



## **FACTUAL HISTORY**

On July 25, 2016 appellant, then a 48-year-old Deputy United States Marshal, filed an occupational disease claim (Form CA-2) alleging that he developed bilateral hearing loss as a result of employment-related noise exposure. By decision dated December 15, 2016, OWCP accepted the claim for bilateral sensorineural hearing loss.

On December 19, 2016 appellant filed a claim for a schedule award (Form CA-7).

By decision dated January 3, 2017, OWCP granted appellant a schedule award for six percent binaural hearing loss. The award covered a period of 12 weeks from November 15, 2016 through February 6, 2017. Appellant's weekly pay was computed at \$1,493.65 based on the 75 percent augmented rate for employees with dependents, totaling \$5,974.62 in continuing payments every four weeks.

In a manual adjustment form, OWCP documented that it paid appellant an additional sum of \$5,547.86 for the period February 7 to March 4, 2017 as appellant's schedule award compensation should have terminated on February 6, 2017. Copies of fiscal worksheets were provided.

By notice dated June 5, 2017, OWCP made a preliminary determination that an overpayment of compensation in the amount of \$5,547.86 had been created for the period February 7 through March 4, 2017 because appellant was overpaid for his schedule award. It further found that he was at fault in the creation of the overpayment because he accepted a payment that he knew or reasonably should have known was incorrect. OWCP explained that appellant received \$5,547.86 in error for the period February 7 through March 4, 2017 because his schedule award expired on February 6, 2017. It informed him of his review rights and instructed him to complete an enclosed overpayment recovery questionnaire form (Form OWCP-20) and submit supporting documentation within 30 days.

In a July 28, 2017 overpayment action request, appellant requested a preresoupment hearing before an OWCP hearing representative, contesting the overpayment decision and finding of fault. He argued that he was not at fault for the overpayment as the funds were electronically deposited into his bank account and he had no knowledge of the transaction until the money appeared. No financial evidence was submitted.

A hearing was held before an OWCP hearing representative on December 12, 2017. During the hearing, appellant argued that the overpayment occurred through no fault of his own because he did not know the total amount he was supposed to receive for his schedule award which he alleged was not clearly explained on OWCP decision. He further noted that he did not know when the payments were supposed to be electronically deposited. The record was held open for 30 days.

In a narrative statement received on January 12, 2018, appellant argued that the overpayment occurred through no fault of his own and that the schedule award determination never stated the total amount of the award.

By decision dated February 23, 2018, an OWCP hearing representative finalized the preliminary overpayment determination, finding that appellant was overpaid in the amount of \$5,547.86 for the period February 7 through March 4, 2017 because he received continued schedule award compensation after his schedule award had expired on February 6, 2017. It found that he was at fault in the creation of the overpayment and thus, not entitled to waiver of recovery of the overpayment. As no financial information was submitted for consideration, recovery was directed by submitting the full amount of the overpayment within 30 days.

### **LEGAL PRECEDENT -- ISSUE 1**

The schedule award provisions of FECA<sup>2</sup> and its implementing regulations<sup>3</sup> 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 20 C.F.R. § 10.404 states that compensation is provided for specified periods of time for the permanent loss or loss of use of certain members.<sup>4</sup>

OWCP's procedures provide that an overpayment is created when a schedule award expires, but compensation continues to be paid.<sup>5</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$5,547.86 for the period February 7 through March 4, 2017. The amount of the overpayment is not in dispute.<sup>6</sup>

OWCP granted appellant a schedule award for six percent binaural hearing loss on January 3, 2017 for the period November 15, 2016 through February 6, 2017. The evidence of record establishes that OWCP continued to pay his schedule award compensation after February 6, 2017, the date the award expired. Consequently, the \$5,547.86 payment received for the period February 7 to March 4, 2017 constituted an overpayment of compensation. Appellant has not contested this amount. The Board accordingly affirms the fact and amount of the overpayment.<sup>7</sup>

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<sup>2</sup> *Id.*

<sup>3</sup> 20 C.F.R. § 10.404.

<sup>4</sup> *Id.* Effective May 1, 2009, OWCP began using the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6<sup>th</sup> ed. 2009). See *E.V.*, Docket No. 17-2026 (issued July 11, 2018).

<sup>5</sup> Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(c) (May 2004).

<sup>6</sup> *E.V.*, Docket No. 17-2026 (issued July 11, 2018).

<sup>7</sup> *R.S.*, Docket No. 17-1985 (issued March 23, 2018).

## LEGAL PRECEDENT -- ISSUE 2

OWCP may consider waiving an overpayment only if the individual to whom it was made was not at fault in either accepting or creating the overpayment.<sup>8</sup> Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from OWCP are proper.<sup>9</sup> The recipient must show good faith and exercise a high degree of care in regard to receipt of their benefits.<sup>10</sup>

A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment: (1) made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or (2) failed to provide information which he or she knew or should have known to be material; or (3) accepted a payment which the recipient knew or should have known to be incorrect.<sup>11</sup>

With respect to whether an individual is without fault, OWCP's regulations provide that whether or not OWCP determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid.<sup>12</sup>

## ANALYSIS -- ISSUE 2

The Board finds that OWCP improperly determined that appellant was at fault in the creation of the overpayment.

In *Tammy Craven*,<sup>13</sup> the Board explained that an employee who receives payment from OWCP in the form of a direct deposit may not be at fault for the first incorrect deposit into his or her account since the acceptance of the overpayment, at the time of receipt of the direct deposit, lacks requisite knowledge. The Board has recognized that, in the case of electronic fund transfers (EFTs), an employee would not receive notification of the date and amount of payment until after the deposit was made and the overpayment created.<sup>14</sup> Because fault is defined by what the claimant

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<sup>8</sup> 20 C.F.R. § 10.433(a).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at § 10.433(b).

<sup>13</sup> Docket No. 05-0249 (issued June 20, 2005), *Order Granting Petition for Recon. and Reaffirming Prior Decision* (issued July 24, 2006).

<sup>14</sup> *See J.H.*, Docket No. 15-0195 (issued March 17, 2015).

knew or should have known at the time of acceptance, one of the consequences of EFTs is that the claimant lacks the requisite knowledge at the time of the first incorrect payment.<sup>15</sup>

In this case, appellant received one electronic deposit on March 4, 2017 in the amount of \$5,547.86. OWCP failed to establish that he was at fault in the creation of the overpayment as he could not avoid the incorrect payment sent by EFT.<sup>16</sup> Although appellant accepted the overpayment at the time it was deposited into his account, OWCP has not shown that he knew or should have known at the time of the direct deposit on March 4, 2017 that the payment was incorrect.<sup>17</sup> Appellant had no reason to suspect at the time of the direct deposit that OWCP had issued an incorrect payment since this was the first and only incorrect payment made.<sup>18</sup>

The Board finds that appellant was not at fault in the creation of the \$5,547.86 overpayment received on March 4, 2017.<sup>19</sup> The case must be remanded for OWCP to determine whether he is entitled to waiver of recovery of the overpayment, followed by an appropriate decision.<sup>20</sup>

### **CONCLUSION**

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$5,547.86 for the period February 7 through March 4, 2017. The Board further finds that OWCP improperly determined that appellant was at fault in the creation of the overpayment.

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<sup>15</sup> *George A. Hirsch*, 47 ECAB 520 (1996).

<sup>16</sup> *J.S.*, Docket No. 12-1707 (issued June 10, 2013).

<sup>17</sup> *V.A.*, Docket No. 12-0637 (issued August 27, 2012).

<sup>18</sup> *See S.C.*, Docket No. 14-1730 (issued April 13, 2015).

<sup>19</sup> *E.T.*, Docket No. 15-0611 (issued June 2, 2015).

<sup>20</sup> *See generally P.D.*, Docket No. 18-0442 (issued July 11, 2018).

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 23, 2018 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part. The case is remanded for further action consistent with this decision of the Board.

Issued: January 3, 2019  
Washington, DC

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

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

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