

FACTUAL HISTORY

On March 30, 2009 appellant, then a 74-year-old census enumerator, tripped and fell in a parking lot while in the performance of duty. On April 1, 2009 he filed a Form CA-1 indicating that he was paid an hourly wage of \$14.25 to work eight-hour shifts five times a week. The form, which was originally signed by a field operations supervisor and crew leader assistant, was amended by Donna Hines, the employing establishment's regional administrative specialist, to specify that appellant may work "up to 40 hours."

OWCP accepted appellant's traumatic injury claim for right closed proximal humerus fracture, adhesive capsulitis, and other unclassified shoulder affections and authorized right shoulder arthroscopic surgery, which was performed on February 16, 2011. Appellant received disability compensation from March 31, 2009 to December 5, 2011.² Payments totaling \$20,575.27 for the period March 31, 2009 to August 14, 2010 were based on a weekly rate of \$328.85.³

In a Form CA-7 dated May 28, 2009, appellant stated that he worked from March 27 to 30, 2009. The employer added that he was scheduled to work a variable number of hours four days a week.

OWCP asked appellant and the employing establishment in two June 22, 2009 letters to furnish additional information regarding appellant's job status. In a Form EN1030 dated July 2, 2009, the employer detailed that he was hired on March 27, 2009 as an intermittent term employee and scheduled to work "up to 40 hours per week, hours varied." Appellant remarked in a separate Form EN1030 dated July 3, 2009 that he was appointed to temporary full-time duty. Both parties confirmed that his hourly wage was \$14.25.

An undated and unsigned document from the employer titled "Pay Rate Computation for Census 2010 Enumerators and Crew Leaders" noted that appellant was hired as a temporary intermittent worker with no expectation of recurrent employment. The document pointed out that such individuals averaged 4.5-hour shifts four times a week based on 2000 personnel data. In a Form EN1032 dated December 11, 2009, appellant listed March 27 to April 8, 2009 as his term of service as an enumerator. He was not otherwise employed in the previous 15 months.⁴

OWCP informed appellant in a November 30, 2010 letter that his compensation was incorrectly based on an 8-hour workday instead of a 4.5-hour workday. Therefore, the weekly

² OWCP finalized termination on December 6, 2011. Appellant does not appeal this decision at present.

³ To obtain this weekly rate, OWCP multiplied the \$14.25 hourly rate by 8 hours per day to calculate a \$144.00 daily wage, multiplied this amount by 150 and divided by 52.

⁴ The case record shows that appellant is a retired mechanical engineer and has volunteered as a mediator since August 2006.

rate was reduced from \$328.85 to \$184.98.⁵ Payments made after August 14, 2010 were adjusted accordingly.

Appellant subsequently provided a Form CA-1 signed by a crew leader assistant on April 1, 2009 indicating that he worked eight-hour shifts five days a week for an hourly wage of \$14.75.⁶ In a January 25, 2011 letter, the employing establishment cited FECA Circular No. 10-01 and contended that \$184.98 was the proper weekly rate because the enumerator position was temporary and intermittent.⁷

On May 27, 2011 OWCP made preliminary findings that appellant received an overpayment of \$7,277.85 for the period March 31, 2009 to August 14, 2010. Specifically, he was paid \$20,575.27 during this period based on a rate of \$328.85 per week when he should have received \$13,297.42 based on a rate of \$184.98 per week.⁸ OWCP noted that appellant was without fault in the creation of the overpayment, informed him of his options if he wished to contest the fact or amount of overpayment or request waiver of recovery, and gave him 30 days to submit a Form OWCP-20, overpayment recovery questionnaire, along with supporting financial documentation.

Appellant maintained in a June 15, 2011 statement that he was hired full time for the period March 27 to May 27, 2009 as demonstrated by the original Form CA-1 filed April 1, 2009 and signed by a field operations supervisor and crew leader assistant. He also concluded that FECA Circular 10-01 did not apply to him.

A SF-50 "Notification of Personnel Action" form dated March 25, 2009 showed that appellant was hired as a census enumerator for an hourly wage of \$14.25 effective March 27, 2009. Box 32, titled "Work Schedule," described the job as "Intermittent." Box 45, titled "Remarks," added that there was "[n]o regular tour of duty during each administrative workweek" and the "[n]ature of the work is strictly temporary."

In a June 27, 2011 letter, the employing establishment reiterated that appellant's position was temporary and intermittent. He was hired for the period March 27 to May 27, 2009 without fixed hours, reinstatement rights, or any assurances during the application, recruiting, and hiring processes that the job was more than temporary or intermittent. As a result, the pay rate standard outlined in FECA Circular 10-01 was applicable. Regarding appellant's Form CA-1, the employer clarified that Ms. Hines was the only individual authorized to sign on its behalf.

⁵ To obtain this updated weekly rate, OWCP multiplied the \$14.25 hourly rate by 4.5 hours per day to calculate a \$64.125 daily wage, multiplied this amount by 150 and divided by 52.

⁶ This was not the same Form CA-1 filed on April 1, 2009.

⁷ FECA Circular No. 10-01, *Guidance for claims filed as a result of the 2010 Decennial Census* (January 15, 2010). The circular updated provisions in the FECA Procedure Manual and provided a formula for calculating pay rates and compensation for employees who were disabled for more than 90 days, but did not have similar employment during the year prior to the injury. *See infra* notes 10, 12-13.

⁸ OWCP provided various compensation histories, tables and calculation worksheets.

By decision dated July 14, 2011, OWCP finalized the \$7,277.85 overpayment and found that appellant, who was not at fault in the creation of the overpayment, was not entitled to waiver of recovery because he did not show that recovery would either defeat the purpose of FECA or be against equity and good conscience.⁹

LEGAL PRECEDENT -- ISSUE 1

OWCP procedures ascribe special rules for computing compensation to claimants employed by the Census Bureau.¹⁰ These employees “can be either full-time 40-hour per week regular employees, or may be hired every 10 years to work in temporary appointments (not to exceed 180 days) as enumerators, crew leaders or clerks.”¹¹ When a claimant’s disability does not exceed 90 days, compensation should be computed on the basis of actual daily wages pursuant to 5 U.S.C. § 8114(c).¹² When disability extends beyond 90 days and the claimant had similar employment during the year prior to the injury, compensation should be allocated in accordance with 5 U.S.C. § 8114(d)(1) or (2). Otherwise, compensation should be paid weekly using the following formula: actual daily wage multiplied by 150, then divided by 52. Actual daily wage is calculated by multiplying the hourly pay rate by 4.5 hours.¹³

An overpayment of compensation may occur when a claimant is not entitled to compensation already paid.¹⁴

ANALYSIS -- ISSUE 1

The case record establishes that appellant injured his right shoulder on March 30, 2009, was disabled for the period March 31, 2009 to December 5, 2011, and did not work as a census enumerator during the year immediately preceding the injury. Therefore, neither section 8114(c) nor section 8114(d)(1)-(2) of FECA applies. Both appellant and the employing establishment agreed that his hourly wage was \$14.25. Applying the weekly pay rate standard set forth in Chapter 2.901.9(a)(2) of OWCP’s procedure manual, as well as FECA Circular No. 10-01, \$14.25 is multiplied by 4.5 hours to calculate a daily wage rate of \$64.125. This, in turn, is multiplied by 150 and divided by 52 to calculate a weekly wage rate of \$184.98. Following this determination, OWCP calculated that appellant should have received \$13,297.42 in

⁹ OWCP noted that the employing establishment submitted evidence showing that appellant concurrently received continuation of pay (COP) and disability compensation, thereby increasing the amount of overpayment. OWCP identified this as a separate issue to be addressed in a future decision.

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Computing Compensation*, Chapter 2.901.9(a)(1) (October 2009).

¹¹ *Id.*, *Determining Pay Rates*, Chapter 2.900.3(e) (March 2011).

¹² *Id.* at Chapter 2.901.9(a)(1).

¹³ *Id.* at Chapter 2.901.9(a)(2). *See also id.* Chapter 2.900.12(e)(3) (Census Bureau analyzed 2000 census data, determined that enumerators worked an average of 4.5 hours per day four times a week, and anticipated similar patterns for 2010).

¹⁴ *R.T.*, Docket No. 07-1454 (issued December 14, 2007); FECA Procedure Manual, *id.*, Part 6 -- Debt Management, *Identification of Overpayments and Debts*, Chapter 6.200.2d (May 2004).

compensation for the period March 31, 2009 to August 14, 2010 based on a \$184.98 weekly wage rate. Instead, he received \$20,575.27 based on a \$328.85 weekly wage rate. OWCP subtracted the two amounts and found an overpayment of \$7,277.85. The Board finds that OWCP properly determined the fact and amount of the overpayment.

Appellant contends on appeal that he was hired to work full time as a census enumerator. The weight of the evidence indicates that his job was temporary and intermittent. The SF-50 "Notification of Personnel Action" form dated March 25, 2009, which predated appellant's employment, clearly shows that the position of census enumerator was temporary in nature and did not guarantee a regular tour of duty each administrative week. In the Form CA-1 filed on April 1, 2009, Ms. Hines, the regional administrative specialist who was designated as the employer's agent in matters of workers' compensation, wrote that appellant could work up to 40 hours per week. Additional documents from July 2, 2009 to June 27, 2011 consistently held that he was a term employee without fixed hours, reinstatement rights, or any assurances of continued work. Furthermore, appellant conceded that he was only hired for the period March 27 to May 27, 2009.

With respect to FECA Circular 10-01, and by extension Chapter 2.901.9(a)(2) of OWCP's procedure manual, appellant first asserts that the circular's provisions do not apply to him because his March 30, 2009 injury predated their January 15, 2010 date of issuance. Date of issuance is not necessarily the same as date of effect.¹⁵ FECA Circular 10-01 unequivocally states that its instructions apply to "claims filed by employees of the Department of Commerce *as a result of the 2010 Decennial Census.*"¹⁶ Next, appellant argues that the weekly pay rate formula, namely the 4.5-hours-per-day constant, is arbitrary and based on obsolete data. The evidence shows that this figure constituted the average number of hours of work performed by enumerators in 2000, the year of the most recent census. Lastly, appellant claims that his hourly pay rate should have been \$16.52, the average of \$10.93 and \$22.10. This is a disingenuous argument since he and the employer stated on numerous occasions that his hourly wage was \$14.25.¹⁷

LEGAL PRECEDENT -- ISSUE 2

An overpayment in compensation shall be recovered by OWCP unless incorrect payment has been made to an individual who is not at fault with respect to its creation and when adjustment or recovery would either defeat the purpose of FECA or be against equity and good

¹⁵ See *R.H.*, Docket No. 07-2256 (issued March 3, 2008).

¹⁶ See *supra* note 7 (Emphasis added).

¹⁷ The Board adds that FECA Circular 10-01 and Chapter 2.901.9(a)(2) of OWCP's procedure manual provide a range of hourly wages between \$10.93 and \$22.10 due to geographical variance. Appellant's \$14.25 hourly wage falls within this continuum.

conscience.¹⁸ Thus, a finding that a claimant was without fault does not automatically result in waiver of recovery.¹⁹

Recovery of an overpayment will defeat the purpose of FECA if such recovery would impose hardship because: (1) the beneficiary needs substantially all of his or her current income (including compensation benefits) to meet ordinary and necessary living expenses; and (2) the beneficiary's assets do not exceed the resource base of \$4,800 for an individual or \$8,000 for an individual with a spouse or one dependent, plus \$960 for each additional dependent.²⁰ An individual is deemed to need substantially all of his or her current income to meet ordinary and necessary living expenses if his or her monthly income does not exceed monthly expenses by more than \$50.00.²¹

Recovery of an overpayment is considered to be against equity and good conscience when: (1) the individual who received an overpayment would experience severe financial hardship attempting to repay the debt; or (2) the 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.²² To establish that a valuable right has been relinquished, it must be shown that the right was in fact valuable, that it cannot be regained, and that the action was based chiefly or solely in reliance on the payments or on the notice of payment.²³

ANALYSIS -- ISSUE 2

OWCP issued preliminary findings on May 27, 2011, finding that appellant received an overpayment but was not at fault in its creation. He was afforded 30 days to submit a Form OWCP-20 requesting waiver of recovery. Appellant submitted a June 15, 2011 statement offering various arguments, but did not request waiver. Because he failed to submit Form OWCP-20 as well as supporting financial documentation needed to determine whether recovery of overpayment would defeat the purpose of FECA or be against equity and good conscience, the Board finds that OWCP properly denied waiver of recovery.²⁴

Appellant contends on appeal that he was entitled to waiver because recovery of overpayment was against equity and good conscience. As noted, he did not timely submit the

¹⁸ See 5 U.S.C. § 8129(b); *Linda E. Padilla*, 45 ECAB 768 (1994).

¹⁹ *L.S.*, 59 ECAB 350, 354 (2008). OWCP must exercise its discretion to determine whether recovery would defeat the purpose of FECA or be against equity and good conscience. *Id.*

²⁰ *D.C.*, Docket No. 09-2042 (issued August 9, 2010). See also *supra* note 10 at Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6a(1)(b) (June 2009).

²¹ *J.O.*, Docket No. 09-264 (issued August 10, 2009).

²² *L.S.*, *supra* note 19 at 354.

²³ *J.O.*, *supra* note 21.

²⁴ See 20 C.F.R. § 10.438.

requested information.²⁵ Appellant also claims that the Form OWCP-20 that he received after the May 27, 2011 preliminary decision was outdated. A review of the case record does not corroborate this allegation.

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment in the amount of \$7,277.85 for the period March 31, 2009 to August 14, 2010; and OWCP properly determined that appellant was not entitled to waiver of recovery.

ORDER

IT IS HEREBY ORDERED THAT the July 14, 2011 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: August 22, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

²⁵ See *R.W. (A.T.)*, 59 ECAB 241 (2007) (where the claimant did not submit an OWCP-20 or other relevant financial information, the Board found that OWCP properly denied waiver of the recovery of the overpayment).