

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

T.M., Appellant

and

**DEPARTMENT OF THE NAVY, MARINE
CORPS LOGISTICS BASE, Albany, GA,
Employer**

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**Docket Nos. 09-1090 & 09-
2226
Issued: March 8, 2010**

Appearances:
Appellant, pro se
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 March 16, 2009 appellant filed a timely appeal from November 25, 2008 and March 4, 2009 merit decisions of the Office of Workers' Compensation Programs determining his pay rate for compensation purposes.¹ On September 8, 2009 he filed a timely appeal from an August 28, 2009 decision finding that he received an overpayment of compensation and denying waiver of the recovery of the overpayment. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

¹ In decisions dated March 24 and July 21, 2008, the Office denied appellant's claim for an additional schedule award under file number xxxxxx500. By decision dated September 16, 2008, it denied his request for reimbursement for medical expenses and travel mileage on intermittent dates in 2004 and 2002. In a nonmerit decision dated October 10, 2008, the Office denied appellant's request for reconsideration of the September 16, 2008 decision. On November 7, 2008 it granted him a schedule award for an additional two percent permanent impairment of each upper extremity. The record also contains a January 27, 2009 decision issued under file number xxxxxx576 denying appellant's request for reconsideration of a January 10, 2005 decision as it was untimely and did not show clear evidence of error. Appellant did not appeal from these decisions and they are not before the Board. 20 C.F.R. § 501.2(c).

ISSUES

The issues are: (1) whether the Office properly determined appellant's pay rate for compensation purposes; (2) whether he received an overpayment of \$5,000.31 for the period September 18, 2003 through March 2, 2005 because he was paid at an inaccurate pay rate; and (3) whether the Office properly denied waiver of the recovery of the overpayment.

FACTUAL HISTORY

On July 17, 2000 appellant, then a 46-year-old heavy mobile equipment mechanic, filed a traumatic injury claim alleging that on June 28, 2000 he sustained an injury to his neck and shoulder in the performance of duty. He stopped work on the date of injury and returned to work on July 10, 2000. At the time of his injury appellant earned \$17.53 per hour and worked a set alternate work schedule from 7:30 a.m. to 5:00 p.m. Monday through Friday. The Office accepted the claim, assigned file number xxxxxx970, for right lateral epicondylitis and displacement of a cervical intervertebral disc without myelopathy.

The Office also accepted that on May 8, 2001 appellant sustained a right hand contusion, a crush injury of the right fingers, right carpal tunnel syndrome, right Boutonniere deformity and traumatic right hand arthropathy. It assigned the case file number xxxxxx500. The employing establishment indicated that appellant earned \$18.20 per hour effective March 21, 2001 at an alternate work schedule. Every two weeks appellant worked eight 9-hour days, one 8-hour day and took one day off. On December 4, 2001 he filed a claim for a schedule award.

By decision dated April 16, 2003, issued under file number xxxxxx500, the Office granted appellant a schedule award for 20 percent impairment of the right hand due to his May 8, 2001 work injury. The Office paid compensation from October 11, 2002 to September 17, 2003 based on a weekly pay rate of \$727.50.

In a decision dated December 8, 2003, the Office granted appellant a schedule award for 20 percent impairment of both arms due to his bilateral nerve root impairment under file number xxxxxx970, less the previous award for the right hand. The period of the awards ran from September 18, 2003 to March 2, 2005. The Office found that the effective pay rate date was May 17, 2001 and based his compensation on a weekly pay rate of \$757.74.

On February 21, 2008 appellant filed a claim for an increased schedule award under file number xxxxxx970. By decision dated March 11, 2008, the Office denied his claim. On March 14, 2008 appellant requested a review of the written record. In a decision dated August 26, 2008, an Office hearing representative affirmed the March 11, 2008 decision.² Appellant requested reconsideration. In a decision dated November 7, 2008, the Office granted him a schedule award for an additional two percent impairment of each arm. It found that appellant had an additional 3 percent impairment to each upper extremity due to a sensory deficit of the C5 nerve root which, when combined with the prior award of 20 percent, yielded

² By decision dated September 16, 2008, the Office denied appellant's request for reimbursement for medical expenses and travel mileage claimed on certain dates.

22 percent impairment of each arm. The Office paid him compensation from August 28 to November 23, 2008. It utilized appellant's date-of-injury pay rate of \$703.56.

On November 13, 2008 appellant contended that the Office paid his schedule award at an inaccurate pay rate. In a decision dated November 25, 2008, the Office determined that he was paid compensation at an inaccurate pay rate from October 11, 2002 to September 17, 2003. It based appellant's pay rate on his weekly compensation effective May 17, 2001 of \$757.74; however, it should have paid compensation based on his weekly pay on the date of injury, June 28, 2000, as he stopped work on the date of injury and returned to work on July 10, 2000 with no further time lost from work except for medical treatment. The Office stated:

“The correct pay rate is the pay rate you earned on the date of injury which was reported as an hourly rate of \$17.53. That amount is multiplied by 2,087 hours (the number of hours in a year for a federal worker) then divided by 52 to arrive at the correct weekly pay rate as follows--

$$\$17.53 \times 2,087 = \$36,585.11 / 52 = \$703.56.”$$

The Office advised appellant that he received an overpayment of compensation.

On November 29, 2008 appellant requested a review of the written record. In an internal memorandum dated December 3, 2008, the Office noted that the decision of November 25, 2008 correctly determined his pay rate but provided inaccurate dates for the schedule award.

On December 9, 2008 appellant described his work injuries and submitted information regarding the dates of injury for each file number. In a statement dated January 20, 2009, the employing establishment noted that he was removed for cause on December 13, 2004. Appellant had filed 13 claims including 2 after his termination from work.

The Office combined file number xxxxxx500 into master file number xxxxxx970 to avoid duplication.

By decision dated March 4, 2009, an Office hearing representative affirmed that appellant's pay rate for compensation purposes was his date-of-injury pay rate of \$17.53 per hour or \$703.56 per week. She found that the Office incorrectly paid him at a rate of \$767.74 per week which created an overpayment of compensation.³

On March 10, 2009 appellant requested reconsideration of the pay rate determination. He noted that the hearing representative incorrectly found that the Office paid him at a rate of \$767.74 per week. Appellant also maintained that he never stopped working after the June 28, 2000 injury.

³ It appears that the hearing representative meant that he was paid at a rate of \$757.74 per week rather than \$767.74 per week. The hearing representative also correctly noted that the Office paid him at an incorrect rate under file number xxxxxx970 for the schedule award issued from September 18, 2003 to March 2, 2005 rather than under file number xxxxxx500 for the period October 11, 2002 to September 17, 2003.

On March 12, 2009 the Office notified appellant of its preliminary determination that he received an overpayment of \$5,000.31 because he received compensation under a schedule award from September 18, 2003 through March 2, 2005 at an incorrect pay rate. It noted that it should have based his pay rate on his date-of-injury weekly pay of \$703.56 instead of the May 2001 pay rate of \$767.74. The Office calculated the overpayment by subtracting the amount appellant should have been paid from September 18, 2003 through March 2, 2005, \$42,055.16, from the amount that he received, \$47,055.49, to find an overpayment in the amount of \$5,000.31. It found that he was without fault in creating the overpayment. The Office requested that he complete an enclosed overpayment recovery questionnaire and submit supporting financial documents if he sought waiver. Appellant was advised he had 30 days to request a telephone conference, a final decision based on the written evidence or a prerecoupment hearing.

On March 6, 2009 appellant asserted that based on an hourly pay rate of \$17.53 his weekly pay rate was \$757.74 rather than \$767.74.⁴ In a separate letter, he noted that his date of injury was "June 20, 2000" under file number xxxxxx970 and May 8, 2001 under file number xxxxxx500.

On March 17, 2009 appellant requested a prerecoupment hearing. He asserted that the employing establishment provided his correct pay rate on his Form CA-7.

On March 17, 2009 the Office doubled case files xxxxxx500 and xxxxxx970.⁵ On March 20, 2009 appellant requested a review of the written record. He asserted that combining the cases would cause him difficulty because of different pay rates and dates of injuries. Appellant submitted copies of personnel records showing increases in pay subsequent to his June 28, 2000 work injury.

On April 3, 2009 the employing establishment confirmed that appellant's hourly pay for his June 28, 2000 date of injury was \$17.53.

On April 8, 2009 the Office advised appellant that the finding that he received a schedule award based on a weekly pay rate of \$767.74 was a typographical error. It informed him that it did not use that amount in calculating the overpayment. The Office totaled the compensation that appellant received from September 18, 2003 through March 2, 2005 in the amount of \$47,055.49. It subtracted \$42,055.16, the amount he should have received under the schedule award using the \$703.56 pay rate. The difference represented an overpayment of \$5,000.31.

On May 22, 2009 appellant contended that he was not at fault in creating the overpayment and requested waiver of the recovery of the overpayment. He stated that he was disabled and should not be responsible for the employing establishment's mistake.

⁴ On March 16, 2009 a claims examiner noted that the schedule award that created the overpayment ran concurrently with a schedule award in file number xxxxxx500, which had a 2001 date-of-injury pay rate of \$757.74.

⁵ The Board notes that the letter advising of this administrative action was captioned "Notice of decision."

On June 16, 2009 the Office notified appellant of the time and place of his hearing. On June 22, 2009 he noted that he had requested a review of the written record rather than an oral hearing.

On June 29, 2009 appellant submitted an overpayment recovery questionnaire. He listed his monthly income as \$2,214.37. For monthly expenses, appellant listed his rent or mortgage as \$572.00; food as \$250.00; clothing as \$50.00; utilities as \$400.00; and miscellaneous expenses as \$130.00. He and his wife paid \$310.00 a month on an \$8,000.00 loan from Sears; \$200.00 a month on an \$8,000.00 loan from Bank of America; \$210.00 on a \$6,000.00 loan from Advanta; and \$270.00 a month on a \$17,000.00 loan from Suntrust Bank or total expenses of \$2,267.00. Appellant related that he was unaware of the overpayment and noted that he received a schedule award under file number xxxxxx500 with a pay rate date of May 8, 2001. He again asserted that he did not stop working after the June 28, 2000 work injury.

By decision dated August 29, 2009, an Office hearing representative finalized the finding that appellant received an overpayment of \$5,000.31 from September 18, 2003 to March 2, 2005 because he was paid compensation at an incorrect pay rate. She found that he was not at fault but denied waiver of the recovery of the overpayment because he had not provided adequate documentation of his expenses. The hearing representative noted that appellant indicated income of \$2,214.37 and expenses of \$2,267.00. She found that he did not provide sufficient information for a determination of how his monthly credit card debt accrued such that she was unable to determine whether it was duplicative of his listed fixed monthly expenses or whether he had monthly income left after ordinary and necessary living expenses. The hearing representative found the overpayment due and payable. She also affirmed the March 17, 2009 administrative action consolidating the case files.

On appeal, appellant argues that he did not stop working on June 28, 2000. He sought medical treatment from June 28 to 29, 2000 and then was on vacation. Appellant noted that the November 25, 2008 decision referred to a schedule award issued with a different pay rate. He also maintains that he is unemployed, bankrupt and disabled and thus unable to repay the overpayment. Appellant asserts that the hearing representative inaccurately considered his wife's income and expenses.

LEGAL PRECEDENT -- ISSUE 1

Section 8107 of the Federal Employees' Compensation Act provides that compensation for a schedule award shall be based on the employee's monthly pay.⁶ Section 8105(a) of the Act provides if the disability is total, the United States shall pay the employee during the disability monthly monetary compensation equal to 66 2/3 percent of his monthly pay, which is known as his basic compensation for total disability.⁷

⁶ 5 U.S.C. § 8107.

⁷ 5 U.S.C. § 8105(a). Section 8110(b) of the Act provides that compensation is paid at the augmented three fourths of an employee's monthly pay when the employee has one or more dependents. 5 U.S.C. § 8110(b).

Section 8101(4) of the Act defines monthly pay for purposes of computing compensation benefits as the monthly pay at the time of injury, the time disability begins or the time disability recurs, if the recurrence is more than six months after returning to full-time work, whichever is greater.⁸ The Board has held that the rate of pay for schedule award purposes is the highest rate which satisfies the terms of section 8101(4).⁹

The Office's implementing regulations provide that the pay rate for compensation purposes means the employee's pay, as determined under 5 U.S.C. § 8114.¹⁰ 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.”¹¹

The Office's procedure manual provides methodology for computing weekly pay on an annual, daily and hourly basis.¹² Regarding hourly pay, the procedure manual provides, “For regular Federal employees, the amount shown is multiplied by 2087 (by administrative determination, the number of hours in a full work year based on a 40[-]hour work week). This figure is then divided by 52.”¹³

ANALYSIS -- ISSUE 1

The Office accepted appellant's traumatic injury claim for right lateral epicondylitis and displacement of a cervical intervertebral disc without myelopathy. On December 4, 2001 appellant filed a claim for a schedule award. The Office initially calculated his pay rate for purposes of a schedule award based on his wages in May 2001; however, the Office subsequently determined that this was inaccurate as he did not incur any disability from employment. It concluded that appellant's pay rate should be based on his date-of-injury pay rate of \$17.53 per hour or \$703.56 per week.

⁸ 5 U.S.C. §§ 8101(4), 8114; *see also* 20 C.F.R. § 10.5(s).

⁹ *Robert A. Flint*, 57 ECAB 369 (2006).

¹⁰ 5 U.S.C. § 8114.

¹¹ *Id.*

¹² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.10 (April 2002).

¹³ *Id.*

The Board finds that appellant's pay rate for schedule award purposes is \$703.56 per week, his pay rate at the time of his June 28, 2000 work injury. Section 8107 of the Act provides that compensation for a schedule award shall be based on the higher of the employee's monthly pay at the time of injury or the time disability begins or the time of a compensable recurrence of disability. Appellant sustained a traumatic injury on June 28, 2000 and stopped work from that date until July 10, 2000. He did not sustain a recurrence of disability. At the time of his traumatic injury on June 28, 2000, appellant worked a fixed work schedule. He earned \$17.53 an hour in a position that provided employment for the whole year preceding the injury.¹⁴ As appellant's rate of pay was fixed and he was employed the year preceding his injury, his average annual earnings equal his annual rate of pay.¹⁵ The Office properly calculated his pay rate by taking his hourly rate on the date of injury, which is also the date disability began, of \$17.53 an hour and multiplied by the number of hours worked in a year, 2,087 and dividing by 52 to find a pay rate of \$703.56 per week.

On appeal, appellant contends that he did not stop work on June 28, 2000 but instead took time for medical treatment and a vacation. As noted, his monthly pay rate is based on the highest of his pay at the time of injury, the time disability begins or the time disability recurs.¹⁶ Even if appellant did not stop work on June 28, 2000, his pay rate would still be based on his date-of-injury wages of \$703.56 a week, as he did not sustain either disability due to his injury or a recurrence of disability after that date.

Appellant further noted that the November 25, 2008 decision referenced a schedule award issued in regard to his May 8, 2001 work injury. As noted by the Office on December 3, 2008, the November 25, 2008 decision accurately determined his pay rate for compensation purposes for his June 28, 2000 work injury but referred to the wrong schedule award in noting the creation of an overpayment. It did not find an overpayment based on appellant's schedule award for his May 8, 2001 work injury and the error did not affect the pay rate determination.

LEGAL PRECEDENT -- ISSUE 2

Section 8107 of the Act provides that compensation for a schedule award shall be based on the employee's monthly pay.¹⁷ For all claims under the Act, compensation is to be based on the pay rate as determined under section 8101(4) which defines monthly pay as:

“[T]he 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.”¹⁸

¹⁴ 5 U.S.C. § 8114; see *Lottie M. Williams*, 56 ECAB 302 (2005).

¹⁵ *Id.* at § 8114(d)(1).

¹⁶ *Id.* at § 8107.

¹⁷ *Id.* at § 8107.

¹⁸ *Id.* at § 8101(4).

When an overpayment has been made to an individual under this subchapter because of an error or fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.¹⁹

ANALYSIS -- ISSUE 2

The Board finds that the Office properly determined that appellant received an overpayment of \$5,000.31 because he received compensation at an incorrect rate from September 18, 2003 through March 2, 2005. As noted, appellant's schedule award compensation should be based on the weekly pay rate of \$703.56 that he earned as of the date of injury. The Office, however, paid compensation from September 18, 2003 through March 2, 2005 based on the pay rate in effect on May 17, 2001 or \$757.74 per week. Consequently, he received an overpayment of compensation. The Office calculated the amount of overpayment by subtracting what it should have paid appellant, \$42,055.16, from the amount that it actually paid him, \$47,055.49, to find an overpayment of \$5,000.31. The Board affirms the fact and amount of overpayment.

LEGAL PRECEDENT -- ISSUE 3

Section 8129 of the Act provides that an overpayment must be recovered unless "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."²⁰ Thus, a finding that appellant was without fault does not automatically result in waiver of the overpayment. The Office must then exercise its discretion to determine whether recovery of the overpayment would defeat the purpose of the Act or would be against equity and good conscience.²¹

Section 10.436 of the implementing federal regulations provide that recovery of an overpayment will defeat the purpose of the Act if recovery would cause undue hardship by depriving a presently or formerly entitled beneficiary of income and resources needed for ordinary and necessary living expenses and outlines the specific financial circumstances under which recovery may be considered to "defeat the purpose of the Act."²²

Section 10.437 provides that recovery of an overpayment is considered to be against equity and good conscience when an individual who received an overpayment would experience severe financial hardship attempting to repay the debt; and when an individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.²³

¹⁹ *Id.* at § 8129; see *Ricky Greenwood*, 57 ECAB 462 (2006).

²⁰ 5 U.S.C. § 8129.

²¹ See *Madelyn Y. Grant*, 57 ECAB 533 (2006); *Keith H. Mapes*, 56 ECAB 130 (2004).

²² 20 C.F.R. § 10.436.

²³ *Id.* at § 10.437.

The Office's procedure manual provides:

"Extensive documentation of assets and expenses in support of the statements made on the OWCP-20 is requested by both Forms CA-2201 and CA-2202 [preliminary notice of overpayment]. If adequate documentation is not supplied, the [Office examiner] should conference the case and request that additional documentation be submitted (or the Hearing Representative should request additional documentation at the hearing)."²⁴

ANALYSIS -- ISSUE 3

The Office hearing representative denied appellant's request for waiver of the recovery of the overpayment after finding that he did not provide adequate documentation of his expenses. She noted that he indicated monthly expenses greater than monthly income on the overpayment recovery questionnaire but noted that the listed monthly credit card payments might duplicate payment of other fixed monthly living expenses. The hearing representative was unable to determine whether recovery would defeat the purpose of the Act.

The Office relied upon section 10.438 of its regulations, which provides that failure to submit the requested financial information shall result in the denial of waiver of the recovery of the overpayment. Appellant, however, submitted a Form OWCP-20 overpayment recovery questionnaire with information on his income and expenses. Office procedure manual notes that the Office requests documentation in support of statements made on the OWCP-20 form 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. If the hearing representative believed that additional documentation was necessary to clarify the submitted financial information, then she should have advised appellant and provided him an opportunity to submit further financial information to supplement the record. The broad request for financial documents in the preliminary overpayment determination is not sufficient notice to a claimant of the specific information the Office may require based on a review of the overpayment recovery questionnaire.²⁵

The Board finds that the Office hearing representative did not properly consider the issue of waiver. The case will be remanded for proper further adjudication of the issue of waiver in accordance with the Office's procedures.²⁶

The Board notes that appellant questioned why the Office combined the case files of his respective claims. Under file number xxxxxx970, the Office accepted that he sustained right lateral epicondylitis and a cervical disc displacement due to a June 28, 2000 work injury. Under file number xxxxxx500, it accepted that on May 8, 2001 he sustained a right hand contusion, a

²⁴ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200(6)(a)(4) (May 2004).

²⁵ S.C., Docket No. 09-525 (issued September 15, 2009).

²⁶ In view of the Board's disposition of the issue of waiver, it need not address appellant's arguments relevant to the waiver on appeal.

crush injury to his right fingers, right carpal tunnel syndrome, right Boutonniere deformity and traumatic right hand arthropathy due to a traumatic injury on May 8, 2001.

The Office procedure manual provides:

“Doubling is the combination of two or more case files. It occurs when an employee has sustained more than one injury and it is necessary to combine all of the records in one case folder. The case records are kept separately but travel under one claim number, which is known as the ‘master file.’”²⁷

* * *

“Cases should be doubled when correct adjudication of the issues depends on frequent cross-reference between files. Cases meeting one of the following tests must be doubled--

(1) A new injury is reported for an employee who previously filed an injury claim for a similar condition or the same part of the body. For instance, a claimant with an existing case for a back strain submits a new claim for a herniated lumbar disc.”²⁸

On March 17, 2009 the Office combined case file xxxxxx500 into master file xxxxxx970.²⁹ Office procedures provide that cases should be doubled when a new injury is reported for an employee who previously filed an injury claim for a similar condition and that cases should be doubled as soon as the need to do so becomes apparent. Appellant filed claims for injuries to the same part of his body, his right upper extremity, under file numbers xxxxxx500 and xxxxxx970. The Office did not abuse its administrative discretion in the processing of claims by combining appellant’s cases together in accordance with its procedures.³⁰

CONCLUSION

The Board finds that the Office properly determined appellant’s pay rate for compensation purposes and that he received an overpayment of \$5,000.31 for the period September 18, 2003 through March 2, 2005 because he was paid at an inaccurate pay rate. The Board finds, however, that the case is not in posture for decision on the issue of waiver of the recovery of the overpayment.

²⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *File Maintenance and Management*, Chapter 2.400.8(a) (February 2000).

²⁸ *Id.* at Chapter 2.400.8(c)(1).

²⁹ It is not readily apparent why the administrative action of making a master file was labeled as a notice of decision.

³⁰ Compare *R.H.*, Docket No. 07-937 (issued August 20, 2007); *M.R.*, Docket No. 06-198 (issued August 28, 2006); *Maynard D. Counts*, Docket Nos. 06-157 and 06-158 (issued July 12, 2006); and *Voncile Williams*, Docket Nos. 03-1741 and 03-1874 (issued August 11, 2005).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated March 4, 2009 and November 25, 2008 are affirmed. The decision dated August 28, 2009 is affirmed with respect to fact and amount of overpayment and remanded on the issue of waiver of the recovery of the overpayment.

Issued: March 8, 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