

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

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**JANET A. CONDON, Appellant**

**and**

**U.S. POSTAL SERVICE, NORTHEAST AREA  
OFFICE, Windsor, CT, Employer**

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**Docket No. 03-1610  
Issued: June 25, 2004**

*Appearances:*

*Katherine Smith, Esq., for the appellant*

*Office of the Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chairman

COLLEEN DUFFY KIKO, Member

MICHAEL E. GROOM, Alternate Member

**JURISDICTION**

On June 12, 2003 appellant filed an application for review of a decision of the Office of Workers' Compensation Programs dated March 10, 2003 finding an overpayment of compensation from January 3, 2000 to September 8, 2001. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the overpayment decision.

**ISSUES**

The issues are: (1) whether the Office properly determined that an overpayment of \$18,358.73 was created; (2) whether the Office properly found that appellant was at fault in creating the overpayment and therefore not entitled to waiver; and (3) whether the Office properly determined that the overpayment should be recovered by deducting \$450.00 every 28 days from appellant's continuing compensation.

**FACTUAL HISTORY**

Appellant filed an occupational disease claim (Form CA-2) dated May 20, 2000, alleging that she sustained an emotional condition causally related to her federal employment. The

reverse of the claim form reported that appellant's position was full time with an annual pay rate of \$45,216.00.

In an accompanying statement, appellant indicated that since 1992 she had been working in a part-time position as a text and data services assistant. Appellant reported that she generally worked 18 hours per week; she also noted that in 1997 the Office had accepted a bilateral carpal tunnel syndrome as employment related.<sup>1</sup> According to appellant, the employing establishment advised her that she would have to return to full-time work effective January 3, 2000. Appellant indicated that she was upset over the proposed change in work hours and she stopped working on January 3, 2000.

By letter dated January 30, 2001, the Office requested a medical report regarding the current status of appellant's work-related carpal tunnel syndrome. The record indicates that the Office issued a compensation payment dated March 30, 2001 for \$5,021.63, covering the period January 3 to May 2, 2000. The daily computation log reported the pay rate as \$869.54 per week. The Office issued a compensation payment dated April 27, 2001 of \$7,010.72 for the period May 3 to September 8, 2000; a payment dated June 22, 2001 of \$24,886.70 for the period September 9, 2000 to June 1, 2001; a payment dated September 7, 2001 of \$6,779.18 for the period June 2 to August 11, 2001; and a payment dated September 21, 2001 of \$2,677.12 for the period August 12 to September 8, 2001. The daily computation log kept by the Office reports that the pay rate for compensation purposes was \$869.54 per week.

In a letter dated June 1, 2001, the Office advised appellant that it had accepted her claim for a single episode of depression and post-traumatic stress disorder.

The record indicates that in the year prior to her work stoppage appellant generally worked approximately 22.5 hours per week, although her actual work hours varied. According to the employing establishment, in the year prior to January 3, 2000, appellant earned \$24,704.36, or \$475.08 per week.

In a letter dated June 12, 2002, the Office advised appellant that a preliminary determination had been made with respect to an overpayment of compensation during the period January 3, 2000 to September 8, 2001. The Office stated that an incorrect pay rate had been used to calculate appellant's compensation; instead of pay rate of \$869.54 per week based on a full-time position, appellant had worked part time and her pay rate should have been \$475.08 per week. The Office advised appellant that she had received \$46,375.35 during the period, but should have been paid \$28,016.62, creating an overpayment of \$18,358.73. With respect to fault, the Office stated that appellant was at fault because she should have realized the compensation she received was greater than the wages she was earning.

By decision dated March 10, 2003, an Office hearing representative finalized the overpayment determination. The hearing representative found that an overpayment of \$18,358.73 was created and that appellant was not entitled to waiver because she was not without fault in creating the overpayment. With respect to repayment, the hearing representative

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<sup>1</sup> OWCP File No. 010344792; this file was administratively combined with the emotional condition claim (010374884).

determined that \$450.00 should be withheld from appellant's continuing compensation payments every 28 days.

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

Under 5 U.S.C. § 8101(4), “‘monthly’ pay means the monthly pay at the time of injury, or the monthly pay at the time disability begins, or the monthly pay at the time compensable disability recurs, if the recurrence begins more than 6 months after the injured employee resumes regular full-time employment with the United States, whichever is greater....”

Section 8114(d) of the Federal Employees’ Compensation Act provides:

“Average annual earnings are determined as follows:

“(1) If the employee worked in the employment in which he was employed at the time of his injury during substantially the whole year immediately preceding the injury and the employment was in a position for which an annual rate of pay--

(A) was fixed, the average annual earnings are the annual rate of pay; or

(B) was not fixed, the average annual earnings are the product obtained by multiplying his daily wage for particular employment, or the average thereof if the daily wage has fluctuated, by 300 if he was employed on the basis of a 6-day workweek, 280 if employed on the basis of a 5½-day week and 260 if employed on the basis of a 5-day week.”

\* \* \*

“(3) If either of the foregoing methods of determining the average annual earnings cannot be applied reasonably and fairly, the average annual earnings are a sum that reasonably represents the annual earning capacity of the injured employee in the employment in which he was working at the time of the injury having regard to the previous earnings of the employee in Federal employment and of other employees of the United States in the same or most similar employment in the same or neighboring location, other previous employment of the employee, or other relevant factors. However, the average annual earnings may not be less than 150 times the average daily wage the employee earned in the employment during the days employed within 1 year immediately preceding his injury.”<sup>2</sup>

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<sup>2</sup> 5 U.S.C. § 8114(d).

## **ANALYSIS -- ISSUE 1**

The record establishes that an overpayment of compensation was created. Appellant received compensation for the period January 3, 2000 to September 8, 2001 based on a pay rate of \$869.54 per week. The correct pay rate, however, must be determined pursuant to section 8101(4) and section 8114. The Office accepted an employment-related emotional condition and appellant stopped working on January 3, 2000. The Office apparently accepted that appellant was disabled from the emotional condition as of January 3, 2000. Under section 8101(4), the pay rate is determined as of January 3, 2000, which represents the date disability began as well as the date of last exposure to employment factors.

The evidence does not indicate that appellant had a fixed annual salary on January 3, 2000 nor can her pay rate be determined under 8114(d)(1)(B) as she worked only three days a week.<sup>3</sup> The proper method is to apply 8114(d)(3), which is to determine a pay rate that reasonably represents the annual earning capacity of the injured employee. In this case, the employing establishment provided the actual amount of annual earnings in the position for the year prior to January 2000. According to the employing establishment, appellant earned \$24,704.36 or \$475.08 per week. As this represents her actual earnings, it reasonably represents her annual earning capacity in this case.

The Office determined that appellant received \$46,375.35 in compensation for the period January 3, 2000 to September 8, 2001, based on a pay rate of \$869.54. Appellant should have been paid \$28,016.62 for the period based on a correct pay rate of \$475.08, thereby creating an overpayment in the amount of \$18,358.73.

## **LEGAL PRECEDENT -- ISSUE 2**

Section 8129(b) of the Act<sup>4</sup> 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 [the Act] or would be against equity and good conscience."<sup>5</sup> No waiver of an overpayment is possible if the claimant is at fault in creating the overpayment.<sup>6</sup>

On the issue of fault, 20 C.F.R. § 10.320(b) provides in pertinent part: "An individual is with fault in the creation of an overpayment who: (1) made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or (2) failed to furnish information which the individual knew or should have known to be material; or (3) with

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<sup>3</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.4(c)(2) (December 1995) states that the pay rate of part-time flexible employees whose earnings fluctuate from week to week would be computed under section 8114(d)(1)(B); this section, however, is limited to employees working at least five days per week.

<sup>4</sup> 5 U.S.C. §§ 8101-8193.

<sup>5</sup> 5 U.S.C. § 8129(b).

<sup>6</sup> *Gregg B. Manston*, 45 ECAB 344 (1994).

respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect.”

### **ANALYSIS -- ISSUE 2**

In the present case, the Office found that appellant was at fault in that she accepted payments she should have known were incorrect. Under the circumstances of this case, however, the Office failed to provide sufficient explanation for the fault determination. The preliminary determination states that appellant should have realized the compensation she was receiving was greater than the wages she was earning. The Office, however, failed to acknowledge the circumstances of this case and the lack of information provided to appellant regarding her compensation payments. Appellant had attempted to return to a full-time position and stopped working on January 3, 2000. Appellant began receiving compensation payments in March 2001 retroactive to January 2000; the payments were irregular and covered several months in a single payment. There was a prior claim accepted for carpal tunnel syndrome and a current claim for an emotional condition and the record does not establish that the Office sent letters accompanying the compensation payments that provided an explanation of the payments. A May 4, 2001 letter from the Office appears to indicate that initially the compensation payments were made pursuant to the carpal tunnel claim. The Office did not cite to any specific information provided to appellant that the pay rate used to calculate the compensation was \$869.54 per week. Moreover, appellant noted that her job had always been classified as a full-time position and that she attempted to return to a full-time position when she stopped working. The hearing representative stated that the letter directing appellant to return to full-time work does not affect the pay rate, but the issue is what appellant knew or should have known with respect to her pay rate. There is no evidence that the Office provided appellant with relevant evidence regarding her entitlement to compensation and the calculation of her compensation.

The Office bears the burden of proof in showing that a claimant is with fault in the matter of an overpayment of compensation.<sup>7</sup> In the absence of any evidence that the Office adequately explained, at the time appellant accepted the payments, how the benefits were calculated or provided other relevant evidence regarding her entitlement to compensation, the Board finds that the Office did not meet its burden of proof to establish that appellant was at fault in creating the overpayment.

### **CONCLUSION**

The Board finds that an overpayment of \$18,358.73 was created for which appellant was without fault. The case will be remanded for an appropriate decision on whether appellant is entitled to waiver of the overpayment. In view of the Board’s holding, the issue of recovery of the overpayment will not be addressed at this time.

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<sup>7</sup> *Danny L. Paul*, 46 ECAB 282 (1994).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated March 10, 2003 is affirmed with respect to the fact and amount of overpayment; the case is remanded for further development on the issue of waiver.

Issued: June 25, 2004  
Washington, DC

Alec J. Koromilas  
Chairman

Colleen Duffy Kiko  
Member

Michael E. Groom  
Alternate Member