

FACTUAL HISTORY

This case was twice previously on appeal before the Board.² In a decision dated September 4, 2009, the Board set aside an OWCP's schedule award decision and remanded the case for appellant's referral for a second opinion to properly determine impairment to his legs. In an October 26, 2010 decision, the Board affirmed OWCP decisions which found that appellant did not establish that he had more than a 15 percent impairment of his right leg and more than 12 percent permanent impairment of his left leg, for which he received schedule awards. The facts of the case, as set forth in the prior decisions, are incorporated by reference.

On July 9, 2008 OWCP granted appellant a schedule award for 12 percent permanent impairment of the left leg and 15 percent of the right leg. The award covered a period of 77.76 weeks from February 21, 2008 to August 18, 2009. OWCP determined that the weekly pay rate was equivalent to \$947.52 effective July 7, 2006. Appellant stopped work on September 12, 2009 and began receiving wage-loss compensation.

In preliminary overpayment decisions dated June 4 and 7, 2010, OWCP found that overpayments had occurred in the amount of \$5,333.02, from February 21 to August 18, 2009, and \$763.14, from October 29, 2009 to March 26, 2010, due to an incorrect pay rate. On June 8, 2010 appellant's counsel disagreed with the determinations and requested a hearing. In an August 25, 2010 decision, an OWCP hearing representative determined that the case was not in posture for decision with regard to its overpayment decisions. He determined that appellant lost no time from work until September 12, 2009, when he stopped work and claimed total disability compensation because the employing establishment had no further limited-duty work available. The hearing representative explained that appellant's total disability should be based on the date disability began on September 12, 2009, provided the pay rate was greater than the June 21, 2007 date-of-injury pay rate, the date of last injurious work exposure. He vacated the preliminary decisions and returned the case to OWCP to further develop the matter.

In a February 1, 2011 memorandum, OWCP determined appellant's weekly pay rate for the June 21, 2007 date of injury was \$878.86. It selected the June 21, 2007 pay rate as it was higher than the pay rate on September 12, 2009. OWCP utilized a January 14, 2011 e-mail from Bernadette Sohn, an employing establishment health and resource management specialist, who indicated that appellant continued to be a part-time flexible (PTF) carrier. Ms. Sohn provided appellant's pay rate information and a detailed list of his earnings for one year prior to June 21, 2007.

On March 1, 2011 OWCP made a preliminary finding that an overpayment of \$5,565.55 arose because appellant was paid for a schedule award based upon an incorrect weekly rate of pay in the amount of \$947.52 instead of the correct rate of pay \$878.86 for the period February 21, 2008 to August 18, 2009. It found that he was without fault in creating the overpayment. OWCP advised appellant of his right to respond to the preliminary finding.

In an attached February 24, 2011 overpayment memorandum, OWCP advised that the correct date of injury was June 21, 2007. The employing establishment reported that appellant

² Docket No. 10-541 (issued October 26, 2010); Docket No. 08-2187 (issued September 4, 2009).

was a PTF carrier and that, for the 12-month period prior to June 21, 2007, he averaged 35.35 hours per week. Additionally, appellant's total earnings were \$865.46 per week plus \$11.69 weekly in night differential and \$1.71 in Sunday premium for a total of \$878.86. OWCP determined that his schedule award for the period February 21, 2008 to August 18, 2009 based upon the incorrect weekly rate of \$947.52 and an incorrect date of injury effective pay rate date of July 7, 2006 with no deductions at calendar days. It determined that the total compensation paid to appellant was \$51,125.65. Furthermore, OWCP explained that he should have received \$45,560.10 based upon the correct weekly pay rate and date of injury. It explained that, for the period February 21, 2008 to August 18, 2009, it utilized the correct weekly wage of \$878.86 and the correct date of injury of June 21, 2007 with no deductions or calendar days. OWCP subtracted the amount that appellant was supposed to receive from the amount he received (\$51,125.65 minus \$45,560.10) and determined that he received an overpayment in the amount of \$5,565.55.³

On March 2, 2011 appellant's representative requested a telephonic hearing. He noted that the August 25, 2010 decision set aside and remanded the matter for the employer to correctly state appellant's pay rates on June 21, 2007 and September 12, 2009 in relation to the payment of the schedule award and disability compensation. Appellant's representative noted that it did not appear that OWCP correctly gathered the information requested in the hearing representative's decision.

On March 7, 2011 OWCP made a preliminary finding that an overpayment of \$1,279.14 occurred from September 24, 2009 to January 15, 2011. It found that appellant received compensation for partial and total disability at an incorrect pay rate. OWCP found that he was without fault in the creation of the overpayment. It advised appellant of his right to respond to the preliminary determination.

In an attached March 7, 2011 memorandum, OWCP explained that from September 24, 2009 to January 15, 2011 appellant was paid compensation for various periods of both total disability and intermittent disability based on incorrect weekly pay rates of \$884.17, \$947.52, \$946.52 and \$1,073.60 based on both the date of injury and the date disability began. It also noted that he was paid using both calendar days and workdays, at both the basic compensation rate of 2/3 and the augmented rate of 3/4. Deductions were made for health benefits and basic life insurance for periods of total disability but not for periods of partial disability. OWCP obtained appellant's actual earnings for the 12-month period prior to June 21, 2007 and September 12, 2009, as he was a PTF employee. The employer confirmed that he was a PTF employee and that, for the 12-month period prior to June 21, 2007, his total earnings were \$865.46 per week plus \$11.69 weekly in night differential and \$1.71 in Sunday premium for a total of \$878.86. For the 12-month period prior to September 12, 2009 appellant earned \$637.41 a week. As the pay rate for June 21, 2007 was higher, OWCP selected this as the correct pay rate. OWCP noted that appellant's continuing benefits on the periodic rolls were adjusted as of January 16, 2011 and that he was not entitled to augmented compensation at the rate of 75 percent as he did not have any eligible dependents. Therefore, it determined that all periods of

³ Supplemental roll payment records attached by OWCP document the compensation actually received by appellant during the period while worksheets calculated the compensation that he should have received at the proper pay rate.

compensation were to be paid at the basic rate of 66 2/3 percent. From September 24, 2009 to January 15, 2011, appellant received a net total compensation of \$40,193.33 (after appropriate deductions for health benefits and basic life insurance for periods of total disability). OWCP explained that he should have received \$38,911.19. After subtracting the amount he received minus the amount he should have received, (\$40,190.33 minus \$38,911.19), OWCP found that appellant received an overpayment in the amount of \$1,279.14.⁴

In a letter dated March 9, 2011, appellant's representative requested a telephonic hearing which was held on June 8, 2011. He noted that the decision was set aside and remanded for the employing establishment to correctly state appellant's pay rates on June 21, 2007 and September 12, 2009 in relation to the payment of the schedule award and disability compensation. Appellant's representative questioned how OWCP calculated appellant's wages and noted that it appeared that OWCP did not gather information as directed by the hearing representative.

On April 7, 2011 OWCP received documentation from the employing establishment showing appellant's weekly earnings for the year prior to September 12, 2009. This revealed a weekly pay rate of \$637.41. This amount included night pay and Sunday pay.

During the June 8, 2011 hearing, an OWCP hearing representative addressed both overpayment periods. Appellant indicated that he only received income from OWCP payments in the amount of \$2,344.96 every four weeks, or \$2,540.37 a month. He indicated that he had a monthly mortgage payment of \$1,155.72. Appellant testified that he spent about \$200.00 to 400.00 per month on food, \$100.00 to \$200.00 on clothes. He advised that he spent monthly \$300.00 for gasoline, \$550.00 for his car payment and \$1,100.00 per year for car insurance.

OWCP received a June 20, 2011 overpayment recovery questionnaire and receipts from appellant to support that his monthly mortgage was \$1,177.26. Additionally, appellant indicated that he spent \$100.00 per month on food, zero for clothing, \$300.00 for gasoline, \$550.00 for his car payment, \$91.67 for car insurance, \$144.00 for utilities and \$69.00 for water. He submitted a copy of \$69.57 check for a water bill. A MasterCard bill showed an outstanding balance of \$5,933.85. This credit card bill revealed charges made at gas stations. A statement for appellant's automobile loan listed the payment amount at \$563.10. Appellant indicated that he paid \$50.00 a month on this card. He listed a Home Depot bill for \$1,000.00 for which he paid \$35.00 a month. Appellant stated that his savings and checking accounts totaled \$500.00.

In decisions dated August 4, 2011, OWCP's hearing representative finalized its preliminary findings on the fact and amount of the \$5,565.55 and \$1,279.14 overpayments. He found that appellant was without fault in creating the overpayments. Regarding waiver, the hearing representative advised that appellant did not qualify for a waiver because his monthly income exceeded his ordinary and necessary living expenses by more than \$50.00. He explained that appellant's monthly household income, based upon his testimony was equal to \$2,540.37.⁵

⁴ Supplemental roll payment records attached by OWCP documents the compensation actually received by appellant during the period while work sheets calculated the compensation that he should have received at the proper pay rate.

⁵ This was based on a net compensation payment every four weeks of \$2,344.96. However, the Board notes that, at the time of the August 4, 2011 decisions, appellant's net compensation payment was \$2,294.96.

The hearing representative also indicated that the ordinary and necessary monthly living expenses were equal to \$2,362.93. He noted accepting the minimal amount of \$144.00 a month for household utilities.⁶ The hearing representative also indicated that he would not accept the amounts for the MasterCard or Home Depot as it was unclear what was charged. He noted that the MasterCard appeared to be for gasoline which was already included. The hearing representative further noted that, while appellant bought clothing items such as shoes, pants, underwear and shirts on a monthly basis, he did not fill in any expense for clothing on the overpayment questionnaire. He determined that the total monthly expenses were equal to \$2,362.93. The hearing representative concluded that appellant's monthly income exceeded his estimated ordinary and necessary living expenses by \$177.44 and concluded that appellant did not qualify for a waiver. He found that \$50.00 per month should be deducted from each periodic rolls payment with respect to the \$1,279.14 debt while \$75.00 should be withheld for the \$5,565.55 debt, until both debts were repaid.

LEGAL PRECEDENT -- ISSUES 1 & 2

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 his duty.⁷ When an overpayment has been made to an individual because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which the individual is entitled.⁸

The amount of compensation paid is a function of the injured employee's pay rate.⁹ 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 was not fixed, the average annual earnings are the product obtained by multiplying his daily wage for the 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.¹⁰ The rate of pay to be used in calculating compensation is based on the greatest of either the monthly pay at the time of injury or at the time disability begins or 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 Federal Government.¹¹

⁶ The hearing representative noted that the utilities were not specified but that, at the hearing, appellant's counsel noted that he paid "Verizon, Sprint and cable television."

⁷ 5 U.S.C. § 8102(a).

⁸ *Id.* at § 8129(a).

⁹ 5 U.S.C. §§ 8105, 8106, 8107 (2006); 20 C.F.R. §§ 10.401(b), 10.404(b) (2008).

¹⁰ 5 U.S.C. § 8114(d)(1)(B). The above-noted phrase substantially the whole year is interpreted as meaning at least 11 months. *Robert A. Flint*, 57 ECAB 369, 375 n.18 (2006).

¹¹ 5 U.S.C. § 8101(4). In an occupational disease claim, the date of injury is the date of last exposure to the employment factors which caused or aggravated the claimed condition. *Jon L. Hoagland*, 57 ECAB 635, 639 n.14 (2006).

OWCP's procedure manual states that the postal service recognizes several kinds of tours of duty, depending on the kind of work performed and that an employee may work many more hours than indicated on the tour of duty. The procedure manual states: in such cases the pattern established by the actual number of hours worked or actual amounts of money earned takes precedence over the stated schedule or tour of duty in deciding which part of 5 U.S.C. § 8114 to use in determining pay rate.¹²

ANALYSIS -- ISSUES 1 & 2

The Board finds that appellant received an overpayment of compensation in the amount of \$5,565.55 for the period February 21, 2008 to August 18, 2009 and \$1,279.14 for the period September 24, 2009 to January 15, 2011.

Regarding the overpayment of \$5,565.55 for the period February 21, 2008 to August 18, 2009, OWCP determined that appellant's proper weekly pay rate was as of the date of injury or \$878.86 based his earnings as a PTF carrier. The employer provided appellant's pay rate information and a detailed list of his earnings for one year prior to June 21, 2007 in which he averaged 35.35 hours per week. Additionally, his total average earnings were \$865.46 per week plus \$11.69 weekly in night differential and \$1.71 in Sunday premium for a total of \$878.86. OWCP properly determined that the date of injury in this occupational disease claim was appellant's last date of exposure to injurious work factors, June 21, 2007.¹³ Appellant had no disability at that time and also did not have a recurrence of disability.

As noted, appellant received a schedule award for the period February 21, 2008 to August 18, 2009 based upon the incorrect weekly rate of \$947.52 based on a July 7, 2006 pay rate. OWCP records show that it paid appellant a total of \$51,125.65 under the schedule award. As appellant should have received \$45,560.10 based upon the correct weekly pay rate, OWCP subtracted the amount that he was supposed to receive from the amount he received (\$51,125.65 minus \$45,560.10). It determined that he received an overpayment in the amount of \$5,565.55. The Board finds that OWCP properly determined that appellant received an overpayment in this regard.

OWCP also properly determined that appellant received an overpayment in the amount of \$1,279.14 for the period September 24, 2009 to January 15, 2011 based on his receipt of disability compensation at an incorrect weekly pay rate and, for certain periods, augmented compensation when he had no dependent and incorrect benefit deductions.¹⁴ It compared earnings for the 12-month period prior to June 21, 2007, the date of injury, and September 12,

¹² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.3(b) (January 2010).

¹³ See *R.S.*, 58 ECAB 362 (2007) (where an injury is sustained over a period of time, the date of injury is the date of last exposure to work factors causing injury).

¹⁴ Section 8105(a) provides that, if the disability is total, the United States shall pay the employee during the disability monetary compensation equal to 66 2/3 percent of his or her monthly pay, the basic compensation rate for total disability. Under 5 U.S.C. § 8110, an employee is entitled to compensation at the augmented rate of 75 percent of weekly pay if he or she has one or more dependents. *R.E.*, 59 ECAB 323 (2008).

2009, the date disability began. As noted, the date-of-injury pay rate was \$878.86 while the average weekly pay rate for the 12-month period prior to September 12, 2009 was \$637.41. Consequently, OWCP properly determined that \$878.86 was the appropriate pay rate. It explained that appellant was not entitled to augmented compensation at the rate of 75 percent as he had not established that he had any eligible dependents for the period above. Therefore, the basic rate of 66 2/3 percent would apply. OWCP explained that, for the period September 24, 2009 to January 15, 2011, appellant received a net total of \$40,193.33 in compensation payments. It explained that he should have received \$38,911.19 using the proper pay rate and after making appropriate deductions for health benefits and basic life insurance. After subtracting the amount appellant received minus the amount he should have received, (\$40,190.33 minus \$38,911.19), OWCP properly determined that he received an overpayment in the amount of \$1,279.14.

Appellant does not contest that an overpayment occurred but argues that OWCP did not consider all of the evidence and that financial hardship was established. As explained, OWCP properly determined that he received an overpayment in the amount of \$1,279.14 and \$5,565.55 for the two specified periods. It provided records documenting its calculations and there is no evidence that these determinations on the fact or the amount of the overpayments were incorrect.

The Board will affirm the August 4, 2011 decisions on the fact and amount of the overpayments.

LEGAL PRECEDENT -- ISSUE 2

Under section 8129 of FECA and the implementing regulations, an overpayment must be recovered unless 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.¹⁵ Section 10.433 of the implementing regulations provide that OWCP may consider waiving an overpayment if the individual to whom it was made was not at fault in accepting or creating the overpayment.¹⁶ Section 10.434 provides that, if OWCP finds the recipient of an overpayment was not at fault, repayment will be required unless:

- (a) Adjustment or recovery of the overpayment would defeat the purpose of FECA or
- (b) Adjustment or recovery of the overpayment would be against equity and good conscience.¹⁷

These terms are further defined in sections 10.436 and 10.437. Section 10.436 provides that recovery would defeat the purpose of FECA if the beneficiary needs substantially all of his current income to meet current ordinary and necessary living expenses and the beneficiary's

¹⁵ 5 U.S.C. § 8129(b); 20 C.F.R. §§ 10.433, 10.434, 10.436, 10.437.

¹⁶ 20 C.F.R. § 10.433(a).

¹⁷ *Id.* at § 10.434.

assets do not exceed a specified amount as determined by OWCP from data provided by the Bureau of Labor Statistics.¹⁸ An individual is deemed to need substantially all of his or her current income to meet ordinary and necessary living expenses if monthly income does not exceed expenses by more than \$50.00.¹⁹ An individual's liquid assets include but are not limited to, the value of stocks, bonds, savings accounts, mutual funds and certificates of deposits.²⁰ 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 and supplies.²¹

Section 10.437 provides that 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.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

As appellant was found to be without fault in the creation of the overpayment in compensation, waiver must therefore be considered, and repayment is still required unless adjustment or recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.

The Board finds that the case is not in posture for a decision regarding waiver of the overpayments. Recovery of an overpayment would defeat the purpose of FECA if the beneficiary needs substantially all of his current income to meet current ordinary and necessary living expenses. An individual is deemed to need substantially all of his or her current income to meet ordinary and necessary living expenses if monthly income does not exceed expenses by more than \$50.00.²⁴ The hearing representative explained that appellant's monthly income, his compensation prorated on a monthly basis, was equal to \$2,540.37. He also found that the ordinary and necessary monthly living expenses were equal to \$2,362.93. The hearing representative concluded that appellant's monthly income exceeded his estimated ordinary and

¹⁸ 20 C.F.R. § 10.436. OWCP procedures provide that 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) (June 2009).

¹⁹ *Desiderio Martinez*, 55 ECAB 245 (2004); Federal (FECA) Procedure Manual, *id.*

²⁰ *See supra* note 18.

²¹ *Id.*

²² 20 C.F.R. § 10.437.

²³ *Id.* at § 10.437(b)(1).

²⁴ Appellant did not identify any significant assets.

necessary living expenses by \$177.44 and concluded that appellant did not qualify for a waiver. He found that \$50.00 per month should be deducted from each periodic rolls payment with respect to the \$1,279.14 debt while \$75.00 should be withheld for the \$5,565.55 debt, which would still leave appellant with more than \$50.00 a month.

The Board notes however that the hearing representative did not appear to consider all of the financial documentation submitted by appellant. In his calculations, the hearing representative determined that the car payment was \$550.00 a month but a motor vehicle loan statement provided by appellant indicated that the payment was higher, at \$563.10. Although the hearing representative properly found that there was insufficient documentation provided with regard to appellant's MasterCard bill which appeared to be for gasoline (and the hearing representative allowed \$300.00 a month for gasoline costs) and Home Depot debt (for which no documentation was provided), he did not clearly state whether the allowed utility expense of \$144.00 included appellant's water bill for which appellant provided documentation of a \$69.57 expense.²⁵ Additionally, the hearing representative did not clearly explain why he allowed only \$100.00 per month for food and nothing for clothing, listed on a partially completed overpayment recovery questionnaire, when appellant testified at his hearing that he spent \$200.00 to \$400.00 a month on food and \$100.00 to \$200.00 a month on clothing. While appellant is responsible for providing information about income and expenses, the hearing representative did not adequately explain how he found \$100.00 a month reasonable for food and clothing in view of appellant testimony that, at a minimum, he spent \$300.00 a month on food and clothing. Furthermore, OWCP records indicate that, beginning July 31, 2011, appellant's net compensation was reduced to \$2,294.96 every four weeks.

In view of these circumstances further development is needed to determine whether appellant's monthly income exceeds his expenses and whether recovery of the overpayment would cause undue hardship. Because OWCP denied waiver without giving due consideration to all of the evidence regarding his current income and expenses, the Board finds that OWCP did not properly exercise its discretion in the matter.²⁶ The Board will set aside the March 10, 2011 decision on the issue of waiver and remand the case for proper exercise of discretion. After such development as may be necessary, OWCP shall issue an appropriate final decision on whether appellant is entitled to waiver.

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment in the amount of \$5,565.55 for the period February 21, 2008 to August 18, 2009; and \$1,279.14 for the period September 24, 2009 to January 15, 2011. The Board also finds that the case is not in posture for decision regarding his eligibility for waiver of the overpayments.²⁷

²⁵ The context of the hearing representative's decision indicates that he considered "Verizon, Sprint and cable television."

²⁶ See *W.H.*, Docket No. 09-2048 (issued May 24, 2010).

²⁷ In view of the Board's finding on waiver, it is premature to address recovery of the overpayments.

ORDER

IT IS HEREBY ORDERED THAT the August 4, 2011 decisions of the Office of Workers' Compensation Programs are affirmed with respect to fact and amount of overpayment and set aside and remanded for further action with respect to the denial of waiver of recovery of the overpayment.

Issued: June 5, 2012
Washington, DC

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

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

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