

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

K.P., Appellant

and

**DEPARTMENT OF COMMERCE, CENSUS
BUREAU, Louisville, KY, Employer**

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**Docket No. 12-1450
Issued: April 4, 2013**

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, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 27, 2012 appellant filed a timely appeal from merit decisions of the Office of Workers' Compensation Programs (OWCP) dated February 7 and April 16, 2012. Pursuant to the Federal Employees' Compensation Act¹ (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 appellant's actual earnings as a field representative fairly and reasonably represented her wage-earning capacity; (2) whether OWCP properly found that she was not entitled to wage-loss compensation for the period August 28 to December 3, 2011; (3) whether it properly found that an overpayment in compensation in the amount of \$9,510.07 had been created because appellant received wage-loss compensation based on an incorrect pay rate for the period May 27, 2009 through August 15, 2011; and (4) whether OWCP properly found that the overpayment was not subject to waiver.

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On May 4, 2009 appellant, then a 43-year-old temporary, part-time census enumerator, filed a traumatic injury claim alleging that she was injured on May 1, 2009 when she fell while climbing steps. She did not return to work and was terminated effective May 27, 2009. The claim was accepted for left lower extremity injuries of sprain of unspecified sites of the knee and leg, contusion of the knee, tear of the medial meniscus and aggravation of localized primary osteoarthritis.

The employing establishment informed OWCP that appellant worked an average of 4.5 hours a day at an hourly rate of \$11.25. Appellant was placed on the periodic compensation rolls, based on a weekly pay rate of \$227.81. On April 14, 2010 Dr. Shiraz Patel, a Board-certified orthopedic surgeon, performed left knee arthroscopic repair.

OWCP continued to develop the claim, and in September 2010, referred appellant to Dr. Bryant A. Bloss, a Board-certified orthopedic surgeon, for a second-opinion evaluation. In an October 7, 2010 report, Dr. Bloss provided physical examination findings of limited knee range of motion and residual tenderness with some functional weakness. He diagnosed status post medial meniscectomy and debridement arthroplasty of the left knee, left knee osteoarthritis, aggravated by May 1, 2009 injury and mild lateral subluxation of the left patella. Dr. Bloss indicated that the compensable injuries had resolved with the exception of aggravation of preexisting left knee arthritis, that appellant had reached maximum medical improvement and that she could perform light work with restrictions that she could not squat, kneel or climb and could not carry significant weight. Walking and standing were limited to two hours daily.

Appellant was referred for vocational rehabilitation in March 2011. On June 28, 2011 the employing establishment offered her a temporary appointment, not to exceed 90 days, as a field representative, working in her home. The job was described as having an intermittent, part-time, variable schedule of 10 to 30 hours a week. Appellant accepted the job on July 6, 2011 and began work on August 15, 2011. She submitted a Form CA-7, claim for compensation, for the period August 28 to December 3, 2011. Appellant attached time analysis forms indicating that she worked intermittently for a total of 34 days during this period.

In a February 7, 2012 decision, OWCP found that appellant's employment as a field representative, effective August 16, 2011, fairly and reasonably represented her wage-earning capacity with zero loss. In a second decision dated February 7, 2012, it denied her claim for wage-loss compensation for the period August 28 to December 3, 2011.

On February 10, 2012 OWCP issued a preliminary determination that appellant received an overpayment in compensation in the amount of \$9,510.07 for the period May 27, 2009 to August 15, 2011 because she was incorrectly paid compensation based on a weekly pay rate of \$227.81 when she should have been paid based on a weekly rate of \$146.03 a week. It explained that her compensation was incorrect because it should have been calculated based on the 150 formula, used for temporary census employees. Appellant was found without fault and advised of her rights if she disagreed with the preliminary finding. She was provided an overpayment questionnaire and an overpayment action request which advised her that she could request a telephone conference with OWCP on the issues of fault and possible waiver of the overpayment.

Appellant was advised that the overpayment action request must be mailed to OWCP within 30 days and that the financial information was needed to determine waiver.²

The record contains overpayment worksheets and computer print-outs describing appellant's compensation for the period May 27, 2009 to August 15, 2011. These indicated that she was paid compensation for the above period based on a weekly pay rate of \$227.81 when she should have been paid compensation based on a weekly rate of \$146.03.

In a February 29, 2012 letter, appellant stated that she would not send in financial information. On the overpayment questionnaire, in which she indicated that all requested information was "N/A," she stated that she had no idea how much she should have been paid.

On April 16, 2012 OWCP finalized the preliminary overpayment decision, finding that appellant received an overpayment in compensation in the amount of \$9,510.07. It found her without fault and that she was not entitled to waiver because she failed to provide any financial information. Repayment was due in full, within 30 days.

LEGAL PRECEDENT -- ISSUE 1

Section 8115(a) of FECA provides that, in determining compensation for partial disability, the wage-earning capacity of an employee is determined by the employee's actual earnings if the actual earnings fairly and reasonably represent the employee's wage-earning capacity.³ Generally, wages actually earned are the best measure of a wage-earning capacity, and in the absence of showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such a measure.⁴ The formula for determining loss of wage-earning capacity based on actual earnings, developed in the *Albert C. Shadrick* decision,⁵ has been codified at 20 C.F.R. § 10.403. OWCP calculates an employee's wage-earning capacity in terms of percentage by dividing the employee's earnings by the current pay rate for the date-of-injury job.⁶

OWCP procedures provide that OWCP can make a retroactive wage-earning capacity determination if the claimant worked in the position for at least 60 days, the position fairly and reasonably represented his or her wage-earning capacity and the work stoppage did not occur because of any change in his or her other injury-related condition affecting the ability to work.⁷ In determining wage-earning capacity based on actual earnings, the procedures further provide

² On February 10, 2012 OWCP also informed appellant that an overpayment of compensation in the amount of \$397.29 was created because she continued to receive compensation after she returned to work. The \$397.29 overpayment was written off.

³ 5 U.S.C. § 8115(a); *Loni J. Cleveland*, 52 ECAB 171 (2000).

⁴ *Lottie M. Williams*, 56 ECAB 302 (2005).

⁵ *Albert C. Shadrick*, 5 ECAB 376 (1953).

⁶ 20 C.F.R. § 10.403(c).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity* Chapter 2.814.7.e(1) (October 2009).

that reemployment of a temporary or casual worker in another temporary or casual position is proper, as long as it will last at least 90 days.⁸

ANALYSIS -- ISSUE 1

The Board finds that appellant's actual earnings in the temporary position as field representative did not fairly and reasonably represent her wage-earning capacity and the February 7, 2012 wage-earning capacity determination must be reversed.

Appellant, a temporary census enumerator, sustained an employment-related left lower extremity injury on May 1, 2009. She was placed on the periodic rolls. On July 6, 2011 appellant accepted a temporary appointment, not to exceed 90 days, as a field representative, working at home and began work on August 15, 2011.

While OWCP procedures provide that OWCP can make a retroactive wage-earning capacity determination if the claimant worked in the position for at least 60 days, the record here does not support that appellant had worked 60 days at the time OWCP issued its February 7, 2012 decision, based on the time analysis forms submitted by appellant and signed by the employing establishment official. The record does not contain any other confirmation from the employing establishment of hours and days appellant worked at the position. The record therefore lacks the evidence necessary for the Board to affirm the February 7, 2012 wage-earning capacity determination. As OWCP simply did not follow its own procedures, the Board finds that it did not discharge its burden of proof in finding that the temporary field representative position fairly and reasonably represented appellant's wage-earning capacity.⁹

LEGAL PRECEDENT -- ISSUE 2

Under FECA, the term "disability" is defined as incapacity, because of employment injury, to earn the wages that the employee was receiving at the time of injury.¹⁰ Disability is thus not synonymous with physical impairment which may or may not result in an incapacity to earn the wages. An employee who has a physical impairment causally related to a federal employment injury but who nonetheless has the capacity to earn wages he or she was receiving at the time of injury has no disability as that term is used in FECA¹¹ and whether a particular injury causes an employee disability for employment is a medical issue which must be resolved by competent medical evidence.¹² Whether a particular injury causes an employee to be disabled for work and the duration of that disability, are medical issues that must be proved by a preponderance of the reliable, probative and substantial medical evidence.¹³

⁸ *Id.* at Chapter 2.814.7.a (October 2009).

⁹ *See D.P.*, Docket No. 12-55 (issued July 6, 2012).

¹⁰ *See Prince E. Wallace*, 52 ECAB 357 (2001).

¹¹ *Cheryl L. Decavitch*, 50 ECAB 397 (1999); *Maxine J. Sanders*, 46 ECAB 835 (1995).

¹² *Donald E. Ewals*, 51 ECAB 428 (2000).

¹³ *Tammy L. Medley*, 55 ECAB 182 (2003); *see Donald E. Ewals, id.*

ANALYSIS -- ISSUE 2

Based on the Board's finding regarding Issue 1, the February 7, 2012 decision denying appellant's claim for intermittent wage-loss compensation, identified here as Issue 2, is not in posture for decision. Upon return of the case record, OWCP should address her claim for wage-loss, based on the Board's reversal of the wage-earning capacity determination and render an appropriate decision.

LEGAL PRECEDENT -- ISSUE 3

Section 8102(a) of FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty.¹⁴ Section 8129 provides, in pertinent part:

“When an overpayment has been made to an individual under this subchapter because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.”¹⁵

For all claims under FECA, compensation is to be based on the pay rate as determined under section 8101(4) which defines monthly pay as 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 six months after the injured employee resumes regular full-time employment with the United States, whichever is greater.¹⁶ In applying section 8101(4), the statute requires OWCP to determine monthly pay based on the greater pay rate, based on the date of injury, date of disability or the date of recurrent disability.¹⁷

OWCP procedures ascribe special rules for computing compensation to claimants employed by the Census Bureau.¹⁸ These employees “can be either full-time 40-hour-per-week regular employees or may be hired every 10 years to work in temporary appointments (not to exceed 180 days) as enumerators, crew leaders or clerks.”¹⁹ When a claimant's disability does not exceed 90 days, compensation should be computed on the basis of actual daily wages pursuant to section 8114(c) of FECA.²⁰ When disability extends beyond 90 days and the claimant had similar employment during the year prior to the injury, compensation should be

¹⁴ 5 U.S.C. § 8102(a).

¹⁵ *Id.* at § 8129(a).

¹⁶ *Id.* at § 8101(4).

¹⁷ *Id.*

¹⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Computing Compensation*, Chapter 2.901.9(a)(1) (October 2009).

¹⁹ *Id.* at *Determining Pay Rates*, Chapter 2.900.3(e) (March 2011).

²⁰ 5 U.S.C. § 8114(c); *id.* at Chapter 2.901.9(a)(1) (October 2009).

allocated in accordance with section 8114(d)(1) or (2).²¹ Otherwise, compensation should be paid weekly using the following formula: actual daily wage multiplied by 150, then divided by 52. Actual daily wage is calculated by multiplying the hourly pay rate by 4.5 hours.²²

ANALYSIS -- ISSUE 3

The Board finds that appellant received a \$9,510.07 overpayment of compensation for the period May 27, 2009 through August 15, 2011. The record here supports that she was hired and worked part time in the intermittent position of census enumerator. Appellant did not work as a census enumerator during the year immediately preceding the injury. The record supports that her hourly pay was \$11.25. As described above, OWCP procedures describe the method to be used in calculating compensation for a part-time census enumerator. In applying the weekly pay rate standard set forth in chapter 2.901.9(a)(2) of OWCP's procedure manual, the hourly rate of \$11.25 is multiplied by 4.5 hours to calculate a daily wage of \$50.625. This, in turn, is multiplied by 150 and divided by 52 to calculate a weekly wage of \$146.03. Following this determination, OWCP properly calculated that appellant should have received \$16,977.90 in compensation for the period May 27, 2009 through August 15, 2011 based on the \$146.03 weekly wage. Instead, appellant received compensation of \$26,487.97, based on an incorrect weekly wage of \$227.81. OWCP therefore properly found that an overpayment of compensation in the amount of \$9,510.07 had been created.

LEGAL PRECEDENT -- ISSUE 4

Section 8129 of FECA provides that an overpayment of compensation shall be recovered by OWCP unless "incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience."²³ Section 10.438 of OWCP regulations provide that the individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by OWCP. This information is needed to determine whether or not recovery on an overpayment would defeat the purpose of FECA or be against equity and good

²¹ *Id.* at § 8114(d)(1), (2).

²² Federal (FECA) Procedure Manual, *supra* note 18 at Chapter 2.901.9(a)(2); *see also supra* note 18 at Chapter 2.900.12(3)(3) (Census Bureau analyzed 2000 census data and determined that enumerators worked an average of four and a half hours a day four days a week and anticipated similar patterns for 2010).

²³ 5 U.S.C. § 8129.

conscience.²⁴ Failure to submit the requested information within 30 days of the request shall result in denial of waiver.²⁵

ANALYSIS -- ISSUE 4

As OWCP found appellant without fault in the creation of the overpayment, waiver must be considered and repayment is still required unless adjustment or recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.²⁶ Appellant, however, had the responsibility to provide financial information to OWCP²⁷ and did not do so.

In its preliminary determination dated February 10, 2012, OWCP clearly explained the importance of providing the requested financial information and advised appellant that it would deny waiver if she failed to furnish the requested financial information within 30 days. Appellant did not submit a completed overpayment questionnaire but merely noted “N/A” on the form. She did not submit financial information supporting her income and expenses. As a result, OWCP did not have the necessary financial information to determine if recovery of the overpayment would defeat the purpose of FECA or if recovery would be against equity and good conscience. Consequently, as appellant did not submit the financial information required under section 10.438 of OWCP regulations, which was necessary to determine her eligibility for waiver, OWCP properly denied waiver of recovery of the overpayment in compensation in the amount of \$9,510.07.²⁸

With respect to recovery of the overpayment, the Board’s jurisdiction is limited to reviewing those cases where OWCP seeks recovery from continuing compensation benefits under FECA.²⁹ As appellant was no longer receiving wage-loss compensation at the time

²⁴ Recovery of an overpayment will defeat the purpose of FECA if such recovery would cause hardship to a currently or formerly entitled beneficiary because: (a) the beneficiary from whom OWCP 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 OWCP from data furnished by the Bureau of Labor Statistics. 20 C.F.R. § 10.436. 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. 20 C.F.R. § 10.437. OWCP procedures provide that the assets must not exceed a resource base of \$4,800.00 for an individual or \$8,000.00 for an individual with a spouse or dependent plus \$960.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a) (June 2009); see *W.F.*, 57 ECAB 705 (2006).

²⁵ 20 C.F.R. § 10.438(b).

²⁶ *Id.*

²⁷ *Id.* at 10.438.

²⁸ *Id.*

²⁹ *Cheryl Thomas*, 55 ECAB 610 (2004).

OWCP issued the final overpayment decision on April 16, 2012, the Board does not have jurisdiction with respect to the recovery of the overpayment under the Debt Collection Act.³⁰

CONCLUSION

The Board finds that OWCP did not meet its burden of proof in finding that appellant's actual earnings as a field representative fairly and reasonably represented her wage-earning capacity. Thus, whether appellant was entitled to wage-loss compensation for the period August 28 to December 3, 2011 is not in posture for decision. The Board further finds that a \$9,510.07 overpayment in compensation was created because she received wage-loss compensation based on an incorrect pay rate for the period May 27, 2009 through August 15, 2011 and that OWCP properly found that the overpayment was not subject to waiver.

ORDER

IT IS HEREBY ORDERED THAT the April 16, 2012 decision of the Office of Workers' Compensation Programs is affirmed. The February 7, 2012 wage-earning capacity decision is reversed and the February 7, 2012 decision regarding entitlement to wage-loss compensation is set aside and the case is remanded to OWCP for proceedings consistent with the decision of the Board.

Issued: April 4, 2013
Washington, DC

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

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

³⁰ *Id.* The Board notes that appellant submitted financial information following the final overpayment decision dated April 16, 2012. The Board cannot consider this, however, as its review of the case is limited to the evidence of record that was before OWCP at the time it rendered its final decision. 20 C.F.R. § 501.2(c)(1); *J.T.*, 59 ECAB 293 (2008).