



June 28, 2001 appellant earned \$16.71 per hour, with \$13.04 per week in night differential and \$10.54 per week in Sunday premium pay.<sup>1</sup> The form indicated that he did not work a fixed 40 hours per week schedule.

As of December 21, 2001, the Office began paying compensation for wage loss, retroactive to July 14, 2001, with a pay rate for compensation purposes of \$691.98 per week. The pay rate represented 40 hours per week at \$16.71 per hour, plus \$13.04 per week in night differential and \$10.54 per week in Sunday premium pay. Appellant continued to receive compensation based on a pay rate of \$691.98 per week until June 2, 2002. He returned to a light-duty job on June 11, 2002.

By letter dated July 26, 2002, the Office advised appellant that it had made a preliminary determination that an overpayment of \$11,009.99, was created during the period July 14, 2001 to June 2, 2002. The Office stated that he had been paid compensation based on an incorrect pay rate of \$691.98, rather than the correct pay rate of \$374.82 per week. According to the Office, appellant was paid \$24,021.83 in compensation during this period, but should have been paid \$13,011.84. An accompanying memorandum stated that he was a part-time flexible clerk averaging 21.02 hours per week, therefore, his pay rate should have been 21.02 multiplied by \$16.71 per hour, with an additional \$23.58 in night differential and premium pay.

The record contains an employing establishment document showing appellant's work hours, night pay and Sunday pay in the year prior to June 28, 2001. The Board notes that during the initial 13 weeks of this period, he did not work except for 6 hours in week 5 and 5 hours in week 6. Commencing with week 14 appellant worked varying hours up to 40 hours per week. The document concluded that over the 1-year period he worked 1093.12 hours or 21.02 hours per week.

Appellant requested a hearing and in a decision dated December 5, 2002, an Office hearing representative found that the case was not in posture for a hearing. The hearing representative stated that the record did not contain evidence as to whether he worked "substantially the whole year" under 5 U.S.C. § 8114(d)(1)(B) and the case was remanded for further development.

In a January 30, 2003 letter, the employing establishment reported that appellant's "averaged salary" was \$18,107.34 annually or \$348.22 per week. No specific explanation was provided as to how this amount was calculated.

By letter dated February 6, 2003, the Office made a preliminary determination that an overpayment of \$11,223.37 was created from July 14, 2001 to June 2, 2002. The Office stated that appellant should have been paid with a pay rate for compensation purposes of \$368.68 per week, which represented a base annual salary of \$18,107.34, plus \$515.81 in night differential and \$548.29 Sunday premium, divided by 52. The Office did not discuss the provisions of 5 U.S.C. § 8114.

---

<sup>1</sup> The CA-2 form indicated that appellant had stopped working on June 27, 2001.

With respect to fault, the Office determined that appellant was not at fault in creating the overpayment and he submitted an overpayment recovery questionnaire (Form OWCP-20). Appellant reported monthly income of \$2,200.00, with expenses that included \$1,600.00 for rent, food, clothing and utilities, plus an estimated \$1,800.00 to \$2,000.00 in credit card payments. At a September 4, 2003 hearing, he indicated that he had minimum payments of approximately \$100.00 each on four credit cards.

By decision dated November 13, 2003, an Office hearing representative finalized the determination that an overpayment of \$11,223.37, was created during the period July 14, 2001 to June 11, 2002.<sup>2</sup> The hearing representative denied waiver of the overpayment as appellant had excess monthly income over expenses.

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

Section 8114(d) of the Federal Employees' Compensation Act provides:

“Average annual earnings are determined as follows:

“(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 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 5½-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.

“(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

---

<sup>2</sup> The overpayment period is July 14, 2001 to June 2, 2002; although appellant was paid through June 10, 2002, the final compensation payment was not based on a \$691.98 pay rate and was not included in the overpayment calculations.

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 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 1 year immediately preceding his injury.”

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

The overpayment in this case is based on an incorrect pay rate. Appellant was paid compensation from January 14, 2001 to June 2, 2002, based on a pay rate for compensation purposes of \$691.98, which represented wages at \$16.71 for a 40 hours per week employee, plus night differential and premium pay. The information from the employing establishment indicated that he was not a full-time employee and did not work 40 hours per week. Therefore, fact of overpayment has been established in this case.

With respect to the specific amount of the overpayment, however, the Board finds that the case must be remanded to the Office. As the hearing representative noted in his December 5, 2002 decision, pay rate is determined under 5 U.S.C. § 8114(d). In this regard, the Office made no findings as to how the statute was applied in this case to determine pay rate. With respect to appellant’s employment in the year prior to the injury, the Office did not acknowledge that the record indicated that he did not work for 11 weeks out of the first 13 weeks and only minimally for the other 2 weeks. No other information was provided from the employing establishment regarding this period. According to Office procedures, appellant did not work “substantially the whole year” preceding the injury.<sup>3</sup> If the employment would have afforded employment for substantially a whole year, section 8114(d)(2) would then require examination of the average annual earnings of an “employee of the same class” who did work substantially the whole year, but this would be difficult to apply here since appellant is a flexible clerk, a position that by its nature involves a wide variety of hours worked.

It would appear that section 8114(d)(3) is applicable in this case and in this regard the Office did not clearly explain why the pay rate of \$368.68 was a sum that reasonably represented appellant’s wage-earning capacity. The Office apparently took actual earnings of \$18,107.34 and divided by 52 to determine average weekly earnings. However appellant did not work for 11 weeks out of the initial 13 weeks, but worked steadily for the remaining weeks.

The Board finds that the Office failed to adequately explain its findings as to the correct pay rate for compensation purposes in this case. The case will be remanded to the Office for a

---

<sup>3</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.4 (December 1995) indicates that an employee that has worked at least 11 months before the injury in the date of injury job has worked substantially the whole year.

proper determination of the pay rate for compensation purposes under 5 U.S.C. § 8114(d). The Office should clearly explain how appellant's pay rate was determined under the statute.

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

Section 8129(b) of the Act<sup>4</sup> provides: "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 the Act or would be against equity and good conscience."<sup>5</sup> Since the Office found appellant to be without fault in the creation of the overpayment, the Office may only recover the overpayment if recovery would neither defeat the purpose of the Act, nor be against equity and good conscience. The guidelines for determining whether recovery of an overpayment would defeat the purpose of the Act or would be against equity and good conscience are set forth in sections 10.434 to 10.437 of Title 20 of the Code of Federal Regulations.

According to section 10.436, recovery of an overpayment would defeat the purpose of the Act 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 the Office from data provided by the Bureau of Labor Statistics.<sup>6</sup> For waiver under the "defeat the purpose of the Act" standard, appellant must show that he needs substantially all of his current income to meet current ordinary and necessary living expenses and that his assets do not exceed the resource base.<sup>7</sup>

Section 10.437 provides that recovery of an overpayment would be against equity and good conscience if: (a) the overpaid individual would experience severe financial hardship in attempting to repay the debt; or (b) the 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.

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

With respect to whether recovery of the overpayment would defeat the purpose of the Act, the hearing representative examined the evidence with respect to monthly income and expenses. Appellant reported \$2,200.00 in monthly income, with \$1,600.00 in expenses for rent, food, clothing and utilities, plus \$400.00 in minimum credit card payments. The record does indicate that he had \$200.00 in excess monthly income over expenses. An individual is deemed to need substantially all of his current income to meet ordinary and necessary living expenses if

---

<sup>4</sup> 5 U.S.C. §§ 8101 *et seq.*

<sup>5</sup> 5 U.S.C. § 8129(b).

<sup>6</sup> Office procedures provide that the assets must not exceed a resource base of \$3,000.00 for an individual or \$5,000.00 for an individual with a spouse or dependent plus \$600.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200 (September 1994).

<sup>7</sup> See *Robert E. Wenzholz*, 38 ECAB 311 (1986).

monthly income does not exceed expenses by more than \$50.00.<sup>8</sup> Since the record indicated that appellant had more than \$50.00 in excess monthly income, he is not deemed to need substantially all current income to meet ordinary and necessary living expenses and, therefore, recovery of the overpayment does not defeat the purpose of the Act.

With respect to equity and good conscience, no evidence was presented that appellant gave up a valuable right or changed his position for the worse in reliance on the overpayment. As noted above, the evidence regarding monthly income and expenses shows excess monthly income and does not establish severe financial hardship in attempting to repay the overpayment. The Board finds that recovery of the overpayment would not defeat the purpose of the Act or be against equity and good conscience under sections 10.436 and 10.437 and, therefore, the Office properly denied waiver of the overpayment.

### CONCLUSION

The Board finds that an overpayment of compensation occurred during the period July 14, 2001 to June 2, 2002. The specific amount of the overpayment cannot be determined as the Office failed to properly explain its findings with respect to the correct pay rate for compensation purposes during this period. Based on the evidence of record, appellant is not entitled to waiver of the overpayment.

---

<sup>8</sup> *Jorge O. Diaz*, 51 ECAB 124, 128 (1999); *Marlon G. Massey*, 49 ECAB 650 (1998); *Carroll R. Davis*, 46 ECAB 361, 363 (1994).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated November 13, 2003 is affirmed with respect to the fact of overpayment and denial of waiver. The decision is set aside with respect to the amount of the overpayment and remanded for an appropriate decision.

Issued: November 23, 2004  
Washington, DC

Alec J. Koromilas  
Chairman

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member