

**United States Department of Labor
Employees' Compensation Appeals Board**

J.H., Appellant)	
)	
and)	Docket No. 07-656
)	Issued: July 26, 2007
DEPARTMENT OF THE AIR FORCE, TEXAS)	
AIR NATIONAL GUARD, Houston, TX,)	
Employer)	
)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 10, 2007 appellant filed a timely appeal from a decision of the Office of Workers' Compensation Programs dated November 17, 2006. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.

ISSUES

The issues are: (1) whether appellant received an overpayment in compensation in the amount of \$21,666.34 because his compensation was based on an incorrect pay rate for the period November 6, 2000 to September 4, 2004; (2) whether the Office properly denied waiver of the overpayment; and (3) whether the Office properly required repayment of the overpayment by deducting \$300.00 every four weeks from appellant's continuing compensation.

FACTUAL HISTORY

This case has previously been before the Board. By order dated July 6, 2005, the Board remanded the case to the Office on the grounds that appellant had timely requested a

prerecoupment hearing from a preliminary overpayment finding.¹ The law and the facts of the previous Board order are incorporated herein by reference.

On August 31, 2006 a hearing was held at which time appellant argued that he was entitled to overtime, shift differential and Sunday and holiday premium pay. He testified that he had acquired a credit card debt of \$15,000.00 which he was having problems paying but was otherwise meeting his expenses. The hearing representative advised appellant that she would forward him an overpayment questionnaire. The record also contains Office debt management worksheets, earnings and leave statements and pay rate information. By decision dated November 17, 2006, the Office hearing representative finalized the finding that an overpayment in compensation in the amount of \$21,666.34 had occurred because an incorrect pay rate was used for compensation purposes and that appellant was without fault in the creation of the overpayment. She denied waiver because appellant testified that he was able to meet his living expenses and found that the overpayment would be recovered at a rate of \$300.00 each payment period from appellant's continuing compensation.²

LEGAL PRECEDENT -- ISSUE 1

Section 8129(a) of the Federal Employees' Compensation Act³ provides, in pertinent part:

“When an 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.”⁴

To determine a weekly pay rate, the Office must first determine the employee's “average annual earnings” and then divide that figure by 52.⁵ Section 8114 of the Act provides four methods for determining “average annual earnings” based on the character and duration of the employment.⁶ Section 8114(d)(1)(A) provides that “if the employee worked in the employment in which the employee was employed at the time of injury during substantially the whole year

¹ Docket No. 05-628 (issued July 6, 2005).

² The record also contains a letter dated December 21, 2006 in which the Office proposed to reduce appellant's compensation benefits based on his capacity to earn wages as a customer service clerk. The record does not contain a final decision on this issue.

³ 5 U.S.C. §§ 8101-8193.

⁴ 5 U.S.C. § 8129.

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Computation of Compensation*, Chapter 2.900.9 (April 2002).

⁶ 5 U.S.C. § 8114; see *William A. Archer*, 55 ECAB 674 (2004).

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 rate of pay.”⁷

Section 8114(e) provides for the inclusion of certain “premium pay” received. Where the evidence indicates additional amounts received in Sunday or night differential pay fluctuated or may have fluctuated, the Office determines the amount of additional pay received during the one-year period prior to injury.⁸ National Guard pay is also included in an employee’s pay rate when membership in the National Guard is a condition of the employee’s civilian employment.⁹ Overtime pay, however, is excluded from consideration in determining rate of pay.¹⁰

ANALYSIS -- ISSUE 1

The Board finds that an overpayment in compensation was created. When appellant was placed on the periodic rolls on November 30, 2000, his weekly pay rate for compensation purposes was found to be \$1,195.48. This was based on a weekly pay rate of \$799.08 plus an additional \$396.40 for 40 hours of shift differential. Effective July 15, 2000, his pay rate for compensation purposes was increased to include military drill and training pay of \$147.15 a week, and he received back compensation of \$7,187.91. His new weekly pay rate was \$1,342.63. The employing establishment provided a chart giving a breakdown of appellant’s pay, stating that “this represents [his] pay received one year prior to the date of injury” and showed totals indicating that appellant received Sunday premium pay of \$827.68, second shift differential pay of \$1,551.68, third shift differential pay of \$1,751.92 and holiday premium pay of \$660.48. The pay chart showed that appellant did not work 40 hours a week at any premium of shift differential rate in any of the pay periods. He would thus not be entitled to the additional 40 hours per week of shift differential, or the \$396.40, that was added to his weekly pay rate. An overpayment in compensation was therefore created.

The Board, however, finds that this case is not in posture for decision regarding the amount of the overpayment. The pay chart provided by the employing establishment included payments dated April 12, June 11, August 28 and September 10, 1999, more than one year prior to appellant’s employment injury of September 15, 2000. An Office worksheet used to calculate appellant’s weekly pay rate correctly provided that his base pay rate was \$799.08 and correctly augmented this rate with \$147.65 for military pay. The rate, however, was also augmented by Sunday and holiday premium pay and shift two and three differential pay, using the totals provided by the employing establishment. The Office divided each of these supplemental payment totals by 56 weeks.

⁷ 5 U.S.C. § 8114(d)(1)(A).

⁸ 5 U.S.C. § 8114(e); see *Lottie M. Williams*, 56 ECAB ____ (Docket No. 04-1001, issued February 3, 2005).

⁹ Federal (FECA) Procedure Manual, Part 2—Claims, *Determining Pay Rate*, Chapter 2.900.7(b)(13) (April 2002); see *Steven A. Berndt*, 51 ECAB 402 (2000).

¹⁰ See *Lottie M. Williams*, *supra* note 8.

The Board finds that the determination of the amount of the overpayment is flawed for several reasons. First, there is no explanation as to why the employing establishment included pay figures beyond the one year date prior to the injury of September 15, 2000 and if, as in this case, the amount of supplemental pay fluctuated, the Office should determine the amount of additional pay received for one year prior to the employment injury.¹¹ Second, while the weekly pay rate calculated by the Office contains the correct base pay rate and increment for military pay, the Office provided no explanation as to why it divided the totals for the various premium pay and shift differentials by 56 weeks. Office procedures provide that to determine a weekly pay rate, the Office must first determine the employee's "average annual earnings" and then divide that figure by 52.¹²

On remand, the Office should obtain accurate pay information from the employing establishment for the period of one year prior to the September 15, 2000 employment injury to include all shift differential and premium pay, which should be divided by 52 as provided in Office procedures. The Office should then add this to appellant's weekly base pay of \$799.08 and weekly military pay of \$147.65 to determine his pay rate for compensation purposes which should be used to ascertain the amount of the overpayment in compensation.

LEGAL PRECEDENT -- ISSUE 2

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.¹³ 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.¹⁴

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.¹⁵ Recovery of an overpayment is considered to be against equity and good conscience when any individual who received an overpayment would experience severe

¹¹ *Supra* note 8.

¹² Federal (FECA) Procedure Manual, Chapter 2.900.9, *supra* note 5.

¹³ 20 C.F.R. § 10.433(a).

¹⁴ 20 C.F.R. § 10.434.

¹⁵ 20 C.F.R. § 10.436.

financial hardship in attempting to repay the debt.¹⁶ 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.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 against equity and good conscience. This information will also be used to determine the repayment schedule, if necessary.¹⁸

ANALYSIS -- ISSUE 2

The Board also finds this case is not in posture for decision regarding waiver. The Office found, and the Board agrees, that appellant was not at fault in the creation of the overpayment in compensation. In finding that appellant was not entitled to waiver, the Office hearing representative advised that appellant had not alleged that repaying the overpayment would create a financial hardship and noted that he was able to meet his current financial obligations. A review of the hearing testimony, however, shows that appellant testified that he had acquired a credit card debt of \$15,000.00 which he was having problems paying. The hearing representative advised that she was going to send appellant an overpayment questionnaire. There is no indication in the record that an overpayment questionnaire was provided to appellant.¹⁹ On remand the Office shall provide an overpayment questionnaire to appellant and then make a determination if waiver should be granted.

Finally, the Board finds that the issue regarding recovery of the overpayment is moot until the Office issues a decision regarding the amount of overpayment and determines whether waiver applies in this case.

CONCLUSION

The Board finds that the Office properly found that an overpayment in compensation was created but that the case is not in posture for decision regarding the amount of the overpayment and whether appellant is entitled to waiver.

¹⁶ 20 C.F.R. § 10.437(a).

¹⁷ 20 C.F.R. § 10.437(b).

¹⁸ 20 C.F.R. § 10.438(a); *Ralph P. Beachum, Sr.*, 55 ECAB 442 (2004).

¹⁹ The Board notes that the September 29, 2004 preliminary overpayment letter indicated that appellant was provided with an overpayment questionnaire. A copy of a blank questionnaire, however, is not found in the record.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 17, 2006 be vacated and the case remanded to the Office for proceedings consistent with this decision of the Board.

Issued: July 26, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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