

Office accepted appellant's claim for bilateral carpal tunnel syndrome and authorized left carpal tunnel release surgery which was performed on July 20, 2006. Appellant was placed on the periodic rolls for temporary total disability by letter dated July 10, 2006. She accepted a light-duty job offer and returned to light-duty work on October 27, 2006 working 40 hours per week.

In a January 20, 2006 statement, appellant noted that she had worked 40 hours per week when working as a data conversion operator and that she transferred to part-time flexible clerk in November 2005. She noted the physical requirements for jobs based on an eight-hour day six days a week.

On January 25, 2006 appellant filed a claim for compensation (Form CA-7), for the period January 4 to 20, 2006. On the back of the form the employing establishment noted that it certified 82.62 hours of leave without pay and that she worked an average of 29 hours per week. Appellant's base salary as of the date of the injury was \$18.38 per hour and \$28.36 per hour for night differential or \$530.12 per week. On January 4, 2006 the date appellant stopped work, the employing establishment reported her salary to be \$18.38 per week base pay and \$27.52 per week for night differential or \$531.97 per week. In an accompanying time analysis form, appellant reported using 2.62 hours of leave without pay, working 26.38 hours for the period December 31, 2005 to January 5, 2006 and using 80 hours of leave without pay for the period of January 7 to 20, 2006. She subsequently filed CA-7 claim forms for the period January 21 April 14, 2006. The employing establishment noted to see prior and noted certified leave without pay in section 14 under remarks.

The record contains computer printouts for the period in question, showing the net amount appellant was paid \$1,167.49,¹ for the period January 4 to 20, 2006, \$828.61,² for the periods January 21 to February 3, 2006 and February 18 to March 3, 2006 and \$1,128.03,³ for the periods February 4 to 17, March 4 to 17 and March 18 to 31, 2006 and April 1 to 14, 2006.

In an overpayment worksheet dated June 24, 2002, the Office noted that appellant was paid at the wrong pay rate. It indicated that she received an overpayment of compensation for the period January 4 to April 14, 2006 because she received compensation for a 40-hour workweek when her work averaged 29 hours per week as a part-time flexible clerk. The Office determined that appellant received \$5,678.73, for the aforementioned period when she should have received \$4,186.74, which resulted in an overpayment of \$1,491.99.

On March 5, 2007 the Office made a preliminary finding that an overpayment of \$1,491.99 arose because appellant's pay rate had been based on a 40-hour work week when she had averaged a 29-hour workweek. It found that she was not at fault in the creation of the overpayment. Appellant was informed of her right to challenge the amount of the overpayment or request a waiver of the overpayment. If she wished a waiver of the overpayment she was directed to submit financial information by completing an overpayment recovery questionnaire.

¹ The gross amount was \$1,186.98

² The gross amount was \$840.81.

³ The gross amount was \$1,144.08.

On March 28, 2007 appellant requested a telephone conference with the Office. She also requested that the Office send her supporting documentation showing how the overpayment was calculated.

On May 7, 2007 a telephone conference was held. The Office sought clarification of the information provided on the overpayment recovery questionnaire. Appellant indicated her total monthly expenses to be \$3,328.70 and monthly income \$2,030.00. The Office informed her to submit pay stubs for both her husband and herself, copies of all current bills and any income or expenses not listed currently on the overpayment questionnaire form. She was given 15 days to submit the requested information to the Office. No additional information was received.

In a decision dated May 29, 2007, the Office finalized its preliminary findings on the fact and amount of the overpayment.⁴ The Office found that the amount was correct, that appellant was not at fault in the creation of the overpayment and that she was not entitled to waiver as she failed to submit the supporting financial documentation. The Office directed appellant that it would deduct monthly repayment of \$50.00 until the overpayment was fully recovered.

LEGAL PRECEDENT -- ISSUE 1

Pay rate for compensation purposes is defined by the Federal Employees' Compensation 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.⁵

Sections 8114(d)(1) and (2) of the Act provide methodology for computation of pay rate for compensation purposes, by determination of average annual earnings at the time of injury. Sections 8114(d)(1) and (2) of the Act specify methods of computation of pay for employees who worked in the employment for substantially the whole year prior to the date of injury and for employees who did not work the majority of the preceding year, but for whom the position would be available for a substantial portion of the following year. 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.⁶

ANALYSIS -- ISSUE 1

The Office found that appellant should not have received compensation based on a full-time pay rate for the period January 4 to April 14, 2006 when she worked an average of 29 hours per week as a part-time flexible clerk. It then determined her pay rate based upon a 29-hour

⁴ The Board notes that appellant submitted financial evidence with her appeal to the Board. However, the Board may not consider new evidence on appeal. *See* 20 C.F.R. §§ 501.2(c); *Donald R. Gervasi*, 57 ECAB ____ (Docket No. 05-1622, issued December 21, 2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

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

⁶ 5 U.S.C. § 8101(d); *see Ricardo Hall*, 49 ECAB 390 (1998).

workweek. However, the Board finds that there are discrepancies in the facts of this case that require further development of appellant's pay rate for compensation purposes.

Appellant noted that she had worked 40 hours per week when working as a data conversion operator and that she transferred to part-time flexible clerk in November 2005. She detailed the physical requirements for part-time flexible job, which were based on an eight-hour day six days a week. On January 25, 2006 appellant filed a claim for compensation (Form CA-7), for the period January 4 to 20, 2006. The employing establishment noted on the back of the form that it certified 82.62 hours of leave without pay and that appellant worked an average of 29 hours per week. In an accompanying time analysis form, appellant reported using 2.62 hours of leave without pay, working 26.38 hours for the period December 31, 2005 to January 5, 2006 and using 80 hours of leave without pay for the period January 7 to 20, 2006. Appellant returned to light-duty work on October 27, 2006 working 40 hours per week. The evidence requires development on whether or not her position was full time and the number of hours she worked prior to her injury. The record contains no evidence as to what her tour of duty was or the number of hours she worked. Appellant indicated that she had worked a 40-hour workweek when first starting with the employing establishment and then noted duties in her new position requiring 8 hours a day 6 days a week. The employing establishment noted that appellant averaged 29 hours of work, yet certified 80 hours of leave without pay for the 2-week period January 7 to 20, 2006. In calculating the overpayment, the Office relied upon the employing establishment's statement that prior to her injury appellant worked an average of 29 hours per week with no supporting documentation such as time sheets or pay stubs and when other evidence indicated her position required at least a 40-hour workweek.

The case will be remanded to the Office for further development regarding appellant's pay rate. The Office shall determine the number of hours she worked each week and her salary. Following this and any other development deemed necessary, the Office shall issue an appropriate decision in the case. As the case must be remanded for further development, the second issue in the case regarding whether the Office properly denied appellant's request for waiver of the recovery of the overpayment is premature.

CONCLUSION

The Board finds that the case is not in posture for a decision and must be remanded to the Office for further development on the pay rate issue.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 29, 2007 is set aside and the case remanded for further development consistent with this opinion.

Issued: February 19, 2008
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