

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

M.B., Appellant

and

**DEPARTMENT OF THE ARMY, CORPS OF
ENGINEERS, Chicago, IL, Employer**

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**Docket No. 08-460
Issued: June 18, 2008**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On December 5, 2007 appellant timely appealed two October 26, 2007 merit decisions of the Office of Workers' Compensation Programs, which found that she had been overpaid approximately \$31,000.00. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of appellant's claim.¹

ISSUES

The issues are: (1) whether appellant received an overpayment of benefits in the amount of \$26,665.39 because the Office paid compensation at an incorrect pay rate; and (2) whether she received an overpayment of \$4,385.75 due to the Office's failure to withhold medical insurance premiums.

¹ The record on appeal includes additional financial information that was received after the Office issued its October 26, 2007 merit decisions. The Board cannot consider evidence for the first time on appeal. The review of a case shall be limited to the evidence in the case record which was before the Office at the time of its final decision. 20 C.F.R. § 10.501.2(c) (2007).

FACTUAL HISTORY

Appellant, a 56-year-old former management analyst, has an accepted traumatic injury claim for lumbar radiculopathy, which arose on August 12, 1999.² She has not worked since her injury. The Office paid appellant wage-loss compensation beginning October 29, 1999.³ At the time of her injury, she worked full time, earning \$23.87 per hour. This hourly rate corresponds to a GS-11, Step 7, with an annual salary of \$49,812.00.⁴ However, when the Office began paying appellant wage-loss compensation in October 1999, the payments were computed based on a date-of-injury weekly pay rate of \$1,245.42, which represented an annual salary of approximately \$65,000.00. For almost five years thereafter, the Office continued to compensate appellant based on an erroneous weekly pay rate of \$1,245.42.

In a letter dated September 15, 2004, the Office advised appellant that her benefits had been adjusted effective September 5, 2004 to reflect a date-of-injury pay rate of \$931.33. This new pay rate was based on 1999 earnings for a GS-11, Step 6, which was \$48,429.00 annually.⁵ The Office relied on the GS-11, Step 6 salary because the information appeared on appellant's August 20, 1999 traumatic injury claim (Form CA-1) under the heading "Employee Data."⁶ In a September 7, 2004 memorandum to the file, it noted that the claim form indicated a pay rate of GS-11, Step 6, but the employing establishment certified that appellant earned \$23.87 per hour (GS-11, Step 7). The memorandum did not explain why the Office chose to rely on the lesser pay rate of a GS-11, Step 6. Appellant telephoned the Office on September 16, 2004 and explained that she was a GS-11, Step 7 at the time of her employment injury. She reportedly received a step increase just prior to her August 12, 1999 injury. From September 5, 2004 onward, the Office paid appellant wage-loss compensation based on a weekly pay rate of \$931.33 (GS-11, Step 6).

In addition to the pay rate miscalculation, the Office did not deduct health insurance premiums from appellant's wage-loss compensation beginning with the period February 4 to April 20, 2002. It found the error and recovered some, if not all of the missed premiums within a matter of weeks. The Office deducted a total of \$447.75 in health insurance premiums from

² Appellant injured herself while descending 13 flights of stairs during a power outage at her worksite.

³ Appellant retired effective September 3, 2000. She received incentive pay of \$25,000.00 for agreeing to accept an early retirement. The Office ultimately adjusted appellant's wage-loss compensation to reflect her receipt of this payment from the employing establishment.

⁴ On February 4, 2000 the employing establishment certified that appellant earned \$23.87 an hour (GS-11, Step 7) at the time of her August 12, 1999 injury. An earlier Form CA-7 dated September 26, 1999, also indicated that appellant was paid at an hourly rate of \$23.87. However, this form was not signed by the employing establishment. When appellant retired effective September 3, 2000, her Standard Form (SF) 50B listed her as a GS-11, Step 7.

⁵ The Office divided the annual salary of \$48,429.00 by 52 weeks to arrive at a weekly pay rate of \$931.33.

⁶ Items 1 through 15 of the form are to be completed by the employee. Item 6 requests information regarding the employee's "Grade as of date of injury." It appears that appellant reported her grade at the time of injury as Grade 11, Step 6. This information was typewritten along with appellant's name, address and other identifying information. Page 2 of the claim form is to be completed by the supervisor. Item 36 on page 2 requests information regarding the pay rate in effect at the time the employee "stopped work." Although appellant's supervisor signed page 2 of the claim form on September 1, 1999, no pay rate information was provided under item 36.

appellant's May 31, 2002 compensation payment. This check covered the period April 21 to May 18, 2002. However, the health insurance premiums the Office withheld covered the extended period February 4 to May 18, 2002.⁷ Despite having corrected the premium withholding error in May 2002, the Office again failed to withhold health insurance premiums the following month. This oversight continued for another two and a half years. The Office neglected to withhold health insurance premiums for the period May 19, 2002 through September 4, 2004.

On February 23, 2005 the Office issued two separate preliminary notices of overpayment.⁸ One notice identified an overpayment of \$26,665.39 for the periods October 29, 1999 through September 3, 2000 and October 15, 2000 through September 4, 2004. This was the overpayment that resulted from the Office's reliance on an incorrect weekly pay rate of \$1,245.42. The second notice pertained to a \$4,385.75 overpayment for the periods February 4 to April 20, 2002 and May 19, 2002 to September 4, 2004. This latter notice addressed the Office's failure to withhold health insurance premiums.⁹ The Office did not consider appellant at fault with respect to the failure to withhold health insurance premiums. However, appellant was found at fault regarding the overpayment based on the erroneous pay rate.

On March 7, 2005 appellant submitted an overpayment questionnaire and asked that the Office issue a final decision based on the documentary evidence of record. She provided copies of bank statements from January through March 2005. Appellant also challenged the Office's preliminary finding of fault with respect to the overpayment of \$26,665.39. She claimed that recovering the overpayment would create a financial hardship. Appellant's reported assets totaled \$530.00 and her monthly wage-loss compensation of \$2,551.52 was her only source of income. She listed total monthly expenses of \$2,355.00. However, appellant did not submit any documentation to support her reported monthly expenses.

More than two and a half years lapsed before the Office took any further action regarding appellant's two overpayments. On October 26, 2007 the Office issued two final overpayment decisions. The February 23, 2005 preliminary notice regarding the \$26,665.39 overpayment included a finding of fault on appellant's behalf. However, the October 26, 2007 final decision found that appellant was not at fault in creating the overpayment. The Office also found that appellant was not entitled to waiver of recovery of the \$26,665.39 overpayment and ordered that \$200.00 be withheld every four weeks from appellant's continuing compensation payments. With respect to the \$4,385.75 overpayment, it similarly denied waiver of recovery. The Office advised that an additional \$50.00 would be withheld from appellant's monthly compensation. Accordingly, appellant's regular four-week compensation payment of \$2,778.82 was reduced by \$250.00.

⁷ The Office's payment records do not apportion the amount of health insurance premiums applicable to the February 4 to April 20, 2002 period.

⁸ Both notices were incorrectly dated "February 23, 2004."

⁹ The Office found a \$328.35 overpayment for the period February 4 to April 20, 2002. The balance of the overpayment was attributed to the May 19, 2002 to September 4, 2004 period.

LEGAL PRECEDENT

The amount of compensation paid is a function of the injured employee's pay rate.¹⁰ Section 8101(4) of the Federal Employees' Compensation Act provides that the rate of pay to be used in calculating compensation is based on the greatest of either the monthly pay at the date of injury, the date disability began or the date compensable disability recurred if it recurred more than six months after the employee returned to work.¹¹ Basic compensation for total disability is equal to 66 $\frac{2}{3}$ percent of the injured employee's monthly pay.¹² Compensation may be increased to 75 percent of the employee's monthly pay if he or she has an eligible dependent.¹³

An employee entitled to disability compensation may continue to participate in the Federal Employee Health Benefits program. The injured employee is responsible for payment of the employee's share of the cost of enrollment.¹⁴ An overpayment of compensation results when the Office fails to withhold the proper amount of health insurance premiums.¹⁵ Once the error is discovered, the Office is obliged to forward the previously uncollected health insurance premiums to the Office of Personnel Management.¹⁶

ANALYSIS

The record establishes that appellant was overpaid due to an incorrect pay rate and because the Office failed to withhold health insurance premiums. While the fact of overpayment has been established, the precise amount of the overpayment remains in question. With respect to the uncollected health insurance premiums, the Office calculated an overpayment of \$328.35 for the period February 4 to April 20, 2002. Appellant paid \$447.75 in health insurance premiums for the period February 4 to May 18, 2002, which the Office apparently overlooked. The premiums were deducted from appellant's May 31, 2002 compensation payment. Accordingly, the record does not establish that appellant was overpaid \$328.35 for the period February 4 to April 20, 2002. As to the remainder of the overpayment, the Board finds that the record establishes an overpayment of \$4,057.40 due to uncollected health insurance premiums over the period May 19, 2002 to September 4, 2004.

The record does not support the Office's determination that appellant was overpaid \$26,665.39 because of an incorrect pay rate. The decision to compensate appellant based on a date-of-injury weekly pay rate of \$1,245.42 is unsupported by the record. The record similarly does not support the Office's decision to compensate appellant based on a date-of-injury weekly

¹⁰ 20 C.F.R. §§ 10.401(b), 10.404(b).

¹¹ 5 U.S.C. § 8101(4)(2000); *see Bette L. Kvetensky*, 51 ECAB 346, 348-49 (2000).

¹² 5 U.S.C. § 8105(a).

¹³ 20 C.F.R. §§ 10.401(b), 10.405.

¹⁴ 5 C.F.R. § 890.502(a).

¹⁵ *John Skarbek*, 53 ECAB 630, 632-33 (2002).

¹⁶ 5 C.F.R. § 890.502(c).

pay rate of \$931.33 (GS-11, Step 6). Appellant appears to have been the source of the GS-11, Step 6 pay rate information that appeared on page 1 of her August 20, 1999 Form CA-1. However, the employing establishment certified that appellant was a GS-11, Step 7 at the time of her August 12, 1999 injury. In September 2004, appellant clarified that she was in fact a GS-11, Step 7 at the time of her injury. The Office paid compensation based on the lesser GS-11, Step 6 pay rate obtained from appellant's claim form.

The record establishes that, at the time of her August 12, 1999 employment injury, appellant was a GS-11, Step 7, earning \$23.87 per hour. The \$931.33 weekly pay rate the Office relied on represents an hourly rate of \$23.28. Applying the correct pay rate for a GS-11, Step 7 would necessarily reduce the previously calculated overpayment of \$26,665.39. It also creates an underpayment of compensation for the period beginning September 5, 2004. On remand, the Office must recalculate appellant's entitlement to wage-loss compensation based on her August 12, 1999 earnings as a GS-11, Step 7 management analyst.

The overpayment issue is further complicated by the Office's failure to properly account for appellant's September 3, 2000 severance pay of \$25,000.00. This amount was offset against appellant's wage-loss compensation for the period February 19, 2001 to February 3, 2002. Relying on a weekly pay rate of \$1,245.42, the Office originally calculated that appellant was entitled to \$41,600.79 for the period. The Office reduced this amount by the \$25,000.00 in severance pay appellant received, and remitted the balance of \$16,600.79. When the Office later recalculated appellant's wage-loss compensation based on the weekly pay rate of \$931.33, it found appellant entitled to \$30,762.96 for the period February 19, 2001 to February 3, 2002. But the Office neglected to reduce this amount by the \$25,000.00 appellant received in severance pay. The result was that appellant was found entitled to an additional \$25,000.00 in wage-loss compensation that she was not otherwise entitled to receive from the Office. Due to these errors the case will be remanded for further consideration.

CONCLUSION

The Board finds that the case is not in posture for decision regarding the amount appellant was overpaid.

ORDER

IT IS HEREBY ORDERED THAT the October 26, 2007 decision of the Office of Workers' Compensation Programs are affirmed, in part, and set aside, in part; and the case is remanded to the Office for further action consistent with this decision.

Issued: June 18, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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