



## **FACTUAL HISTORY**

On November 25, 2008 appellant, a 58-year-old rural carrier associate, sustained a traumatic injury in the performance of duty when she reached for a mailbox and felt pain in her right shoulder. OWCP accepted her claim for rotator cuff tendinitis. Appellant received compensation for disability.

Appellant's pay rate on the date of injury was \$18.24 an hour. OWCP determined that her weekly pay rate was \$729.60.<sup>3</sup> Appellant received compensation based on this pay rate.

Appellant did not work a fixed 40-hour-per-week schedule. She worked 3.29 hours a day, 5 days a week. Appellant did not work in her position for 11 months prior to the injury, but the position would have afforded employment for 11 months but for the injury. During the period of her employment, she earned a total of \$7,814.49.

The employing establishment advised, however, that there was no other employee with a similar appointment. It could not provide the actual earnings of another employee with the same kind of appointment working in a job with the same or similar duties. Further, the employing establishment indicated that appellant had no earnings in Federal or non-Government employment during the year prior to the employment in which she was employed at the time of her injury.

On March 3, 2011 OWCP made a preliminary determination that appellant received a \$15,294.79 overpayment of compensation from June 20, 2009 to March 12, 2011. Payment records shows that she received \$30,770.27 for this period but should have received \$15,475.48. OWCP determined that appellant's proper weekly pay rate was \$168.23, not \$729.60.<sup>4</sup>

OWCP found that appellant was not at fault in the creation of the overpayment, making her eligible for waiver of recovery of the overpayment. It asked her to fill out an overpayment recovery form:

“In order for OWCP to consider the question of waiver or to determine a reasonable method for collection, you must complete and submit the enclosed Form OWCP-20. Attach supporting documents to Form OWCP-20, including copies of income tax returns, bank account statements, bills and cancelled checks, pay slips and any other records which support the income and expenses listed. Under 20 C.F.R. § 10.438, failure to submit the requested information within 30 days will result in the denial of waiver and no further request for waiver shall be considered until the requested information is furnished.”

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<sup>3</sup> \$18.24 an hour times 40 hours a week equals \$729.60 a week.

<sup>4</sup> OWCP divided the total amount earned (\$7,814.49) by the total number of days worked (134) to determine appellant's average daily wage (\$58.32). It then multiplied the average daily wage by 150 to determine average annual earnings (\$8,748.00) and divided that number by 52 weeks to find her weekly pay rate (\$168.23).

Appellant disagreed that the overpayment occurred. She advised that she was seeking legal assistance. OWCP did not receive a completed overpayment recovery form or any supporting financial documents.

In a May 15, 2012 decision, OWCP finalized its preliminary determination. It found that appellant received a \$15,294.79 overpayment of compensation but was not at fault in its creation. OWCP further found that the circumstances of the case did not warrant waiver of recovery, as no financial information established a basis for waiver. As appellant was not receiving continuing compensation payments, OWCP found that she should repay the debt at a rate of \$200.00 a month.

On appeal, appellant argues that she is not prepared to pay \$200.00 a month from the minimum income that she has each month. The amount, she explains, would severely strain her already limited budget. Appellant stated that she receives no workers' compensation and has not since March 2011. She had to collect social security early, at the age of 62, to have any income.

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

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of her duty.<sup>5</sup>

Section 8114(d) of FECA provides four different methods for determining the "average annual earnings" depending on the character and duration of the employment:

"(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 the 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.

"(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.

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<sup>5</sup> 5 U.S.C. § 8102(a).

“(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 class working 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.”<sup>6</sup>

### **ANALYSIS -- ISSUE 1**

Fact of overpayment is well established. OWCP paid compensation at an inflated pay rate. It multiplied appellant’s hourly wages by 40 to obtain her weekly pay rate, but she did not work 40 hours a week. Appellant averaged less than 17 hours a week. Thus, she received significantly more compensation than she should have. The Board will affirm the OWCP’s May 15, 2012 decision on the issue of fact of overpayment.

Appellant did not work in the employment in which she was employed at the time of her injury during substantially the whole year immediately preceding the injury. The position would have afforded employment for substantially the whole year but for the injury, but the employing establishment advised that there was no other employee with the same or similar appointment. It could not provide the actual earnings of another employee with the same kind of appointment working in a job with the same or similar duties. Moreover, the employing establishment indicated that appellant had no earnings in Federal or non-Government employment during the year prior to the employment in which she was employed at the time of her injury.

Under the circumstances, the Board finds that OWCP properly determined average annual earnings under section 8114(d)(3). OWCP gave due regard to relevant factors and properly applied the 150 formula to determine average annual earnings and a weekly pay rate of \$168.23.<sup>7</sup> At that pay rate, appellant should have received \$15,475.48 from June 20, 2009 to May 12, 2011. She instead received \$30,770.27. The Board will therefore affirm OWCP’s May 15, 2012 decision on the issue of amount of overpayment.

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

Section 8129(a) of FECA provides that, when an overpayment of compensation has been made 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.<sup>8</sup>

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<sup>6</sup> *Id.* at § 8114(d).

<sup>7</sup> *See supra* note 4.

<sup>8</sup> 5 U.S.C. § 8129(a).

OWCP may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment.<sup>9</sup>

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. This information will also be used to determine the repayment schedule, if necessary. 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.<sup>10</sup>

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

Appellant was without fault in accepting or creating the overpayment. She was therefore eligible for consideration of waiver. Appellant was responsible, however, for providing the financial information necessary to determine whether waiver of recovery of an overpayment should be granted. As OWCP notified her in the March 3, 2011 preliminary determination, failure to submit the requested information within 30 days “will result in the denial of waiver” and no further request for waiver shall be considered until the requested information is furnished.

Because appellant did not complete the overpayment recovery questionnaire and did not submit financial documentation to establish her income, expenses and assets, the Board finds that OWCP properly denied waiver of recovery of the overpayment. The Board will therefore affirm OWCP’s May 15, 2012 decision on the issue of waiver. No further request for waiver shall be considered until appellant furnishes the requested information.

On appeal, appellant argues that she is not prepared to pay \$200.00 a month from the minimum income that she has each month. The Board’s jurisdiction to review the collection of an overpayment, however, is limited to cases of adjustment, where OWCP decreases later payments of compensation to which the individual is entitled.<sup>11</sup> Because appellant is no longer receiving compensation, collection of the overpayment in this case cannot be made by adjusting later payments but must be recovered by other means. The Board therefore lacks jurisdiction to review the amount of recovery determined by OWCP to be appropriate.

### **CONCLUSION**

The Board finds that appellant received a \$15,294.79 overpayment in compensation. The Board also finds that OWCP properly denied waiver of recovery of the overpayment, as she has not yet completed the overpayment recovery question or submitted financial information necessary to establish the income, expenses and assets listed therein.

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<sup>9</sup> 20 C.F.R. § 10.433(a).

<sup>10</sup> *Id.* at § 10.438.

<sup>11</sup> 5 U.S.C. § 8129; *Levon H. Knight*, 40 ECAB 658 (1989).

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 15, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 7, 2012  
Washington, DC

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

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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