



## **FACTUAL HISTORY**

This case has previously been before the Board. In an order dated June 12, 2012, the Board remanded the case to OWCP.<sup>2</sup> The Board noted that OWCP issued a preliminary overpayment decision on March 23, 2011 and that in an April 20, 2011 response received by OWCP on April 26, 2011 appellant submitted an overpayment action request in which she requested waiver, an overpayment questionnaire and additional financial information.<sup>3</sup> OWCP finalized the preliminary overpayment decision on May 3, 2011 finding that appellant received an overpayment in compensation in the amount of \$24,439.26 and, while she was not at fault, she was not entitled to waiver of the overpayment because she did not respond to the preliminary decision. In its June 10, 2012 order, the Board found that as appellant had responded to the preliminary finding of March 23, 2011 and submitted evidence that was not considered by OWCP in the May 3, 2011 decision, the case must be remanded for OWCP to review the evidence submitted by appellant on April 26, 2011, to be followed by an appropriate decision regarding the overpayment.<sup>4</sup> The law and facts of the previous Board order are incorporated herein by reference.

In the interim, on May 13, 2011, appellant was returned to the periodic compensation rolls. OWCP found that she was entitled to compensation effective July 8, 2010. It found that for the period July 8, 2010 to April 1, 2011 appellant was entitled to gross compensation of \$22,057.92, with a \$2,644.77 deduction for health benefits, a \$120.60 deduction for basic life insurance, a \$285.23 deduction for optional life insurance, and a \$17,000.00 deduction for an outstanding overpayment. Periodic rolls payments beginning April 2, 2011 included a \$1,000.00 periodic deduction to repay the overpayment of compensation.

In May 2011 appellant submitted documentation regarding the hours she worked for the first through the last pay periods of 2003. In October 2011, she resubmitted the overpayment questionnaire, signed by her on April 20, 2011.

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<sup>2</sup> Appellant, then a part-time regular clerk, sustained a head and right shoulder injury when she slipped and fell at work on December 6, 2003. The claim was accepted for an open wound of the scalp, a contusion of the right shoulder, lumbar sprain, cervical sprain, postconcussion syndrome and convulsions. She stopped work that day, returned to modified duty on April 3, 2007, and again stopped on May 1, 2010. Pay rate information indicates that on December 6, 2003, the date of injury and the date disability began, appellant's hourly pay was \$19.80.

<sup>3</sup> In the March 23, 2011 preliminary determination, OWCP found that appellant received a \$24,739.26 overpayment for the period January 21, 2004 to April 2, 2007 because she was paid compensation based on a 40-hour workweek instead of a 30-hour workweek, to which she was entitled. It found that she was not at fault in creating the overpayment. Appellant was provided an overpayment action request form and an overpayment questionnaire. In her April 20, 2011 response, she challenged the preliminary decision and requested waiver, stating that she was working more than 40 hours a week when injured. Appellant requested that OWCP base the final overpayment decision on the written evidence. On the overpayment questionnaire, she indicated that she received \$2,000.00 in income and had expenses totaling \$2,723.34 per month. Appellant also submitted financial information. She was not receiving wage-loss compensation at the time of the May 3, 2011 decision.

<sup>4</sup> Docket No. 12-197 (issued June 12, 2012).

An August 9, 2012 memorandum to file provides a list of hours appellant worked, based on the information forwarded by her regarding the first through the last pay period of 2003. The memorandum indicates that for this period appellant worked an average of 34.11 hours per week.

In a September 17, 2012 decision, OWCP found that an overpayment of compensation in the amount of \$14,074.21 was created for the period January 21, 2004 to January 2, 2007. It noted that, based on information received concerning the hours worked, it was found that she worked an average of 34.11 hours per week at an hourly rate of \$19.80 for a weekly pay rate of \$675.38 whereas she had been paid compensation based on a 40-hour workweek, or a weekly pay rate of \$792.00. OWCP stated that for the period January 21, 2004 to January 2, 2007 appellant received compensation of \$94,491.32 when she should have received compensation of \$80,117.11, thus yielding a \$14,074.21 overpayment of compensation. It noted that appellant had repaid \$22,400.00, and was therefore entitled to a refund of \$7,325.79. The record contains an overpayment worksheet with these calculations and copies of computer printouts regarding compensation paid. OWCP paid appellant the refund of \$7,325.79 and advised that the overpayment was liquidated and closed.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8102(a) of 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.<sup>5</sup> Section 8129 provides, in pertinent part:

“When an overpayment has been made to an individual under this subchapter 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 an individual is entitled.<sup>6</sup>”

Under FECA, monetary compensation for disability or impairment due to an employment injury is paid as a percentage of monthly rate.<sup>7</sup> Section 8101(4) provides that “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.<sup>8</sup> OWCP procedures provide that, if the employee did not stop work on the date of injury or immediately afterwards, defined as the next day, the record should indicate the pay rate for the date of injury and the date disability began. The greater of the two should be

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<sup>5</sup> 5 U.S.C. § 8102(a).

<sup>6</sup> *Id.* at § 8129; *see Ricky Greenwood*, 57 ECAB 462 (2006).

<sup>7</sup> *See* 5 U.S.C. §§ 8105-8107.

<sup>8</sup> 5 U.S.C. § 8101(4).

used in computing compensation, and if they are the same, the pay rate should be effective on the date disability began.<sup>9</sup>

Section 8114(d) of FECA provides that average annual earnings are determined: (1) if the employee worked in the employment in which the employee was employed at the time of 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 rate of pay.<sup>10</sup>

### **ANALYSIS -- ISSUE 1**

The record supports that appellant, a part-time regular clerk, was paid compensation for the period January 2, 2004 to April 2, 2007 based on a 40-hour workweek instead of an average 34.11-hour workweek. Appellant submitted documentation regarding the hours she worked for 26 pay periods in 2003. An August 9, 2012 OWCP memorandum averaged the hours submitted by appellant which yielded a weekly average of 34.11 hours. As her compensation should have been based on a 34.11-hour workweek, an overpayment of compensation was therefore created.

On appeal appellant questioned whether OWCP properly determine her weekly pay rate. Under section 8114(d)(1)(A) of FECA, if the employee worked in the employment, in which he or she was employed at the time of injury during substantially the whole year immediately preceding the injury and the employment was in a position for which the annual rate of pay was fixed, the average annual earnings are the annual rate of pay.<sup>11</sup> As noted above, OWCP properly found, based on records submitted by appellant, that she averaged 34.11 hours per week during the year preceding the December 6, 2003 employment injury. Pay rate information indicates that on December 6, 2003, the date of injury and the date disability began, appellant's hourly pay was \$19.80.<sup>12</sup> Her pay rate for compensation purposes for the period January 2, 2004 to April 2, 2007 was thus based on a correct hourly pay rate which, when multiplied by 34.11 hours per week, yielded a weekly pay rate of \$675.38. The Board, however, notes that the overpayment worksheet contained in the record has a mathematical error. Computer print-outs indicate that for the period January 12, 2004 to April 2, 2007 appellant received compensation totaling \$94,491.32 when she should have received \$80,117.11. Subtracting \$80,117.11, the compensation appellant should have received, from \$94,491.32, the compensation appellant received, yields an overpayment of compensation of \$14,374.21, not the \$14,074.21 found by OWCP.

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<sup>9</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.5(a)(3) (September 2011).

<sup>10</sup> 5 U.S.C. § 8114(d)(1)(A).

<sup>11</sup> 5 U.S.C. § 8114(d)(1)(A); *see Lottie M. Williams*, 56 ECAB 302 (2005).

<sup>12</sup> *Supra* note 2.

## 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 purpose of FECA or would be against equity and good conscience.”<sup>13</sup> 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. This 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.<sup>14</sup> Failure to submit the requested information within 30 days of the request shall result in denial of waiver.<sup>15</sup>

OWCP procedures provide that an individual is deemed to need substantially all of his or her current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.<sup>16</sup>

## ANALYSIS -- ISSUE 2

The Board finds the case not in posture for decision regarding waiver. In the case at hand, OWCP did not consider waiver in its September 17, 2012 decision. OWCP noted that the overpayment had been paid in full. The fact that the overpayment had been repaid does not preclude OWCP from determining whether a claimant is entitled to waiver.

As OWCP found appellant without fault in the creation of the overpayment in compensation, 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.<sup>17</sup> OWCP procedures indicate that when waiver is requested without a hearing, the claims examiner “shall fully consider the evidence of record” and “prepare a brief memorandum to the file to include the rationale for his or her finding as to the question of the overpayment.”<sup>18</sup> OWCP did not follow its procedure in this case.

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<sup>13</sup> 5 U.S.C. § 8129.

<sup>14</sup> 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. *Id.* at § 10.437.

<sup>15</sup> 20 C.F.R. § 10.438.

<sup>16</sup> Federal (FECA) Procedure Manual, Part 6 -- *Debt Management*, Chapter 6.200.6(b) (June 2009).

<sup>17</sup> 20 C.F.R. §§ 10.436, 10.437.

<sup>18</sup> *Supra* note 16 at Chapter 6.200.4(c)(3) (June 2009).

In this case, appellant submitted an overpayment action request in which she requested waiver.<sup>19</sup> She also submitted an overpayment questionnaire and financial information. The case must therefore be remanded to OWCP to properly consider waiver. On remand OWCP should obtain updated financial information from appellant, to be followed by a decision on whether the overpayment of compensation in the amount of \$14,374.21 should be waived.

**CONCLUSION**

The Board finds that appellant received an overpayment of compensation in the amount of \$14,374.21 for the period January 2, 2004 to April 2, 2007 and that OWCP erred in not determining whether appellant was entitled to waiver of the overpayment.

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 17, 2012 decision of the Office of Workers' Compensation Programs is affirmed as modified in part and set aside in part and the case is remanded to OWCP for proceedings consistent with this opinion of the Board.

Issued: June 7, 2013  
Washington, DC

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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

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

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<sup>19</sup> *Supra* note 3.