United States Department of Labor
Employees' Compensation Appeals Board

K.S., Appellant	)	
and	)	**Docket No. 11-2085**
	)	**Issued: May 10, 2012**
DEPARTMENT OF COMMERCE, CENSUS BUREAU, Eureka, CA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 23, 2011 appellant filed a timely appeal from a July 12, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether OWCP properly found that an overpayment of $63,711.81 was created from July 1, 2000 to June 5, 2010 due to an incorrect pay rate for compensation purposes; (2) whether OWCP properly found that appellant was at fault in creating the overpayment and, therefore, not entitled to waiver; and (3) whether OWCP properly found that the overpayment should be recovered by deducting $401.00 from appellant's continuing compensation payments.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On July 25, 2000 appellant, then a 53-year-old recruiting assistant, filed an occupational claim (Form CA-2) alleging that she sustained neck and shoulder injuries as a result of her federal employment. She stopped working on June 30, 2000. The accepted conditions in the case are left shoulder strain, neck strain and temporary aggravation of degenerative cervical intervertebral disc.

Appellant began receiving compensation for wage loss as of July 1, 2000. On a claim for compensation (Form CA-7) dated August 17, 2000, the employing establishment indicated that her pay rate as of June 29, 2000 was $10.50 per hour. The employing establishment checked a box "no" with respect to whether appellant worked a fixed 40-hour week, whether she had worked for 11 months prior to injury and whether the position would have afforded employment for 11 months but for the injury. The employing establishment stated that appellant was "terminated for lack of work."

An OWCP memorandum dated November 28, 2000, noted that appellant's pay rate should be $242.31 per week, based on multiplying her average daily wage ($84.00) by 150. OWCP issued a compensation payment for the period July 1 to December 8, 2000 using a pay rate for compensation purposes of $242.31 per week.

By letter dated December 19, 2000, the employing establishment asserted appellant's pay rate for compensation purposes should be $196.88 per week. It stated that census workers averaged 6.5 hours per day. OWCP issued compensation payments for December 9, 2000 to March 1, 2001 using a pay rate of $196.88 per week.

On May 24, 2001 appellant submitted a letter advising that she had worked for the employing establishment from October 21, 1999. She earned $9.50 per hour from October 21 to December 31, 1999 and then $10.50 per hour as of January 1, 2000. According to appellant, from June 1 to October 10, 1999, she worked as a case manager for a private corporation at $18.75 per hour. On July 15, 2001 she submitted a Form W-2 (wage and tax statement) for 1999, with earnings of $30,300.00 reported.

In a memorandum dated July 17, 2001, OWCP found that appellant's pay rate was $582.69 per week, based on annual earnings of $30,300.00. Appellant began receiving compensation based on a pay rate for compensation purposes of $582.69 per week.

By letter dated April 8, 2001, appellant stated that she was concerned that she was being overpaid, as her base pay as a census worker was $10.50 an hour or $420.00 per week. She stated that some information on the W-2 form was incorrect. Appellant noted that she had worked for Trinity Occupational Training through August 12, 1999 and had earnings from a hotel in August through October 1999. In a letter dated May 29, 2002, she referenced her April 8, 2001 letter and indicated that she had not received a response.

On December 12, 2002 OWCP advised appellant that her pay rate was correct. It stated that she had been sent a retroactive payment based on the recalculated pay rate. By letter dated February 20, 2003, appellant stated that she had not been reimbursed for travel to physicians nor

had some physicians been reimbursed by OWCP. She also asked that she be compensated for the period July 27, 2001 to May 29, 2002 at the weekly rate established.

In a letter dated June 7, 2010, an employing establishment compensation specialist stated that he reviewed documents regarding appellant's pay rate. He noted that earnings from private employment were not considered unless the employment was the same or similar to federal employment. According to the compensation specialist, the private company where appellant worked as a case manager was no longer in business, but there was no evidence the job was similar to census work. The employing establishment stated that she had earned $16,705.00 in 33 weeks from October 21, 1999 to June 30, 2000 or $506.21 per week. A June 8, 2010 memorandum of telephone call clarified that appellant had actually worked 36.14 weeks and, therefore, her actual earnings were $462.23 per week.

In a memorandum dated June 8, 2010, OWCP found that appellant had not worked substantially a whole in the date-of-injury position nor would the position be expected to last substantially the whole year. It stated that since the evidence had shown "that the injured worker worked full-time employment for substantially the whole year prior to the date of injury at other jobs," the pay rate should be calculated in accord with 5 U.S.C. § 8114(d)(2). According to OWCP a regular employee working in the same type of job as appellant earned $10.50 per hour at 40 hours per week or $421.21 per week.[2]

The record contains a worksheet documenting that for the period July 1, 2000 to June 5, 2010 appellant was paid $241,643.36 in compensation for wage loss. OWCP calculated that, using a pay rate for compensation purposes of $42.21 per week, she should have been paid $177,931.55, creating an overpayment of $63,711.81.

By letter dated September 2, 2010, OWCP issued a preliminary determination that an overpayment of $63,711.81 had been created. It made a preliminary determination that appellant was at fault in creating the overpayment, as she accepted payments she knew were incorrect. OWCP stated that she had submitted letters complaining about an error in the pay rate.

On September 29, 2010 OWCP received a request for a telephone conference. Appellant noted that she had not received an OWCP-20 and requested an "extension of time" as she had a hearing scheduled for October 12, 2010.[3] By letter dated October 1, 2010, OWCP enclosed an OWCP-20 and noted that a conference would be scheduled when she returned the form. The record indicates a telephone conference was held on July 11, 2011.

By decision dated July 12, 2011, OWCP finalized the overpayment determinations. It found an overpayment of $63,711.81 was created, appellant was at fault in creating the overpayment and $401.00 would be deducted from continuing compensation every 28 days to recover the overpayment.

[2] OWCP stated that $10.50 was multiplied by 2087 and divided by 52.

[3] Appellant had requested a hearing of a May 4, 2010 OWCP decision denying a schedule award for a bilateral carpal tunnel syndrome condition.

LEGAL PRECEDENT -- ISSUE 1

Section 8114(d) of FECA 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 5 1/2-day week and 260 if employed on the basis of a 5-day week.
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> (2) If the employee did not work in employment in which he was employed at the time of his injury during substantially the whole year immediately preceding the injury, but the position was one which would have afforded employment for substantially a whole year, the average annual earnings are a sum equal to the average annual earnings of an employee of the same class working substantially the whole immediately preceding year in the same or similar employment by the United States in the same or neighboring place, as determined under paragraph (1) of this subsection.
>
> (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 [f]ederal 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 [one] year immediately preceding his injury."

ANALYSIS -- ISSUE 1

OWCP determined that an overpayment of $63,711.81 was created from July 1, 2000 to June 5, 2010 based on an incorrect pay rate for compensation purposes. As to the period of the overpayment, the Board notes that the record requires clarification. The initial compensation payment from July 1 to December 8, 2000 was based on a pay rate of $242.31 per week. Although OWCP later issued a retroactive payment, the payment history of record noted that this payment covered the period December 9, 2000 to March 1, 2001, which had been initially based on a pay rate of $196.88 per week. It is not clear, therefore, that the overpayment period included July 1 to December 8, 2000. If appellant received compensation for this period based on a pay rate of $242.31, there may be a separate issue of an underpayment of compensation for this period. An underpayment of compensation cannot be used as an offset of an overpayment amount.[4]

From December 9, 2000 to June 5, 2010, the record notes that OWCP used a pay rate for compensation purposes of $582.69. The pay rate was based on a W-2 form for the year 1999, which report annual earnings of $30,300.00 or $582.69 per week. It is clear that the pay rate of $582.69 was incorrect. The time period for determining pay rate would be from June 30, 1999 to June 30, 2000, since disability began July 1, 2000.[5] The W-2 form covered earnings from January 1 to December 31, 1999.

The pay rate for compensation purposes must be properly determined under 5 U.S.C. § 8114. OWCP found that 5 U.S.C. § 8114(d)(2) was applicable in this case. But the evidence of record does not support OWCP's finding in this regard. As noted, 5 U.S.C. § 8114(d)(2) is applicable only if the employee did not work in the date-of-injury position for substantially the whole year preceding the injury and also the position was one which would have afforded employment for substantially a whole year.[6] OWCP apparently interpreted this language to mean that if the employee had worked in any full-time employment for substantially a whole year prior to injury, then 8114(d)(2) would apply if the employee had not worked in the date-of-injury position for substantially a year prior to injury. 5 U.S.C. § 8114(d)(2) clearly states that "the position" (*i.e.* the date-of-injury position) must be one that would have afforded employment for substantially a whole year. The evidence of record from the employing establishment stated that the census position would not have afforded employment for substantially a whole year. Appellant had worked in the position for a little over eight months, she was terminated for lack of work and the employing establishment indicated on the CA-7 form that the position would not have afforded employment for 11 months but for the injury.

[4] Although such an offset appears administratively straightforward, the Board has held that it may circumvent established legal procedures and protections if the claimant is entitled to consideration of waiver. Such an offset could allow OWCP an unrestricted recovery of the offset portion of the overpayment without regard to the claimant's due process rights. *T.W.* Docket No. 09-2039 (issued April 6, 2010); *Robert L. Curry*, 54 ECAB 675 (2003).

[5] *See Ricardo Hall*, 49 ECAB 390 (1998).

[6] OWCP's procedures indicate that substantially the whole year means 11 months. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.4(a) (September 2011).

The Board finds from the evidence of record that 5 U.S.C. § 8114(d)(3) is the applicable statute. The methods provided under 8114(d)(1) and (2) are not applicable and the statute provides that 8114(d)(3) will be used if the foregoing methods are not applicable. In this regard the Board notes that OWCP may consider employees of the United States working in the same or similar employment. Therefore, the pay rate of $421.21 may be correct under 5 U.S.C. § 8114(d)(3). But 8114(d)(3) also includes "other previous employment of the employee" as a relevant factor. With respect to appellant's nonfederal employment, OWCP may consider earnings from employment that, is the same as or similar to, the work the employee was doing when injury.[7] It made no finding as to whether any earnings from appellant's private section employment from July 1, 1999 should be included in the pay rate determination. For this reason, the fact and the amount of overpayment are not established. On remand, OWCP should secure a detailed statement of appellant's work duties in private section employment during the relevant period. It should then make a proper determination on the overpayment issues regarding fact, amount and period of an overpayment of compensation.

CONCLUSION

The Board finds that the case is not in posture for decision with respect to fact and amount of overpayment based on an incorrect pay rate for compensation purposes.

[7] *See supra* note 6 at Chapter 2.900.4(c)(3).

ORDER

IT IS HEREBY ORDERED THAT the July 12, 2011 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: May 10, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board