

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

B.W., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Owenton, KY, Employer**

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**Docket No. 09-1210
Issued: January 5, 2010**

Appearances:
Geoffrey P. Damon, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 3, 2009 appellant filed a timely appeal from a January 6, 2009 decision of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merit issues of this case.

ISSUES

The issues are: (1) whether the Office properly found that an overpayment in compensation in the amount of \$10,467.50 had been created for the period March 29, 2003 to March 10, 2004 because appellant's compensation was based on an incorrect pay rate; and (2) whether the Office properly denied waiver of the overpayment.¹

¹ At the time the Office issued the January 6, 2009 decision, it did not seem aware that appellant was receiving wage-loss compensation under Office file number xxxxxx846 for an injury that occurred on September 11, 2006. With respect to the recovery of an overpayment, the Board's jurisdiction is limited to those cases where the Office seeks recovery from continuing compensation benefits under the Act, and it did not do so in this case. *D.R.*, 59 ECAB ___ (Docket No. 07-823, issued November 1, 2007).

FACTUAL HISTORY

On February 11, 2003 appellant, then a 61-year-old rural carrier associate, sustained an employment-related concussion and left shoulder impingement syndrome when he fell on ice while loading mail into his car. He stopped work that day. On July 22 and November 18, 2003 appellant underwent left shoulder arthroscopic repair. He received augmented compensation based on a 40-hour workweek at a weekly pay rate of \$729.60. Appellant returned to modified duty on March 11, 2004. He stopped work on March 15, 2004 when he sustained a new injury to his left shoulder.²

By letter dated April 14, 2004, the employing establishment informed the Office that appellant received an overpayment in compensation, noting that he was entitled to only 25 hours of weekly compensation, based on a calculation of his work the previous year. On June 4, 2004 Darla Baker, the postmaster, advised that appellant was a substitute mail carrier working five to six days a week because a carrier had retired. On June 10, 2004 the employing establishment provided an analysis of appellant's employment the previous year, noting that he averaged 30.98 hours per week at an average weekly pay rate of \$553.75. On June 27, 2006 Ms. Baker advised that appellant was a noncareer employee who worked on an on-call basis. She stated that she did not have records but estimated that appellant would have worked an average of 35 hours per week at a weekly pay rate of \$646.45. On January 25, 2008 the employing establishment informed the Office that, based on appellant's employment records for the 12 months prior to the February 11, 2003 injury, he averaged working 31 hours per week with an average weekly pay, minus overtime, of \$559.02. On September 4, 2008 the employing establishment provided appellant's payroll records for the year prior to the February 11, 2003 injury, ascertaining that his total pay was \$23,408.00 or \$450.15 a week. Computer worksheets show that appellant received \$27,259.36 in wage-loss compensation for the period March 29, 2003 to March 10, 2004 and advised that, based on a weekly pay rate of \$450.15, he should have received compensation of \$16,791.86, yielding an overpayment in compensation in the amount of \$10,467.50.

On October 31, 2008 the Office issued a preliminary determination that appellant had received an overpayment in compensation in the amount of \$10,467.50 from March 29, 2003 to March 10, 2004 because he was paid at an incorrect pay rate. It found appellant without fault. Appellant was given 30 days to respond and was provided an overpayment questionnaire. In a November 4, 2008 letter, the Office further explained to him that his initial claim forms had listed him as working 40 hours a week whereas the employing establishment confirmed on September 4, 2008 that, at the time of the February 11, 2003 injury, he worked an average 25-hour workweek. It advised that it was important that appellant respond within the 30 days allotted in the preliminary decision. On January 6, 2009 the Office finalized the determination that appellant received an overpayment in compensation in the amount of \$10,467.50, found that he was not at fault and denied waiver because he failed to submit the requested financial information. It set up a repayment schedule of \$250.00 per month.³

² On June 14, 2004 appellant filed a recurrence claim, stating that he reinjured his left shoulder on March 15, 2004. The Office determined that appellant sustained a new injury and adjudicated the claim under file number xxxxxx645.

³ See *supra* note 1.

LEGAL PRECEDENT -- ISSUE 1

Section 8102 of 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 The Act provides that monthly pay means the monthly pay at the time of injury, or 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, whichever is greater.⁷

To determine a weekly pay rate, the Office must first determine the employee's "average annual earnings" and then divide that figure by 52.⁸ Section 8114(d) of the Act 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."⁹

ANALYSIS

The Board finds this case is not in posture for decision. The Office found an overpayment in compensation on the grounds that appellant received wage-loss compensation

⁴ 5 U.S.C. §§ 8101-8193.

⁵ *Id.* at 8102(a).

⁶ *Id.* at 8129(a).

⁷ *Id.* at § 8101(4); see *Janet A. Condon*, 55 ECAB 591 (2004).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Computation of Compensation*, Chapter 2.900.9 (April 2002).

⁹ 5 U.S.C. § 8114(d).

based on an incorrect pay rate. The initial pay rate used by the Office, based on the date of injury which was also the date disability began, was based on a 40-hour workweek or \$729.60 per week. This was later adjusted to reflect actual earnings during the previous year for an average weekly pay rate of \$553.75. In the preliminary overpayment determination, the Office advised appellant that the correct weekly pay rate was \$450.15, stating that his actual earnings the previous year of \$23,408.00 were divided by 52 weeks to yield a correct weekly pay rate of \$450.15.

A pay rate determination must be made in accordance with the specific provisions of section 8114 of the Act. The record indicates that, as a rural carrier associate, appellant did not have fixed hours. The postmaster, Ms. Baker, advised that he worked as a substitute mail carrier on an on-call basis, and had worked five to six days a week the previous year because a carrier had retired. She estimated that he worked 35 hours per week. The record also includes two employing establishment records that purport to show appellant's hours worked and earnings in the year prior to the February 11, 2003 employment injury. From these records and the statements of the postmaster, it appears that appellant worked in the date-of-injury job during substantially the whole year preceding the injury, that he was paid an hourly wage, and that he worked a varying number of hours per week. Thus, since his annual earnings were not fixed, the Office should have determined his pay rate in accordance with section 8114(d)(1)(B).¹⁰ As noted above, this requires determining the average daily wage and multiplying by the appropriate number. The case is therefore not in posture for decision, and the case must be remanded for the Office to secure sufficient evidence to determine appellant's average daily wage, and whether he was employed on the basis of a six, five and one half or five-day workweek.

The case will therefore be remanded to the Office for a proper determination as to the correct pay rate for compensation purposes. Once this issue is resolved, the Office may properly determine the amount of any overpayment and issue an appropriate decision. Due to the Board's finding on the first issue, it will not address the issue of waiver. If the Office finds an overpayment and establishes recovery from continuing compensation payments, the Office must consider the relevant factors.¹¹

CONCLUSION

The Board finds this case is not in posture for decision because the Office did not properly determine appellant's pay rate for compensation purposes in accordance with section 8114 of the Act.

¹⁰ *Id.* at § 8114(d)(1)(B).

¹¹ *See* 20 C.F.R. § 10.441.

ORDER

IT IS HEREBY ORDERED THAT the January 6, 2009 decision of the Office of Workers' Compensation Programs be set aside and the case remanded to the Office for proceedings consistent with this opinion of the Board.

Issued: January 5, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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