

FACTUAL HISTORY

On January 8, 2000 appellant, then a 34-year-old rural carrier associate driver, injured her back, head, hip, neck and left arm when her postal vehicle slid on ice and hit a tree. OWCP accepted the claim for dislocation of cervical and thoracic vertebra, herniated discs at C4-5 and C5-6, cervicalgia and cervical radiculopathy. Appellant stopped work following the injury, returned to limited duty on April 29, 2000 and worked intermittently thereafter. OWCP accepted her recurrence of disability claims beginning April 12, 2004. Appellant did not return to work.

OWCP determined that an incorrect pay rate for compensation was used from April 12, 2004 to April 11, 2009, paid appellant compensation based on a weekly pay rate of \$266.12. The record reveals that appellant's date-of-injury pay rate was \$178.95. Computer print-outs and an overpayment worksheet show that she received \$67,294.24 in compensation for the period April 12, 2004 through April 11, 2009, when she should have received \$54,586.57, yielding a \$12,707.67 overpayment in compensation. On April 21, 2009 OWCP issued a preliminary determination that appellant had received an overpayment of compensation in the amount of \$12,707.67 for the period April 12, 2004 through April 11, 2009, because she was paid at an incorrect pay rate. It found her without fault and explained that, as she had never returned to full duty, she should have been paid using the date-of-injury pay rate of \$178.95.

Appellant was given 30 days to respond and was provided an overpayment action request form and an overpayment questionnaire. On April 27, 2007 appellant's counsel requested a precoupment hearing before an OWCP hearing representative, stating that she disagreed that the overpayment occurred and requested waiver.

At the hearing, held on August 13, 2009, appellant's representative argued that appellant was entitled to the recurrent pay rate because she was a regular employee. Appellant testified that she was a full-time rural carrier substitute as she was guaranteed work for one day per week and filled in for regular carries when coverage was needed. She stated that she returned back to work following her injuries in 2000 and stopped work in 2004. The hearing representative advised appellant to provide an overpayment financial questionnaire. Appellant submitted a completed overpayment form. On the form she noted zero dollars of monthly income, that she supported her husband and provided monthly expenses and assets. Monthly, payments included \$821.88 for rent; \$450.00 for food; \$150.00 for clothing; \$250.00 for miscellaneous expenses; \$475.00 for utilities, \$821.88 to Fifth Third Bank,² \$148.00 to VA FCU,³ \$19.00 to Chase Bank,⁴ \$782.00 to GMAC,⁵ \$175.00 to Independent Bank,⁶ \$37.51 to Sams Club,⁷ \$321.00 to Capital

² The amount owed is \$111,897.00.

³ The amount owed is \$6,060.00.

⁴ Appellant reported the balance due as \$658.00.

⁵ The outstanding balance on the debt was listed as \$38,202.00.

⁶ The balance due is \$6,917.00.

⁷ The balance due is \$288.00.

One,⁸ \$20.00 to First Premier,⁹ \$200.00 to Zane Mead,¹⁰ \$150.00 to Dr. Dan Gole¹¹ and \$35.00 to Sam Good.¹² Appellant also noted owing \$58.02 to Thoracic Cardiovascular, \$371.26 to Cleveland Clinic, \$643.83 to Ingham Regional Medical Center, \$225.00 to Hayes Green Beach Hospital, \$150.00 to Penneck Hospital and \$200.00 to Rolle Chiropractor. Assets include \$116.32 in a checking account, \$117.02 in a savings account \$9,500.00 in her husband's stocks and bonds, and approximately \$15,000.00 in personal property and other funds, resulting in a total of \$24,733.32.

By decision dated December 28, 2009, an OWCP hearing representative found that an overpayment of compensation in the amount of \$12,707.67 had been created because appellant was paid at an incorrect pay rate for the period April 12, 2004 through April 11, 2009. The hearing representative found that she was not entitled to waiver of the overpayment as she failed to submit any financial information and evidence of financial hardship. The hearing representative determined that \$300.00 would be deducted from appellant's continuing compensation each payment period to repay the overpayment.

On February 10, 2011 the Board issued an order remanding the case to OWCP.¹³ The Board found the December 28, 2009 hearing representative's decision failed to provide clear reasoning as to how the overpayment was calculated.

On April 15, 2011 an OWCP hearing representative found that an overpayment of compensation in the amount of \$12,707.67 had been created because appellant had been paid at an incorrect pay rate for the period April 12, 2004 through April 11, 2009. She noted that appellant worked 15 hours per week in the year prior to her injury with a date-of-injury pay-rate of \$11.93 per hour or \$178.95 per week. The hearing representative noted that appellant returned to modified work on August 12, 2000 and sustained a recurrence of disability on April 12, 2004. She found that appellant was not entitled to a recurrent pay rate of \$266.12 as she did not return to regular duty following her injury. The hearing representative found that appellant received an overpayment in the amount of \$12,707.67 for the period April 12, 2004 to April 11, 2009. She found that appellant was not entitled to waiver of recovery of the overpayment as she failed to submit information regarding her household income on the overpayment questionnaire or evidence of financial hardship. The hearing representative determined that \$300.00 would be deducted from appellant's continuing compensation each payment period to repay the overpayment.

⁸ The balance due is \$381.00.

⁹ The outstanding balance is \$581.00.

¹⁰ The balance listed is \$6,468.00.

¹¹ Appellant noted that she owed about \$6,000.00 to the physician.

¹² The balance is \$1,378.00.

¹³ Docket No. 10-719 (issued February 10, 2011).

LEGAL PRECEDENT -- ISSUE 1

Section 8102 of FECA¹⁴ 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.¹⁵ 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.¹⁶ FECA provides that, monthly pay means the monthly pay at the time of injury or the time disability begins or the time compensable disability recurs, if the recurrence begins more than six months after the injured employee resumes regular full-time employment, whichever is greater.¹⁷

The Board has defined regular employment as established and not fictitious, odd-lot or sheltered and that the duties of regular employment are covered by a specific job classification that would have been performed by another employee if appellant did not perform them.¹⁸

ANALYSIS -- ISSUE 1

Following her January 2000 employment injury when she stopped work, appellant returned to light-duty work on April 29, 2000, worked intermittently, stopped work on April 12, 2004 and claimed total disability beginning that day.

The Board finds that it is apparent that appellant did not return to regular employment. By her own testimony, appellant related having intermittent periods of disability following her return to work in April 2000 and work stoppage on April 12, 2004 due to total disability. The test is not whether the tasks that she performed during her modified duty would have been done by someone else, but instead whether she occupied a regular position that would have been performed by another employee. The record supports that appellant did not perform all the duties of the position of rural letter carrier or any other regular classified position at any time after her return to work following the January 8, 2000 employment injury. She did not resume regular employment within the meaning of section 8101(4) of FECA and, as such, the correct pay rate for compensation purposes should have been \$178.85, the weekly pay rate in effect on the date of injury. Appellant was thus not entitled to the recurrent weekly pay rate of \$266.12 on which her compensation was based for the period April 12, 2004 through April 11, 2009.¹⁹

¹⁴ 5 U.S.C. §§ 8101-8193.

¹⁵ *Id.* at § 8102(a). See *D.C.*, Docket No. 09-1460 (issued April 19, 2010); *George A. Rodriguez*, 57 ECAB 224 (2005).

¹⁶ *Id.* at 8129(a). See also *D.C.*, *id.*; *Ricky Greenwood*, 57 ECAB 462 (2006); *Terry A. Keister*, 56 ECAB 559 (2005).

¹⁷ *Id.* at § 8101(4); see *Janet A. Condon*, 55 ECAB 591 (2004).

¹⁸ *Jeffrey T. Hunter*, 52 ECAB 503 (2001).

¹⁹ *Janet A. Condon*, *supra* note 17.

The record supports that appellant's monetary compensation for the period April 12, 2004 through April 11, 2009 was based on a recurrent pay rate of \$266.12 per week, when she should have received compensation based on the date-of-injury pay rate of \$178.95. Computer print-outs and an overpayment worksheet show that she received compensation of \$67,294.24 for this period, when she should have received compensation of \$54,586.57. The Board will affirm the fact of overpayment in the amount of \$12,707.67.

LEGAL PRECEDENT -- ISSUE 2

According to section 10.436,²⁰ recovery of an overpayment would defeat the purpose of FECA if recovery would cause hardship because the beneficiary needs substantially all of his or her current income (including compensation benefits) to meet current, ordinary and necessary living expenses and also, if the beneficiary's assets do not exceed a specified amount as determined by OWCP from data provided by the Bureau of Labor Statistics.²¹ For waiver under this standard, an appellant must meet the two-pronged test and show that she needs substantially all of her current income to meet current ordinary and necessary living expenses,²² and that her assets do not exceed the resource base.²³

The burden is on the claimant to show that the expenses are reasonable and needed for a legitimate purpose.²⁴ OWCP's regulations provide:

“(a) 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 of an overpayment would defeat the purpose of FECA or be against equity and good conscience....

“(b) Failure to submit the requested information within 30 days of the request shall result in denial of waiver and no further request for waiver shall be considered until the requested information is furnished.”²⁵

²⁰ 20 C.F.R. § 10.436.

²¹ OWCP procedures provide that 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) (October 2004).

²² An individual is deemed to need substantially all of his or her income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. *Desiderio Martinez*, 55 ECAB 245, 250 (2004).

²³ See *supra* note 21. *W.F.*, 57 ECAB 705, 708 (2006).

²⁴ *Id.*

²⁵ 20 C.F.R. § 10.438. See *Madelyn Y. Grant*, 57 ECAB 533 (2006).

ANALYSIS -- ISSUE 2

The Board notes that appellant failed to provide any information regarding her income on the overpayment questionnaire she completed, even though she was in receipt of workers' compensation benefits. In addition, appellant failed to provide any financial information for OWCP to determine whether waiver of the overpayment was appropriate. An OWCP hearing representative informed her at the hearing that she should submit a completed overpayment questionnaire form with supporting documentation. While appellant submitted an overpayment questionnaire and provided certain information on assets and expenses, she failed to provide any supporting documentation for the claimed expenses. The burden is on the claimant to show that waiver would defeat the purpose of FECA. Appellant did not allege and the evidence does not demonstrate that she relinquished a valuable right or changed her position for the worse due to the payment of the erroneous amount of compensation. Because she has not shown that, recovery would defeat the purpose of FECA or would be against equity and good conscience, the Board finds that OWCP properly denied waiver of the overpayment.

LEGAL PRECEDENT -- ISSUE 3

OWCP's implementing regulations provide that, if an overpayment of compensation has been made to an individual entitled to further payments and no refund is made, it shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize any hardship.²⁶

ANALYSIS -- ISSUE 3

Appellant did not provide any information regarding her household's monthly income on the overpayment questionnaire she submitted or provide sufficient supporting evidence regarding current financial circumstances. It is her responsibility to provide information about income, expenses and assets.²⁷ An Office hearing representative set the recovery of the overpayment at \$300.00 from continuing compensation payments. Based on the evidence, the hearing representative did take relevant evidence into account so as to minimize hardship in recovering the overpayment. OWCP therefore did not abuse its discretion in finding that appellant should repay her overpayment at the rate of \$300.00 per compensation period.

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment in compensation in the amount of \$12,707.67, that OWCP properly denied waiver of recovery of the overpayment and required recovery of the overpayment by deducting \$300.00 every 28 days from her continuing compensation payments.

²⁶ *Id.* at § 10.441(a); see *Steven R. Cofrancesco*, 57 ECAB 662 (2006).

²⁷ *Id.* at § 10.438.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 15, 2011 is affirmed.

Issued: May 3, 2012
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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