United States Department of Labor
Employees' Compensation Appeals Board

R.F., Appellant	)	
and	)	**Docket No. 06-812**
	)	**Issued: November 15, 2006**
U.S. POSTAL SERVICE, POST OFFICE, Milwaukee, WI, Philadelphia, PA, Employer	)	

Appearances:
Gordon Reiselt, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 22, 2006 appellant filed a timely appeal of the January 11, 2006 pay rate and overpayment decision of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the pay rate and overpayment issues in this case.

ISSUES

The issues are: (1) whether the Office properly computed appellant's pay rate for compensation purposes effective January 24, 2002, the date of injury; (2) whether the Office properly determined that appellant received a $4,330.98 overpayment of compensation for the period January 25, 2003 through October 30, 2004; (3) whether the Office properly denied waiver of the overpayment; and (4) whether the Office properly found that the overpayment should be repaid by deducting $200.00 from appellant's continuing compensation benefits every 28 days.

FACTUAL HISTORY

On January 24, 2002 appellant, then a 46-year-old part-time, flexible driver, filed a claim alleging that he injured himself that day when he fell on ice. His claim was accepted by the Office for bilateral knee contusions, left fifth finger contusion and lumbar strain. The Office subsequently accepted a medial meniscus tear of the right knee, for which he underwent surgery on May 15, 2003. Following his injury, appellant performed restricted-duty work. He stopped work on January 23, 2003. In a January 24, 2003 letter, the employing establishment advised that appropriate accommodations were no longer available. On January 30, 2003 appellant filed a claim for compensation. The employing establishment advised that appellant's pay rate was $18.72 per hour on January 24, 2003, the date disability began. On January 30, 2003 appellant filed a recurrence of disability claim for his work stoppage of January 23, 2003. The Office accepted for permanent aggravation of degenerative disc disease, lumbar spine. The record indicates that, from May 16, 2002 to May 29, 2004, appellant was employed as a limousine driver at $10.00 an hour for 12.42 hours per week.

In a letter dated January 29, 2003, the employing establishment indicated that at the time of the recurrence appellant was earning $18.72 an hour or a weekly pay of $748.80 ($18.72 per hour x 40 hours a week). Prior to the January 24, 2002 injury, appellant had averaged 32 hours of work per week at the hourly rate of $16.71. Appellant had worked in his date-of-injury position since May 23, 1998.

Based on appellant's date of disability weekly pay rate of $748.80, the Office paid wage-loss compensation beginning January 23, 2003. Appellant was placed on the periodic rolls beginning July 13, 2003. In a letter dated October 21, 2003, the Office notified appellant that beginning September 7, 2003 his disability compensation would be based on a weekly pay rate of $550.72.

Appellant, and his attorney, subsequently questioned the reduced weekly pay rate and whether he was being paid at the correct pay rate. He also submitted a CA-7 form claiming additional compensation for the period October 21, 2003 to June 7, 2004.

In an August 17, 2004 letter, the Office advised that the weekly compensation rate was adjusted as appellant had received compensation at an incorrect pay rate. The Office noted that it assumed appellant had worked 40 hours a week at the employing establishment, when he worked on a part-time flexible basis. To clarify the correct pay rate effective date, weekly base pay and night differential and Sunday premium amount, the Office requested that the employing establishment provide appellant's earnings for one year prior to his January 24, 2002 date of injury and one year prior to his January 23, 2003 disability. On the CA-1 form completed on January 24, 2002, the employing establishment listed appellant's hourly rate as $16.71 and on the CA-2a form completed on January 30, 2004 appellant's hourly rate was listed as $18.72. The Office further noted that appellant had worked for a limousine service prior to the date of his January 23, 2003 recurrence, but it was unclear whether he held nonpostal employment for the one year prior to his January 24, 2002 injury.

The Office subsequently received worksheets pertaining to appellant's wages earned one year prior to his January 24, 2002 work injury ($27,766.25), one year prior to his January 23, 2003 disability ($17,391.58), which included night differential and Sunday premium pay. Appellant's wages earned as a limousine driver during the period May 10, 2002 through June 4, 2004 were also submitted. The evidence does not reflect that appellant held other nonpostal employment one year prior to his January 24, 2002 injury.

In a November 5, 2004 letter, the Office issued a notice of proposed overpayment in the amount of $4,330.98 because appellant was paid compensation at an incorrect pay rate from January 25, 2003 through October 30, 2004. The Office found that the correct pay rate was $533.97 a week, which was based on appellant's earnings of $27,766.25 divided by 52 weeks, during the one year prior to the January 24, 2002 injury. The Office stated that, during the period January 25, 2003 through October 30, 2004, appellant received compensation totaling $42,288.52 based on the incorrect pay rate and should have received compensation in the amount of $37,957.54, which resulted in an overpayment in the amount of $4,330.98. The Office found that appellant was not at fault in creating the overpayment. Appellant was advised that he could request a telephone conference, a final decision based on the written evidence only, or a hearing within 30 days of the date of the letter, if he disagreed that the overpayment occurred, if he disagreed with the amount of the overpayment and if he believed that recovery of the overpayment should be waived. The Office requested that he complete an accompanying overpayment recovery questionnaire (Form OWCP-20) and submit financial documents in support thereof within 30 days.

In a November 10, 2004 letter, the Office advised that appellant's weekly rate of compensation had been recomputed pursuant to his request. It further noted that the date of injury weekly pay rate of $533.97 was used.

On November 16, 2004 appellant, through his attorney, requested an oral hearing, which was held October 20, 2005. He argued that appellant was underpaid and that the Office used the incorrect pay rate. Following the hearing, appellant's attorney reiterated his arguments and submitted copies of a personnel form showing that appellant was a part-time flexible employee and a pay schedule for full-time employees effective March 8, 2003.

In an overpayment recovery questionnaire dated November 20, 2005, appellant indicated that there were no assets, his monthly income was $4,199.00[1] and monthly expenses consisted of: $1,018.00 for rent or mortgage, including property tax; $400.00 for food; $200.00 for clothing, $400.00 for utilities and $370.00 for other expenses. Other debts which appellant noted were paid by monthly installments were: $600.00 in child support and a $3,725.00 attorney fee for which he paid $175.00 installments. Appellant contended that he was not at fault in the creation of the overpayment. No financial evidence was submitted.

By decision dated January 11, 2006, an Office hearing representative found that the date of injury of January 24, 2002 represented the correct weekly pay rate for compensation purposes which was $533.97. The Office hearing representative finalized the overpayment determination

[1] Appellant's monthly income was comprised of Veterans benefits of $2,500.00 and Office benefits of $1,699.00.

that a $4,330.98 overpayment had been created for the period January 25, 2003 through October 30, 2004 for which appellant was without fault. The Office hearing representative found that appellant was not entitled to waiver of the overpayment and that the overpayment would be collected by deducting $200.00 every 28 days from his compensation payments.

On appeal, appellant argues his pay rate should have been based on January 23, 2003, the date of his recurrence of disability, which is also the date that his disability began.

LEGAL PRECEDENT -- ISSUE 1

Pay rate for compensation purposes is defined by the Act and in Office regulations as the employee's pay at the time of injury, time disability began or when compensable disability recurred, if the recurrence began more than six months after the employee resumed regular full-time employment with the United States, whichever is greater.[2]

With respect to the calculation of appellant's pay rate for compensation purposes, the Act provides for different methods of computation of average annual earnings depending on whether the employee worked in the employment in which she was injured substantially the entire year preceding the injury or would have been afforded employment for substantially the whole year except for the injury. Section 8114(d) of the Act provides:

> "Average annual earnings are determined as follows –
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> "(1) If the employee worked in the employment in which he was employed at the time of injury during substantially the whole year immediately preceding the injury and the employment was in a position for which an annual rate of pay –
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> > (A) was fixed, the average annual earnings are the 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-day week and 260 if employed on the basis of a 5-day week.
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> "(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 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 for 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]

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[2] 5 U.S.C. § 8101(4); 20 C.F.R. § 10.5(s); *see John M. Richmond*, 53 ECAB 702 (2002).

[3] 5 U.S.C. § 8114(d)(1), (2); *see Billy Douglas McClellan*, 46 ECAB 208, 212-13 (1994).

Section 8114(d)(3) of the Act provides an alternative method for determination of pay to be used for compensation purposes when the methods provided in the foregoing sections of the Act cannot be applied reasonably and fairly.[4]

ANALYSIS -- ISSUE 1

In this case, appellant worked in his position as a part-time flexible driver with the employing establishment during substantially the whole year immediately preceding his injury on January 24, 2002 and performed restricted-duty work on a part-time flexible basis for approximately a whole year prior to January 23, 2003. For pay rate purposes, the Board notes that the date of injury is January 24, 2002. There is no evidence of wage loss prior to January 23, 2003, the date his disability began. A recurrent pay rate is not applicable as there is no showing that appellant ever resumed full-time regular work with the United States. Following his injury he was performing restricted duty until he stopped work on January 23, 2003.

Section 8114(d)(1)(B) requires that the average daily wage is multiplied by 260 (52 multiplied by 5) if the employee was employed on a five-day workweek. In this case, the employing establishment indicated one year prior to his injury appellant had annual earnings of $27,766.25. Under section 8114(d)(1)(B), appellant's pay rate as of the date of injury was $533.97 per week. The employing establishment also indicated that one year prior to January 23, 2003 the date disability began, appellant had annual earnings of $17,391.58. Under section 8114(d)(1)(B), appellant's pay rate the date of disability is $334.45 per week.[5] Appellant's pay rate as of the date of injury on January 24, 2002 is higher than that of January 23, 2003 the date disability began.[6] Accordingly, the Board finds that the date of injury, January 24, 2002, is the appropriate pay rate for compensation purposes.

Appellant argued that his pay rate should be considered under section 8114(d)(3) as he worked a part-time flexible schedule for substantially the entire year and worked another job concurrently with his federal employment. The record reflects that appellant was a limousine driver during the period May 16, 2002 through June 4, 2004. There is no evidence of record that appellant was engaged in concurrent employment at the time of his January 24, 2002 injury. Additionally, the Board has recognized that nonfederal, concurrent earnings may be included in a compensation pay rate determination only under circumstances where section 8114(d)(3) is applicable.[7] However, section 8114(d)(3) is only applicable if neither sections 8114(d)(1) or

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[4] *Id.*

[5] Office procedures indicate that the pay rate of a part-time flexible employee of the postal service who works substantially the entire year prior to injury would be computed under section 8114(d)(1)(B), not section 8114(d)(3), even if the earnings fluctuated considerably from week to week, because an annual rate of pay can be established. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.4(c)(2) (April 2002).

[6] 5 U.S.C. § 8101(4).

[7] *Charles T. Cummings*, 54 ECAB 598 (2003); *Ricardo Hall*, 49 ECAB 390, 394-95 (1998). *See* 5 U.S.C. § 8114(d)(3).

8114(d)(2) are applicable.[8] In the instant case, section 8114(d)(1) is applicable as appellant had worked at the employing establishment in a full-time position for substantially the whole year prior to the injury. Therefore, appellant's nonfederal concurrent employment is not included and his pay rate is based on his federal earnings in accordance with section 8114(d)(1).[9] The Board finds that the Office properly excluded appellant's wages from concurrent nonfederal employment in determining his pay rate effective January 24, 2002. Thus, appellant's concurrent employment and section 8114(d)(3) need not be considered in determining appellant's pay rate.

Appellant worked a part-time flexible schedule for substantially the entire year prior to his injury and his pay rate can be established under section 8114(d)(1)(B). For the period January 27, 2001 through January 25, 2002, the employing establishment indicated that appellant's average annual earnings were $27,766.25.[10] The employing establishment noted that appellant earned an hourly rate of $16.51 from January 27 to September 7, 2001 and a $17.21 hourly rate from September 8, 2001 to January 25, 2002. The employing establishment further listed appellant's base hours, which included night differential and Sunday premium, to establish his base pay for each pay period during the period January 27, 2001 through January 25, 2002. Appellant's average annual earnings of $27,766.25 divided by 52 weeks/year equals $533.97 weekly rate. Accordingly, the Board finds that the Office properly determined that the correct pay rate was $533.97 per week based on the date of injury. The record is devoid of any evidence to the contrary.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of the Act 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 the individual is entitled.[11]

ANALYSIS -- ISSUE 2

The Office originally paid compensation based on a weekly pay rate of $748.80 and then on a weekly pay rate of $550.72 as it had erroneously assumed that appellant worked 40 hours a week at the employing establishment, when he actually worked on a part-time flexible basis. After conducting an investigation into his pay rate based on appellant's request, the Office determined that the proper weekly pay rate was $533.97. The Office determined that an overpayment in the amount of $4,330.98 existed as appellant was paid at an incorrect higher pay rate for the period January 25, 2003 through October 30, 2004.

Appellant should have been paid $37,957.54 for the above period, but received $42,288.52. The difference results in an overpayment of $4,330.98 for the period January 25,

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[8] *See* 5 U.S.C. § 8114(d). *See also supra* note 5.

[9] *See Charles T. Cummings and Ricardo Hall, supra* note 7.

[10] This figure includes the night differential and Sunday premium amount appellant worked.

[11] *See* 5 U.S.C. § 8129(a).

2003 through October 30, 2004. Appellant received compensation based on a $748.80 pay rate from January 25 through September 7, 2003. On and after September 7, 2003, appellant received compensation based on a $550.72 pay rate. The Office determined that appellant was paid at the incorrect weekly pay rate of $748.80 from January 25 through September 7, 2003 and $550.72 from September 7, 2003 through October 30, 2004, resulting in an overpayment of $4,330.98. An overpayment of compensation in the amount of $4,330.98 was created from January 25, 2003 through October 30, 2004 as the Office had paid at an incorrect pay rate than which appellant was entitled.[12]

LEGAL PRECEDENT -- ISSUE 3

Section 8129(b) provides that 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.[13]

The Office may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment.[14] If the Office finds that the recipient of an overpayment was not at fault, repayment will still be required unless: (1) adjustment or recovery of the overpayment would defeat the purpose of the Act; or (2) adjustment or recovery of the overpayment would be against equity and good conscience.[15]

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.[16] 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.[17]

The 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 overpayment would defeat the purpose of the Act or be

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[12] *See* 5 U.S.C. § 8129(a).

[13] *Id.*

[14] *See* 5 U.S.C. § 8129(b).

[15] 20 C.F.R. § 10.433(a).

[16] 20 C.F.R. § 10.436. Office procedures provide that the 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).

[17] *See Robert E. Wenholz*, 38 ECAB 311 (1986).

against equity and good conscience. This information will also be used to determine the repayment schedule, if necessary.[18] 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.[19]

ANALYSIS -- ISSUE 3

Although the Office found that appellant was without fault in the matter of the overpayment, recovery is still required unless it is established that adjustment or recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience.[20] The financial evidence indicates that appellant has total monthly income in the amount of $4,199.00 and total monthly expenses of $3,163.00.[21] Therefore, appellant's monthly income of $4,199.00 exceeds monthly expenses of $3,163.00 by $1,036.00, in excess of the amount specified in the Office's procedures.[22] Appellant listed no assets. Because his monthly income exceeds his expenses by more than $50.00, appellant is not deemed to need substantially all of his current income to meet current ordinary and necessary living expenses and has sufficient funds available for debt repayment. Therefore, the Office properly concluded that recovery of the overpayment would not cause severe financial hardship to appellant or defeat the purpose of the Act.

Appellant made no argument that he would suffer financial hardship in attempting to repay the debt. He further advanced no argument that he gave up a valuable right or changed his position for the worse in reliance on the overpaid compensation, other than paying his bills.

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[18] 20 C.F.R. § 10.434. 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 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. A higher amount is specified for a beneficiary with one or more dependents. *Id*. at § 10.436. Recovery of an overpayment is considered to be against equity and good conscience when any individual who received an overpayment would experience severe financial hardship in attempting to repay the debt. *Id*. at § 10.437(a). Recovery of an overpayment is also considered to be against equity and good conscience when any 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. *Id*. at § 10.437(b).

[19] *Id*. at § 10.438(a).

[20] *See Keith H. Mapes*, 56 ECAB ___ (Docket No. 03-1747, issued October 20, 2004).

[21] Appellant's $3,163 monthly expenses consist of: $1,018.00 for rent/mortgage; $400.00 for food; $200.00 for clothing; $400.00 for utilities; $375.00 for other expenses; $600.00 child support; and $175.00 installments for attorney fees.

[22] *See* Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a)(1) (December 2004). (An individual is deemed to need substantially all of his or her current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than $50.00. In other words, the amount of monthly funds available for debt repayment is the difference between current income and adjusted living expenses (*i.e*., ordinary and necessary living expenses plus $50.00)).

As appellant has not shown that recovery would "defeat the purpose of the Act" or would "be against equity and good conscience," the Board finds that the Office properly denied waiver of recovery of the overpayment.[23]

LEGAL PRECEDENT -- ISSUE 4

The method by which the Office may recover overpayments is defined by regulation. The applicable regulation, 20 C.F.R. § 10.441(a), provides as follows:

> "Whenever an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to [the Office] the amount of the overpayment as soon as the error is discovered or his or her attention is called to the same. If no refund is made, [the Office] shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize hardship."[24]

ANALYSIS -- ISSUE 4

The Office found that recovery of the overpayment would be made by an adjustment against continuing compensation at the rate of $200.00 per payment. It is appellant's responsibility to provide information about income, expenses and assets.[25] Appellant indicated on his overpayment questionnaire that he had no assets. The hearing representative noted the available evidence did indicate that appellant's income exceeded his expenses by more than $1,000.00. Based on the evidence, the hearing representative did take relevant evidence into account so as to minimize hardship in recovering the overpayment. The Board finds that the Office properly followed its regulations in this case. The Board, therefore, finds that the Office properly determined that the overpayment sum of $4,330.98 could be deducted from appellant's compensation benefits at the rate of $200.00 per payment.[26]

CONCLUSION

The Board finds that the Office properly determined the pay rate on which appellant's compensation was based. The Board also finds that the Office properly determined that an overpayment of $4,330.98 was created from January 25, 2003 through October 30, 2004 and properly denied waiver of the overpayment of compensation. The Office also properly followed

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[23] Appellant has alleged that he should not be required to repay the overpayment because the creation of the overpayment was not his fault. However, as noted above, a claimant would requests waiver of recovery of an overpayment must shown not only that he 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.

[24] 20 C.F.R. § 10.441(a).

[25] *Id.*

[26] Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.4(c)(2) and 6.200.4.d(1)(b) (December 2004).

its regulations in recovering the overpayment by deducting $200.00 every 28 days from continuing compensation.

ORDER

IT IS HEREBY ORDERED THAT the January 11, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 15, 2006
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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