



## ISSUES

The issues on appeal are: (1) whether the Office properly determined that an overpayment in the amount of \$794.11 was created and (2) whether the Office abused its discretion by refusing to waive recovery of the overpayment.

## FACTUAL HISTORY

On December 6, 2002 appellant, then a 23-year-old tax examining clerk, filed a claim for an occupational disease alleging that she developed a hand condition due to her daily computer use and using her right hand to operate a 10-key pad. She noted the date of injury as December 5, 2002. Appellant stopped work on December 6, 2002 and returned on December 12, 2002 with restrictions. The Office accepted the conditions of right elbow strain and forearm strain. Appropriate medical and wage-loss benefits were paid.

The record reflects that, when appellant was injured on December 5, 2002, she was working 33 hours on a 6/7/7/7/6-hour-a-week schedule in a 40-hour-a-week position with an annual base salary of \$32,480.00. The employing establishment indicated that she had been working in that position for 11 months prior to her injury. On March 24, 2003 appellant started working a 40-hour-a-week job, which was noted as having an annual base salary of \$34,057.00, with a 9-hour-a-day condensed work schedule and worked from March 25 to May 5, 2003, when a pattern of total disability of 9 hours a day began. The Office indicated that appellant was paid \$1,124.31, by U.S. Check #00001705 dated June 20, 2003, for 108 hours of intermittent time off for the period May 5 to 30, 2003 and was paid \$742.05, by U.S. Check #00001408 dated July 11, 2003, for 31 hours of intermittent time off work for the period June 2 to 26, 2003. The Office reported that the pay rate for compensation purposes was \$515.31 per week,<sup>2</sup> which is reflected in the daily computation log kept by the Office.

By decision dated February 17, 2004, the Office terminated appellant's compensation benefits and denied her recurrence claim for the period commencing May 5, 2003.<sup>3</sup>

By letter dated February 18, 2004, the Office made a preliminary determination that appellant was overpaid compensation benefits in the amount of \$794.11 during the period May 5 to June 26, 2003 because it had incorrectly paid compensation based on her new full-time 40-hour schedule, rather than on her 33-hour week schedule she held at the time of injury. The Office further advised that she was without fault in creating the overpayment. The Office requested that he indicate whether appellant wished to contest the existence or amount of the

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<sup>2</sup> The Office found that appellant earned a weekly base pay rate of \$515.31 in her 33-hour date-of-injury job. The annual salary of \$32,480.00 was divided by 52 weeks/year to achieve a weekly base pay rate of \$624.62 for a 40-hour job. Appellant's weekly pay rate was calculated by: \$624.62 (weekly pay rate based upon a 40-hour week) multiplied by 33/40 hours to get a weekly pay rate of \$515.31 based on a 33-hour workweek. The Board notes that hourly rate for appellant's date-of-injury position for both the 40-hour week and the 33-hour week equates to \$15.62. The new 40-hour position which appellant started on March 24, 2003 was noted as having an annual salary of \$34,057 which has a weekly base pay rate of \$654.94 and a \$16.37 hourly rate based on a 40-hour workweek.

<sup>3</sup> As previously noted, the Board does not have jurisdiction over the merits of the February 17, 2004 decision. *See supra* note 1.

overpayment or to request waiver of the overpayment and asked her to complete an attached overpayment recovery questionnaire (Form OWCP-20) and submit financial documents in support thereof. The Office informed her that the financial information would be used to determine whether she was entitled to waiver and that failure to submit the requested financial information within 30 days would result in a denial of waiver of the overpayment.

Appellant did not respond to the February 18, 2004 preliminary notice.

By decision dated April 5, 2004, the Office finalized the overpayment determination in the amount of \$794.11 and found that appellant was not at fault in the creation of the overpayment. The Office further determined that the circumstances of the case did not warrant waiver of the overpayment as she did not request waiver and did not submit the required financial information required to consider waiver.

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

Under 5 U.S.C. § 8101(4), “‘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....”<sup>4</sup>

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.”

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“(3) If either of the foregoing methods of determining the average annual earnings cannot be applied reasonably and fairly, the average annual

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<sup>4</sup> 5 U.S.C. § 8101(4); *see also* 20 C.F.R. § 10.5(a)(20).

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 Federal 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.”<sup>5</sup>

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

Because of the confusion of appellant’s work schedule and the fact that she accepted a new job with increased hours and pay, the Office found that it had incorrectly paid appellant based on a 40-hour week in her new position, which was noted as having a \$16.37 hourly rate, during the period May 5 to June 25, 2003, when it should have continued to pay her based on her date-of-injury 33-hour-per-week job, which had a \$15.62 hourly rate. The Office stated that she claimed and was paid for, more disability than the originally scheduled number of hours to be worked per week (33 hours) which, in turn, created the overpayment.

Initially, the Board notes that appellant received compensation based on her date-of-injury, 33-hour-per-week job. Pay rate for compensation purposes is determined pursuant to section 8101(4) and section 8114. Under section 8101(4), the pay rate in this case is determined to be December 5, 2002, the date disability began, as there is no evidence that appellant suffered a recurrence of disability after she had been in her new position for more than six months.<sup>6</sup> Thus, although she started a new job on March 24, 2003 with increased hours and wages, she would only be entitled to the pay rate which she earned in her date-of-injury position.

Under section 8114(d)(1)(a), the evidence indicates that appellant had a fixed annual salary on December 5, 2002 the date disability began. According to the employing establishment, she earned \$26,796.00 or a weekly rate of \$515.31 in her 33-hour-a-week position and had worked in such position during substantially the whole year immediately preceding the injury pursuant to the statute. Appellant’s weekly earnings of \$515.31 in her 33-hour-a-week date-of-injury position represent her average annual earnings in this case. Thus, the Board finds that the Office used the correct rate of pay based on the date disability began in calculating her compensation.

For the period May 5 to 30, 2003, the record reflects that appellant was paid \$1,124.31 for 108 hours based on a 40-hour week position. However, the record reflects that she worked 44.5 hours during that time frame and was only entitled to a maximum of 71.5 hours based on

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<sup>5</sup> 5 U.S.C. § 8114(d).

<sup>6</sup> Although appellant had filed a recurrence claim commencing May 5, 2003, the Board finds that the issue of whether she would be entitled to a greater pay rate based on the alleged May 5, 2003 recurrence is premature at this time as that issue is still under development.

her 33-hour week position. Thus, based on her date-of-injury 33-hour week position, appellant should have been paid \$749.54 for 71.5 hours, which created an overpayment in the amount of \$374.77. The Board further finds that, for the period June 2 to 26, 2003, she received \$742.05 for 54 claimed hours based on her 40-hour week position. However, based on her 33-hour week position, she should have been paid \$322.71, which resulted in an overpayment in the amount of \$419.34. The Board finds that this resulted in a total overpayment amount of \$794.11 which is supported by the evidence of record and the Office's calculations.

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

The waiver or refusal to waive an overpayment of compensation by the Office is a matter that rests within the Office's discretion pursuant to statutory guidelines.<sup>7</sup> These statutory guidelines are found in section 8129(b) of the Act which states: "Adjustment or recovery [of an overpayment] by the United States may not be made when [an] 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>8</sup> Since the Office found appellant to be without fault in the creation of the overpayment, then, in accordance with section 8129(b), the Office may only recover the overpayment if it determined that recovery of the overpayment would neither defeat the purpose of the Act nor be against equity and good conscience.

Section 10.436 of the implementing regulation provides that recovery of an overpayment will defeat the purpose of the Act if such recovery would cause hardship to a currently or formerly entitled beneficiary because: (a) the beneficiary from whom the Office seeks recovery needs substantially all of his or her current income, (including compensation benefits) to meet current or ordinary and necessary living expenses; and (b) the beneficiary's assets do not exceed a specified amount as determined [by the Office] from data furnished by the Bureau of Labor Statistics. 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.<sup>9</sup>

Section 10.437 provides that 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 or her position for the worse.<sup>10</sup>

Section 10.438 of the regulation provides that, "[t]he individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by [the Office]. This information is needed to determine whether or not recovery of an

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<sup>7</sup> See *James Lloyd Otte*, 48 ECAB 334, 337 (1997).

<sup>8</sup> 5 U.S.C. § 8129(b); see *Robert Atchison*, 41 ECAB 83 (1989).

<sup>9</sup> 20 C.F.R. § 10.436.

<sup>10</sup> 20 C.F.R. § 10.437.

overpayment would defeat the purpose of the Act or be against equity and good conscience.”<sup>11</sup> 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>12</sup>

### ANALYSIS -- ISSUE 2

Because appellant was not at fault in creating the overpayment, the Office proceeded to determine whether appellant was entitled to waiver of the overpayment.

Appellant failed to meet her responsibility for providing the requisite financial information to support waiver of the overpayment. The Office requested that appellant submit a Form OWCP-20 for the purpose of determining her entitlement to waiver of the overpayment, but she failed to submit such information within the 30 days allotted by the Office. The Office clearly advised her of her responsibility to submit such information and of the consequences of not doing so. As a result, the Office did not have the necessary financial information to determine whether recovery of the overpayment would defeat the purpose of the Act. Under Office regulation, waiver shall be denied.<sup>13</sup> Therefore, the Office acted properly in refusing to waive the recovery of the overpayment on these grounds.

Consequently, appellant has not established that recovery of the overpayment would defeat the purpose of the Act because she has failed to submit financial information showing that she needs substantially all of her current income to meet ordinary and necessary living expenses and that her assets do not exceed the applicable resource base. She also has not established that recovery of the overpayment would be against equity and good conscience because appellant has failed to submit financial information showing that she would experience severe financial hardship in attempting to repay the debt and has failed to submit evidence showing that she relinquished a valuable right or changed her position for the worse in reliance on the payment which created the overpayment.<sup>14</sup>

Because appellant has failed to submit the requested financial information, she has not established that she is eligible for waiver of recovery of the \$794.11 overpayment.<sup>15</sup>

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<sup>11</sup> 20 C.F.R. § 10.438.

<sup>12</sup> *Id.* at § 10.438(b).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* See *William J. Murphy*, 41 ECAB 569 (1989).

<sup>15</sup> Appellant has alleged that she should not be required to repay the overpayment because the creation of the overpayment was not her fault. However, as noted above, a claimant who requests waiver of recovery of an overpayment must show not only that she was without fault in the creation of the overpayment, but also that recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience.

**CONCLUSION**

The Board finds that the Office properly determined that appellant received an overpayment of compensation of \$794.11 during the period May 5 to June 26, 2003, as the Office failed to properly calculate her compensation based on the 33-hour work schedule upon which her pay rate was based. The Board further finds that the Office properly denied waiver of the overpayment of compensation.<sup>16</sup>

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated April 5, 2004 is affirmed.

Issued: March 25, 2005  
Washington, DC

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member

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<sup>16</sup> As appellant is no longer in receipt of compensation benefits, the Board does not have jurisdiction to review the Office's recovery determination. See *Robert Ringo*, 53 ECAB 258 (2001).