

FACTUAL HISTORY

Appellant, a 47-year-old census enumerator/field representative, injured her right ankle while running from a dog on March 21, 2010. She filed a claim for benefits on March 30, 2010, which OWCP accepted for fractured right fibula, sprained ligament of the right ankle, tenosynovitis of the right foot and ankle and sprained left ankle.

Appellant filed CA-7 forms claiming compensation for wage loss from May 6 to July 31, 2010 and from August 21 to September 4, 2010. OWCP accepted these claims and paid compensation for wage loss for intermittent hours.

On April 21, 2010 OWCP received a memorandum from the employing establishment which stated that appellant had worked at the employing establishment for the 52 weeks preceding injury, earning \$21,952.22, performing part-time flexible work. Appellant's date-of-injury hourly pay rate was stated as \$14.31.

In an OWCP pay rate worksheet dated December 27, 2011, it was indicated that appellant had been paid at an hourly rate of \$14.31 for 4.5 hours per day as a census field representative. For the period including May 6 to July 31, 2010, appellant was awarded compensation totaling 204.5 hours. This included 9.5 hours from May 6 to 8, 2010; 27 hours from May 11 to 15, 2010; 53 hours from May 24 to June 5, 2010; 12.1 hours from June 6 to 12, 2010; 27.2 hours from June 20 to July 3, 2010; 47.2 hours from July 4 to 17, 2010; and 28.5 hours from July 18 to 31, 2010. For the period August 21 to September 4, 2010, appellant received compensation for 55 hours of intermittent disability.

In an OWCP pay rate worksheet dated February 6, 2012, it was indicated that appellant had been paid for compensation for wage loss for intermittent hours from May 6 to September 4, 2010, rather than the 150 formula, which is used to calculate compensation for census workers who are disabled for more than 90 days. Under the 150 formula a claimant's compensation is calculated by multiplying the actual daily wage times 150, then divided by 52. The actual daily wage is determined by multiplying the hourly pay rate by 4.5 hours. OWCP determined that appellant had been paid \$9,941.35 for this period for intermittent hours; however, under the 150 formula, she was due compensation in the amount of \$1,936.35. This created an overpayment of \$8,004.94.

On March 13, 2012 OWCP issued a preliminary determination that an overpayment had occurred in the amount of \$8,004.94 for the period May 6 to September 6, 2010. It noted that the overpayment had occurred because she had incorrectly been paid compensation for wage loss for intermittent hours from May 6 to September 4, 2010 and from August 21 to September 4, 2010. OWCP stated that appellant's pay rate should have been determined by using the 150 formula, which is used to calculate compensation for census workers who are disabled for more than 90 days. It further advised that she had been found without fault in the creation of the overpayment. OWCP advised appellant that if she disagreed with the fact or amount of the overpayment she could submit new evidence in support of her contention or request a preresoucement hearing. It further advised appellant that, when she was found without fault in the creation of the overpayment, recovery might not be made if it could be shown that such recovery would defeat

the purpose of the law or would be against equity and good conscience. Appellant did not respond to this letter within 30 days.

In a decision dated April 17, 2012, OWCP finalized the preliminary determination regarding the overpayment of \$8,004.94. It found that appellant was not entitled to waiver because she did not respond to the March 13, 2012 preliminary determination and did not complete and submit the attached Form OWCP-20 overpayment questionnaire within 30 days.

By letter postmarked April 13, 2012, appellant, through her representative, requested an oral hearing. OWCP received this request on April 24, 2012.

On May 10, 2012 OWCP denied appellant's request for a precoupment hearing on the grounds that her request was not made timely.

LEGAL PRECEDENT -- ISSUE 1

OWCP procedures ascribe special rules for computing compensation for claimants employed by the Census Bureau.² Pursuant to OWCP's procedure manual, temporary positions such as census enumerators historically average four and a half hours a day, four days a week.³ However, an individual may have worked more or less depending on the local census office's operational requirements and the factual evidence should be evaluated carefully. Because of their irregular federal employment, these employees are usually paid under the provisions of 5 U.S.C. § 8114(d)(3).⁴ However, pursuant to the procedure manual, when computing compensation for census workers, when disability did not exceed 90 days, compensation should be paid on a daily basis according to 5 U.S.C. § 8114(c). For enumerators who ordinarily worked 4.5 hours a day, 4 days a week, where disability extended beyond 90 days and the claimant had similar employment during the years prior to the injury,⁵ compensation should be paid according to 5 U.S.C. § 8114(d)(1) and (2).⁶ Otherwise, it should be based on a weekly basis using the following formula: 150 times the actual daily wage divided by 52. The actual daily wage should be determined by multiplying the hourly pay rate by four and a half hours.⁷

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

³ *See id.* at Chapter 2.900.3(3) (March 2011).

⁴ *Id.* at Chapter 2.900.12(e)(3) (March 2011); Chapter 2.900.4.

⁵ *See supra* note 4.

⁶ *See supra* note 4 at Chapter 2.900.4. *Pay for Whole Year Employment.* For employees who have worked for at least a full year prior to the injury, but whose pay fluctuated during the year, the weekly pay rate for compensation purposes is determined under 5 U.S.C. § 8114(d)(1)(B).

For instance, the pay rate of a rural carrier associate or part-time flexible employee of the postal service who works substantially the entire year prior to injury would be computed under section 8114(d)(1)(B), not section 8114(d)(3), even if the earnings fluctuated considerably from week to week, because an annual rate of pay can be established by obtaining the yearly earnings, without overtime, for the year prior to the injury.

⁷ *Id.*

ANALYSIS -- ISSUE 1

The Board finds that this case is not in posture for decision.

OWCP determined that appellant received an overpayment of compensation for the period May 6 to July 31, 2010 and from August 21 to September 4, 2010. It explained that the overpayment occurred because her compensation was incorrectly paid for the intermittent hours she was disabled, rather than, pursuant to the 150 formula, used to calculate compensation for census workers who are disabled for more than 90 days.

The record reflects that appellant was employed as an intermittent part-time census employee. The record establishes that she had been employed in this employment for a full year prior to the date of injury and had earned \$21,952.22 in her employment during the preceding year. While OWCP found that an overpayment existed because appellant's pay rate had not been paid pursuant to the 150 formula; it did not consider whether she was entitled to compensation based upon the provisions of 5 U.S.C. § 8114(d)(1)(2) as she was employed in the same employment for the year preceding injury and her disability exceeded 90 days.⁸ Its April 17, 2012 decision will be set aside and remanded for further adjudication of the pay rate issue. Based on the fact of overpayment being further developed, issue two is moot.

CONCLUSION

The Board finds that this case is not in posture for decision.

⁸ See *D.G.*, Docket No. 12-1480 (issued January 11, 2013).

ORDER

IT IS HEREBY ORDERED THAT the May 10 and April 17, 2012 decisions of the Office of Workers' Compensation Programs are affirmed in part and set aside and remanded for further action consistent with this decision.

Issued: March 18, 2013
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