financial information to determine if recovery of the overpayment would defeat the purpose of FECA or if recovery would be against equity and good conscience such that it would cause a financial burden.

⁹ 20 C.F.R. § 10.436.

¹⁰ *Id.* at § 10.437.

¹¹ *Id.* at § 10.438(a).

¹² *Id.* at § 10.438(b).

¹³ 5 U.S.C. § 8129.

Consequently, as appellant did not submit the financial information it had properly requested from him as required under section 10.438 of OWCP's regulations,¹⁴ which was necessary to determine his eligibility for waiver, OWCP properly denied waiver of recovery of the overpayment in the amount of \$2,110.15 for the period February 15 through March 4, 2017.

With respect to recovery of an overpayment, the Board's jurisdiction is limited to reviewing those cases when OWCP seeks recovery from continuing compensation benefits under FECA. As appellant is no longer in receipt of compensation benefits, the Board has no jurisdiction over the recovery of the overpayment.¹⁵

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$2,110.15 for the period February 15 through March 4, 2017 for which he was not at fault. The Board further finds that OWCP properly determined that this overpayment was not subject to waiver of recovery.

ORDER

IT IS HEREBY ORDERED THAT the May 10, 2017 merit decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 12, 2017
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

¹⁴ 20 C.F.R. § 10.438; *R.L.*, Docket No. 16-1564 (issued January 4, 2017).

¹⁵ See *Lewis George*, 45 ECAB 144, 154 (1993).