

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of IRVING E. SANDY, JR. and DEPARTMENT OF JUSTICE,
MARSHALL SERVICE, McLean, VA

*Docket No. 02-704; Submitted on the Record;
Issued August 12, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, COLLEEN DUFFY KIKO,
WILLIE T.C. THOMAS

The issues are: (1) whether appellant has more than a four percent monaural loss of hearing, for which he received a schedule award; (2) whether the Office of Workers' Compensation Programs properly determined that an overpayment occurred in the amount of \$13,183.51; and (3) whether the Office properly denied waiver of the overpayment.

On September 27, 1998 appellant, then a 54-year-old deputy U.S. marshal, filed an occupational disease claim (Form CA-2) alleging that his hearing loss was due to his duties as a firearms instructor.¹ The Office accepted the claim for sensorineural hearing loss on August 28, 2000.

Appellant filed for a schedule award on September 4, 2000 based on an incomplete October 23, 2000 report of the district medical adviser, the Office erroneously issued, on January 26, 2000, a check in the amount of \$14,329.90 for a schedule award for a binaural hearing loss of 13 percent.

However, the district medical adviser had noted that the August 14, 1999 audiogram conducted by Heidi Dout had failed to comply with the Office's requirements as there was no audiometric calibration date of the instrument, no date of the audiogram nor the name and credentials of the audiologist who performed the audiogram, no bone conduction tests and no impedance measurements. He had requested that a June 6, 1999 audiogram that had been performed by Dr. Arnaldo A. Garro, a second opinion Board-certified otolaryngologist, be provided to the district medical adviser for review.

The Office medical adviser, after reviewing the June 7, 1999 audiologic and otologic evaluation by Dr. Garro; the June 7, 1999 verification of audiometric testing from audiologist, Aurion Dwyer; found the audiometric testing performed by Mr. Dwyer on June 7, 1999 to be the most reliable hearing examination results. Based upon Dr. Garro's report, the Office medical adviser found that appellant had a 3.75 hearing loss in his left ear and a nonratable loss in the

¹ Appellant retired effective August 31, 1990 due to the mandatory law enforcement provisions.

right ear. The April 14, 1999 audiometric testing from Heidi Dout was disregarded by the Office medical adviser due to the deficiencies noted above. The district medical adviser then applied the standards of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001) to the June 7, 1999 audiogram to determine that appellant had a four percent monaural hearing loss of the left ear.

In a decision dated March 6, 2001, the Office awarded appellant a schedule award for a four percent monaural hearing loss. The award was in the amount of \$1,146.39 and for the period June 7 through 21,1999.

On March 6, 2001 the Office made a preliminary determination that an overpayment had occurred in the amount of \$13,183.51 because the Office erroneously paid appellant for a schedule for a 13 percent binaural hearing loss when he should only have been paid for a 4 percent monaural hearing loss in the left ear. The Office also found that appellant was without fault in the creation of the overpayment.

In letters dated March 21, 2001, appellant requested a hearing before the Branch of Hearings and Review both on the issue of overpayment and on the amount of the schedule award. He enclosed copies of audiograms dated April 14,1999, July 30, 1984, June 17, 1985, June 30, 1986, July 29, 1987, June 14, 1989 and June 21,1990. Appellant returned the overpayment questionnaire without providing any financial information. The Office hearing representative affirmed the Office's finding by decision dated November 16, 2001.

The Board has duly reviewed the evidence contained in the case record presented on appeal and finds that appellant has no more than a four percent monaural hearing loss.

Section 8107 of the Federal Employees' Compensation Act² 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. The Act, 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 Office evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.³ 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.⁴ 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.⁵ The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.⁶ 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 up to the greater loss and the total is divided

² 5 U.S.C. § 8107.

³ A.M.A., *Guides* at 250 (5th ed. 2001).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

by six to arrive at the amount of the binaural hearing loss.⁷ The Board has concurred in the Office's adoption of this standard for evaluating hearing loss.⁸

In reviewing appellant's June 7, 1999 audiogram, the frequency levels recorded at 500, 1,000, 2,000 and 3,000 hertz for the right ear reveal decibel losses of 15, 20, 25 and 30, respectively, for a total of 90 decibels. When divided by 4, the result is an average hearing loss of 22.5 decibels. The average loss of 22.5 is reduced by 25 decibels to equal 0 which when multiplied by the established factor of 1.5, results in a 0 percent monaural hearing loss for the right ear.⁹ Testing for the left ear at the frequency levels of 500, 1,000, 2,000 and 3,000 hertz revealed decibel losses of 20, 20, 30 and 40 respectively, for a total of 110 decibels. When divided by 4, the result is an average hearing loss of 2.75. The average loss is reduced by 25 decibels to equal 2.5 which, when multiplied by the established factor of 1.5 results in a 3.75 percent monaural hearing loss for the left ear.¹⁰ This figure was properly rounded up to four percent.¹¹ Consequently, the reliable evidence of record does not establish that appellant has greater than a three percent binaural loss of hearing.

In this case, appellant does not have a total or 100 percent monaural hearing loss, but rather at most a 4 percent monaural hearing loss, which the Office has determined was employment related. As appellant has no more than a 4 percent loss of use of his left ear, he is entitled to 4 percent of the 52 weeks of compensation, which is 2.08 weeks. The Office, therefore, properly determined the number of weeks for which appellant is entitled to compensation under the schedule award provisions of the Act.

The Board also finds that the Office was correct in disregarding the audiogram test results from Ms. Dout as it failed to meet the Office's standards by providing a calibration date, audiometric calibration date of the instrument, no clear information on the audiologist's credentials who performed the audiogram, no bone conduction tests and no impedance measurements.¹²

The Board finds that appellant received an overpayment of compensation in the amount of \$13,183.51.

The record indicates that the Office issued appellant a check in the amount of \$14,329.90 for a 13 percent binaural hearing loss when appellant was only entitled to \$1,146.39¹³ for his

⁷ *Id.*

⁸ *Donald E. Stockstad*, 53 ECAB ____ (Docket No. 01-1570, issued January 23, 2002).

⁹ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.4b(2)(b) (September 1994).

¹⁰ *Id.*

¹¹ *Id.*

¹² For the complete list of requirements and the specifics of such requirements, see Federal (FECA) Procedure Manual, Chapter 2.0806, Part 2 -- Claims, Paragraph 16c and FECA Tr. No. 81-15 (Exhibit 5 in Part 2 of Chapter 2.806 of the Procedure Manual).

¹³ At the weekly pay of \$734.36 for 2.08 weeks, the schedule award amount would be \$1,527.47 multiplied by the $\frac{3}{4}$ rate of pay equals \$1,146.39.

4 percent monaural hearing loss. As he was erroneously issued a check in the amount of \$14,329.90, he received an overpayment in compensation that totaled \$13,183.51. Appellant has not shown and the record does not otherwise establish, that the Office erred in calculating the amount of the overpayment. Therefore, an overpayment in compensation in the amount of \$13,183.51 was created.

The Board further finds that, while appellant was not at fault in the creation of the overpayment, he is not entitled to waiver.

The waiver or refusal to waive an overpayment of compensation by the Office is a matter that rests within the Office's discretion pursuant to statutory guidelines.¹⁴ These statutory guidelines are found in section 8129(b) of the Act which states: "Adjustment or recovery [of an overpayment] by the United States may not be made when incorrect payment has been made to an individual which is without fault and when adjustment or recovery would defeat the purpose of [the Act] or would be against equity and good conscience."¹⁵ Since the Office found appellant to be without fault in the creation of the overpayment, then, in accordance with section 8129(b), the Office may only recover the overpayment if it determined that recovery of the overpayment would neither defeat the purpose of the Act nor be against equity and good conscience.

Section 10.436 of the implementing regulations¹⁶ provides that recovery of an overpayment will defeat the purpose of the Act if such recovery would cause hardship to a current or formerly entitled beneficiary because: (a) the beneficiary from whom the Office seeks recovery needs substantially all of his or her current income (including compensation benefits) to meet current or ordinary and necessary living expenses; and (b) the beneficiary's assets do not exceed a specified amount as determined by the Office from data furnished by the Bureau of Labor Statistics.¹⁷ An individual is deemed to need substantially all of his or her income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.¹⁸

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.¹⁹

Under section 10.438 of the regulations it states that "the individual who received the overpayment is responsible for providing information about income, expenses and assets as

¹⁴ See *Robert Atchison*, 41 ECAB 83 (1989).

¹⁵ 5 U.S.C. § 8129(b).

¹⁶ 20 C.F.R. § 10.436 (1999).

¹⁷ An individual's assets must exceed a resource base of \$3,000.00 for an individual or \$5,000.00 for an individual with a spouse or one dependent plus \$600.00 for each additional dependent. This base includes all of the individual's assets not exempt from recoupment; see *Robert F. Kenney*, 42 ECAB 297 (1991).

¹⁸ See *Demitri J. Fasi*, 49 ECAB 278 (1998); *Leticia C. Taylor*, 47 ECAB 198 (1995).

¹⁹ 20 C.F.R. § 10.437 (1999).

specified by [the Office]. This information is needed to determine whether or not recovery on an overpayment would defeat the purpose of Act or be against equity and good conscience.”²⁰

In this case, appellant did not complete an overpayment questionnaire as requested by the Office, nor did he provide any financial information to show that recovery of the overpayment would defeat the purpose of the Act. Appellant has not alleged and the evidence does not demonstrate that he relinquished a valuable right or changed his position for the worse in reliance on the erroneous amount of compensation benefits received in this case without deduction of appropriate health and life insurance premiums. Because appellant has not shown that recovery would “defeat the purpose of the Act” or would “be against equity and good conscience” the Board finds that the Office properly denied waiver of recovery of the overpayment.

The November 16, 2001 decision of the Office of Workers’ Compensation Programs is hereby affirmed.

Dated, Washington, DC
August 12, 2002

Michael J. Walsh
Chairman

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

²⁰ With respect to recovery, the Board’s jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation benefits under the Act. Where appellant is not receiving wage-loss compensation benefits, the Board does not have jurisdiction with respect to the Office’s recovery of the overpayment under the Debt Collection Act. *Robert S. Luciano*, 47 ECAB 793 (1996).