

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

B.E., Appellant)
)
and) **Docket No. 06-1516**
) **Issued: June 22, 2007**
DEPARTMENT OF HOMELAND SECURITY,)
EMERGENCY PREPAREDNESS & RESPONSE,)
Denton, TX, Employer)

Appearances:
Appellant, pro se
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 June 20, 2006 appellant filed a timely appeal of an April 25, 2006 merit decision of the Office of Workers' Compensation Programs concerning an overpayment of compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this overpayment appeal.

ISSUES

The issues are: (1) whether the Office properly computed appellant's pay rate for purposes of calculating the amount of an overpayment of compensation; (2) whether she received an overpayment in the amount of \$5,725.44 for the period April 21, 1999 through February 18, 2006 because she received compensation at an incorrect pay rate; (3) whether the Office properly denied waiver of the overpayment; and (4) whether the Office properly recovered the overpayment by withholding \$150.00 every four weeks from appellant's continuing compensation payments.

FACTUAL HISTORY

On April 20, 1999 appellant, then a 38-year-old applicant assistant,¹ filed a claim alleging that she sustained swelling and pain in her arms and wrists as a result of her federal employment. The Office accepted the claim for carpal tunnel syndrome and paid compensation benefits. The Office paid wage-loss compensation based on the annual salary of appellant's position as a Grade 6, step 4, full-time employee as of the date of disability of April 21, 1999.

The record reflects that appellant was totally disabled from April 21, 1999 to May 14, 2000. She returned to work at the employing establishment for four hours per day from May 15 to June 16, 2000 and was totally disabled from June 17 to August 6, 2000. Appellant resumed work for four hours per day from August 7 to 14, 2000. Thereafter, she was totally disabled from August 15, 2000 to May 9, 2004. On May 10, 2004 appellant obtained private employment with Dillard's department store as part of the Office's rehabilitation efforts.

In a February 23, 2005 letter, the employing establishment advised that appellant was a temporary part-time intermittent employee who earned a total of \$23,080.39 and worked 46 weeks in the year prior to her injury. It noted that the Office paid appellant compensation based on 2004 annual wages, \$33,610.00, for a full-time employee at appellant's grade and step. The record indicates that the pay rate for a full-time employee in appellant's position, Grade 6, step 4, was \$27,129.00 in 1999, \$28,453.00 in 2000 and \$33,610.00 in 2004.

In a February 24, 2006 memorandum, the Office indicated that appellant's original pay rate was based on a yearly annual salary of \$27,129.00 for a full-time regular employee working as a Grade 6, step 4 as of April 21, 1999, the date of disability. However, appellant was a Grade 6, step 4 part-time temporary employee who worked intermittently and had earned \$23,080.39 in the 46 weeks prior to her injury. Therefore, it calculated her compensation according to Chapter 2.0807.11(e) of the Office's procedure manual pertaining to the calculation of pay for intermittent or irregular employee not part of an agency's regular full-time or part-time workforce.² Using the mathematical formula set forth at Chapter 2.0807.11(e), the Office calculated appellant's weekly pay rate as \$501.75 under the first formula by dividing appellant's total earnings during the 12-month period immediately preceding the date of injury (excluding overtime) (\$23,080.39) by the number of weeks worked during that year (46). Under the second formula, the Office calculated 150 times the average daily wage³ earning in the employment during the days employed within the full year immediately preceding the date of injury divided by 52 weeks $((\$23,080.39/1632.75) \times 8 \times 150)/52$ to obtain a \$326.21 weekly pay rate. It took the greater of the two weekly pay rates calculated under the formulas and determined that appellant's corrected pay rate for compensation purposes effective April 21, 1999, the date of disability, was \$501.75.

¹ The record indicates that appellant was a part-time temporary employee with intermittent hours.

² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Continuation of Pay and Initial Payments*, Chapter 2.807.11(e) (March 2004); 20 C.F.R. § 10.216(b)(3).

³ The daily wage is the hourly rate times eight.

In a March 17, 2006 memorandum, the Office noted that appellant had received compensation in the amount of \$123,321.74 at the incorrect pay rate for the period April 21, 1999 through February 18, 2006 based on the salary of a regular full-time employee, when she was only entitled to \$117,596.30 based on the fact that she was a temporary part-time intermittent employee who worked only 46 weeks in the year prior to her date of injury.

On March 20, 2006 the Office made a preliminary determination that appellant received an overpayment in the amount of \$5,725.44 for the period April 21, 1999 through February 18, 2006. It paid compensation based on an incorrect pay rate for the above period and that this resulted in the overpayment. The Office found that she was without fault in creating the overpayment. Appellant was requested to submit financial information and to indicate whether she wanted an oral hearing in the matter. The Office attached February 24 and March 17, 2006 memorandums which noted appellant's pay rate for compensation purposes and explained how the overpayment was calculated.

In an April 3, 2006 overpayment recovery questionnaire (Form OWCP-20), appellant listed her monthly income and expenses, which also included that of her spouse. Her total monthly income was listed as \$4,100.00, which she noted did not include her workers' compensation check. Appellant listed her monthly expenses of \$4,563.00 as: rent or mortgage \$1,250.00, food \$300.00, clothing \$300.00, utilities \$620.00, and other expenses (such as miscellaneous household expenses, medical and dental care not covered by insurance, automobile expenses or other transportation costs, personal necessities) \$1,450.00. Payments on appellant's debts were listed as Bank of America \$168.00, AT&T Card, GM Card, Lowes, Dillard's, CompUSA \$475.00. She also indicated that she had \$548.00 available funds which included: cash \$100.00, a checking account balance \$253.00 and savings account balance \$95.00.⁴ No copies of bills, receipts or other documents relating to her expenses were submitted.

In a decision dated April 25, 2006, the Office finalized its determination that appellant received an overpayment in the amount of \$5,725.44 as a result of being paid at the incorrect pay rate for the period April 21, 1999 through February 18, 2006 for which she was without fault. However, the Office denied waiver of the overpayment and determined the overpayment would be recovered by deducting \$150.00 every four weeks from her continuing compensation payments. The Office noted that appellant was currently receiving \$631.00 per 28 days in loss of wage-earning capacity payments.

LEGAL PRECEDENT -- ISSUE 1

Under section 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.⁵

⁴ The Board notes that a correct mathematical calculation results in \$448.00, not \$548.00.

⁵ 5 U.S.C. § 8101(4); 20 C.F.R. § 10.5(s); *see Janet A. Condon*, 53 ECAB 702 (2002).

Section 8114(d) of the Federal Employees' Compensation Act provides, in pertinent part:

“(d) Average annual earnings are determined as follows:

(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--

(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 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 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.”⁶

If sections 8114(d)(1) and (2) of the Act are not applicable, such as in cases where the date-of-injury employment was seasonal work that would not have provided employment for substantially the whole year preceding the injury, section 8114(d)(3) provides as follows:

“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 that reasonably represents the annual earning capacity of the injured employee in the employment in which he was working at the time of 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 class working 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 one year immediately preceding his injury.”⁷

⁶ 5 U.S.C. § 8114(d)(1), (2).

⁷ 5 U.S.C. § 8114(d)(3).

ANALYSIS -- ISSUE 1

The Office found that appellant received an overpayment of compensation because she received wage-loss compensation at an incorrect pay rate. The Office determined the correct pay rate pursuant to section 8101(4) and section 8114 of the Act. Appellant's pay rate for compensation purposes is the rate of pay she was receiving as of the time of disability on April 21, 1999. There is no evidence of wage loss prior to April 21, 1999, the date her disability began a recurrent pay rate is not applicable as the evidence does not show that appellant resumed full-time regular work with the United States.

The evidence shows that appellant was a part-time temporary employee who worked intermittently for only 46 weeks in the year immediately preceding her injury.⁸ For these reasons, section 8114(d)(3)⁹ applies to the computation of appellant's pay rate.¹⁰ This section specifies that an employee's 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 one year immediately preceding her injury.¹¹ The two formulas used by the Office to calculate appellant's rate of pay are found at section 8114(d)(3). The Office used the statutory mathematical formula incorporated at section 2.807.11(e) of the Office's procedure manual, dealing with calculation of initial payments for a claimant who is not a full-time worker.

The Office used the correct formula to determine appellant's earnings of \$23,080.39 divided by the 46 weeks appellant worked immediately preceding the accepted injury to total \$501.75 weekly earnings. It compared this amount to the amount derived by multiplying the average daily wage by 150. The Office determined appellant's actual hourly earnings to be \$14.14 (\$23,080.39 annual earnings divided by 1632.75 hours worked), multiplied by 8 hours a day multiplied by the minimum 150 days, equaled \$16,963.08 a year or \$326.21 a week. As appellant's pay rate is higher under the first formula, the Office properly based appellant's compensation on her weekly earnings of \$501.75. This is consistent with Office regulations stating that the Office should use the greater of the two alternatives.¹²

⁸ Office procedures indicate the phrase "substantially the whole year" means 11 months. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.4(a) (April 2002).

⁹ 5 U.S.C. § 8114(d)(3).

¹⁰ See *Ricardo Hall*, 49 ECAB 390 (1998).

¹¹ 5 U.S.C. § 8114(d)(3).

¹² *Id.* See also *Monte Fuller*, 51 ECAB 571 (2000); *Robin Bogue*, 46 ECAB 488 (1995) (the Office should not use the 150 times formula prior to considering other factors as listed in section 8114(d)(3)).

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of the Act 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.¹³

ANALYSIS -- ISSUE 2

The record indicates that for the period April 21, 1999 through February 18, 2006 appellant received \$123,321.74 in compensation. Pay rate information provided by the employing establishment indicated that appellant was paid at the rate of a regular full-time employee, at the time of disability, earning an annual salary of \$27,129.00 or weekly wages of \$521.71 (\$27,129.00 divided by 52 weeks per year). As previously noted, appellant’s weekly pay rate for working part-time should have been \$501.75 (\$23,080.39 divided by 46 weeks per year). The Board therefore finds that an overpayment in compensation was created. The record demonstrates that, for the period April 21, 1999 to February 18, 2006, appellant received compensation in the amount of \$123,321.74 based on the incorrect pay rate of \$521.71 per week, when she should have received compensation totaling \$117,596.30 based on the correct pay rate of \$501.75 per week, yielding an overpayment in compensation in the amount of \$5,725.44, as determined by the Office. The Board will affirm fact and amount of overpayment.

LEGAL PRECEDENT -- ISSUE 3

Section 8129 of the Act¹⁴ provides that an overpayment of compensation 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 this subchapter of the Act or would be against equity and good conscience.

Section 10.436 of the implementing regulation¹⁵ provides that recovery of an overpayment would defeat the purpose of the Act if such recovery would cause hardship in a currently or formerly entitled beneficiary because: 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

¹³ 5 U.S.C. § 8129.

¹⁴ 5 U.S.C. § 8129(b); *see Carroll R. Davis*, 46 ECAB 361, 363 (1994).

¹⁵ 20 C.F.R. § 10.436.

Labor Statistics.¹⁶ 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 \$50.00.¹⁷

Section 10.437 provides that recovery of an overpayment is considered 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.¹⁸

ANALYSIS -- ISSUE 3

The Office determined that an overpayment was created for which appellant was not at fault based on the use of an incorrect pay rate in calculating her wage-loss compensation. However, the fact that the Office found that appellant was not at fault in the creation of the overpayment does not, of itself, establish a basis for waiver of recovery of the overpayment.¹⁹ 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 had a total monthly income -- not including her workers' compensation benefits -- of \$4,100.00. The Office indicated that appellant was currently receiving \$631.00 every 28 days in loss of wage-earning capacity payments. This combines for a total monthly income of \$4,731.00. The financial evidence also indicates that appellant has total monthly expenses of \$4,563.00.²¹ Therefore, her monthly income of \$4,731.00 exceeds monthly expenses of \$4,563.00 by \$168.00, in excess of the amount specified in the Office's procedures.²² Appellant listed no significant assets. Because her monthly income exceeds her expenses by more than \$50.00, appellant is not deemed to need substantially all of her 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.

¹⁶ An individual's assets must exceed a resource based on \$4,800.00 for an individual or \$8,000.00 for an individual with a spouse or one dependent plus \$960.00 for each additional dependent. This includes all of the individual's assets not exempt from recoupment. See Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a)(1)(b) (October 2004).

¹⁷ See *Sherry A. Hunt*, 49 ECAB 467, 473 (1998).

¹⁸ 20 C.F.R. § 10.437.

¹⁹ *Jorge O. Diaz*, 51 ECAB 124 (1999).

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

²¹ This included: \$1,250.00 rent/mortgage; \$300.00 food; \$300.00 clothing; \$620.00 utilities; \$1,450.00 miscellaneous; and \$643.00 monthly credit card payments.

²² See Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a)(1) (October 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)).

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

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 the overpayment.²³

LEGAL PRECEDENT -- ISSUE 4

The method by which the Office may recover overpayments is defined by regulation. Section 10.441(a) of the Office's regulations provides:

“When 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 same. If no refund is made [the Office] shall decrease later payments of compensation, taking into account the probably extent of future payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize any hardship.”²⁴

ANALYSIS -- ISSUE 4

With respect to the \$150.00 withheld from appellant's continuing compensation payments to recoup the amount of the outstanding payment, the Office's regulations note the factors to be considered in determining repayment from continuing compensation.²⁵ The implementing regulations provide that the Office must take 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 any hardship.²⁶

The Office found that recovery of the overpayment would be made by an adjustment against continuing compensation at the rate of \$150.00 per payment. It is appellant's responsibility to provide information about income, expenses and assets.²⁷ Appellant did not list any significant assets on her overpayment questionnaire. However, the financial evidence

²³ 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 not defeat the purpose of the Act or be against equity and good conscience.

²⁴ 20 C.F.R. § 10.441(a).

²⁵ *Id.*, See *Fred A. Cooper, Jr.*, 44 ECAB 498 (1994).

²⁶ *Id.*

²⁷ 20 C.F.R. § 10.441(a).

indicated that appellant's monthly income exceeded her expenses by \$168.00. Based on the evidence, the Office 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 Office properly determined that the \$5,725.44 overpayment could be recovered by deducting \$150.00 from appellant's continuing compensation payments.²⁸

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 \$5,725.44 was created from April 21, 1999 through February 18, 2006 and properly denied waiver of the overpayment of compensation. The Office also properly directed recovery of the overpayment by deducting \$150.00 every 28 days from continuing compensation.

ORDER

IT IS HEREBY ORDERED THAT the April 25, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 22, 2007
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

²⁸ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.4(c)(2) and 6.200.4.d(1)(b) (May 2004).