



position of personnel manager represented appellant's wage-earning capacity.<sup>2</sup> In an order dated February 25, 2010, the Board remanded the case for further development regarding an overpayment of \$9,065.11.<sup>3</sup> The Board noted that, while OWCP found an overpayment based on an incorrect pay rate, OWCP did not explain its finding in this regard. As the Board noted, an OWCP hearing representative stated that the correct pay rate was determined by the date of injury (January 21, 1997), without providing further explanation or referring to the "monthly pay" provisions of 5 U.S.C. § 8101(4). In addition, the Board noted that, while OWCP found appellant to be at fault because he accepted payments he should have known were incorrect, it provided no explanation or support in the record for its findings.

On return of the case record, an OWCP hearing representative reviewed the record and issued an August 12, 2010 decision. She stated that the Office had incorrectly paid compensation for wage loss using a pay rate of \$878.41 on December 10, 2003, the date appellant selected FECA benefits instead of Office of Personnel Management (OPM) retirement benefits. Later, the hearing representative found the correct pay rate was the date of injury, January 21, 1997, at \$769.01 per week. Based on the amount of compensation appellant received from December 10, 2003 to February 14, 2009, and the amount he should have received using the correct pay rate, the overpayment was \$9,065.11. With respect fault, the hearing representative stated that appellant should have known that he was not entitled to compensation based on a pay rate higher than the date-of-injury pay rate.

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

Under 5 U.S.C. § 8101(4), "'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 ...."<sup>4</sup>

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

In the February 25, 2100 order, the Board specifically noted that monthly pay is determined pursuant to 5 U.S.C. § 8101(4), but OWCP had failed to cite this section in its November 10, 2009 decision. The August 12, 2010 OWCP decision also fails to analyze the issue of pay rate using the proper statutory authority.

As noted above, there are three possible dates to determine a claimant's rate of pay: date of injury, date disability begins, or date compensable disability recurs, if more than six months after a return to regular full-time employment. The date providing the greater pay rate is used. In this case, appellant had elected OPM benefits as of December 29, 2000. On February 13, 2007 appellant elected FECA benefits retroactive to December 10, 2003. On April 13, 2007

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<sup>2</sup> Docket No. 08-751 (issued September 25, 2008).

<sup>3</sup> Docket No. 10-456 (issued February 25, 2010).

<sup>4</sup> See also 20 C.F.R. § 10.5(s), which defines "pay rate for compensation purposes" as the employee's pay 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 employee resumes regular full-time employment.

OWCP issued compensation payments covering the period commencing December 10, 2003. The compensation was based on a weekly pay rate of \$878.45, which OWCP found was appellant's pay rate on December 10, 2003. OWCP's hearing representative finds that this is an incorrect pay rate date because it represented a date appellant went from OPM to FECA benefits, not a recurrence of disability. There are no actual findings on this issue with respect to 5 U.S.C. § 8101(4). It did not appear that appellant had returned to regular full-time employment for six months following the employment injury, but OWCP did not discuss appellant's work history after the injury. The Board also notes that appellant submitted a December 10, 2003 report from Dr. Doreen Landrum, a psychologist, who discussed disability for work.

The Board finds OWCP did not properly discuss the relevant facts and explain the determination that a rate of pay on December 10, 2003 was incorrect under 5 U.S.C. § 8101(4). In addition, OWCP failed to properly explain its finding that the proper pay rate date was January 21, 1997, the date of injury. Even if the pay rate on December 10, 2003 is ultimately determined to be incorrect, OWCP does not consider whether a date disability began would provide a greater pay rate than the date of injury. On the CA-1 claim form appellant indicated that he did not seek medical treatment until March 10, 1997. A June 16, 1997 letter from the employing establishment indicates that appellant did not immediately stop working; there are intermittent dates of leave claimed and it appeared he claimed continuous sick leave or leave without pay from April 8, 1997. The record indicates OWCP did not begin paying compensation for wage loss until April 21, 1997. OWCP's procedures state that, when a claimant does not stop work immediately after the injury, the record should reflect a date disability began and a pay rate on that date.<sup>5</sup> The Board notes that the August 12, 2010 OWCP's decision specifically stated that appellant had been a "WS7 Step 4" on January 21, 1997 and became a Step 5 on April 13, 1997. Therefore it is important to determine the date disability began and the proper pay rate on that date.

Accordingly, the case will be remanded to properly determine the pay rate for compensation purposes in accord with 5 U.S.C. § 8101(4). OWCP should discuss the relevant facts and make proper findings on the issue presented. If it confirms that an overpayment was created based on an incorrect rate of pay, OWCP should calculate the amount of an overpayment, clearly explaining the amount of compensation appellant received during the overpayment period and the amount he should have received.

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

Section 8129(b) of FECA<sup>6</sup> 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

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<sup>5</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.5(a)(3) (May 1996).

<sup>6</sup> *Supra* note 1.

good conscience.”<sup>7</sup> Waiver of an overpayment is not permitted unless the claimant is “without fault” in creating the overpayment.<sup>8</sup>

On the issue of fault, 20 C.F.R. § 10.433 provides that an individual will be found at fault if he or she has done any of the following: “(1) made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; (2) failed to provide information which he or she knew or should have known to be material; or (3) accepted a payment which he or she knew or should have known was incorrect.”

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

In this case, OWCP found that appellant was at fault because he accepted payments he knew or should have known were incorrect. In the August 12, 2010 decision, OWCP’s hearing representative found “the claimant was aware that he was not entitled to receive compensation at a pay rate higher than the pay rate on the date of injury.” No evidence was cited in support of the finding as to fault. The record indicates that on April 6, 2007 OWCP advised appellant that he would be receiving compensation as of March 1, 2007, with a weekly pay rate used to determine gross compensation of \$878.95. OWCP did not explain how this pay rate was calculated or provide additional information on the issue. As the above discussion illustrates, OWCP itself did not properly cite and apply the appropriate statutory authority regarding the pay rate in this case. In its decision, OWCP did not refer to any probative evidence of record establishing that appellant knew or should have known that the pay rate was incorrect, and therefore specific payments he received were incorrect. The finding as to fault is reversed.

### **CONCLUSION**

The Board finds OWCP did not properly explain its findings with respect to an overpayment of compensation based on an incorrect pay rate for compensation purposes during the period December 10, 2003 to February 14, 2009, and the case is remanded for further development. The Board further finds that OWCP did not establish that appellant was at fault in creating an overpayment of compensation.

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<sup>7</sup> *Id.* at § 8129(b).

<sup>8</sup> *Norman F. Bligh*, 41 ECAB 230 (1989).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated August 12, 2010 is set aside and remanded with respect to fact and amount of an overpayment of compensation. The August 12, 2010 decision is reversed as to finding that appellant was at fault in creating an overpayment.

Issued: July 5, 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