

FACTUAL HISTORY

On August 20, 2004 appellant, then a 36-year-old rural letter carrier, filed a claim for a back condition. She first became aware of the condition on April 22, 2004 when she experienced a sharp pain in her back while lifting tubs of mail. Appellant stopped work on July 24, 2004. The Office accepted her claim for a herniated disc at L4-5 and appellant underwent an L4-5 posterior lumbar interfusion on July 26, 2004.

On the Form CA-7 appellant completed on December 10, 2004, the employing establishment reported that her base pay on the date of injury and the date of disability was \$15.22 per hour. Appellant received compensation for total disability on the periodic rolls for the period August 21, 2004 through March 12, 2005. The record reflects that on December 24, 2004 a check for \$8,218.80 was issued for the period August 21 through December 24, 2004; on February 4, 2005 a check for \$913.20 was issued for the period December 27, 2004 through January 8, 2005; on February 11, 2005 a check for \$913.20 was issued for the period January 9 to 22, 2005; on February 25, 2005 a check for \$913.20 was issued for the period January 24 to February 5, 2005; on March 11, 2005 a check for \$913.20 was issued for the period February 7 to 19, 2005; on March 21, 2005 a check for \$753.75 was issued for the period February 21 to March 5, 2005; and on April 26, 2005 a check for \$405.87 was issued for the period March 6 to 12, 2005. Appellant returned to work as a modified rural carrier associate on March 14, 2005.²

On January 19, 2005 the employing establishment provided the Office with appellant's base pay for 52 weeks from July 24, 2003.³ The attached worksheet indicated that appellant had worked a total of 1,583.16 hours and earned \$23,799.26. Her average weekly salary was \$457.68 (\$23,799.26 divided by 52 weeks).

By decision dated December 15, 2005, the Office advised appellant that she had been paid at an incorrect pay rate of \$608.80 per week for the period August 21, 2004 through March 12, 2005. The Office noted that \$15.22 was her hourly wage as of July 24, 2004, the date she stopped work, and that her weekly compensation rate as a regular employee was initially calculated by multiplying the hourly rate of \$15.22 by 2,080 hours and dividing it by 52 weeks to arrive at a weekly rate of \$608.80. The Office stated that, as a rural carrier associate, appellant had earned a total income of \$23,799.26 before her disability began and, by dividing her total income by 52, her weekly compensation was \$457.68. It found that appellant's correct pay rate for compensation purposes was \$457.68 as opposed to the \$608.80 rate she was paid from August 21, 2004 through March 12, 2005.

² By decision dated November 29, 2005, the Office found that appellant's position as a modified rural carrier associate fairly and reasonably represented her wage-earning capacity. As previously noted, appellant has not appealed this decision. *See supra* footnote 1. The Board additionally notes that this decision is not adverse to appellant as the modified position has a higher base pay rate of \$16.24 per hour as opposed to her date-of-injury base pay rate of \$15.22 per hour.

³ The Board notes that the employing establishment inadvertently noted that it was providing appellant's base pay for 52 weeks from July 24, 2004. The Board recognizes that this was a typographical error.

On December 16, 2005 the Office issued a preliminary determination that an overpayment had occurred in the amount of \$3,027.63 for the period August 21, 2004 through March 12, 2005 because she had received compensation at an incorrect pay rate to which she was not entitled. It found that appellant was at fault in the matter because she accepted payments she knew or reasonably should have known to be incorrect. The Office advised appellant that if she disagreed with the fact or amount of the overpayment she could submit new evidence and argument in support of her contention. It further advised appellant that, if the Office found her to be without fault in the occurrence of the overpayment, waiver may be considered. The Office informed appellant that, if she disagreed with the decision, she could, within 30 days, submit evidence or argument to the Office, or request a precouplement hearing with the Branch of Hearings and Review on the matter of the overpayment and that any response she wished to make with regard to the overpayment should be submitted within 30 days. A copy of an overpayment recovery questionnaire was also submitted for appellant to complete.⁴

Appellant did not respond to either the pay rate decision of December 15, 2005 or the preliminary overpayment decision of December 16, 2005.

In a decision dated January 18, 2006, the Office finalized the preliminary determination regarding the overpayment of \$3,027.63. The Office further found that appellant was at fault in the creation of the overpayment.

LEGAL PRECEDENT -- ISSUE 1

Pay rate for compensation purposes is the greater of the employee's pay as of the date of injury, the date disability begins, or the date of recurrence of disability if more than six months after returning to work.⁵ Office procedures provide that, for postal service employees where, as here, the hourly salary is reported by the employing establishment and no annual salary was reported, the hourly salary should be multiplied by 2,080 and divided by 52 to determine the weekly compensation rate. For postal service employees who work less than a full schedule, the figure of 2,080 hours should be prorated and then multiplied by the amount shown.⁶

ANALYSIS -- ISSUE 1

On the Form CA-7 appellant completed on December 10, 2004, the employing establishment reported that her pay rate on the date of disability of July 24, 2004 was \$15.22 per hour as a Grade 5, Step Y rural carrier associate. The employing establishment subsequently reported that in the 52 weeks prior to the date of disability of July 24, 2004 appellant earned a total of \$23,799.26 for 1,583.16 hours worked, which equated to a weekly average of \$457.68 with an average of 30.45 weekly hours worked. The Office advised appellant in its December 15, 2005 and January 18, 2006 decisions that she had been paid at the incorrect pay

⁴ The Board notes that the overpayment recovery questionnaire contains the name and claim number of a different claimant.

⁵ 5 U.S.C. § 8101(4).

⁶ Federal (FECA) Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.10.c(1) (April 2002).

rate of \$608.80 per week for the period August 21, 2004 through March 12, 2005, based on one fifty second of her hourly rate for a 40-hour week per year (\$15.22 hourly wage multiplied by 2,080 hours divided by 52 weeks). The Office stated that the pay rate should have been \$457.68 per week, based on one fifty second of her average annual earnings \$23,799.26 one year prior to the date her disability began (\$23,799.26 yearly salary divided by 52 weeks per year). Appellant was not noted to have any night differential or Sunday premium pay. The record reflects that appellant worked an average of 30.45 hours the year prior to the date her disability began. Given the fact that appellant is an hourly employee who did not regularly work 40-hour weeks, the Office properly adjusted appellant's pay rate for compensation purposes to \$457.68 per week, her date-of-disability pay rate. The Board will affirm the Office's December 15, 2005 and January 18, 2006 decisions regarding pay rate for the date of disability.

LEGAL PRECEDENT -- ISSUE 2

The United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.⁷ If disability is partial, the United States shall pay the employee during the disability monthly compensation equal to 66 2/3 percent of the difference between the employee's monthly pay and the employee's monthly wage-earning capacity after the beginning of the partial disability.⁸

ANALYSIS -- ISSUE 2

The record shows that the Office paid compensation based on a weekly pay rate of a regular employee working 40 hours a week at an hourly rate of \$15.22, appellant's hourly wage when her disability began. The Office computed appellant's weekly rate to be \$608.80 (\$15.22 hourly rate multiplied by 2,080 hours per week in a year divided by 52 weeks per year). The record contains a compensation payment history showing the amount of each compensation check issued for the period August 21, 2004 through March 12, 2005. Total compensation paid was \$13,031.21.

The employing establishment clarified that, prior to appellant's April 22, 2004 injury, she worked an average of 30.45 hours per week. It provided the Office with a spreadsheet itemizing appellant's weekly hours and the salary earned for 52 weeks from July 24, 2003, the date her disability began. Work hours totaled 1,583.16 for a total salary of \$23,799.25. Appellant's correct weekly pay rate then would be \$457.68 (\$23,799.26 divided by 52 weeks/year). At this rate appellant should only have received \$10,003.58 in compensation from August 21, 2004 through March 12, 2005, as shown by a compensation worksheet on December 16, 2005.

⁷ 5 U.S.C. § 8102(a).

⁸ 5 U.S.C. § 8106(a). When compensation is paid on a weekly basis, the weekly equivalent of the monthly pay is deemed one fifty second of the average annual earnings. 5 U.S.C. § 8114(c).

The Board finds that appellant received an overpayment of \$3,027.63 (\$13,031.21 minus \$10,003.58) from August 21, 2004 through March 12, 2005. The Board will affirm the Office's January 18, 2006 decision on the fact and amount of the overpayment.⁹

LEGAL PRECEDENT -- ISSUE 3

Section 8129 of the Federal Employees' Compensation Act¹⁰ provides that an overpayment must be recovered unless 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. No waiver of an overpayment is possible if the claimant is not without fault in helping to create the overpayment.¹¹

In determining whether an individual is with fault, section 10.433(a) of the Office's regulations provides in relevant part:

A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment:

“Made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or

“Failed to provide information which the individual knew or should have known to be material; or

“Accepted a payment which he or she knew or should have known to be incorrect.”¹²

ANALYSIS -- ISSUE 3

The Office found that appellant accepted payments which she knew or should have known to be incorrect in reaching its determination that she was at fault in the creation of an overpayment. Based on the circumstances of this case, however, the Board finds that appellant is not with fault in creating the overpayment. The evidence of record is insufficient to establish that appellant was put on sufficient notice to know that she was receiving more money than that to which she was entitled. The record reflects that appellant received checks from the Office which covered approximately a two-week period for the periods December 27, 2004 through January 8, 2005, January 9 through January 22, 2005, January 24 through February 5, and February 7 to February 19, 2005 which amounted to \$913.20 in compensation for each bi-weekly

⁹ The Board notes that the Office inadvertently noted that the period was from August 24, 2004 through March 12, 2005.

¹⁰ 5 U.S.C. § 8129(a)-(b).

¹¹ *Bonnye Mathews*, 45 ECAB 657 (1994).

¹² 20 C.F.R. § 10.433(a).

check period or \$456.60 weekly. When compared to her typical two-week salary of the year prior, the amount of \$913.20 would have been approximately the same as appellant's average bi-weekly salary the year prior of \$915.36 (\$457.68 weekly salary times 2 weeks). Thus, even though the Office incorrectly issued compensation payments based on a 40-hour weekly rate of \$608.80, there is nothing of record to indicate nor did the Office explain how appellant knew or reasonably should have known that the compensation payments received were incorrect as the amounts received were substantially equivalent to her weekly salary of the year prior.

Thus, under these circumstances, the Office improperly found that appellant was at fault in the creation of the overpayment of \$3,027.63. The case must be remanded to consider appellant's eligibility for waiver.

CONCLUSION

The Board finds that the Office properly based appellant's pay rate for compensation on one fifty second of her average annual earnings of her date-of-disability pay rate. The Board also finds that the Office properly determined that appellant received an overpayment in the amount of compensation in the amount of \$3,027.63 for the period August 21, 2004 through March 12, 2005. However, the Board reverses the Office's fault finding and remands the case for consideration of appellant's eligibility for waiver.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated January 18, 2006 and December 15, 2005 are affirmed in part, reversed in part and remanded for further proceedings consistent with this decision.

Issued: August 18, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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