

FACTUAL HISTORY

On December 12, 2002 appellant, then a 26-year-old rural carrier, injured her back while lifting a package in the performance of duty. OWCP accepted the claim for a lumbar strain and herniated lumbar disc. Appellant underwent L5-S1 surgery on April 2, 2003. She returned to a part-time light-duty position and on February 2, 2004 returned to her regular, full-time employment. Appellant continued to work through December 10, 2008.

On July 19, 2010 appellant submitted a claim for compensation (Form CA-7) commencing March 1, 2010. In a letter dated July 13, 2010, she stated that she had been attending school but was unable to continue due to her back condition. By letter dated February 1, 2011, appellant stated that her last day at the employing establishment was December 10, 2008, although she remained an employee until January 2009. She noted that from February to June 2009 she worked “for a contractor for FEDEX” and then left due to the lack of work. According to appellant, she attended beauty school from July 2009 to March 1, 2010.

OWCP accepted that appellant sustained a recurrence of disability as of March 1, 2010 and paid compensation for wage loss based on a weekly pay rate of \$985.77, her pay rate as of January 2009 when her employment was terminated. By letter dated August 3, 2011, it advised appellant that, as of July 8, 2011, her compensation would be based on a pay rate of \$550.39 per week, her pay rate on date of injury (December 12, 2002). OWCP stated that appellant should submit evidence that she was working as of March 1, 2010 to establish entitlement to a recurrent pay rate.

By decision dated October 4, 2011, OWCP found that there was no evidence that appellant worked as of March 1, 2010, to substantiate a pay rate higher than \$550.39 per week. In a letter dated October 5, 2011, it made a preliminary determination that an overpayment of \$17,087.19 had been created because compensation from March 1, 2010 to July 7, 2011 was based on an incorrect pay rate. OWCP found that appellant was not at fault in creating the overpayment. Appellant was requested to submit an overpayment recovery questionnaire (Form OWCP-20) and supporting financial documents, to support a request for waiver. She did not respond.

By decision dated December 23, 2011, OWCP finalized the overpayment decision. It found an overpayment of \$17,087.19 was created, denied waiver of the overpayment and indicated that the overpayment would be recovered by deducting \$300.00 from continuing compensation payments.

LEGAL PRECEDENT -- ISSUE 1

Under 5 U.S.C. § 8101(2), “‘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....”

ANALYSIS

OWCP paid appellant wage-loss compensation from March 1, 2010 to July 7, 2011 based on a pay rate of \$985.77 per week. This represented the pay rate in January 2009, when appellant's employment was terminated. As noted, there are three possible dates by which to determine monthly pay: date of injury, date disability began and date disability recurs, whichever is greater. The pay rate as of January 2009 does not correspond to any of these pay rate dates. OWCP accepted a recurrence of disability as of March 1, 2010 and this recurrence began more than six months after appellant had returned to regular full-time employment. Therefore it must properly determine the pay rate as of March 1, 2010 and determine if it is greater than the date of injury or date of disability.

OWCP made a finding that appellant was not employed as of March 1, 2010 and therefore a recurrent pay rate could not be established. No authority was cited for this proposition. A claimant's pay rate is properly determined pursuant to 5 U.S.C. § 8114(d).² Under this section, appellant's earnings for the prior year are considered. For example, under 5 U.S.C. § 8114(d)(3), average annual earnings may not be less than 150 times the average daily wage for employment in the preceding year. OWCP's procedures clearly indicate that a claims examiner will need to explore the claimant's employment history for the prior year with respect to private employment.³ The record indicates that appellant had earnings in private employment in the year prior to March 1, 2010. OWCP needs to make findings as to the nature of the employment⁴ and follow its procedures to secure any necessary evidence to make a proper determination pursuant to 5 U.S.C. § 8114 as to the pay rate for compensation purposes on March 1, 2010.

OWCP did not cite to 5 U.S.C. § 8114(d), or make other relevant findings on the issue presented. The case will accordingly be remanded to OWCP for further development and proper findings on the overpayment issue. After such further development as OWCP deems necessary, it should issue an appropriate decision. In view of the Board's determination, it will not address the waiver and recovery issues at this time.

CONCLUSION

The Board finds the case is not in posture for decision as to an overpayment based on an incorrect pay rate and the case is remanded for further development.

² 5 U.S.C. § 8114(d)(1) is applied if the employee worked in the position for substantially the whole preceding year; (d)(2) is applied if appellant did not work substantially the whole year but the position would have afforded employment for substantially the whole year, and (d)(3) is applied if either of the foregoing methods cannot be applied reasonably and fairly. Under 5 U.S.C. § 8114(d)(3) OWCP may consider other previous employment of the employee or other relevant factors.

³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.4(c)(3) (March 2011). This section also discusses methods for securing information as to private employment from the employer.

⁴ Earnings in private employment that are the same as, or similar to, earnings in federal employment when injured are considered. *See K.S.*, Docket No. 11-2085 (issued May 10, 2012); *supra* note 3.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 23, 2011 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: August 24, 2012
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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