

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

P.W., Appellant)	
)	
and)	Docket No. 09-857
)	Issued: October 16, 2009
DEPARTMENT OF VETERANS AFFAIRS,)	
VETERANS ADMINISTRATION MEDICAL)	
CENTER, Cheyenne, WY, 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 February 11, 2009 appellant filed a timely appeal of the January 7, 2009 merit decision of the Office of Workers' Compensation Programs, which found an overpayment of compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of this claim.¹

ISSUES

The issues are: (1) whether appellant received an overpayment of \$1,774.47 for the period December 18, 2006 through March 29, 2008; and (2) whether the Office properly denied waiver of recovery.

¹ The current record includes evidence received after the Office issued its January 7, 2009 decision. The Board's review of a case is limited to the evidence in the case record that was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c)(1) (2009).

FACTUAL HISTORY

Appellant, a 62-year-old accounts receivable technician, was involved in an employment-related fall on November 2, 2006. The Office accepted her claim for right shoulder contusion, right wrist fracture, right thumb contusion, lumbar sprain and right knee and leg contusion. In January 2007, it began paying appellant wage-loss compensation based on a date-of-injury weekly pay rate of \$832.85. The pay rate information was obtained from a December 22, 2006 claim for compensation (Form CA-7), which indicated an annual base pay of \$34,637.00 (GS-6, Step 8) and locality pay of \$8,671.00, for a total annual salary of \$43,308.00.² All compensation payments covering the period December 18, 2006 through March 29, 2008 were based on a weekly pay rate of \$832.85. In April 2008, the Office noted that compensation had been paid based on an incorrect pay rate. Appellant's actual date-of-injury annual salary of \$38,974.00, for Grade 6, step 8 incorporated locality pay for the State of Wyoming and represented a weekly pay rate of \$749.50.

In a May 12, 2008 preliminary determination, the Office advised appellant that she had received an overpayment of \$1,774.47 for the period December 18, 2006 through March 29, 2008. It explained that appellant's net compensation for the period at issue was \$17,697.81, which was based on an incorrect weekly pay rate of \$832.85. Applying the correct date-of-injury weekly pay rate of \$749.50, her net compensation should have only been \$15,923.34, the difference, representing an overpayment of \$1,774.47. The Office advised appellant that she was not at fault in creating the overpayment because the employing establishment had provided inaccurate pay rate information.

Appellant requested a precoupment hearing before the Branch of Hearings and Review. She was unable to attend the October 3, 2008 hearing and the Office provided her a review of the written record. However, appellant did not timely submit any relevant financial information or an overpayment recovery questionnaire (Form OWCP-20).

By decision dated January 7, 2009, the hearing representative affirmed the fact and the amount of the overpayment, as well as the finding that appellant was not at fault in creating the \$1,774.47. She further found that appellant was not entitled to waiver of recovery of the overpayment. This latter finding was based on appellant's failure to submit information regarding her assets, income and expenditures.

LEGAL PRECEDENT -- ISSUE 1

The amount of compensation paid is a function of the injured employee's pay rate.³ 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

² Appellant's November 6, 2006 claim form (CA-1) indicated an annual pay rate of \$38,974.00. Effective January 2006, a GS 7, step 8 annual pay rate was \$43,308.00.

³ 20 C.F.R. §§ 10.401(b), 10.404(b).

injury, the date disability began or the date compensable disability recurred if it recurred more than six months after the employee returned to work.⁴

ANALYSIS -- ISSUE 1

The record indicates that for the period December 18, 2006 through March 29, 2008 the Office paid appellant based on an incorrect weekly pay rate of \$832.85. This weekly pay rate represented the pay rate for a GS 7, step 8 employee; however appellant was a GS 6, step 8 employee. Her actual date-of-injury pay rate was \$749.50. This weekly pay rate of \$749.50 incorporated the proper locality pay for the State of Wyoming. The inaccurate pay rate resulted in an overpayment of benefits in the amount of \$1,774.47 for the above-noted period. Both the senior claims examiner and the hearing representative found that appellant were not at fault in creating this overpayment. The Board affirms the hearing representative's findings with respect to the fact and amount of the overpayment. Additionally, the Board finds that appellant was not at fault in creating the overpayment.

LEGAL PRECEDENT -- ISSUE 2

An individual who is without fault in creating or accepting an overpayment is nonetheless subject to recovery of the overpayment unless adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience.⁵ Recovery of an overpayment will defeat the purpose of the Act if such recovery would cause hardship to 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 ordinary and necessary living expenses and the beneficiary's assets do not exceed a specified amount as determined by the Office.⁶ Additionally, recovery of an overpayment is considered to be against equity and good conscience when any individual who received an overpayment would experience severe financial hardship in attempting to repay the debt or when any individual, in reliance on such payment or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.⁷

The individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by the Office.⁸ This information is necessary for

⁴ 5 U.S.C. § 8101(4) (2006); see *Bette L. Kvetensky*, 51 ECAB 346, 348-49 (2000).

⁵ *Id.* at § 8129(b); 20 C.F.R. §§ 10.433, 10.434, 10.436, 10.437.

⁶ *Id.* at § 10.436(a), (b). For an individual with no eligible dependents the asset base is \$4,800.00. The base increases to \$8,000.00 for an individual with a spouse or one dependent, plus \$960.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6a(1)(b) (October 2004).

⁷ *Id.* at § 10.437(a), (b).

⁸ *Id.* at § 10.438(a).

determining whether a waiver of recovery of the overpayment is warranted.⁹ Failure to submit the requested information within 30 days of the request shall result in denial of waiver.¹⁰

ANALYSIS -- ISSUE 2

While appellant was not at fault in creating the \$1,774.47 overpayment she is not entitled to waiver of recovery of the overpayment. At the time, the hearing representative issued her January 7, 2009 decision, she had not submitted any information regarding her personal finances. This information was initially requested on May 12, 2008 and again on June 19, 2008. Appellant, however, did not submit any requested financial information. As noted, the information is necessary in determining whether a waiver of recovery is warranted.¹¹ In view of appellant's failure to timely submit the requested financial information, the hearing representative properly denied waiver of recovery of the overpayment.¹²

CONCLUSION

The Board finds that appellant received an overpayment of \$1,774.47 for the period December 18, 2006 through March 29, 2008. The Board further finds that appellant is not entitled to waiver of recovery of the overpayment.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

ORDER

IT IS HEREBY ORDERED THAT the January 7, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 16, 2009
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