

ISSUES

The issues are: (1) whether OWCP properly found an overpayment of compensation in the amount of \$25,667.99 for the period September 30, 2014 through March 16, 2015; and (2) whether it properly denied waiver of recovery of the overpayment.

FACTUAL HISTORY

On November 18, 2013 appellant, then a 60-year-old program analyst, filed an occupational disease claim (Form CA-2), alleging hearing loss and severe tinnitus as a result of noise exposure in the workplace. He indicated that he was exposed to noise from an air compressor, endothermic gas generators, and pneumatic tools for over 39 years.

The record indicates that appellant previously filed a claim for hearing loss (OWCP File No. xx-xxxx716), and OWCP issued a schedule award dated March 18, 1994 for 12 percent binaural hearing loss. And, in another separate hearing loss claim (OWCP File No. xx-xxxx814), OWCP issued an August 2, 1999 schedule award for 10 percent binaural hearing loss.

In February 2014, OWCP accepted the current occupational disease claim (OWCP File No. xx-xxxx968) for binaural hearing loss, which arose on or about August 1, 2000.

In a February 18, 2014 second opinion examination, Dr. R. Michael Loper, a Board-certified otolaryngologist, diagnosed binaural hearing loss and indicated that it was due to noise exposure in federal employment. The report contained results of an audiological examination at 500, 1,000, 2,000, and 3,000 cycles per second. For the right ear, the results were 30, 40, 50, and 75 respectively. For the left ear, the results were 35, 35, 60, and 105. In a report dated April 10, 2014, an OWCP medical adviser found that appellant had 38 percent binaural hearing loss based on the report from the second opinion physician.

By decision dated November 26, 2014, OWCP issued a schedule award for an additional 28 percent binaural hearing loss, for a total of 38 percent binaural hearing loss. It reduced appellant's current 38 percent rating to reflect his previous schedule award for 10 percent binaural hearing loss. The period of the award was from February 18, 2014 to March 16, 2015.

In a December 7, 2015 preliminary overpayment determination, OWCP found that appellant received a \$25,667.99 overpayment due to schedule award payments that were in error. It explained that it had neglected to reduce the November 26, 2014 schedule award by 12 percent, which appellant was previously awarded on March 18, 1994. As to the amount, OWCP submitted worksheets indicating that appellant had been paid \$59,881.91 in compensation from February 18, 2014 to March 16, 2015. According to OWCP calculations, appellant should have been paid only \$34,213.92 from February 18 to September 29, 2014 for an additional six percent binaural hearing loss. OWCP also found that appellant was without fault in the creation of the overpayment of compensation. It asked appellant to submit an attached overpayment recovery questionnaire, which would allow it to consider waiving the overpayment and determine, if necessary, a reasonable method for collection. OWCP notified appellant that failure to submit the requested financial information within 30 days would result in a denial of waiver.

On January 15, 2016 appellant submitted an overpayment recovery questionnaire (Form OWCP-20) indicating that he had a spouse, a monthly income of \$3,747.12, and monthly expenses of \$3,709.32 for rent or mortgage, food, clothing, utilities, and other expenses. He further indicated that he had \$763.08 in a checking account, \$816.84 in savings, \$14,022.96 in stocks and bonds, and \$13,000.00 in other personal property and funds.

By decision dated March 7, 2016, OWCP finalized its overpayment determination that an overpayment of \$25,667.99 had been created. It denied waiver of the overpayment, noting that appellant's monthly expenses did not exceed his income and his assets of \$763.08 in checking, \$816.84 in savings, and \$14,022.96 in stocks and bonds, totaled \$15,602.88, which was above the guideline of \$8,000.00 provided by FECA procedures when considering a waiver of recovery.

LEGAL PRECEDENT -- ISSUE 1

Section 8107 of FECA sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions, and organs of the body.³ FECA, however, does not specify the manner by which the percentage loss of a member, function, or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The implementing regulations have adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) as the appropriate standard for evaluating schedule losses.⁴ Effective May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).⁵

Schedule awards for hearing loss are calculated as follows: Using the frequencies of 500, 1,000, 2,000, and 3,000 hertz (Hz), the losses at each frequency are added up and averaged.⁶ Then, the "fence" of 25 decibels (dB) is deducted because, as the A.M.A., *Guides* points out, losses below 25 dB 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.⁸ The binaural loss is determined by calculating the loss in each ear using

³ For complete loss of hearing of one ear, an employee shall receive 52 weeks' compensation. 5 U.S.C. § 8107(c)(13). For complete loss of hearing of both ears, an employee shall receive 200 weeks' compensation. *Id.*

⁴ 20 C.F.R. § 10.404.

⁵ See 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).

⁶ See Section 11.2, Hearing and Tinnitus, A.M.A., *Guides* at 248-51 (6th ed. 2008).

⁷ *Id.* at 250.

⁸ *Id.* at 250-51.

the formula for monaural loss; the lesser loss is multiplied by five, and then added to the greater loss and the total is divided by six to arrive at the amount of the binaural hearing loss.⁹

When determining entitlement to a schedule award, preexisting impairment to the scheduled member should be included.¹⁰ Impairment ratings for schedule awards include those conditions accepted by OWCP as job related, and any preexisting permanent impairment of the same member or function.¹¹ If the work-related injury has affected any residual usefulness in whole or in part, a schedule award may be appropriate.¹² There are no provisions for apportionment under FECA,¹³ but when the prior impairment is due to a previous work-related injury and a schedule award has been granted for such prior impairment, the percentage already paid is subtracted from the total percentage of impairment.¹⁴

ANALYSIS -- ISSUE 1

OWCP found that an overpayment of compensation occurred because it neglected to offset appellant's prior award for 12 percent binaural hearing loss. The current medical evidence of record showed that appellant had 38 percent binaural hearing loss, based on the report and accompanying audiogram provided by the second opinion physician, Dr. Loper. In his April 10, 2014 report, OWCP's medical adviser applied the above-noted formula to the February 18, 2014 audiometric results and properly determined that appellant had 38 percent binaural hearing loss.

The record establishes that appellant previously received a March 18, 1994 schedule award for 12 percent binaural hearing loss, as well as an August 2, 1999 award for 10 percent binaural hearing loss, for a total of 22 percent binaural hearing loss. While OWCP reduced the latest award by the August 1999 10 percent award, it did not offset appellant's March 1994 12 percent award. Consequently, when OWCP issued a schedule award on November 26, 2014 for an additional 28 percent binaural hearing loss, an overpayment was created.¹⁵

As to the amount of the overpayment, OWCP calculated that appellant was paid \$59,881.91 in compensation from February 18, 2014 to March 16, 2015. Had OWCP properly issued a schedule award for only an additional 16 percent binaural hearing loss, appellant would have received just \$34,213.92 for the period February 18 to September 29, 2014. Therefore, the difference between the two amounts, \$25,667.99, represented an overpayment of compensation. No contrary evidence or argument was provided. The Board accordingly finds that the evidence

⁹ *Id.* at 251.

¹⁰ *Carol A. Smart*, 57 ECAB 340, 343 (2006); *Michael C. Milner*, 53 ECAB 446, 450 (2002).

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5d.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at Chapter 2.808.7a(1); 20 C.F.R. § 10.404(c).

¹⁵ *Id.*.

of record establishes a \$25,667.99 overpayment of compensation for the period September 30, 2014 through March 16, 2015.

LEGAL PRECEDENT -- ISSUE 2

An individual who is without fault in creating or accepting an overpayment is nonetheless subject to recovery of the overpayment unless adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.¹⁶ Recovery of an overpayment will defeat the purpose of FECA if such recovery would cause hardship to a current or former beneficiary because the beneficiary from whom OWCP seeks recovery needs substantially all of his current income, including compensation benefits, to meet current ordinary and necessary living expenses, and the beneficiary's assets do not exceed a specified amount as determined by OWCP.¹⁷ Additionally, 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 in attempting to repay the debt or when an individual, in reliance on such payment or on notice that such payments would be made, relinquished a valuable right or changed his position for the worse.¹⁸

The individual who received the overpayment is responsible for providing information about income, expenses, and assets as specified by OWCP.¹⁹ This information is necessary for determining whether waiver of recovery of the overpayment is warranted.²⁰ The information is also used to determine an appropriate repayment schedule, if necessary.²¹ Failure to submit the requested information within 30 days of the request shall result in denial of waiver.²²

ANALYSIS -- ISSUE 2

OWCP found that appellant was without fault in the creation of the overpayment. Appellant may seek waiver of recovery 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 overpayment recovery questionnaire (Form OWCP-20) indicating that he had a spouse, a monthly income of \$3,747.12, and monthly expenses of \$3,709.32 for rent or mortgage, food, clothing, utilities, and other expenses. Appellant further indicated that he had

¹⁶ 5 U.S.C. § 8129(b); 20 C.F.R. §§ 10.433, 10.434, 10.436, 10.437.

¹⁷ 20 C.F.R. § 10.436(a), (b). For an individual with no eligible dependents the asset base is \$4,800.00. The base increases to \$8,000.00 for an individual with a spouse or one dependent, plus \$960.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6a(1)(b) (June 2009).

¹⁸ *Id.* at § 10.437(a), (b).

¹⁹ *Id.* at § 10.438(a).

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at § 10.438(b).

\$763.08 in a checking account, \$816.84 in savings, \$14,022.96 in stocks and bonds, and \$13,000.00 in other personal property and funds.

Regarding the \$25,667.99 overpayment of compensation, OWCP found that appellant was not with fault in the creation of the overpayment, but denied waiver of recovery because he had not provided sufficient evidence to establish the need for waiver or a reasonable monthly repayment amount. Although OWCP found that appellant was without fault in the creation of the overpayment, repayment is still required unless adjustment or recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.²³ The record reflects that appellant has a monthly income of \$3,747.12 and monthly expenses of \$3,709.32. In its March 7, 2016 decision, OWCP denied waiver of the overpayment on the basis that appellant's monthly expenses did not exceed his income and his total reported assets of \$15,602.88 far exceeded the applicable \$8,000.00 asset base.²⁴ It properly concluded that recovery of the overpayment would not defeat the purpose of FECA, be against equity or good conscience, or cause hardship to appellant. Thus, the Board finds that OWCP properly denied waiver of recovery of the \$25,667.99 overpayment.

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$25,667.99 for the period September 30, 2014 through March 16, 2015. The Board further finds that OWCP properly denied waiver of recovery of the overpayment.

²³ See *Wade Baker*, 54 ECAB 198 (2002).

²⁴ See *supra* note 17.

ORDER

IT IS HEREBY ORDERED THAT the March 7, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 7, 2018
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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