

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

R.R., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Penn Hills, PA, Employer**

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**Docket No. 07-1934
Issued: March 24, 2008**

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 16, 2007 appellant filed a timely appeal from an April 4, 2007 decision of the Office of Workers' Compensation Programs which found that she received an overpayment of compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.

ISSUES

The issues are: (1) whether appellant received overpayments in compensation totaling \$2,496.67; and (2) whether the Office properly denied waiver of the overpayments.

FACTUAL HISTORY

On September 11, 2004 appellant, then a part-time flexible city carrier, sustained multiple injuries when she was attacked by a dog while in the course of her federal duties.¹ She stopped work that day. An employing establishment computer print-out faxed to the Office on September 14, 2004 indicated that appellant's annual salary was \$34,331.00 or \$17.17 hourly. Appellant initially received wage-loss compensation based on submitting CA-7 claims which provided varying hourly pay rates of \$17.41 and \$17.47. A CA-7 signed by the employing establishment on December 10, 2004 provided an hourly pay rate of \$17.48 and advised that appellant was entitled to 36.9 hours per week of wage-loss compensation. Appellant's wage-loss compensation was based on a weekly pay rate of \$698.80. A memorandum to file on March 28, 2005 provided that appellant's hourly pay rate was \$17.17 per hour for 36.9 hours per week or a weekly pay rate of \$633.57. Appellant continued receiving compensation based on a weekly pay rate of \$633.57. A pay rate form in the record indicates that she worked substantially the entire year prior to the September 11, 2004 employment injury with annual earnings of \$32,902.86, that she worked an average of 36.9 hours a week with calculations showing an hourly pay rate of \$17.48 for a weekly pay rate of \$645.15. On May 16, 2005 the Office requested that the employing establishment clarify appellant's pay rate, and on May 18, 2005, the employing establishment confirmed that appellant's current pay rate was \$17.48 an hour for 36.9 hours a week. Appellant was placed on the periodic rolls on May 31, 2005 at a weekly pay rate of \$633.57, effective April 2, 2005. On February 2, 2006 her wage-loss compensation was adjusted to reflect a weekly pay rate of \$645.01.

On May 26, 2006 the Office issued a preliminary finding that an overpayment in compensation in the amount of \$860.51 had been created for the period April 16 through 30, 2007. The Office explained that the overpayment resulted because appellant had been paid this amount by check dated May 20, 2005 but had already been issued two checks covering this period. The Office found appellant without fault in the creation of the overpayment. Office memoranda and computer print-outs contained in the record provide that on May 18, 2005 appellant was issued a check for \$1,722.23 covering the period April 17 through May 14, 2005 and that this check was cashed, that on May 20, 2005 she was issued a check for \$861.11 covering the period April 2 through 16, 2005 and that this check was cashed, and that on May 27, 2005 she was issued a check for \$860.51 covering the period April 16 through 30, 2005 and that this check was cashed.

On May 26, 2006 the Office issued a second preliminary finding that an overpayment in compensation in the amount of \$1,636.16 had been created for the period October 27 through December 10, 2004. The Office explained that the overpayment resulted because appellant had received sick and annual leave for the period November 6 through 24, 2004 and that the payment for this period was based on an incorrect pay rate. The Office stated that she had received a total of \$3,369.21 in compensation for this period when she should have received \$1,733.05, yielding an overpayment in compensation of \$1,636.16. Office forms and computer print-outs contained

¹ The Office accepted that appellant sustained employment-related left eye corneal abrasion, right wrist sprain, lumbar strain, multiple contusions of the trunk, right arm and right shoulder, open wound of the left knee, median nerve injury of the right wrist and right shoulder impingement syndrome. She underwent surgical procedures to her right wrist and right shoulder.

in the record note that appellant worked an average of 36.9 hours per week for at least one year prior to her September 11, 2004 employment injury, for total earnings of \$32,902.86 or a weekly rate of \$645.15, that for the period November 6 through 24, 2004 she received sick and annual leave, and for the period October 27 through December 10, 2004 she was paid at a weekly pay rate of \$698.80 whereas the correct weekly pay rate was \$645.01.

On June 25, 2006 appellant requested a prerecoupment hearing or teleconference regarding the preliminary overpayment determinations and submitted an overpayment questionnaire.² By letter dated August 28, 2006, the employing establishment forwarded to the Office a check for \$43,336.20, funds appellant received as proceeds of a third-party recovery for the September 11, 2004 employment injury. On February 20, 2007 an Office hearing representative advised appellant that, because she had received a third-party settlement, she should submit a new overpayment questionnaire and asked that she explain the \$900.00 monthly miscellaneous expenses claimed. The hearing was scheduled for March 21, 2007 and appellant did not attend. On March 22, 2007 an Office rehabilitation counselor explained that appellant had returned to work on March 21, 2007 in a full-time modified carrier position. By decision dated April 4, 2007, an Office hearing representative finalized the overpayments in compensation, finding appellant not at fault. The hearing representative noted that appellant did not appear at the scheduled hearing and noted that, as she did not submit an additional overpayment questionnaire or explain the \$900.00 monthly miscellaneous expenses claimed, she was not entitled to waiver.³

LEGAL PRECEDENT -- ISSUE 1

The Federal Employees' Compensation Act⁴ 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 duty.⁵ When an overpayment has been made to an individual 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 the individual is entitled.⁶

² On the overpayment questionnaire appellant indicated that her income was \$1,670.00 per month, that she had zero cash, checking or savings and that her monthly expenses were \$800.00 for rent, \$300.00 for food, \$300.00 for clothing and \$900.00 in miscellaneous expenses.

³ Office procedures provide that a hearing can be considered abandoned if the claimant has not requested a postponement; the claimant has failed to appear at a scheduled hearing; and the claimant has failed to provide any notification for such failure within 10 days of the scheduled date of the hearing. In cases involving prerecoupment hearings, the Office will also issue a final decision on the overpayment, converting the format from an oral hearing to a review of the written record, based on the available evidence. Office (FECA) Procedure Manual, Part 2 -- Claims, *Abandonment of Hearing Requests*, 2.1601.6(e)(1) (January 1999). See *D.F.*, 58 ECAB ____ (Docket No. 06-1815, issued November 27, 2006). As appellant did not request a postponement of the scheduled March 21, 2006 hearing, did not appear at the scheduled hearing and did not personally provide notification for such failure within 10 days of the scheduled hearing, the hearing representative in this case properly issued a decision on a review of the written record. *Id.*

⁴ 5 U.S.C. §§ 8101-8193.

⁵ 5 U.S.C. § 8102(a).

⁶ 5 U.S.C. § 8129(a).

Under section 8101(4) of the Act, “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 six months after the injured employee resumes regular full-time employment with the United States, whichever is greater.⁷

Section 8114(d) of the Act provides that average annual earnings are determined: (1) if the employee worked in the employment in which the employee was employed at the time of 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 rate of pay; or (B) was not fixed, the average annual earnings are the product obtained by multiplying the daily wage for the particular employment, or the average thereof if the daily wage has fluctuated, by 300 if the employee was employed on the basis of a six-day workweek, 280 if employed on the basis of a five and a half-day week and 260 if employed on the basis of a five-day week.⁸

Office procedures state 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.⁹

Section 8116 of the Act defines the limitations on the right to receive compensation benefits. This section of the Act provides that, while an employee is receiving compensation, he or she may not receive salary, pay, or remuneration of any type from the United States, except in limited circumstances.¹⁰ Office regulations provide that compensation for wage loss due to disability is available only for any periods during which an employee’s work-related medical condition prevents him or her from earning the wages earned before the work-related injury.¹¹

ANALYSIS -- ISSUE 1

Regarding the overpayment in the amount of \$860.51 for the period April 16 to 30, 2005, the record support that appellant received a duplicate payment for this amount. An overpayment in compensation was therefore created.¹² The Board finds, however, that the case is not in posture for decision regarding the amount of the overpayment. The record indicates that the duplicate payments were based on a pay rate for compensation purposes of \$633.57. The record supports that appellant worked substantially the entire year preceding the September 11, 2004 employment injury. The chart used to provide this information lists appellant’s total earnings for a 50-week period beginning with the 21st pay period of 2003. There is no information, however,

⁷ 5 U.S.C. § 8101(4); *see Carl R. Benavidez*, 56 ECAB 596 (2005).

⁸ 5 U.S.C. § 8114(d); *see Robert L. Curry*, 53 ECAB 656 (2002).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.4(c)(2) (December 1995); *see Janet A. Condon*, 55 ECAB 591 (2004).

¹⁰ 5 U.S.C. § 8116.

¹¹ 20 C.F.R. § 10.500; *see Otha J. Brown*, 56 ECAB 228 (2004).

¹² *See Lawrence J. Dubuque*, 55 ECAB 667 (2004).

regarding the number of hours appellant worked during each of these weekly periods, and there are no calculations to show how the hourly par rate of \$17.48 or the weekly pay rate of \$645.15 were determined or how it was determined that appellant worked 36.9 hours a week.¹³ Additionally, the record contains contradictory information regarding appellant's pay rate with hourly figures ranging from \$17.11 to \$17.48.

The Board therefore finds that the Office did not provide adequate findings and reasoning for its determination of the amount of the overpayment in compensation based on appellant's receipt of a duplicate payment for the period April 16 to 30, 2005. The determination of pay rates for compensation purposes requires a number of calculations and the proper determination of the pay rate in this case would be pursuant to section 8114(d) of the Act.¹⁴ In this case, there are no clear calculations to show that appellant's pay rate was determined using this provision or any other clear calculations to show how the pay rate was found. The Office did not explain why the figures used were accurate and did not produce additional documentation, such as complete employing establishment records, to establish that they were accurate.¹⁵

Regarding the overpayment in compensation in the amount of \$1,636.16, the record supports that appellant received both wage-loss compensation and sick and annual leave for the period October 27 through December 10, 2004. A claimant is not entitled to receive compensation for loss of wages for a period when there is no loss of wages, as in this case where she received compensation in the form of sick and annual leave.¹⁶ However, for the reasons stated above, the Board cannot determine if the correct pay rate for compensation purposes was used to calculate the \$1,636.16 overpayment.

The case must be remanded to the Office for further findings, supported by documentation, regarding the correct pay rate for compensation purposes, and further explanation of how the overpayments in compensation were determined, to be followed by an appropriate decision.

In view of the Board's findings regarding the first issue in this case, the issue of whether the Office properly denied waiver of the overpayments need not be addressed.¹⁷

¹³ The Board notes that the calculations seem to be based on 51 weeks rather than the 50 weeks listed on the form.

¹⁴ *Supra* note 8.

¹⁵ *See Paul M. Colosi*, 56 ECAB 294 (2005).

¹⁶ *See generally Danny E. Haley*, 56 ECAB 393 (2005).

¹⁷ The Board notes that, where no further compensation benefits are due an individual, the Board does not have jurisdiction and the recovery of an overpayment remains within the discretion of the Office. The Board's jurisdiction over recovery is limited to reviewing those cases where the Office seeks recovery from continuing compensation under the Act. *Terry A. Keister*, 56 ECAB 559 (2005).

CONCLUSION

The Board finds that overpayments in compensation had been created for the periods October 27 to December 10, 2004 and April 16 to 30, 2005 but that the case is not in posture for decision regarding the amounts of the overpayments.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 4, 2007 be affirmed in part, vacated in part, and the case remanded to the Office for proceedings consistent with this opinion of the Board.

Issued: March 24, 2008
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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