

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

C.W., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,)
VETERANS HEALTH ADMINISTRATION,)
San Diego, CA, Employer)

Docket No. 08-2170
Issued: June 2, 2009

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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 4, 2008 appellant filed a timely appeal from a July 1, 2008 merit decision of the Office of Workers' Compensation Programs finding that she received an overpayment of compensation and denying waiver. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the overpayment decision.

ISSUES

The issues are: (1) whether appellant received an \$812.81 overpayment of compensation for the period July 7 to October 19, 2007 because the Office used an incorrect pay rate; (2) whether the Office properly denied waiver of the overpayment.

FACTUAL HISTORY

On February 19, 2002 appellant, then a 39-year-old medical support assistant, filed an occupational disease claim alleging that she sustained pain in her left wrist, left elbow, left

shoulder and right wrist due to factors of her federal employment. The Office accepted her claim for bilateral carpal tunnel syndrome and left elbow strain.¹

Appellant underwent a right carpal tunnel release on February 13, 2004 and a left carpal tunnel release on April 6, 2004.² The Office paid her compensation for total disability from February 13 to September 6, 2004.

On June 12, 2007 appellant filed a claim for compensation beginning June 21, 2007.³ In an internal memorandum dated June 19, 2007, the Office calculated appellant's pay rate for compensation purposes as \$753.75 per week from June 21 to July 6, 2007 based on a recurrent pay rate date of June 21, 2007. On June 19, 2007 it paid appellant \$1,427.65 in net compensation for total disability from June 21 through July 6, 2007. The Office utilized a weekly pay rate of \$753.75 and indicated that this was based on a pay rate date of February 13, 2004.

From July 7 to September 7, 2007, the Office paid appellant net compensation of \$1,187.24 every four weeks using a pay rate of \$753.75 per week and a pay rate date of February 13, 2004.

On September 7, 2007 the Office paid appellant \$1,067.04 in net compensation for total disability from September 1 through 13, 2007 using a pay rate of \$753.75 per week and a pay rate date of February 13, 2004. On September 18, 2007 it paid her \$1,307.44 in net compensation for total disability from September 14 through 28, 2007 using a pay rate of \$753.75 per week and a pay rate date of February 13, 2004.

On October 10, 2007 the Office paid appellant \$1,478.68 in net compensation for the period September 29 through October 19, 2007. It utilized a pay rate of \$630.56 per week and a pay rate date of February 13, 2004.

In an internal Office memorandum dated October 23, 2007, a claims examiner stated, "For the period of September 29 to October 19, 2007 [appellant] was paid \$1,478.68 net [compensation] with a weekly pay rate of \$630.56. I generated a worksheet with the correct pay rate of \$753.75. The result was \$1,618.30 net [compensation.]" The Office claims examiner subtracted \$1,478.68 from \$1,618.30 and found an underpayment of \$139.62. It paid appellant a supplemental payment of \$139.62 for the period September 29 to October 19, 2007.

¹ By decision dated April 23, 2002, the Office denied appellant's claim on the grounds that the evidence was insufficient to establish that she sustained a medical condition due to work factors. In a decision dated April 25, 2003, an Office hearing representative affirmed the April 23, 2002 decision. On August 29, 2003 the Office vacated its April 23, 2002 decision and accepted the claim for bilateral carpal tunnel syndrome and left elbow strain.

² By decision dated June 2, 2005, the Office granted appellant a schedule award for an additional eight percent permanent impairment of the right upper extremity. The period of the award ran for 24.96 weeks from October 26, 2004 to April 18, 2005. The Office noted that she previously received schedule awards for a 17 percent impairment of the left upper extremity and a 2 percent impairment of the right upper extremity.

³ On June 21, 2007 appellant underwent a second right carpal tunnel release.

In a report of telephone call dated November 6, 2007, the Office noted that it had paid appellant using a pay rate date of 2004 rather than 2007. It indicated that she had been overpaid approximately \$900.00 in compensation.

On November 15, 2007 the Office notified appellant of its preliminary determination that she received an overpayment of \$812.81 because a computer error adjusted her pay rate to include consumer price increases from 2004. It indicated that it had used a worksheet to calculate the amount of the overpayment. The Office found that appellant was entitled to \$8,091.49 for the period July 7 to October 19, 2007 but received \$8,904.30, which resulted in an overpayment of \$812.81. It advised her of its preliminary finding that she was without fault in the creation of the overpayment. The Office requested that appellant complete the enclosed overpayment recovery questionnaire and submit supporting financial documents. Additionally, it notified her that, within 30 days of the date of the letter, she could request a telephone conference, a final decision based on the written evidence or a prerecoumment hearing.

Appellant requested a prerecoumment hearing. She contended that she was without fault in creating the overpayment. Appellant submitted an overpayment recovery questionnaire. She related that she called the Office on two occasions regarding the difference in her compensation payments but the Office was unable to explain the reason for the differences.

A telephonic hearing was held on April 14, 2008. By decision dated July 1, 2007, the hearing representative finalized the preliminary finding that an overpayment of \$812.81 occurred and that appellant was without fault in its creation. She denied waiver of the overpayment and found the overpayment due and payable in full.

LEGAL PRECEDENT -- ISSUE 1

The Federal Employees' Compensation Act⁴ provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.⁵ When an overpayment has been made to an individual 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 the individual is entitled.⁶

Office procedures state, "The reason that the overpayment occurred must be clearly stated in the preliminary decision and the [Office] should provide a clearly written explanation indicating how the overpayment was calculated."⁷

⁴ 5 U.S.C. §§ 8101-8193.

⁵ *Id.* at § 8102(a).

⁶ *Id.* at § 8129(a).

⁷ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.4a (May 2004).

ANALYSIS -- ISSUE 1

The Board finds that the case is not in posture for decision regarding whether appellant received an overpayment of compensation. The Office calculated appellant's net compensation every two weeks from July 7 to October 19, 2007 using a pay rate date of February 13, 2004 and a pay rate of \$753.75 per week. Using this date and pay rate, the Office paid her \$1,427.65 from June 21 through July 6, 2007; \$1,187.24 from July 7 to September 7, 2007; \$1,067.04 from September 1 through 13, 2007 and \$1,307.44 from September 14 through 28, 2007. It paid appellant \$1,478.68 for the period September 29 through October 19, 2007 using a pay rate of \$630.56 and a pay rate date of February 13, 2004. On October 23, 2007 a claims examiner found that for the period September 29 to October 19, 2007 appellant received \$1,478.68 in net compensation based on a weekly pay rate of \$630.56. He determined that the correct pay rate was \$753.75 and that she was thus entitled to receive \$1,618.30 in net compensation. The claims examiner determined that an underpayment existed.

On November 6, 2007 the Office noted that it had paid appellant using a pay rate date of 2004 rather than 2007 and concluded, without explanation, that she received an overpayment of \$900.00. In its November 15, 2007 preliminary determination of overpayment, it found that she received an overpayment of compensation for the period July 7 to October 19, 2007 because the computer calculated her compensation using a recurrent pay rate date of 2004 which included consumer price increases instead of the appropriate pay rate date of 2007. The Office subtracted \$8,091.49 from \$8,904.30 to find an overpayment of \$812.81. It indicated that it calculated the overpayment amount in a worksheet; however, the worksheet is not contained in the case record and does not accompany the November 15, 2007 preliminary determination of overpayment. The Office further did not explain why appellant received an overpayment of compensation given its October 23, 2007 finding that she was entitled to receive \$1,618.30 in net compensation every two weeks. It, consequently, did not follow its procedures and provide a clearly written explanation regarding how it calculated the overpayment.⁸

As the Office did not set forth how it determined that appellant received an overpayment of compensation, the Board will set aside the Office's finding that an overpayment occurred and remand the case to the Office for further factual findings. After such further development as the Office deems necessary, it should issue an appropriate decision.⁹

CONCLUSION

The Board finds that the case is not in posture for decision on the issue of whether appellant received an overpayment of compensation.

⁸ *Id.*

⁹ In view of the Board's findings, the issues of the amount of the overpayment and waiver are moot.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 1, 2008 is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: June 2, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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