

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

F.C., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Edmore, MI, Employer**

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**Docket No. 09-406
Issued: September 3, 2009**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On November 26, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated October 20, 2008, with respect to an overpayment of compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly determined that an overpayment of \$4,495.94 was created due to an incorrect pay rate; and (2) whether the Office properly denied waiver of the overpayment.

FACTUAL HISTORY

Appellant filed an occupational claim (Form CA-2) alleging that she sustained right knee injuries as a result of her federal employment. The Office accepted the claim for aggravation of degenerative arthritis in the right knee and right knee chondromalacia patella. Appellant filed a claim for compensation (Form CA-7) commencing December 11, 2004. The reverse of the claim

form reported appellant's annual earnings as \$48,220.00. A Form CA-7 dated January 27, 2005 reported appellant's annual earnings as of December 11, 2004 as \$49,908.00.

In an undated letter received by the Office on February 4, 2005, appellant indicated that she had stopped working as of August 2, 2004. She stated that she filed a Form CA-7 claiming compensation from December 11, 2004 because this was the first pay period after the Office accepted the claim.

The Office paid compensation for wage loss commencing December 11, 2004. The pay rate for compensation purposes was \$959.77 per week (based on \$49,908.00 per year). Appellant continued to receive compensation for wage loss based on a weekly pay rate of \$959.77.

The record indicates that appellant returned to work on March 3, 2008. By decision dated May 28, 2008, the Office determined that actual earnings fairly and reasonably represented her wage-earning capacity.¹

On May 5, 2008 appellant filed a Form CA-7 claiming retroactive compensation from August 6, 2004. In a memorandum dated August 28, 2008, the Office indicated that, as the date disability began in this case was August 2, 2004, the Office had been paying compensation based on an incorrect salary (\$49,908.00). Appellant's pay rate on August 6, 2004 was \$48,820.00 per year, or \$927.31 per week. The Office paid appellant compensation from August 6 to December 10, 2004 using the proper pay rate for compensation purposes of \$927.31 per week.

By preliminary determination dated September 15, 2008, the Office stated that an overpayment of \$4,495.94 was created. It explained that commencing December 11, 2004, appellant had been paid compensation based on the incorrect pay rate for compensation purposes (\$49,908.00). According to the Office, the total overpayment for the period December 11, 2004 to March 2, 2008, and intermittent dates through August 15, 2008, was \$4,533.80. It then deducted \$37.86 due to an excessive deduction of life insurance premiums. With respect to fault, the Office found appellant was not at fault in creating the overpayment. Appellant was advised to submit financial information relevant to the issue of waiver within 30 days.

On October 20, 2008 the Office received an overpayment recovery questionnaire (Form OWCP-20). By decision dated October 20, 2008, it finalized its preliminary determination of a \$4,495.94 overpayment. The Office denied waiver and found appellant had not responded to the preliminary determination.

LEGAL PRECEDENT -- ISSUE 1

Under 5 U.S.C. § 8101(2), “‘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

¹ Appellant did not request that the Board review this decision.

disability recurs, if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater....”²

ANALYSIS -- ISSUE 1

In the present case, the Office paid compensation for wage loss commencing December 11, 2004 using a pay rate for compensation purposes of \$959.77 per week. This determination was based on information provided by the employing establishment on claims for compensation that appellant’s pay rate as of December 11, 2004 was \$49,908.00 per year.³ Appellant, however, had indicated that the date disability began was actually August 2, 2004. She later filed a claim for compensation commencing August 6, 2004.

As noted above, monthly pay in this case is properly determined under 5 U.S.C. § 8101(2) as the date disability began. Based on evidence from the employing establishment, the Office found that appellant’s pay rate on August 2, 2004 was \$48,220 per year, or \$927.31 per week. Appellant’s continuing compensation for wage loss after August 2, 2004 should have been based on a pay rate for compensation purposes of \$927.31. Since the Office used an incorrect and higher pay rate for compensation purposes, an overpayment of compensation was created.

As to the amount of the overpayment, the Office’s calculations show that, from December 11, 2004 to March 2, 2008, and intermittently through August 15, 2008, appellant received \$133,640.66 in gross compensation. With a pay rate of \$927.31, appellant should have received \$129,106.86 in compensation, resulting in an overpayment of \$4,533.80.

The Office attempted to reduce the amount of the overpayment by \$37.86 based on incorrect life insurance deductions. As the Board explained in *Lawrence Sherman*,⁴ it is improper to attempt to offset the overpayment based on amounts owed to appellant. There must be proper consideration of waiver of the entire amount of the overpayment. Appellant remains entitled to any amounts owed for improper deduction of life insurance premiums, but this is a separate issue from the overpayment due to an incorrect pay rate. Based on the evidence, the overpayment amount is \$4,533.80.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Federal Employees’ Compensation Act⁵ provides: “Adjustment or recovery by the United States may not be made when incorrect payment has been made to an

² See also 20 C.F.R. § 10.5(s), which defines “pay rate for compensation purposes” as the employee’s pay as determined under 5 U.S.C. § 8114 at the time of injury, the time disability begins, or the time compensable disability recurs, if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater.

³ The Board notes that the initial CA-7 forms filed December 28, 2004 and January 10, 2005 reported a pay rate of \$48,220.00 per year.

⁴ 55 ECAB 359 (2004).

⁵ 5 U.S.C. § 8101 *et seq.*

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.”⁶ Since the Office found appellant to be without fault in the creation of the overpayment, the Office may only recover the overpayment if recovery would neither defeat the purpose of the Act nor be against equity and good conscience. The guidelines for determining whether recovery of an overpayment would defeat the purpose of the Act or would be against equity and good conscience are set forth in sections 10.434 to 10.437 of Title 20 of the Code of Federal Regulations.

According to section 10.436, recovery of an overpayment would defeat the purpose of the Act if recovery would cause hardship because the beneficiary “needs substantially all of his or her current income (including compensation benefits) to meet current ordinary and necessary living expenses,” and, also, if the beneficiary’s assets do not exceed a specified amount as determined by the Office from data provided by the Bureau of Labor Statistics.⁷ For waiver under the “defeat the purpose of the Act” standard, appellant must show that he needs substantially all of his current income to meet current ordinary and necessary living expenses, and that his assets do not exceed the resource base.⁸

The Board has held that since the Board’s jurisdiction of a case is limited to reviewing the evidence which was before the Office at the time of its final decision, it is necessary that the Office review all evidence submitted by a claimant and received by the Office prior to issuance of its final decision. As the Board’s decisions are final as to the subject matter appealed, it is critical that all evidence relevant to that subject matter which was properly submitted to the Office prior to the time of issuance of its final decision be addressed by the Office.⁹

ANALYSIS -- ISSUE 2

On appeal, appellant indicates that she submitted additional evidence to the Office. The record indicates that, on October 20, 2008, the Office received the completed OWCP-20 overpayment recovery questionnaire. The October 20, 2008 Office decision indicated that it did not receive any response from appellant. It is well established that the Office is required to review all evidence submitted by a claimant and received by the Office prior to the issuance of its final decision, including evidence received on the date of the decision.¹⁰ The case will be remanded to the Office for proper consideration of the evidence submitted on the issue of waiver. After such further development as the Office deems necessary, it should issue an appropriate decision.

⁶ *Id.* at § 8129(b).

⁷ Office procedures provide that the assets must not exceed a resource base of \$4,800.00 for an individual or \$8,000.00 for an individual with a spouse or dependent plus \$960.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a) (October 2004).

⁸ *See Robert E. Wenzholz*, 38 ECAB 311 (1986).

⁹ *William A. Couch*, 41 ECAB 548 (1990).

¹⁰ *Yvette N. Davis*, 55 ECAB 475 (2004); *Linda Johnson*, 45 ECAB 439 (1994).

CONCLUSION

The Board finds that an overpayment on \$4,533.80 was created due to an incorrect pay rate. The case will be remanded for proper consideration of the evidence on the issue of waiver.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 20, 2008 is modified to reflect an overpayment of \$4,533.80. The decision is set aside and the case remanded on the issue of waiver of the overpayment.

Issued: September 3, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board