

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

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**S.G., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Pittsburgh, PA, Employer**

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**Docket No. 10-2377  
Issued: August 24, 2011**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

RICHARD J. DASCHBACH, Chief Judge  
ALEC J. KOROMILAS, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On September 23, 2010 appellant filed a timely appeal from an August 24, 2010 overpayment decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act (FECA)<sup>1</sup> and 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 OWCP properly found that an overpayment in compensation in the amount of \$1,417.44 was created for the period September 11, 2005 to February 17, 2006 because appellant's compensation was based on an incorrect pay rate; (2) whether it properly denied waiver of recovery of the overpayment; and (3) whether OWCP properly found that the overpayment should be recovered by deducting \$102.00 from appellant's continuing compensation.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On August 4, 2005 appellant, then a 54-year-old postal clerk, filed a recurrence claim of a November 11, 2002 back injury alleging that on July 27, 2005 she placed a large parcel into a hamper and felt a sharp pain in her back. She stopped work on July 28, 2005. In a supplemental personal statement, appellant explained that, since returning to modified full duty in July 2004, she continued to experience back pain. She also submitted a Form CA-7 requesting compensation commencing on July 28, 2005. The employing establishment noted that, at the date appellant stopped work, she was paid \$20.95 an hour and entitled to 35.8 hours of work a week. OWCP accepted her claim for temporary aggravation of preexisting lumbar degenerative disc disease and spinal stenosis.<sup>2</sup>

Appellant received compensation for wage loss based on a weekly pay rate of \$844.70 for the period September 11, 2005 to February 17, 2006. Her total payment received was \$12,389.74.

Appellant returned to light duty on July 24, 2006. On July 31, 2006 she filed a recurrence claim commencing on July 25, 2006 alleging that she experienced extreme pain, tightness and contractions in her lower back. Appellant stopped work on July 26, 2006. OWCP accepted her recurrence claim.

Appellant was placed on the periodic rolls commencing on August 5, 2006 with a weekly pay rate of \$750.01 based on a date-of-injury pay rate of August 9, 2006 of \$20.95 an hour for 35.8 hours a week.

On March 2, 2010 appellant returned to work as a modified clerk for 4 hours a day 20 hours a week.<sup>3</sup>

In a decision dated July 13, 2010, OWCP issued a preliminary finding that an overpayment of \$1,417.44 arose from September 11, 2005 until February 17, 2006 because appellant was paid at an incorrect pay rate. It found appellant without fault and explained that she should have received compensation based on a weekly pay rate of \$750.01 instead of \$844.70. Appellant was informed of her options if she wished to challenge the fact of overpayment or to request waiver of recovery of the overpayment. If she wished a waiver of the overpayment, she was advised to submit financial information and a completed overpayment recovery questionnaire (OWCP-20) within 30 days.

On July 21, 2010 appellant requested a telephone conference and submitted a completed overpayment recovery questionnaire. She reported an income of approximately \$2,621.00 a month from \$1,486.00 in earnings, \$163.00 from her pension and \$972.00 from OWCP benefits.

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<sup>2</sup> OWCP accepted appellant's claim as a new traumatic injury claim, and not as a recurrence of her November 11, 2002 injury.

<sup>3</sup> On April 26, 2010 OWCP issued a preliminary decision that appellant had received an overpayment of \$456.60 because she received compensation for total disability until March 14, 2010 even though she returned to part-time work on March 2, 2010. It found that she was at fault in creating the overpayment. Appellant repaid the overpayment in full.

Her expenses were reported at \$2,456.00 a month, including \$550.00 for rent, \$320.00 for food, \$200.00 for clothing, \$631.00 for utilities and \$755.00 for miscellaneous household expenses. Appellant included various statements and invoices. She also reported that she had \$517.00 in her checking account and \$1,700.00 in her savings account.<sup>4</sup> Appellant requested a waiver on the grounds that she was overwhelmingly in debt to friends and family. She further stated that she was not in the financial position to repay and would not become financially able due to her physical conditions which limited her to only working four hours a day.

In an August 12, 2010 telephone conference memorandum, the issues discussed were waiver and appellant's ability to repay the overpayment. OWCP requested pay stubs for the last month to verify that her current monthly take home pay with her employing establishment was \$1,486.00. It also noted that appellant's monthly expenses of \$550.00 for rent, \$320.00 for food, \$200.00 for clothing and \$631.00 for utilities appeared reasonable. OWCP advised her, however, that her utility statements totaled \$599.34 and she stated that she would provide a copy of her sewer bill which was not in the record. Appellant also stated that she would submit documentation to support her claimed \$755.00 miscellaneous expenses and her savings and checking account balances.

In a letter dated August 16, 2010, appellant modified her miscellaneous expenses from \$755.00 to \$1,137.00 because she felt it more accurately represented her actual expenses. She stated that she paid \$349.26 in car payments, \$67.00 for car insurance, \$120.00 for gas, \$20.00 for wage tax, \$100.00 for doctors' visits, \$80.00 for prescription, \$40.00 for pet care, \$60.00 for grooming products and services and \$200.00 a month for entertainment.<sup>5</sup> Appellant also submitted copies of her last month's pay stubs, which indicated that she received a net pay of \$743.59, \$823.57 and \$890.22 for pay periods 14, 15 and 16. She noted that these pay stubs contained errors and adjustments were needed. Appellant explained that she was on sick leave due to surgery for part of this time, but her employing establishment erroneously charged her eight hours a day of sick leave, instead of four hours a day due to her medical restrictions. She also submitted copies of medical invoices, a sewer bill and a checking account statement.

By decision dated August 24, 2010, OWCP finalized the finding of overpayment in the amount of \$1,417.44 for the period September 11, 2005 to February 17, 2006. It further found that appellant was not at fault in the creation of the overpayment because she was not and could not have been aware that she was not entitled to the payment received and also denied waiver. In denying waiver, OWCP found that her total monthly income was \$2,854.00, not \$2,621.00 as she indicated, based on her recent pay stubs.<sup>6</sup> It also determined that appellant's monthly expenses of \$2,737.00 appeared necessary and reasonable. Thus, OWCP found that her total monthly income of \$2,854.00 was more than her total monthly expenses of \$2,737.00 and recovery of the

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<sup>4</sup> An attached checking account statement, however, revealed that appellant had \$3,322.29 in her account.

<sup>5</sup> The Board notes that the amounts actually total \$1,036.26 and not \$1,137.00 as appellant alleged.

<sup>6</sup> OWCP noted that appellant's net compensation for pay periods 14, 15 and 16 totaled \$2,457.38. It then divided this amount by six weeks for a weekly rate of \$409.53 and multiplied this amount by four weeks for a monthly rate of \$1,638.10. OWCP also determined that appellant received \$1,053.00 a month in its compensation, instead of \$972.00 as she indicated on her recovery questionnaire form.

overpayment account would occur by withholding \$102.00 from her continuing compensation payments.

### **LEGAL PRECEDENT -- ISSUE 1**

FECA 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.<sup>7</sup> When an overpayment has been made to an individual because of error of fact or law, adjustments shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which the employee is entitled.<sup>8</sup> FECA 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 full-time employment, whichever is greater.<sup>9</sup>

5 U.S.C. § 8114(d)(1) states that average annual earnings are determined as follows:

“(1) If the employee worked in the employment in which she was employed at the time of her 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....”

### **ANALYSIS -- ISSUE 1**

In the present case, OWCP determined that at the time of appellant’s July 27, 2005 recurrence of disability she had worked for substantially the entire year in a clerk position for 35 hours a week. Computer printouts reveal that appellant received compensation for wage loss for the period September 11, 2005 through February 17, 2006 based on a weekly pay rate of \$844.70, which represented wages for a 40-hour workweek, when she should have received compensation based on a weekly pay rate of \$750.01, based upon a 35-hour workweek for this period. Appellant received a total of \$12,389.74 in compensation during this period when she should have received \$10,972.30, resulting in an overpayment of \$1,417.44. She does not dispute the fact and amount of overpayment. Therefore, the Board finds that appellant received an overpayment of compensation in the amount of \$1,417.44.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8129 of FECA provides that 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 FECA or would be against equity and good conscience.<sup>10</sup> Recovery of an overpayment will defeat the purpose of FECA if such recovery

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<sup>7</sup> 5 U.S.C. § 8102(a).

<sup>8</sup> *Id.* at § 8129(a).

<sup>9</sup> *Id.* at § 8101(4).

<sup>10</sup> *Id.* at § 8129(b); 20 C.F.R. §§ 10.433, 10.434, 10.436, 10.437.

would cause hardship to a currently or formerly entitled beneficiary because the beneficiary from whom OWCP 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 OWCP.<sup>11</sup> 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.<sup>12</sup>

### **ANALYSIS -- ISSUE 2**

OWCP determined that appellant was not at fault in creating the overpayment. However, the fact that she was not at fault in the creation of the overpayment does not, of itself, establish a basis for waiver of recovery of the overpayment.<sup>13</sup> Appellant must still repay the overpayment unless recovery would defeat the purpose of FECA or recovery would be against equity and good conscience.<sup>14</sup> She does not contend that she gave up a valuable right or changed her position for the worse. Instead, appellant essentially contends that recovery of the overpayment would defeat the purpose of FECA because her actual monthly earnings are more than her monthly expenses. As her assets do not exceed the established resource base,<sup>15</sup> she must also establish that she needs substantially all of her current income to meet ordinary and necessary living expenses before a waiver may be granted.

Appellant indicated on her overpayment recovery questionnaire that her monthly income totaled \$2,621.00, which included \$972.00 in OWCP compensation, \$163.00 in her pension and \$1,486.00 in earnings. She provided pay stubs for pay periods 14, 15 and 16 and noted that her employing establishment erroneously charged her for eight hours a day of sick leave when it should have only charged her four hours a day due to her medical restrictions. Appellant concluded that the pay stubs therefore showed inflated earnings for pay periods 14 to 16. She explained that her manager was in the process of correcting these errors. In an August 16, 2010 statement, appellant reported that her monthly expenses were \$2,737.00.

In its August 24, 2010 decision, OWCP concluded that appellant's expenses were reasonable and necessary, but found that her monthly earnings actually amounted to \$1,638.10 based on the pay stubs provided and that her OWCP compensation amounted to \$1,053.00, which increased her total monthly income to \$2,854.00. Thus, it determined that because her

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<sup>11</sup> 20 C.F.R. § 10.436(a) (b). For an individual with no eligible dependants 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 dependant. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a)(1)(b) (June 2009).

<sup>12</sup> *Id.* at § 10.437(a) (b).

<sup>13</sup> *L.S.*, 59 ECAB 350 (2008); *Jorge O. Diaz*, 51 ECAB 124 (1999).

<sup>14</sup> *Supra* note 10.

<sup>15</sup> *Supra* note 11.

total monthly income exceeded her total monthly expenses by more than \$50.00, she was not entitled to a waiver. OWCP did not make a finding regarding appellant's asset base. The Board notes, however, that OWCP did not address her explanation that she was incorrectly charged for eight hours of sick leave a day during a portion of pay periods 14, 15 and 16 when she is only authorized to work four hours a day, and thus, these pay stubs did not accurately reflect her earnings. The Board also notes that correct financial information regarding appellant's pay was never resolved.<sup>16</sup> The Board finds that the case should be remanded for OWCP to conduct a proper assessment of her financial circumstances. As OWCP's decision on the issue of waiver is set aside, the Board will not issue a decision on the issue of recovery of overpayment. The Board will set aside OWCP's August 24, 2010 decision on the issue of waiver of recovery and remand the case for such further development of the financial evidence as may be necessary and for an appropriate final decision.

### CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment in compensation in the amount of \$1,417.44. The Board also finds that further development is warranted on the issue of waiver of recovery.

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<sup>16</sup> The Board notes that, based on appellant's stated \$1,486.00 earnings in her financial questionnaire, her total monthly income would be \$2,702.00, which does not exceed her monthly expenses of \$2,854.00.

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 24, 2010 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part. The case is remanded for further action consistent with this opinion.

Issued: August 24, 2011  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

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