

employing establishment reported appellant's base pay rate as of December 11, 2004 was \$38,927.00 per year as a GS (General Services) Grade 6, Step 9.

Appellant's pay rate for compensation purposes was determined using a formula for firefighters that generally work 24-hour shifts and more than 106 hours every biweekly pay period. In addition to the base pay of \$38,927.00 per year (or \$1,496.72 every two weeks), the Office determined appellant worked 38 hours in excess of the 106 hours, earning \$808.84, and \$21.18 in adjusted firefighter extra pay. It accordingly found appellant's weekly pay rate was \$1,150.78 as of December 11, 2004, the date disability began.

The record establishes that the employing establishment offered appellant a light-duty job and he returned to work on October 2, 2006. In a memorandum of telephone call dated November 21, 2006, the employing establishment indicated that appellant had been working at the time of injury at 40 hours per week, but if he was working on a fire he could work up to 16 hours a day. The employing establishment stated that no employee worked a 24-hour shift. By letter dated December 22, 2006, the employing establishment stated that on December 11, 2004 appellant was a full-time permanent seasonal employee. The employing establishment submitted earnings and leave statements for the year prior to December 11, 2004. In a letter dated July 24, 2007, the Office provided appellant's premium pay for the year commencing December 11, 2003. The employing establishment indicated that appellant earned \$17.50 per week in Sunday, night, hazard and holiday pay.

In a September 10, 2007 memorandum, the Office calculated that appellant's pay rate for compensation purposes as of December 11, 2004 should have been \$766.10 per week. This figure was based on a base pay rate of \$748.60 (\$38,927.00 divided by 52), plus \$17.50 in premium pay. In a letter dated October 26, 2007, the Office advised appellant of preliminary determination that an overpayment of \$27,290.68 existed. The Office explained that appellant had received \$77,396.16 in compensation from December 11, 2004 to October 1, 2006, but he should have received \$50,105.48 using the correct pay rate. Appellant was advised that he was found not at fault in creating the overpayment, and the actions he could take included requesting a prerecoupment hearing within 30 days. The Office enclosed an overpayment recovery questionnaire (OWCP-20) and indicated that a completed form should be submitted with any request for action.

In a letter postmarked November 27, 2007, appellant requested a prerecoupment hearing.

By decision dated December 26, 2007, the Office Branch of Hearings and Review denied the request as untimely. The Branch exercised its discretion and found the issue could equally well be addressed by requesting a telephone conference with the Office and submitting new evidence.

By decision dated January 9, 2008, the Office finalized its determination that an overpayment of \$27,290.68 was created. It denied waiver of the overpayment, noting that

appellant had not submitted financial information. Appellant was directed to repay the overpayment by submitting a \$400.00 payment every month.¹

LEGAL PRECEDENT -- ISSUE 1

5 U.S.C. § 8101(2) provides that “‘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 6 months after the injured employee resumes regular full-time employment with the United States, whichever is greater...” Under the Office’s regulations, the “pay rate for compensation purposes” means the employees’ pay as determined under 5 U.S.C. § 8114.

5 U.S.C. § 8114(d) provides:

“Average annual earnings are determined as follows:

“(1) If the employee worked in the employment in which he was employed at the time of his 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 annual rate of pay; or

(B) was not fixed, the average annual earnings are the product obtained by multiplying his daily wage for 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.

ANALYSIS -- ISSUE 1

The Office found an overpayment of compensation occurred because appellant had been paid wage loss using an incorrect pay rate for compensation purposes. In this case, it determined the relevant date to determine the pay rate was December 11, 2004. As noted, the monthly pay is determined on the date of injury, the date disability began or the date compensable disability recurs, if more than six months after a return to regular full-time employment. Appellant had stopped working on December 11, 2004 and filed a claim for compensation commencing on that date. Therefore December 11, 2004 is appropriately found to be the date disability began.

The pay rate for compensation purposes was initially determined using the formula set forth in Office procedures for certain firefighters that were included in the Firefighters Overtime Pay Reform Act of 1998, codified at 5 U.S.C. § 5545b. This statute included firefighters “whose normal work schedule, as in effect throughout the year, consists of regular tours of duty

¹ The Office did not order repayment from continuing compensation. By decision dated April 23, 2008, it terminated compensation for wage loss. Appellant did not request the Board to review that decision on the current appeal.

which average at least 106 hours per biweekly pay period.”² Although, overtime pay is normally not included in determining pay rate for compensation purposes under 5 U.S.C. § 8114,³ 5 U.S.C. § 5545b was amended to establish that overtime pay for firefighters under that section shall be included in any computation of pay under 5 U.S.C. § 8114.⁴ Office procedures established a formula for determining pay rate for these firefighters, using a base pay for 106 biweekly work hours, and an “overtime rate” of 38 hours above the 106 hours.⁵ The pay rate for compensation purposes of \$1,150.78 per week was calculated according to this formula.

It is evident from the record that appellant was not a firefighter covered under 5 U.S.C. § 5545b. According to the employing establishment he was a seasonal firefighter, who normally had a 40-hour workweek that could include up to an additional eight hours per day if he was engaged in firefighting. A review of the earnings and leave statements for the year prior to December 11, 2004 indicate only two pay periods where appellant worked more than 106 hours in a pay period. He did not have a work schedule that consisted of regular tours of duty that averaged at least 106 hours a biweekly pay period over the course of the year.

Therefore, the Office incorrectly determined appellant’s pay rate for compensation purposes at \$1,150.78 per week. The next issue is whether it properly determined appellant’s pay rate was \$766.10 per week. In this regard the Board notes that although the employing establishment referred to appellant as “seasonal,” this may refer to his firefighter duties, rather than his employment. Appellant’s job title was Lead Forestry Technician and it appears he was a permanent employee working the entire year.⁶ The record indicates that he did have a fixed rate of pay at \$38,927 per year, supplemented by premium pay. Based on the information provided by the employing establishment, the Office determined appellant’s pay rate for compensation purposes as of December 11, 2004 was \$766.10 per week. This represented \$748.60 per week in base pay plus \$17.50 in premium pay. The Board finds the evidence of record supports the Office’s finding.

The amount of the overpayment was calculated based on the above pay rates. Appellant received \$77,396.16 in compensation from December 11, 2004 to October 1, 2006 based on a weekly pay rate of \$1,150.78. He should have received \$50,105.48 for that period, using a weekly pay rate of \$766.10. Accordingly, the Board finds a \$27,290.68 overpayment of compensation was created.

² 5 U.S.C. § 5545b(a).

³ *Id.* at § 8114(e) specifically excludes overtime pay.

⁴ *Id.* at § 5545b(d)(4).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.8(d) (April 2002).

⁶ Even if a career seasonal employee, appellant would be entitled to receive compensation on the same basis as an employee who worked the entire year. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.4(a) (December 1995).

LEGAL PRECEDENT -- ISSUE 2

The waiver or refusal to waive an overpayment of compensation by the Office is a matter that rests within the Offices' discretion pursuant to statutory guidelines.⁷ These statutory guidelines are found in section 8129(b) of the Federal Employees' Compensation Act which states: "Adjustment or recovery [of an overpayment] 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."⁸ Since the Office found appellant to be without fault in the creation of the overpayment, then, in accordance with section 8129(b), the Office may only recover the overpayment if it determined that recovery of the overpayment would neither defeat the purpose of the Act nor be against equity and good conscience.

Section 10.436 of the implementing regulations⁹ provides that recovery of an overpayment will defeat the purpose of the Act if 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.¹⁰ 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 \$50.00.¹¹

Section 10.437 provides that recovery of an overpayment is considered to be against equity and good conscience when an individual who received an overpayment would experience severe financial hardship in 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.¹²

The Office's regulations provide:

"(a) 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 the overpayment

⁷ *Robert Atchison*, 41 ECAB 83 (1989).

⁸ *See* 5 U.S.C. § 8129(b); *Carroll R. Davis*, 46 ECAB 361 (1994).

⁹ 20 C.F.R. § 10.436 (1999).

¹⁰ An individual's assets must exceed a resource base of \$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 base 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 (October 2004).

¹¹ *Sherry A. Hunt*, 49 ECAB 467 (1998).

¹² 20 C.F.R. § 10.437 (1999).

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.

“(b) 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.”¹³

ANALYSIS -- ISSUE 2

Appellant did not submit any relevant financial information regarding waiver of the overpayment. The preliminary determination of the overpayment provided him with an overpayment recovery questionnaire and indicated that he should submit the information regardless of the action he pursued as to the overpayment. Under the regulations at 20 C.F.R. § 10.438(b), failure to submit the necessary information shall result in denial of waiver. In the absence of any relevant financial evidence, the Board finds the Office properly denied waiver of the overpayment in this case. It is also noted that the Office directed appellant to repay the overpayment at \$400.00 per month. Since the recovery is not from continuing compensation benefits, the Board does not have jurisdiction over this issue.¹⁴

LEGAL PRECEDENT -- ISSUE 3

The Office’s regulations provide a claimant may request a precoupment hearing with respect to an overpayment.¹⁵ Precoupment hearings are conducted in the same manner as hearings provided under section 10.615 to 10.622.¹⁶ Failure to request a precoupment hearing within 30 days shall constitute a waiver of the right to a hearing.¹⁷

ANALYSIS -- ISSUE 3

Appellant requested a precoupment hearing by letter postmarked November 27, 2007. Since the preliminary overpayment determination was dated October 26, 2007, he had until November 26, 2007 to postmark a hearing request. Appellant did not timely request a precoupment hearing, and therefore he had waived his right to a hearing. The Office properly denied the precoupment hearing request.

¹³ *Id.* at § 10.438.

¹⁴ *See Levon H. Knight*, 40 ECAB 658, 665 (1989).

¹⁵ 20 C.F.R. § 10.432.

¹⁶ *Id.* at § 10.439.

¹⁷ *Id.* at § 10.432.

CONCLUSION

The evidence establishes that an overpayment of \$27,290.68 was created during the period December 11, 2004 to October 1, 2006 as the Office used an incorrect pay rate for compensation purposes. Appellant did not submit any relevant financial information and therefore the Office properly denied waiver of the overpayment. A request for a prerecoupment hearing was postmarked more than 30 days after the preliminary overpayment determination, and therefore appellant waived his right to a hearing.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 9, 2008 is affirmed.

Issued: January 16, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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