

FACTUAL HISTORY

On February 11, 2003 appellant, then a 53-year-old contracting officer, filed an occupational claim (Form CA-2) alleging that he sustained injuries as a result of his federal employment. The reverse of the claim form indicated that he worked 32 hours per week. On February 27, 2003 OWCP accepted the claim for bilateral carpal tunnel syndrome. Appellant stopped working on April 14, 2003 and filed a claim for compensation (Form CA-7) commencing on April 14, 2003.

With respect to appellant's pay rate, the record contains an SF-50 form (notification of personnel action) with an effective date of January 12, 2003, indicating that appellant was a part-time employee working 64 hours every pay period. The form indicated that he was a General Services (GS) Grade 13, Step 10 employee, with a full-time annual pay rate of \$86,509.00.² There is also a second SF-50 form, with an effective date of January 12, 2003, indicating that the pay for GS 13, Step 10 was \$87,289.00. The form indicated that a retroactive locality adjustment was authorized by a March 21, 2003 executive order.

OWCP issued compensation payments for the period April 14 to May 17, 2003, using a weekly pay rate of \$1,663.63.³ An optional life insurance premium was deducted. For the period May 18 to October 4, 2003, OWCP initially issued compensation payments based on a pay rate of \$1,343.06 per week.⁴

In a memorandum dated October 20, 2003, an OWCP claims examiner stated that, although appellant appeared to be working 32 hours per week, "his official personnel paperwork" showed that he had an annual pay of \$87,289.00, or \$1,678.63 per week. The record indicates that OWCP issued a supplemental payment covering the period through October 4, 2003 and as of October 4, 2003 appellant was paid compensation based on a pay rate of \$1,678.63 per week.

On March 23, 2006 OWCP received a March 17, 2006 Office of Personnel Management (OPM) form indicating that as of June 26, 2003 deductions for postretirement basic life insurance (PRBLI) should have begun. The compensation payments did not reflect any PRBLI deductions.

By letter dated December 22, 2010, OWCP advised appellant that his compensation would be adjusted as of December 18, 2010. It found that he had been paid compensation based on a full-time pay rate of \$1,678.63, but should have been paid based on a pay rate of \$1,343.06, since he worked only 32 hours per week. OWCP also found that PRBLI deductions would commence. In a letter dated December 27, 2010, appellant stated that, although he was working part time, he had been required to pay insurance premiums based on a full-time employee. By letter dated January 31, 2011, he argued that there was no statute or regulation stating that a

² The pay rate included the appropriate locality adjustment for appellant's work area.

³ This represents the weekly pay for an annual pay rate of \$86,509.00.

⁴ A periodic rolls worksheet stated that for a 32-hour workweek the pay rate would be \$1,343.06.

permanent part-time employee should have their part-time salary used to determine compensation benefits.

In a letter dated February 14, 2011, OWCP advised appellant of a preliminary determination that an overpayment of \$185,982.09 had occurred. According to OWCP there were two overpayments: (1) an overpayment of \$170,917.82 from April 14, 2003 to December 18, 2010 due to an incorrect pay rate; and (2) an overpayment of \$15,064.27 from May 1, 2003 to December 18, 2010 due to a failure to deduct PRBLI premiums. As to the \$170,917.82 overpayment, it stated that appellant was paid \$546,248.85 in compensation and should have been paid \$375,331.03 in benefits. OWCP directed him to refer to “enclosed worksheets” as to the overpayments, without further explanation.⁵ With respect to fault, it found that appellant was not at fault in creating the overpayments.

The record contains an earnings and leave statement dated April 11, 2003. The copy in the record is difficult to read, although the regular pay appeared to 64 hours with earnings of \$2,652.80. A pay rate memorandum dated February 15, 2011 noted that the earnings and leave results and found that the full-time annual pay rate of \$87,289.00 divided by 2087 hours equaled \$41.83 per hour, resulting in a pay rate of \$1,343.06 per week.

On March 14, 2011 appellant requested a precoupment hearing and submitted detained financial information. On OWCP-20 form, he reported \$10,382.10 in monthly income and \$9,093.82 in expenses. As to assets, appellant reported \$16,902.39 in checking and savings bank accounts. He also argued that under 5 U.S.C. § 8114(d)(3) he would be entitled to the full-time pay rate. Appellant submitted time sheets commencing in 2001 that included the period from April 2002 to April 2003. A hearing was held on November 8, 2011. On November 29, 2011 appellant submitted additional financial documents and arguments as to the interpretation of 5 U.S.C. § 8114.

By decision dated January 26, 2012, the hearing representative finalized the preliminary determination as to overpayments totaling \$185,982.09. The hearing representative denied waiver, finding that appellant had excess income over expenses and exceeded the asset limit. Based on the evidence of record, the hearing representative found that he could repay the overpayment by deducting \$1,500.00 from continuing compensation.

Appellant requested reconsideration by letter dated February 13, 2012. By decision dated May 15, 2012, OWCP reviewed the case on its merits and denied modification.

LEGAL PRECEDENT -- ISSUE 1

Under 5 U.S.C. § 8101(4), “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”

⁵ The preliminary determination in the record contains an overpayment recovery questionnaire but no specific worksheets as to the overpayment amount calculations.

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 5 1/2-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.

(3) If either of the foregoing methods of determining the average annual earnings cannot be applied reasonably and fairly, the average annual earnings are a sum that reasonably represents the annual earning capacity of the injured employee in the employment in which he was working at the time of the injury having regard to the previous earnings of the employee in federal employment and of other employees of the United States in the same or most similar employment in the same or neighboring location, other previous employment of the employee or other relevant factors. However, the average annual earnings may not be less than 150 times the average daily wage the employee earned in the employment during the days employed within one year immediately preceding his injury.”

ANALYSIS -- ISSUE 1

In the present case, the record indicates that appellant began receiving compensation for wage loss as of April 14, 2003. The pay rate used by OWCP was based on annual earnings of

\$87,289.00, the full-time pay for a GS 13, Step 10. OWCP has found that this was an incorrect pay rate, as appellant was not a full-time employee.

The correct pay rate is determined under 5 U.S.C. § 8114. The evidence indicates that appellant worked in the employment in which he was employed at the time of his injury during substantially the whole year immediately preceding the injury. The next question under 5 U.S.C. § 8114(d)(1) is whether his pay was fixed or not fixed. While appellant argues that his pay was not fixed, the probative evidence of record does not support his argument. The SF-50 clearly indicates that his was a part-time employee scheduled to work 32 hours per week. The April 11, 2003 earnings and leave statement also corroborates that appellant had a fixed work schedule of 32 hours per week.

A similar situation was presented in *E.K.*,⁶ a case cited by the hearing representative. In that case the employing establishment had referred to a base salary for a 40-hour workweek, but the claimant was working 24 hours per week. The Board found that his pay was a fixed rate of pay under 5 U.S.C. § 8114(A)(1) and OWCP had properly determined the pay rate for compensation purposes. OWCP calculated the daily wage based on the full-time position, adjusted for the part-time percentage of hours worked and calculated the weekly pay rate for the part-time position.⁷

Appellant has submitted time sheets and argued that he worked more than 32 hours for some weeks. For the relevant period April 2002 to April 2003, the time sheets indicated that only there were occasional weeks he earned credit hours. There is no evidence that appellant was paid additional amounts or that his pay rate was not based on a fixed schedule of 32 hours per week.

The Board accordingly finds that pursuant to 5 U.S.C. § 8114(d)(1)(A) appellant's pay rate was his fixed annual rate of pay based on 32 hours per week. Since appellant received compensation based on a full-time GS 13, Step 10 employee, there was an overpayment of compensation.

On appeal, appellant suggests that he worked 9.6 months a year (part-time hours compared to full-time) and argues that he did not work substantially the whole year prior to injury. However, he concedes that he was a permanent part-time employee and the record indicates that he worked 12 months a year and therefore the evidence established that he did work in the position substantially the whole year prior to injury. The Board reiterates that the evidence of record establishes that under 5 U.S.C. § 8114(d) appellant had a fixed rate of pay based on a part-time position and he was not entitled to the pay rate for a full-time employee.

As to the amount of the overpayment, the Board finds that OWCP provided little documentation. There is a reference to worksheets in the February 14, 2011 preliminary determination, but there were no worksheets in the record accompanying the preliminary determination. The Board is unable to identify any specific documentation in the record to

⁶ Docket No. 09-693 (issued December 7, 2009).

⁷ *Id.*

establish and confirm the amount of compensation received or the proper compensation owed for the overpayment period. A claimant is entitled to an adequate statement of reasons with respect to any final decision by OWCP.⁸ On remand, OWCP should provide adequate documentation as to the overpayment amount.

LEGAL PRECEDENT -- ISSUE 2

Under the Federal Employees' Group Life Insurance (FEGLI) program, most civilian employees of the Federal Government are eligible to participate in basic life insurance and one or more of the options.⁹ The coverage for basic life is effective unless waived¹⁰ and premiums for basic and optional life insurance coverages are withheld from the employee's pay.¹¹

FECA and its implementing regulations provide that an employee entitled to disability compensation benefits may continue his or her basic life insurance coverage without cost under certain circumstances¹² and may also retain the optional life insurance.¹³ At separation from the employing establishment, the FEGLI insurance will either terminate or be continued under "compensationeer" status.¹⁴ If the compensationeer chooses to continue basic and optional life insurance coverage, the schedule of deductions made while the compensationeer was an employee will be used to withhold premiums from his or her compensation payments.¹⁵ Thus while receiving disability compensation in lieu of retirement benefits, the former employee is responsible for all insurance premiums.¹⁶

ANALYSIS -- ISSUE 2

The documentation from OPM dated March 17, 2006 indicated that appellant was responsible for PRBLI deductions as of June 26, 2003. The compensation payments issued did not include a deduction for PRBLI. As noted above, a claimant is responsible for all insurance premiums. The Board accordingly finds that an overpayment was created due to the nondeduction of PRBLI premiums.

As to the amount, the Board again finds OWCP provided little explanation or documentation as to how the amount was calculated. OWCP provided no worksheets to

⁸ An OWCP decision shall contain findings of fact and a statement of reasons. 20 C.F.R. § 10.126.

⁹ 5 C.F.R. § 870.201.

¹⁰ *Id.* at § 870.204(a).

¹¹ *Id.* at § 870.401(a).

¹² *Id.* at § 870.701, subpart G.

¹³ *Id.* at § 871.201, subpart B; 870.201, subpart B; 873.203, subpart B.

¹⁴ *Id.* at § 870.501.

¹⁵ *Id.* at § 872.410, subpart D.

¹⁶ *Scherrie L. Stanley*, 53 ECAB 433 (2002).

appellant and did not explain on what evidence it relied to determine the appropriate amount of the deduction for PRBLI. The Board also notes that the stated period of the overpayment commenced May 1, 2003, but the documentation from OPM referred to June 26, 2003. On remand OWCP should provide additional documentation and explanation for its calculations.

LEGAL PRECEDENT -- ISSUE 3

The waiver or refusal to waive an overpayment of compensation by OWCP is a matter that rests within OWCP's discretion pursuant to statutory guidelines.¹⁷ These statutory guidelines are found in section 8129(b) of FECA which states: "Adjustment or recovery [of an overpayment] 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."¹⁸ Since OWCP found appellant to be without fault in the creation of the overpayment, then, in accordance with section 8129(b), OWCP may only recover the overpayment if it determined that recovery of the overpayment would neither defeat the purpose of FECA nor be against equity and good conscience.

Section 10.436 of the implementing regulations¹⁹ provide that recovery of an overpayment will defeat the purpose of FECA if 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 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 An individual is deemed to need substantially all of his or her income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.²¹

Section 10.437 provides that 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 in 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.²²

¹⁷ *Robert Atchison*, 41 ECAB 83 (1989).

¹⁸ *See* 5 U.S.C. § 8129(b); *Carroll R. Davis*, 46 ECAB 361 (1994).

¹⁹ 20 C.F.R. § 10.436 (1999).

²⁰ An individual's assets must exceed a resource base of \$4,800.00 for an individual or \$8,000.00 for an individual with a spouse or one dependent plus \$960.00 for each additional dependent. This base includes all of the individual's assets not exempt from recoupment; *see* Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6 (October 2004).

²¹ *Sherry A. Hunt*, 49 ECAB 467 (1998).

²² 20 C.F.R. § 10.437 (1999).

ANALYSIS -- ISSUE 3

In the present case, appellant completed an OWCP-20 and submitted extensive financial documentation. As noted above, when an employee's assets exceed \$8,000.00 for an individual with a spouse, recovery of the overpayment will not defeat the purpose of FECA. The evidence submitted indicated that appellant had more than \$8,000.00 in bank accounts. With respect to whether recovery would be against equity and good conscience, there was no evidence that he would experience severe financial hardship in repaying the debt. The evidence indicated that appellant had excess monthly income over expenses and as noted above, had significant assets. In addition, there was no evidence presented that he had given up a valuable right in reliance on the overpayment or changed his position for the worse. The Board finds that the evidence of record does not establish that recovery of an overpayment would defeat the purpose of FECA or be against equity and good conscience. OWCP properly denied waiver of the overpayment in this case.

On appeal, appellant refers to language in 20 C.F.R. § 10.437(b) that OWCP does not consider the individual's current ability to repay the overpayment. 20 C.F.R. § 10.437(b) discusses the "against equity and good conscience" standard with respect to giving up a valuable right or changing position for the worse and indicates that a decision in this respect does not consider ability to repay the overpayment. As noted above, there was no evidence presented of detrimental reliance on the overpayment in this case.

LEGAL PRECEDENT -- ISSUE 4

OWCP regulations provide:

"When an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to OWCP the amount of the overpayment as soon as the error is discovered or his or her attention is called to the same. If no refund is made, OWCP shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize hardship."²³

ANALYSIS -- ISSUE 4

In the present case, the hearing representative reviewed in detail appellant's financial circumstances based on the evidence of record. The hearing representative noted that he indicated that he had approximately \$734.00 in monthly income over expenses. In addition, the hearing representative found that stated expenses of \$1,500.00 for groceries and necessities was excessive, noting the Bureau of Labor Statistics Expenditure Survey.²⁴ The hearing representative found that appellant had approximately \$1,646.06 in excess income per month and

²³ 20 C.F.R. § 10.441.

²⁴ A hearing representative must provide reasons for finding claimed expenses are excessive. *Supra* note 20 at Chapter 6.200.6 (October 2004).

set the recovery of the overpayment at \$1,500.00 from continuing compensation. The Board finds that the hearing representative properly considered the factors to minimize the financial hardship in this case.

CONCLUSION

The Board finds that an overpayment of compensation was created as appellant received compensation based on an incorrect pay rate. The case is remanded for a proper explanation as to the amount of the overpayment. The Board further finds an overpayment of compensation was created from the failure to deduct PRBLI premiums. The case is remanded for a proper explanation as to the amount. The Board further finds that OWCP properly denied waiver of the overpayment based on the evidence of record and properly determined the overpayment should be recovered by deducting \$1,500.00 from continuing compensation.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated May 15 and January 26, 2012 are affirmed with respect to fact of overpayments, denial of waiver and recovery of the overpayments. The case is remanded for proper explanation as to the calculation of the amount of the overpayments.

Issued: April 26, 2013
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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