

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

D.G., Appellant

and

**DEPARTMENT OF COMMERCE, CENSUS
BUREAU, Shreveport, LA, Employer**

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**Docket No. 12-1460
Issued: January 11, 2013**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 27, 2012 appellant's counsel filed a timely appeal of a March 30, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) finalizing overpayment of compensation. 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.²

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received an overpayment in the amount of \$5,713.27; and (2) whether it properly determined that she was at fault in the creation of the overpayment and therefore not entitled to a waiver of recovery.

¹ 5 U.S.C. § 8101 *et seq.*

² Counsel did not appeal OWCP's finding that appellant was entitled to a schedule award for 10 percent permanent impairment of the left lower extremity in its February 15, 2012 decision.

FACTUAL HISTORY

On March 13, 2010 appellant, then a 55-year-old census enumerator, injured her left leg while in the performance of duty. She noted in Form CA-7 dated June 20, 2010 that she earned \$11.75 a hour. OWCP's pay rate memoranda concurred that appellant's hourly wage rate was \$11.75 and, after multiplying \$11.75 by 4.5 hours, determined that her daily wage rate was \$52.875. In turn, \$52.875 was multiplied by 150 and divided by 52 to establish a weekly wage rate of \$152.52.

By decision dated July 9, 2010, OWCP accepted appellant's traumatic injury claim for left closed bimalleolar fracture and paid disability compensation for the period April 28, 2010 to April 9, 2011.³ A July 28, 2010 letter from OWCP informed her at the outset that payments would be based on a pay rate of \$152.52 a week.

In a Form EN1032 dated April 14, 2011, appellant specified that she worked as a caregiver between August 2009 and April 13, 2010. She did not otherwise indicate that she performed tasks akin to those of a census enumerator during the year prior to the March 13, 2010 employment injury.

Appellant filed a claim for a schedule award on October 13, 2011. By decision dated February 15, 2012, OWCP granted a schedule award of \$10,186.13 for 10 percent permanent impairment of the left leg for the period April 10 to October 28, 2011. The award was based on a pay rate of \$471.58 a week, which was identified as the effective weekly wage rate as of March 13, 2010.

On February 23, 2012 OWCP made preliminary findings that appellant received an overpayment of \$5,713.27. Specifically, appellant was granted a schedule award of \$10,186.13 based on a weekly wage rate of \$471.58 when she should have been given an award of \$4,472.86 based on a weekly wage rate of \$152.52.⁴ OWCP added that she was at fault in the creation of the overpayment because she knew or should have known that she accepted compensation to which she was not entitled. It informed appellant of her options if she wished to contest the fact or amount of overpayment or request waiver of recovery, and gave her 30 days to submit a Form OWCP-20 "Overpayment Recovery Questionnaire."

In a March 16, 2012 letter, counsel challenged OWCP's determination that \$152.52 a week was the proper pay rate.

By decision dated March 30, 2012, OWCP finalized the \$5,713.27 overpayment and found that appellant was at fault in its creation.

³ By decision dated April 4, 2011, OWCP terminated appellant's wage-loss compensation and medical benefits effective April 10, 2011.

⁴ OWCP provided various fiscal worksheets and calculation tables.

LEGAL PRECEDENT -- ISSUE 1

OWCP procedures ascribe special rules for computing compensation to claimants employed by the Census Bureau.⁵ These employees “can be either full-time 40 hours a week regular employees or may be hired every 10 years to work in temporary appointments (not to exceed 180 days) as enumerators, crew leaders or clerks.”⁶ When a claimant’s disability does not exceed 90 days, compensation should be computed on the basis of actual daily wages pursuant to 5 U.S.C. § 8114(c).⁷ When disability extends beyond 90 days and the claimant had similar employment during the year prior to the injury, compensation should be allocated in accordance with 5 U.S.C. § 8114(d)(1) or (2). Otherwise, compensation should be paid weekly using the following formula: actual daily wage multiplied by 150, then divided by 52. Actual daily wage is calculated by multiplying the hourly pay rate by 4.5 hours.⁸

An overpayment of compensation may occur when a claimant is not entitled to compensation already paid.⁹

ANALYSIS -- ISSUE 1

The case record establishes that appellant injured her left leg on March 13, 2010, was disabled from April 28, 2010 to April 9, 2011, and did not work as a census enumerator during the year immediately preceding the injury. Therefore, neither section 8114(c) nor section 8114(d)(1)-(2) of FECA applies. Both appellant and the employing establishment agreed that her hourly wage was \$11.75. Applying the weekly pay rate standard set forth in Chapter 2.901.9(a)(2) of OWCP’s procedure manual, as well as FECA Circular No. 10-01,¹⁰ \$11.75 is multiplied by 4.5 hours to calculate a daily wage rate of \$52.875. This, in turn, is multiplied by 150 and divided by 52 to calculate a weekly wage rate of \$152.52. Based on this determination, OWCP calculated that appellant’s schedule award for the period April 10 to October 28, 2011 should have amounted to \$4,472.86. Instead, appellant received \$10,186.13 based on a \$471.58 weekly wage rate. OWCP subtracted the two amounts and found an overpayment of

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Computing Compensation*, Chapter 2.901.9(a)(1) (October 2009).

⁶ *Id.* at Chapter 2.900.3(e) (March 2011).

⁷ *Id.* at Chapter 2.901.9(a)(1).

⁸ *Id.* at Chapter 2.901.9(a)(2). *See also id.* at Chapter 2.900.12(e)(3) (Census Bureau analyzed 2000 census data, determined that enumerators worked an average of 4.5 hours a day four times a week and anticipated similar patterns for 2010).

⁹ *R.T.*, Docket No. 07-1454 (issued December 14, 2007); FECA Procedure Manual, *id.*, Part 6 -- Debt Management, *Identification of Overpayments and Debts*, Chapter 6.200.2d (May 2004).

¹⁰ FECA Circular No. 10-01, *Guidance for claims filed as a result of the 2010 Decennial Census* (January 15, 2010). The circular updated provisions in FECA procedure manual and provided a formula for calculating pay rates and compensation for employees who were disabled for more than 90 days, but did not have similar employment during the year prior to the injury.

\$5,713.27.¹¹ The Board finds that OWCP properly determined the fact and amount of the overpayment.

LEGAL PRECEDENT -- ISSUE 2

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 purpose of FECA or would be against equity and good conscience.¹² Conversely, a waiver of recovery is not possible if the claimant is at fault in the creation of the overpayment.¹³

A claimant who has done any of the following will be found to be at fault with respect to creating an overpayment: (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 to be incorrect. Whether or not an individual was at fault depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid.¹⁴ In applying the tests to determine fault, OWCP applies a "reasonable person" standard.¹⁵

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly determined that appellant was at fault in the creation of the overpayment because she accepted a payment which she knew or should have known to be incorrect. The case record shows that OWCP advised appellant in a July 28, 2010 letter that her disability compensation payments for the period April 28, 2010 to April 9, 2011 would be based on a pay rate of \$152.52 a week. Subsequently, by decision dated February 15, 2012, appellant received a schedule award of \$10,186.13, which was ostensibly based on her weekly wage rate as of the March 13, 2010 employment injury. However, OWCP erroneously listed \$471.58 as the proper rate in its decision. Where the weekly pay rate about tripled between that paid for wage-loss compensation and that for schedule award compensation, appellant should have reasonably known that she was accepting an incorrect amount since she was notified as early as July 28, 2010 that the appropriate weekly wage rate at the time of her

¹¹ The Board notes that OWCP's preliminary findings on February 23, 2012 clearly explained how the overpayment was calculated. *O.R.*, 59 ECAB 432 (2008); *Sandra K. Neil*, 40 ECAB 924 (1989).

¹² 5 U.S.C. § 8129(b); *Linda E. Padilla*, 45 ECAB 768 (1994).

¹³ *Donald L. Overstreet*, 54 ECAB 678 (2003); *Gregg B. Manston*, 45 ECAB 344 (1994).

¹⁴ 20 C.F.R. § 10.433.

¹⁵ *Ralph P. Beachum, Sr.*, 55 ECAB 442, 447 (2004).

March 13, 2010 injury was \$152.52.¹⁶ Therefore, she was at fault in the creation of the overpayment and not eligible for waiver of recovery.

Counsel contends on appeal that the March 30, 2012 decision is contrary to fact and law. As noted, OWCP properly determined the fact and amount of the overpayment and that appellant was at fault in its creation.

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment in the amount of \$5,713.27 and that she was at fault in the creation of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the March 30, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 11, 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

¹⁶ See also *V.F.*, Docket No. 09-1695 (issued May 5, 2010) (the compensation rate for schedule awards is the same as compensation for wage loss); cf. *Luis D. Alamo*, 35 ECAB 1045, 1050 (1984) (the Board found that the increase in appellant's monthly checks was so great that he should have known the payment was incorrect).