

\$46,401.00 (\$892.32 per week or \$22.30 per hour). Appellant filed a claim for compensation (Form CA-7) for disability commencing May 21, 2007. The reverse side of the claim form reported her pay rate as \$22.31 per hour as of April 5, 2007. The date appellant stopped work was reported as April 6, 2007, with an hourly pay rate that is difficult to read; it could be read as \$22.31 or \$27.31 per hour.

Commencing May 21, 2007, appellant began receiving compensation for wage loss based on a weekly pay rate for compensation purposes of \$1,092.40 per week, or \$27.31 per hour based on a 40-hour work week. Appellant returned to work at four hours per day on June 14, 2007 and received compensation for the remaining four hours per day. The light-duty job offer reported her pay rate as \$22.31 per hour. Continuing compensation payments were issued based on a weekly pay rate for compensation purposes of \$1,092.40. In a letter dated December 17, 2007, the employing establishment indicated that the annual pay rate for appellant's grade, level and step and the time of injury was now \$47,051.00 (or \$22.62 per hour).

A memorandum of telephone call (Form CA-110) indicated that the employing establishment advised the Office that appellant's pay rate on the date of injury was \$22.31 per hour. In a worksheet dated September 18, 2008, the Office indicated that the correct pay rate should have been \$22.31 per hour, or \$892.40 per week. Using this pay rate for compensation purposes, appellant should have received \$19,573.31 in compensation for the period May 21, 2007 to August 1, 2008. The Office indicated that appellant had received \$23,960.02.

By letter dated September 18, 2008, the Office advised appellant that it made a preliminary determination that an overpayment of \$4,386.71 was created from May 21, 2007 to August 1, 2008 due to an incorrect pay rate. Appellant was advised that she was found not at fault in creating the overpayment. As to waiver of the overpayment, the Office advised her that she must complete an OWCP-20 (overpayment recovery questionnaire) and should attach supporting documents, including income tax returns, bank account statements, bills, cancelled checks and pay slips.

On October 16, 2008 the Office received a completed OWCP-20 form. By decision dated October 23, 2008, it finalized its preliminary determination of a \$4,786.71 overpayment of compensation. As to waiver of the overpayment, the Office noted that the September 18, 2008 preliminary determination had advised appellant that under 20 C.F.R. § 10.438 her failure to submit the requested information within 30 days would result in the denial of waiver. It stated, "The claimant did not provide any supporting documents to Form OWCP-20. The information provided was insufficient to justify waiving recovery of the overpayment." With regard to repayment, the Office found that \$200.00 would be withheld from continuing compensation payments.

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 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...." The

monthly pay is deemed one-twelfth of the average annual earnings, as determined under 5 U.S.C. § 8114(d), and the weekly pay is one-fifty-second of the average annual earnings.¹

ANALYSIS -- ISSUE 1

The appropriate date for determining the pay rate for compensation purposes is April 5, 2007, the date of injury and the date disability began. The probative evidence of record indicates the pay rate at that time was \$22.31 per hour, or \$892.40 per week. The initial CA-7 form and the light-duty job offer reported a pay rate of \$22.31 per hour as of April 5, 2007, and the employing establishment confirmed this amount in a September 18, 2008 telephone call.

On appeal, appellant stated that she was uncertain that she had been paid based on a pay rate of \$27.31 per hour. The record, however, does document that the compensation paid from May 21, 2007 to August 1, 2008 was based on a pay rate of \$27.31 per hour, or \$1,092.40 per week. All of the fiscal documents relating to payment of compensation commencing May 21, 2007 show a pay rate of \$1,092.40 per week.

The Board accordingly finds that an overpayment of compensation was created in this case. From May 21, 2007 to August 1, 2008 appellant was paid compensation based on an incorrect pay of \$1,092.40, instead of the correct pay rate of \$892.40 per week. The Office calculated that appellant was paid \$23,960.02, but should have been paid \$19,573.31, resulting in an overpayment of \$4,786.71.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Federal Employees' Compensation Act² provides: "Adjustment or recovery 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."³ 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

¹ See 5 U.S.C. § 8114(c). Under the Office's regulations, the "pay rate for compensation purposes" is determined pursuant to 5 U.S.C. § 8101(2) and 5 U.S.C. § 8114.

² 5 U.S.C. § 8101 *et seq.*

³ *Id.* at § 8129(b).

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.⁴ 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.⁵

ANALYSIS -- ISSUE 2

The Office did not make findings with respect to whether recovery would defeat the purpose of the Act or would be against equity and good conscience. In this case the Office relies on 20 C.F.R. § 10.438, which provides that failure to submit the “requested information” shall result in denial of waiver. But the instant case is not a situation where the claimant did not submit any financial information, or an incomplete OWCP-20.⁶ Appellant submitted a Form OWCP-20 overpayment recovery questionnaire with information on income and expenses. Office procedures note that documentation is requested in support of statements made on the OWCP-20, and “if adequate documentation is not supplied, the [claims examiner] should conference the case and request that additional documentation be submitted (or the Hearing Representative should request additional documentation at the hearing).”⁷ If the Office felt there was specific documentation needed with regard to the OWCP-20 statements, then it should have advised appellant and provided an opportunity to submit the requested documentation. The broad request for financial documents in the preliminary overpayment determination is not sufficient notice to a claimant of the specific documents the Office may require based on a review of the submitted overpayment recovery questionnaire.⁸

The Board finds the Office did not properly consider the issue of waiver. The case will be remanded to the Office for proper adjudication of the waiver issue in accord with its procedures. After such further development as the Office deems necessary, it should issue an appropriate decision. In view of the Board’s finding on the waiver issue, it will not address the repayment issue at this time.

CONCLUSION

The Board finds that the evidence establishes an overpayment of \$4,786.71. The case is remanded to the Office for proper consideration of the waiver issue.

⁴ 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).

⁵ See *Robert E. Wenholz*, 38 ECAB 311 (1986).

⁶ See *T.S.*, 60 ECAB ___ (Docket No. 08-1604, issued March 13, 2009); *Madelyn Y. Grant*, 57 ECAB 533 (2006) (incomplete OWCP-20).

⁷ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200(6)(a) (May 2004).

⁸ The Office may choose, for example, to consider the waiver issue solely based on the information provided in the OWCP-20.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 23, 2008 is affirmed with respect to fact and amount of overpayment, and set aside and remanded on the issue of waiver.

Issued: September 15, 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