

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

T.P., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Warren, OH, Employer**

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**Docket No. 12-97
Issued: July 19, 2012**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 19, 2011 appellant filed a timely appeal from a July 21, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether OWCP properly found a \$1,589.64 overpayment of compensation from March 28, 2008 to March 31, 2010, due to an incorrect pay rate; (2) whether OWCP properly denied waiver of this overpayment; (3) whether OWCP properly found an overpayment of \$11,936.00 from April 1 to August 28, 2010; and (4) whether OWCP properly found appellant at fault in creating the overpayment and therefore not entitled to waiver.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On March 21, 2008 appellant, then a 48-year-old part-time flexible carrier, filed a traumatic injury claim (Form CA-1) alleging that she sustained a left ankle injury in the performance of duty on March 17, 2008. She slipped and fell on snow and stopped work as of the date of injury. OWCP accepted the claim for a fracture of the left distal tibia and left ankle sprain.

A memorandum of telephone call (Form CA-110) dated April 18, 2008 reported that appellant had worked less than 11 months, but her job would have afforded employment for 11 months. With respect to pay rate for compensation purposes, the record contains an undated document indicating that her hourly rate was \$19.61. An April 21, 2008 telephone memorandum noted that appellant worked from January 5, 2008 at \$19.84 per hour, earning a total of \$7,216.30. A listing of work hours indicated that she worked 40 hours per week on some weeks and between 32 and 40 hours in other weeks.

Appellant began receiving compensation for wage loss. On June 24, 2008 she submitted a June 23, 2008 claim for compensation (Form CA-7) from June 7 to 20, 2008. Appellant indicated on the form that she had not worked outside federal employment during the period claimed. For the period March 28 to June 20, 2008, she was initially paid compensation based on a pay rate of \$452.54 per week.² In response to an inquiry from OWCP as to wages of a comparable employee with similar job duties, the employing establishment submitted a June 30, 2008 form report. It advised that a part-time flexible carrier working 260 days per year would earn \$35,098.84 annually, plus \$1,798.00 in holiday pay.

In a worksheet dated July 9, 2008, OWCP calculated that, based on appellant's actual earnings for 10 weeks, her weekly pay rate was \$721.63, an amount higher than the pay rate based on a comparable employee.³ It also found that appellant's employment would have been available for 11 months. Appellant retroactively received compensation from March 28, 2008 based on a pay rate for compensation purposes of \$721.63 per week.

On April 5, 2009 appellant completed a Form CA-1032 regarding her employment for the prior 15 months. She reported that she worked as a mail carrier from January 1 to March 17, 2008. In a note dated April 9, 2009, appellant reported that she had worked for several employers prior to her employment with the postal service. She listed a retail employer, an osteopath and a local school system as employers.

In a report dated April 7, 2010, the employing establishment's Office of Inspector General noted that appellant had submitted a CA-1032 form dated April 5, 2008 with a supplemental statement dated April 9, 2009 and a June 23, 2008 CA-7 form. The report stated that in November 2009 the owner of a medical journal publication had been interviewed and

² This represented a daily wage of \$156.88 ($\19.61×8) multiplied by 150 and divided by 52.

³ OWCP incorrectly determined that the comparable employee pay rate would be \$706.41 per week, based on \$35,098.84 plus \$1,298.00 in holiday pay, divided by 52. The actual amount is \$36,396.84 annually or \$699.94 per week.

stated that appellant had been paid for writing five articles since March 2008. The investigative report stated that on December 15, 2009 two criminal complaints had been filed in the Ohio Municipal Court for violation of Ohio Revised Code § 2921.13(B). The criminal charges were based on providing false information on the CA-1032 and CA-7 forms with respect to income earned.

The exhibits provided included a copy of the criminal complaints filed for knowingly making a false statement for the purpose of misleading a public official. A Municipal Court Judgment entry indicated that on April 1, 2010 appellant entered a plea of no contest and was found guilty.

By decision dated September 7, 2010, OWCP terminated appellant's compensation effective April 1, 2010. It found that, pursuant to 5 U.S.C. § 8148, she was not entitled to compensation after being found guilty of a state criminal statute regarding fraud in receipt of benefits.

In a memorandum dated November 29, 2010, OWCP found that an overpayment of compensation had occurred from March 28, 2008 to August 28, 2010. The memorandum indicated that an incorrect pay rate had been used since March 28, 2008. OWCP found that the correct pay rate should have been \$699.94 per week, based on comparable earnings of a similar employee earning \$35,098.84 annually as base pay, plus \$1,298.00 holiday pay. It found that appellant had also been overpaid based on fraud. The calculations as to the amount referred to gross compensation paid from March 28, 2008 to August 28, 2010 as \$68,772.93 and gross compensation owed from March 28, 2008 to March 31, 2010 as \$55,124.09, resulting in a difference of \$13,648.54. OWCP found that there was an underpayment of deductions for life insurance from April 1 to August 28, 2010, resulting in an overpayment of \$13,525.64.

On November 30, 2010 OWCP made a preliminary determination that an overpayment of \$13,525.64 was created based on an incorrect pay rate from March 28, 2008 to August 28, 2010 and from April 1 to August 28, 2010. Appellant was found without fault in the creation of the overpayment due to the pay rate used; but found at fault as to that portion of overpayment related to fraud in receipt of benefits. Appellant was advised of her right to a prerecoument hearing.

By decision dated January 3, 2011, OWCP finalized its overpayment determinations.

A hearing before an OWCP hearing representative was held on January 11, 2011 with respect to the termination of compensation effective April 1, 2010. By decision dated March 9, 2011, the hearing representative affirmed the September 7, 2010 OWCP decision.⁴

On April 12, 2011 a hearing before an OWCP hearing representative was held with respect to the overpayment decision. On May 16, 2011 appellant submitted an overpayment recovery questionnaire reporting monthly income of \$3,200.00 and expenses of \$4,328.36. She listed \$9,267.00 in assets from checking and savings accounts and cash on hand. Appellant noted that she had a spouse and one dependent and included a list of her income and expenses.

⁴ The Board does not have jurisdiction over the March 9, 2011 OWCP decision. A notice of appeal must be filed within 180 days from the date of issuance of a final OWCP decision. 20 C.F.R. § 501.3(e).

By decision dated July 21, 2011, the hearing representative affirmed the November 30, 2010 decision. The hearing representative denied waiver with respect to an overpayment of \$1,589.64, finding that appellant's allowable expenses were \$2,739.36.

LEGAL PRECEDENT -- ISSUE 1

Section 8114(d) of FECA 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; or

“(B) was not fixed, the average annual earnings are the product obtained by multiplying his daily wage for particular employment, or the average thereof if the daily wage has fluctuated, by 300 if he was employed on the basis of a 6-day workweek, 280 if employed on the basis of a 5½-day week and 260 if employed on the basis of a 5-day week.

“(2) If the employee did not work in employment in which he was employed at the time of his injury during substantially the whole year immediately preceding the injury, but the position was one which would have afforded employment for substantially a whole year, the average annual earnings are a sum equal to the average annual earnings of an employee of the same class working substantially the whole immediately preceding year in the same or similar employment by the United States in the same or neighboring place, as determined under paragraph (1) of this subsection.”

ANALYSIS -- ISSUE 1

OWCP found an overpayment of compensation occurred during the period March 28, 2008 to March 31, 2010 because appellant had been paid compensation based on an incorrect rate of pay. Appellant received wage-loss compensation based on a pay rate of \$721.63 per week. This pay rate was based on her actual earnings for the 10 weeks she had worked prior to the employment injury. The Board finds, however, the correct pay rate must be determined in accord with the provisions of 5 U.S.C. § 8114.

The evidence from the employing establishment noted that, although appellant had not been employed for substantially the whole year prior to the injury, the position would have

afforded employment for substantially a whole year.⁵ Therefore, the applicable section is 5 U.S.C. § 8114(d)(2), which determines the pay rate based on “average annual earnings of an employee of the same class working substantially the whole immediately preceding year in the same or similar employment by the United States in the same or neighboring place.” According to the employing establishment, a similarly situated flexible carrier would have annual earnings of \$36,396.84 annually or \$699.94 per week.

Based on the evidence of record, there was an overpayment of compensation as appellant received compensation based on an incorrect rate of pay. As to the amount, the case will be remanded to OWCP for clarification of its calculations. In this case, there are two overpayments, one based on an incorrect pay rate and the other based on fraud under 5 U.S.C. § 8148. Rather, than treat the overpayments separately OWCP attempted to combine the overpayments in one calculation. An OWCP hearing representative found an overpayment of \$1,589.64 based on the incorrect pay rate. This figure was based on OWCP’s calculations that the overall overpayment in this case was \$13,525.64 (the hearing representative deducted \$11,936.00 as the overpayment based on 5 U.S.C. § 8148). The Board is unable to determine whether the amount of \$1,589.64 is correct based on the evidence of record. The calculations provided in the November 28, 2010 memorandum refer to gross compensation and deductions for life insurance for periods through August 28, 2010. The overpayment period based on an incorrect pay rate is March 28, 2008 to March 31, 2010. The amount should be a straightforward calculation based on the net compensation appellant received during this period, compared to the net compensation she should have received for this period based on the correct pay rate. The difference in these amounts is the overpayment amount. The case will be remanded to OWCP for further findings conforming to this decision.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) 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 [FECA] or would be against equity and good conscience.”⁶ Since OWCP found appellant to be without fault in the creation of the overpayment, it may only recover the overpayment if recovery would neither defeat the purpose of FECA nor be against equity and good conscience. The guidelines for determining whether recovery of an overpayment would defeat the purpose of FECA or would be against equity and good conscience are set forth in sections 10.434 to 10.437 of Title 20 of the Code of Federal Regulations.

Title 20 C.F.R. § 10.436 provides that recovery of an overpayment would defeat the purpose of FECA if recovery would cause hardship because the beneficiary “needs substantially all of his or her current income (including compensation benefits) to meet current ordinary and necessary living expenses” and, also, if the beneficiary’s assets do not exceed a specified amount

⁵ According to OWCP’s procedures, substantially a whole year means 11 months. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.4 (December 1995).

⁶ 5 U.S.C. § 8129(b).

as determined by OWCP from data provided by the Bureau of Labor Statistics.⁷ For waiver under the “defeat the purpose of [FECA]” standard, appellant must show that she needs substantially all of her current income to meet current ordinary and necessary living expenses and that her assets do not exceed the resource base.⁸ An individual is deemed to need substantially all of her current income to meet ordinary and necessary living expenses if monthly income does not exceed expenses by more than \$50.00.⁹

Under 20 C.F.R. § 10.437, recovery of an overpayment would be against equity and good conscience if: (a) the overpaid individual would experience severe financial hardship in attempting to repay the debt; and (b) 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.

An individual’s liquid assets “include but are not limited to cash, the value of stocks, bonds, saving accounts, mutual funds and certificate of deposits.”¹⁰ Nonliquid assets “include but are not limited to the fair market value of an owner’s equity in property such as a camper, boat, second home and furnishings/supplies ...”¹¹

ANALYSIS -- ISSUE 2

OWCP found that recovery of the overpayment would not defeat the purpose of FECA. With respect to ordinary and necessary living expenses, the hearing representative reviewed in detail the information provided by appellant. Under OWCP’s procedures, the hearing representative may determine that some of the claimed expenses, such as credit card debt, are duplicative of other claimed expenses and may find some expenses are not ordinary and necessary.¹² In this case, the hearing representative explained that there appeared to be duplicative credit card debt and that the \$430.00 claimed amount for television and telephones should be reduced to \$150.00 to reflect an ordinary and necessary expense. The hearing representative also noted that several student loan payments were noted, with no documentation as to whether the debt was that of appellant.¹³ Appellant did not provide any supporting documentation, such as bills or financial statements.

⁷ OWCP’s procedures provide that the assets must not exceed a resource base of \$4,800.00 for an individual or \$8,000.00 for an individual with a spouse or dependent plus \$960.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a) (October 2004).

⁸ See *Robert E. Wenzholz*, 38 ECAB 311 (1986).

⁹ *Jorge O. Diaz*, 51 ECAB 124, 128 (1999); *Marlon G. Massey*, 49 ECAB 650 (1998); *Carroll R. Davis*, 46 ECAB 361, 363 (1994).

¹⁰ Federal (FECA) Procedure Manual, *supra* note 7, Chapter 6.200.6(a) (June 2009).

¹¹ *Id.*

¹² *Id.*

¹³ The hearing representative did include one student loan payment as it appeared to be a debt of the parent.

The Board finds that the hearing representative explained her rationale with respect to the finding that appellant did not need substantially all of her current income to meet current ordinary and necessary living expenses. An individual is deemed to need substantially all of her current income to meet ordinary and necessary living expenses if monthly income does not exceed expenses by more than \$50.00.¹⁴ It is also noted that appellant reported \$9,267.00 in liquid assets, which does exceed the resource base of \$8,960.00 for an individual with a spouse and one dependent.¹⁵ The Board finds that the evidence of record does not establish that recovery of the overpayment would defeat the purpose of FECA.

With respect to whether recovery would be against equity and good conscience, the above discussion establishes that appellant would not experience severe financial hardship in attempting to repay the debt.¹⁶ In addition, there was no evidence that appellant gave up a valuable right in reliance of the overpayment. Accordingly, the Board finds OWCP properly denied waiver of the overpayment.

LEGAL PRECEDENT -- ISSUE 3

Public Law No. 103-333, enacted on September 30, 1994, amended FECA by adding section 8148, which provides for forfeiture of compensation benefits by an individual convicted of fraud with respect to receipt of compensation and prohibits the payment of compensation benefits to an individual while incarcerated pursuant to a felony conviction. Section 8148(a) states:

“Any individual convicted of a violation of section 1920 of title 18 or any other Federal or State criminal statute relating to fraud in the application for a receipt of any benefit under this subchapter or subchapter [3] of the this chapter, shall forfeit (as of the date of such conviction) any entitlement to any benefit such individual would otherwise be entitled to under this subchapter of subchapter [3] for any injury occurring on or before the date of such conviction. Such forfeiture shall be in addition to any action the Secretary may take under section 8106 or 8129.”¹⁷

In addition, OWCP’s regulations provide:

“When a beneficiary either pleads guilty or is found guilty on either Federal or State criminal charges of defrauding the Federal Government in connection with a claim for benefits, the beneficiary’s entitlement to any further compensation benefits will terminate effective the date either the guilty plea is accepted or a verdict of guilty is returned after trial, for any injury occurring on or before the date of such guilty plea or verdict. Termination of entitlement under this section

¹⁴ *Supra* note 9.

¹⁵ *Supra* note 7.

¹⁶ OWCP’s procedures state that the factors considered in determining financial hardship are those used under defeating the purpose of FECA. Federal (FECA) Procedure Manual, *supra* note 7, Chapter 6.200.6(b) (June 2009).

¹⁷ 5 U.S.C. § 8148(a).

is no affected by any subsequent change in or recurrence of the beneficiary's medical condition.”¹⁸

ANALYSIS -- ISSUE 3

The record establishes that appellant was charged with violation of Ohio Revised Code § 2921.13(B) in connection with providing false information on her CA-1032 form. Appellant pled no contest and the Municipal Court accepted the plea and entered a guilty verdict on April 1, 2010. The language of 5 U.S.C. § 8148(a) clearly states that conviction of a state criminal charge relating to fraud with respect to the receipt of benefits under FECA results in a forfeiture of entitlement to compensation benefits. Title 20 C.F.R. § 10.17 establishes that entitlement to compensation is terminated as of the date the plea is accepted or a guilty verdict returned. Based on the evidence of record appellant was not entitled to compensation as of April 1, 2010.

The evidence of record indicates that, for the period April 1 to August 28, 2010, appellant received \$11,936.00 in net compensation benefits. The hearing representative noted that appellant received five payments of \$2,228.00, plus an additional 10 days of compensation from April 1 to 10, 2010. Since the entire amount received after April 1, 2010 represents an overpayment of compensation, OWCP properly found an overpayment of \$11,936.00 was created.

LEGAL PRECEDENT -- ISSUE 4

Section 8129(b) 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 FECA or would be against equity and good conscience.”¹⁹ A claimant who is at fault in creating the overpayment is not entitled to waiver.²⁰ 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 4

Although the hearing representative noted the provisions of 20 C.F.R. § 10.433, the findings on the issue of fault consisted of a statement that appellant had received compensation “after her fraud conviction and that she must be considered at fault for the overpayment created beginning with that date.” There is no additional explanation or discussion as to which specific provision or provisions of 20 C.F.R. § 10.433 appellant was found to have violated. There is no

¹⁸ 20 C.F.R. § 10.17.

¹⁹ 5 U.S.C. § 8129(b).

²⁰ See *Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

discussion of the specific facts relevant to appellant's plea or reference to any other relevant evidence of record on the issue of fault.

The case will be remanded to OWCP for proper findings on the issue of fault. After such further development as OWCP deems necessary, it should issue an appropriate decision.

CONCLUSION

The Board finds that there was an overpayment of compensation based on an incorrect rate of pay, but the case must be remanded as to the amount. OWCP properly found that appellant was not entitled to a waiver of this overpayment based on an incorrect pay rate. The Board further finds that an overpayment of \$11,936.00 was created pursuant to 5 U.S.C. § 8148. The case is remanded for further development as to a finding of fault.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 21, 2011 is affirmed in part and set aside and remanded with respect to the amount of an overpayment based on an incorrect pay rate and a finding of fault with respect to an overpayment based on 5 U.S.C. § 8148.

Issued: July 19, 2012
Washington, DC

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

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

James A. Haynes, Alternate Judge
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