

FACTUAL HISTORY

On June 27, 1994 appellant, then a 40-year-old temporary carrier, stepped into a hole and while trying to avoid falling, pulled a muscle near his neck and shoulder. OWCP accepted his claim for herniated nucleus pulposus at C4-5 and C6-7. A cervical discectomy and fusion was authorized at C6-7 and performed on July 27, 1994. OWCP paid compensation and medical benefits.

Appellant was hired as a transitional employee on May 17, 1993. After his injury on June 27, 1994, he returned to limited-duty work for four hours a day on September 28, 1994. Appellant worked 35 hours a week with no loss of pay as a modified clerk on January 25, 1995. His temporary position ended on May 9, 1996.

Appellant filed multiple claims for compensation, including a claim for 26.35 hours of compensation for the period January 7 to 24, 1995. However, OWCP paid compensation for 35 hours for the time period January 7 to 24, 1995.

On August 31, 2011 OWCP made a preliminary determination that appellant was overpaid compensation benefits in the amount of \$925.43. It found that he was paid compensation for wage loss from September 6, 1994 to January 24, 1995. Appellant's compensation was calculated using a pay rate of \$12.38 an hour and based on a 40-hour workweek. The pay rate was determined by multiplying \$12.38 by 40 to equal \$495.20 a week. OWCP determined that appellant was never a full-time employee; rather, he was a temporary carrier for 35 hours a week. Accordingly, it determined that he should have been paid based on a pay rate of \$433.30 a week ($\$12.38 \times 35 = \433.30). OWCP further noted that appellant was paid for 34 hours of compensation for the period January 7 to 24, 1995, but that he only claimed wage loss for 26 hours and that accordingly he was overpaid for 8 hours. It then calculated that the total amount overpaid to him was \$925.43. OWCP forwarded financial forms to appellant, and informed him that, if he wished to contest overpayment or request a waiver, he must respond within 30 days. Appellant filed no response.

In a decision dated October 11, 2011, finalized its determination that appellant received an overpayment in the amount of \$925.43 and declined to waive that overpayment.

LEGAL PRECEDENT -- ISSUE 1

Pay rate for compensation purposes is defined by FECA and its OWCP regulations as the employee's pay at the time of injury, time disability began or when compensable disability recurred, if the recurrence began more than six months after the employee resumed regular full-time employment with the United States, whichever is greater.²

Sections 8114(d)(1) and (2) of FECA provide methodology for computation of pay rate for compensation purposes, by determination of average annual earnings at the time of injury. Sections 8114(d)(1) and (2) of FECA specify methods of computation of pay for employees who worked in the employment for substantially the whole year prior to the date of injury and for

² 5 U.S.C. § 8101(4); 20 C.F.R. § 10.5(s); *see John M. Richmond*, 53 ECAB 702 (2002).

employees who did not work the majority of the preceding year, but whom the position would be available for a substantial portion of the following year. Section 8114(d)(3) of FECA provides an alternative method for determination of pay to be used for compensation purposes when the methods provided in the foregoing sections of FECA cannot be applied reasonably and fairly.³

A mistake in determining either the appropriate pay rate may result in an overpayment of benefits.⁴

ANALYSIS -- ISSUE 1

OWCP found that appellant worked 35 hours a week; but he was paid wage loss based on a 40-hour workweek.

A pay rate determination must be made in accordance with the provisions of section 8114 of FECA.⁵ OWCP's Federal (FECA) Procedural Manual provides methods for computing weekly pay on an annual, daily and hourly basis.⁶ To compute the basic weekly pay rate for employees paid on an hourly basis by the employing establishment and working full time, the hourly rate is multiplied by 2,080 and then divided by 52. For employees of the employing establishment who work less than a full schedule, the figure of 2,080 hours should be prorated then multiplied by the amount shown.⁷

Appellant worked a full year prior to his injury. He held a temporary part-time position in which he worked 35 hours a week. Accordingly, the pay rate should have been based on 35 hours a week and not 40.⁸ OWCP found it should have multiplied appellant's hourly wage of \$12.38 by 35 instead of 40, which rendered a rate of pay \$433.30 a week rather than \$492.50. Furthermore, it correctly noted that appellant requested compensation for 26 hours for the period January 7 to 24, 1995, but received 35 hours of compensation.

In evaluating these errors, OWCP determined that appellant was paid \$4,210.09 when he should have been paid \$3,284.66 (\$2,727.56 for September 18, 1994 to January 24, 1995 and \$557.10 for September 6 to 17, 1994). The difference between these amounts, \$925.43, represented the amount of the overpayment.

OWCP's calculations are supported by the evidence of record. Therefore, the Board finds that appellant received an overpayment of compensation in the amount of \$925.43.

³ *Id.* at § 8101(d); *see Ricardo Hall*, 49 ECAB 390 (1998).

⁴ *C.D.*, Docket No. 12-105 (issued May 25, 2012).

⁵ *B.W.*, Docket No. 09-1210 (issued January 5, 2010).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.10 (April 2002); *see also T.M.*, 61 ECAB (2010).

⁷ *Id.* at 2.900.10(c)(1).

⁸ *See S.G.*, Docket No. 10-2377 (issued August 24, 2011).

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA provides that an overpayment in compensation shall be recovered by OWCP unless incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purposes of FECA or would be against equity and good conscience.⁹ Section 10.438 of OWCP regulations provide that the individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by OWCP. The information is needed to determine whether or not recovery on an overpayment would defeat the purpose of FECA or be against equity and good conscience.¹⁰ Failure to submit the requested information within 30 days of the request shall result in denial of waiver.¹¹

ANALYSIS -- ISSUE 2

OWCP found appellant without fault in the creation of the overpayment. Waiver must 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.¹² Appellant, however, had the responsibility to provide financial information to OWCP.¹³ He did not do so.

In its preliminary determination dated August 31, 2011, OWCP clearly explained the importance of providing the requested financial information for determination of waiver and forwarded appellant a financial questionnaire to be completed within 30 days. Appellant did not submit a completed overpayment questionnaire or otherwise submit financial information supporting his income and expenses. As a result, OWCP did not have the necessary financial information to determine if recovery of the overpayment would defeat the purpose of FECA or if recovery would be against equity and good conscience. Appellant did not submit the financial information required under section 10.438 of OWCP regulations, which is necessary to determine his eligibility for waiver. OWCP properly denied waiver of recovery of the overpayment of compensation in the amount of \$925.43.

⁹ 5 U.S.C. § 8129.

¹⁰ Recovery of an overpayment will defeat the purpose of FECA if such recovery would cause hardship to a currently or formerly entitled beneficiary because: (a) the beneficiary from whom OWCP seeks recovery needs substantially all of his or her current income (including compensation benefits) to meet current or ordinary and necessary living expenses; and (b) the beneficiary's assets do not exceed a specified amount as determined by OWCP from data furnished by the Bureau of Labor Statistics. 20 C.F.R. § 10.436. Recovery of an overpayment is considered to be against equity and good conscience when an individual who received an overpayment would experience severe financial hardship attempting to repay the debt; and when an 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. 20 C.F.R. § 10.437.

¹¹ *Id.* at § 10.438.

¹² *Supra* note 4.

¹³ *Supra* note 11.

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$925.43 and that OWCP properly denied waiver of recovery of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the October 11, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 9, 2012
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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