

FACTUAL HISTORY

OWCP accepted that on May 11, 2010 appellant, then a 59-year-old census enumerator, sustained a left ankle sprain, tear of his left Achilles tendon and tear of the medial meniscus of his left knee when steps cracked underneath his feet while working in Delray Beach, FL.² Appellant stopped work on May 11, 2010.³ He underwent a left Achilles tendon repair on May 17, 2010 which was authorized by OWCP. Appellant initially received continuation of pay and started receiving compensation for temporary disability on June 26, 2010.

In a November 17, 2010 letter to an OWCP claims examiner, Robert Heitmann, a senior workers' compensation specialist for the employing establishment, noted that appellant had received OWCP compensation based on an improper pay rate.⁴ He also sent the letter to appellant's address of record. Mr. Heitmann stated that, with respect to appellant's pay rate, reference should be made to Chapters 2.900.12(e) and 2.901.9 of OWCP procedure and FECA Circular No. 10-01 (issued January 15, 2010). He explained the usual application of 5 U.S.C. § 8114(d)(1) and (2) and was not appropriate for temporary, intermittent census workers unless disability extended beyond 90 days and the claimant had similar employment during the year prior to the injury. Mr. Heitmann noted that the correct formula for calculating appellant's pay rate was as follows: $\$14.75$ (appellant's pay per hour) \times 4.5 hours \times 150/52 = $\$191.47$ per week. He pointed out, however, that appellant's previously paid compensation was based on a full time, 40-hour per week pay rate of $\$14.75 \times 40$ hours = $\$590.00$. Mr. Heitmann then listed the amounts of overpaid compensation (totaling $\$4,867.73$) that appellant received between June 26 and October 17, 2010 based on the use of an improper pay rate.⁵

In a November 22, 2010 letter to appellant, Mr. Heitmann advised that OWCP's procedure manual dictated how pay rates were calculated. He informed appellant that pay rates could not be calculated based on a temporary, nonstatus employee's desire to become a full-time, career government employee "as you expressed in your voice mail." Mr. Heitmann stated, "Your compensation pay rate should have been calculated on the same basis of every other injured enumerator; however, due to an error, it was miscalculated." In a November 30, 2010 letter to appellant, he advised that, with respect to the pay rate calculation, OWCP would inform him of how to contest any overpayment after it had issued a formal decision on the matter.

² Appellant's supervisor completed a portion of the traumatic claim form submitted by appellant on May 12, 2010 and indicated that appellant's workdays and work hours varied. The position of census enumerator was a part-time, temporary position which involved working on an intermittent basis during the 2010 Decennial Census. The position did not guarantee work for 40 hours per week and appellant was paid at a rate of $\$14.75$ per hour.

³ Appellant worked for the employing establishment for 14 days prior to sustaining his May 11, 2010 injury and he worked for a total of 80 hours during these 14 days. He attended training sessions for the first few days of this 14-day period and during the remaining days he engaged in enumerator duties.

⁴ The letter was addressed to Patricia Turner, a claims examiner, who was handling appellant's claim at the time. In early 2011, another OWCP claims examiner, Loretta Miller-Robertson, began handling appellant's claim.

⁵ The record also contains a form document, completed on August 19, 2010 by an administrative specialist for the employing establishment, which contains a recitation of the census worker pay formula (*i.e.*, claimant's hourly pay rate \times 4.5 hours \times 150/52). It does not appear that this document was sent to appellant.

Mr. Heitmann noted that pay rate calculations were a matter of law and did not take into consideration future aspirations of injured workers.

In a May 20, 2011 letter, OWCP advised appellant of its preliminary determination that he received a \$9,952.52 overpayment of compensation. For the period June 26, 2010 to April 3, 2011 he was paid compensation based on the weekly pay rate of \$590.00 but should have been paid compensation based on the weekly pay rate of \$191.47 derived from the census worker pay formula for temporary workers.⁶ It informed appellant that it also made a preliminary determination that he was at fault in the creation of the overpayment because he knew or reasonably should have known that he received incorrect payments. OWCP provided appellant with a financial informational questionnaire (Form OWCP-20) and requested that he complete and return it within 30 days.

In a May 24, 2011 letter, appellant challenged OWCP's preliminary determination that he had received an overpayment of compensation. He claimed that in October 2010, Ms. Turner and Ms. Miller-Robertson told him that his compensation was based on a full 40-hour workweek. Appellant contended that he worked 40-hour work weeks prior to being injured at work. He asserted that his case examiner "overrode" Mr. Heitmann's calculations regarding his pay rate and continued to receive compensation based on a 40-hour pay rate after November 2010.⁷

Appellant requested a hearing before an OWCP hearing representative regarding the claimed overpayment of compensation. He submitted a Form OWCP-20 detailing his financial situation which he completed on June 7, 2011. On the form, appellant asserted that he did not receive an overpayment of compensation and that he was not at fault in creating any overpayment. He stated, "I never had a say in what the Census was paying me other than the \$14.75 [per hour] I was paid until my horrific accident on the job...." Appellant asserted that Mr. Heitmann's assessment of his pay rate had been "overruled" by OWCP.

In a June 17, 2011 letter, Ms. Miller-Robertson advised that appellant had been paid compensation at an improper pay rate and noted that he was initially notified of this error through the November 17, 2010 letter of Mr. Heitmann. She described the census worker pay formula and indicated that the matter would be further discussed at his hearing.

In a June 20, 2011 letter to Ms. Miller-Robertson, appellant asserted that Ms. Turner and Ms. Miller-Robertson told him that Mr. Heitmann did not and never would determine what compensation he was paid. He contended that Ms. Turner stated, "I determine what you get paid," and told him that Mr. Heitmann's assessment was wrong and did not affect him. Appellant discussed his financial acumen noting that he had worked in various positions in the

⁶ The record contains documents detailing the amount of compensation appellant received for the period June 26, 2010 to April 3, 2011 as well as the census worker pay formula for calculating the amount of compensation he should have received for this period and the resultant overpayment that occurred due to OWCP's failure to use this formula.

⁷ On May 25 and 27, 2011 appellant telephoned Ms. Miller-Robertson and advised her that he believed that he had not received an overpayment.

financial market, including as a stockbroker and senior mortgage specialist, for a period of almost 35 years.⁸

At the October 13, 2011 hearing before an OWCP hearing representative, appellant testified that he worked 80 hours in the 14 days prior to his May 11, 2010 work injury. He stated that his work schedule was flexible and that the job did not allow working more than 40 hours per week. The job involved calling people that he was assigned for the purpose of gathering census information. Appellant knew that the enumerator job was not going to be more than a two- or three-month job at best and stated that he planned to move to Washington, DC, to find a job based on his experience in the financial services business. He acknowledged receiving several letters from Mr. Heitmann in November 2010 and indicated that, after he received the first letter dated November 17, 2010, he telephoned Ms. Turner and Ms. Miller-Robertson who told him that they, not Mr. Heitmann, determined what compensation he was paid. Appellant indicated that he was surprised when in May 2011 OWCP sent him a letter that was “almost identically written as the one that Mr. Heitmann wrote back in November 17.” Appellant also testified regarding his monthly income, monthly expenses and assets.⁹

In a January 18, 2012 decision, an OWCP hearing representative found that appellant received a \$9,952.52 overpayment of compensation for which he was at fault in creating, thereby precluding waiver of recovery of the overpayment. She further found that, given the amount of the overpayment and appellant’s income and age, the overpayment should be recovered by deducting \$500.00 from his ongoing compensation payments every 28 days. The hearing representative discussed the census worker pay formula in the context of appellant’s hourly wage (\$14.75 x 4.5 hours x 150/52) and explained that appellant’s pay rate should have been calculated using this formula rather than a formula based on full-time, permanent work. She indicated that appellant’s statements of record and financial experience made it clear that he knew of the part-time and temporary nature of his position and concluded that, therefore, he should have been aware that the compensation he was receiving was several times above his entitlement given the nature of his employment.

LEGAL PRECEDENT -- ISSUE 1

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.¹⁰ Section 8129(a) of FECA provides, in pertinent part, “When an

⁸ In an August 11, 2011 letter, appellant asserted that Ms. Turner and Ms. Miller-Robertson told him verbally on several occasions that Mr. Heitmann’s letters regarding his pay rate were irrelevant and that they determined what compensation he would be paid.

⁹ In a November 13, 2011 letter, Mr. Heitmann stated that appellant was paid for 80 hours for his two weeks of employment but that he had no expectation of any number of hours. He stated, “In other words, he may have worked up to 40 hours one week, but the next, may have been assigned enough cases to work 10 hours, or none. That is the nature of Decennial Census temporary intermittent work, and the reason Census determined that the average of all 700,000 enumerators worked 4 hours per week, 4.5 hours per day during the entire term of their employment.”

¹⁰ 5 U.S.C. § 8102(a).

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.”¹¹

For temporary-hire employees (including enumerators and crew leaders), the pay rates for 2010 Decennial Census workers were to be calculated in accordance with OWCP’s procedure manual which provides:

“Enumerators and crew leaders ordinarily worked 4.5 hours per day, 4 days per week. Where disability extended beyond 90 days and the claimant had similar employment during the year prior to the injury, compensation should be paid according to ... 5 U.S.C. [§] 8114(d)(1) and (2).¹² Otherwise, it should be paid on a weekly basis using the following formula: 150 x the actual daily wage divided by 52 (the actual daily wage should be determined by multiplying the hourly pay rate by 4.5 hours).”¹³

ANALYSIS -- ISSUE 1

The Board finds that appellant received a \$9,952.52 overpayment of compensation because OWCP used an improper pay rate for the period June 26, 2010 to April 3, 2011. Appellant held a temporary enumerator job with intermittent hours during the 2010 Decennial Census and worked for a total of 80 hours during the 14 days he worked prior to sustaining a disabling work injury on May 11, 2010.¹⁴

Between June 26, 2010 and April 3, 2011, OWCP improperly paid appellant compensation that was based on a pay rate derived from working an average of 40 hours per week.¹⁵ Appellant was not entitled to receive compensation based on such a pay rate because he

¹¹ *Id.* at § 8129(a).

¹² 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 was fixed, the average annual earnings are the annual rate of pay; or if the annual rate of pay 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. 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. *See* 5 U.S.C. § 8114(d)(1), (2).

¹³ *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Computing Compensation*, Chapter 2.901.9 (October 2009). *See id.* at Chapter 2.900.12(e) (March 2011) and FECA Circular 10-01 (issued January 15, 2010).

¹⁴ The position, which was meant to last for a limited period, did not guarantee work for 40 hours per week. Appellant did not have set workdays or work hours and it was possible that on some days he would be assigned no work at all.

¹⁵ The compensation appellant received was based on a pay rate of \$590.00 per week.

did not work in the job in which he was employed at the time of his injury during substantially the whole year immediately preceding the injury and the position was not one which would have afforded him employment for substantially a whole year. Therefore, the pay rates described in 5 U.S.C. § 8114(d)(1) and (2) were not applicable to the calculation of his pay rate for compensation purposes.¹⁶ OWCP procedures provide that in such a situation, a special formula is used for part-time, temporary census workers such as appellant: actual hourly pay rate x 4.5 x 150/52.¹⁷ Appellant should have been paid compensation based on this formula for the period June 26, 2010 to April 3, 2011, but he improperly received compensation based on a much higher pay rate.¹⁸ The record contains documents showing that OWCP's payment of compensation based on an improper pay rate resulted in appellant receiving \$9,952.52 more in compensation than he should have received during this period. For these reasons, OWCP properly determined that appellant received a \$9,952.52 overpayment of compensation.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of FECA provides that where an overpayment of compensation has been made "because of an error of fact or law," adjustment shall be made by decreasing later payments to which an individual is entitled.¹⁹ The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): "Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience."²⁰ No waiver of payment is possible if the claimant is not "without fault" in helping to create the overpayment.²¹

In determining whether an individual is not "without fault" or alternatively, "with fault," section 10.433(a) of Title 20 of the Code of Federal Regulations provide in relevant part:

"An individual is with fault in the creation of an overpayment who:

- (1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or
- (2) Failed to provide information which he or she knew or should have known to be material; or

¹⁶ See *supra* note 12.

¹⁷ See *supra* note 13. Appellant was paid \$14.75 per hour and application of the census worker pay formula yielded a pay rate of \$191.47.

¹⁸ Before OWCP and on appeal, appellant argued that he should have been paid compensation based on a 40-hour workweek because he worked 80 hours in the 14 days prior to his May 11, 2010 injury. He did not present any support for this position and the relevant precedent described above does not support his contention in this regard.

¹⁹ 5 U.S.C. § 8129(a).

²⁰ *Id.* at § 8129(b).

²¹ *Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

(3) Accepted a payment which he or she knew or should have known to be incorrect....”²²

Section 10.433(c) of OWCP’s regulations provide:

“Whether or not OWCP determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual’s capacity to realize that he or she is being overpaid.”²³

If OWCP finds a claimant to be without fault in the matter of an overpayment for a given period, then, in accordance with section 8129(b), OWCP may only recover the overpayment if it determined that recovery of the overpayment would neither defeat the purpose of FECA nor be against equity and good conscience.²⁴ According to 20 C.F.R. § 10.436, recovery of an overpayment would defeat the purpose of FECA if recovery would cause hardship because the beneficiary needs substantially all of his 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.²⁵ According to 20 C.F.R. § 10.437, 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 position for the worse.²⁶ To establish that a valuable right has been relinquished, it must be shown that the right was in fact valuable, that it cannot be regained and that the action was based chiefly or solely in reliance on the payments or on the notice of payment.²⁷

ANALYSIS -- ISSUE 2

OWCP determined that appellant was at fault in creating the \$9,952.52 overpayment of compensation from June 26, 2010 and April 3, 2011 due to receipt of compensation at an

²² 20 C.F.R. § 10.433(a).

²³ *Id.* at § 10.433(c).

²⁴ 5 U.S.C. § 8129(b).

²⁵ 20 C.F.R. § 10.436. An individual is deemed to need substantially all of his monthly income to meet current and ordinary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. *Desiderio Martinez*, 55 ECAB 245 (2004). 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).

²⁶ 20 C.F.R. § 10.437(a), (b).

²⁷ *Id.* at § 10.437(b)(1).

improper pay rate. OWCP found that appellant was at fault because he received compensation payments which he knew or should have known to be incorrect.

The Board finds that the evidence of record shows that it was not until late-November 2010 that appellant received compensation payments which he knew or should have known to be incorrect. Appellant was not at fault in the creation of the overpayment before this point. In mid- to late-November 2010, appellant received several letters from Mr. Heitmann, a senior workers' compensation specialist for the employing establishment, which clearly put him on notice that he had received compensation based on an improper pay rate. Mr. Heitmann addressed a November 17, 2010 letter to an OWCP claims examiner and sent a copy of the letter to appellant's address of record. In the letter, Mr. Heitmann stated that the usual application of 5 U.S.C. § 8114(d)(1) and (2) was not appropriate for temporary, intermittent census workers unless disability extended beyond 90 days and the claimant had similar employment during the year prior to the injury. He noted that the correct formula for calculating appellant's pay rate was as follows: $\$14.75$ (appellant's pay per hour) \times 4.5 hours \times 150/52 = $\$191.47$ per week. Mr. Heitmann pointed out, however, that appellant's previously paid compensation was based on a full time, 40 hour per week pay rate of $\$14.75 \times 40$ hours and he listed the amounts of overpaid compensation received by appellant through October 17, 2010. In November 22 and 30, 2010 letters addressed to appellant, Mr. Heitmann further explained to appellant why he received an overpayment of compensation. The letters of Mr. Heitmann were sent to appellant's address of record and appellant has acknowledged receiving them.

The November 17, 2010 letter of Mr. Heitmann explained to appellant how his compensation was based on an improper pay rate and, after receiving this letter, appellant knew or should have known that any future compensation payments he received based on the same incorrect pay rate constituted an overpayment of compensation.²⁸ Before OWCP and on appeal, appellant claimed that two OWCP claims examiners, Ms. Turner and Ms. Miller-Robertson, told him that they, rather than Mr. Heitmann, were in charge of determining the amount of compensation he received and that he should ignore the letters of Mr. Heitmann. However, appellant did not submit any evidence to support this assertion.²⁹

The first compensation check that OWCP paid to appellant after he received the November 17, 2010 letter of Mr. Heitmann covered a period beginning November 29, 2010. This compensation check and the remaining compensation checks paid through April 3, 2011 were improper due to use of an incorrect pay rate. Given that appellant knew or should have known as of November 17, 2010 that he was receiving incorrect amounts of compensation, he was at fault in the creation of the overpayment from November 29, 2010 to April 3, 2011.

²⁸ The Board further notes that appellant's extensive experience in the financial services field helped to give him a high capacity to realize that he was being overpaid. *See supra* note 23.

²⁹ The record reflects that appellant was proactive in handling his compensation case. Although the record contains evidence of several telephone conversations between appellant and Ms. Miller-Robertson in 2011, there is no indication in the documents describing the conversations that Ms. Miller-Robertson or Ms. Turner told appellant that Mr. Heitmann's pay rate assessment was improper. In a June 17, 2011 letter, Ms. Miller-Robertson indicated that appellant had been paid compensation at an improper pay rate and noted that he was initially advised of this error through the November 17, 2010 letter of Mr. Heitmann. She provided no indication that Mr. Heitmann improperly identified a payment of compensation at an improper rate.

The Board notes that OWCP improperly determined that appellant was at fault in creating the overpayment of compensation for the period June 26 to November 28, 2010. OWCP did not support its finding that appellant accepted a payment which he knew or should have known to be incorrect before gaining knowledge of the incorrect payments in mid-November 2010. It suggested that appellant had knowledge of what his proper compensation rate should be around the time he started working as an enumerator, but it did not present any evidence to support this assertion. There is no evidence of record which establishes that appellant would have understood prior to mid-November 2010 what pay formula would apply for wage-loss compensation purposes.

Appellant would not be entitled to waiver of recovery of the overpayment during the period that he has been found to be at fault, November 29, 2010 to April 3, 2011.³⁰ For the period that the Board has found appellant not at fault in the creation of the overpayment, June 26 to November 28, 2010, OWCP may only recover the overpayment if it is determined that recovery of the overpayment would neither defeat the purpose of FECA nor be against equity and good conscience.³¹ Therefore, the case shall be remanded to OWCP for a consideration of whether appellant is entitled to waiver of recovery for the period June 26 to November 28, 2010. After such development it deems necessary, OWCP shall issue an appropriate decision regarding the overpayment.³²

CONCLUSION

The Board finds that OWCP properly determined that appellant received a \$9,952.52 overpayment of compensation. The Board further finds that appellant was not at fault in the creation of the overpayment for the period June 26 to November 28, 2010; but OWCP properly found that he was at fault in the creation of the overpayment from November 29, 2010 to April 3, 2011 and that waiver of recovery of the overpayment is precluded for this period. The case is remanded to OWCP for further development.

³⁰ See *supra* notes 20 and 21.

³¹ See *supra* notes 24 through 27.

³² The Board notes that, given the disposition of the fault and recovery issues, the case is not in posture for decision regarding whether OWCP properly required repayment of the overpayment by deducting \$500.00 from appellant's compensation payments every 28 days.

ORDER

IT IS HEREBY ORDERED THAT the January 18, 2012 decision of the Office of Workers' Compensation Programs is affirmed with respect to the fact and amount of the overpayment. The January 18, 2012 decision is affirmed with respect to the finding that appellant was at fault in the creation of the overpayment from November 29, 2010 to April 3, 2011, but the decision is set aside with respect to the finding that he was at fault in the creation of the overpayment from June 26 to November 28, 2010. The case is remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: February 15, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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