

FACTUAL HISTORY

On June 7, 2008 appellant, then a noncareer 46-year-old letter carrier, sustained injury when a dog charged her while she was delivering mail. She fell which caused neck and back pain. Appellant stopped work that day.² OWCP accepted that she sustained multiple contusions, neck and lumbar sprains, displacement of lumbar intervertebral disc without myelopathy, and aggravation of lumbar degenerative disc disease. Appellant returned to full duty on June 24, 2008 and continued to work full duty until her appointment expired on September 22, 2008.

On December 20, 2008 appellant began work with the Department of Veterans Affairs (VA) Health Care System.³ She continued in that position until February 23, 2012 when she underwent lumbar surgery. Appellant was placed on the periodic compensation rolls, based on a weekly pay rate of \$823.20. She returned to full duty at the VA on June 1, 2012.⁴ Appellant again stopped work on September 24, 2012 and filed Form CA-7 claims for wage-loss compensation.⁵

By decision dated November 14, 2012, OWCP found that an overpayment of compensation had been created for the period February 23 through June 2, 2012 in the amount of \$8,577.25. Appellant received compensation from the VA for sick and annual leave and FECA benefits for this same period.

In a report dated December 27, 2012, Dr. Marvin E. Van Hal, a Board-certified orthopedic surgeon, provided a second opinion evaluation for OWCP. He found that appellant could work full time with a restriction on heavy lifting, and that she had been able to work since September 24, 2012, following her postsurgery release on August 29, 2012. Appellant's attending physician, Dr. Louise Lamarre, Board-certified in emergency medicine, agreed with Dr. Van Hal's conclusion. On January 29, 2013 OWCP authorized payment of compensation for the period September 24, 2012 to January 29, 2013, totaling \$10,961.80, based on a weekly pay rate of \$823.20. The amount of the outstanding overpayment for the period February 23 to June 2, 2012, \$8,577.25, was deducted from the compensation due, yielding net compensation of \$2,384.55.⁶

² The instant claim was adjudicated by OWCP under file number xxxxxx184. Appellant has a separate claim, adjudicated under file number xxxxxx631, for a traumatic injury that occurred on November 17, 2007, accepted for lumbar strain. Under that claim, by decision dated November 18, 2009, OWCP denied her claim for compensation for the period November 17, 2007 to March 28, 2008. The files were doubled on February 11, 2013, with the claim, file number xxxxxx 631, becoming the master file.

³ At the VA, appellant initially worked as a food service worker and later became a nursing assistant.

⁴ An overpayment in the amount of \$169.85 was created because appellant received FECA compensation after her return to work. It was administratively terminated because a collection action would exceed the expected recovery. The record indicates that appellant returned to full duty on May 14, 2012.

⁵ Appellant returned to work at the VA on December 3, 2012.

⁶ On February 10, 2013 appellant filed a schedule award claim. By decision dated May 14, 2013, OWCP denied the schedule award claim on the grounds that the medical evidence did not support a permanent impairment to a scheduled member or function.

On September 11, 2012 the employing establishment informed OWCP that appellant's pay rate was \$30,290.94 a year. On November 7, 2013 the VA informed OWCP that appellant's pay rate, effective February 23, 2012, was \$32,204.00 per year, with sporadic premium pay of \$904.68 for Sunday premium, \$20.02 for night differential, and \$915.84 for holiday pay.

By letter dated November 19, 2013, OWCP issued a preliminary determination that appellant received an overpayment in compensation in the amount of \$6,715.67 because she was paid compensation at an incorrect pay rate for the period September 23, 2012 through January 29, 2013 and for a period of that time, December 3, 2012 through January 29, 2013, she received compensation after her return to work. It explained the calculation of the overpayment and found her not at fault in its creation. Appellant was provided an overpayment action request form and an overpayment questionnaire.⁷ An overpayment work sheet indicates that for the period September 24, 2012 to January 29, 2013 appellant received compensation of \$10,961.80 when she should have received compensation of \$4,246.13, yielding an overpayment of \$6,715.67. The worksheet indicated that the annual pay rate provided by the VA of \$32,204.00 yielded a weekly pay rate of \$619.31 and sporadic increments of \$915.84 yielded an additional \$17.61 per week, for a total weekly pay rate of \$636.92. Appellant did not respond to the preliminary overpayment finding.

By decision dated December 30, 2013, OWCP finalized the overpayment decision. It found that appellant was not at fault in the creation of the overpayment but that, as she did not respond to the preliminary decision, she did not meet the criteria necessary to waive the overpayment. OWCP ordered repayment at the rate of \$200.00 per month.

LEGAL PRECEDENT -- ISSUE 1

Section 8102 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 duty.⁸

Section 8116 of FECA defines the limitations on the right to receive compensation benefits. This section of FECA provides that, while an employee is receiving compensation, he or she may not receive salary, pay or remuneration of any type from the United States, except in limited circumstances.⁹ Section 10.500 of OWCP's regulations provide that "compensation for wage loss due to disability is available only for any periods during which an employee's work-related medical condition prevents him or her from earning the wages earned before the work-related injury."¹⁰

⁷ In a November 12, 2013 decision, OWCP had initially determined that appellant received an overpayment of compensation in the amount of \$10,724.45. By letter dated November 19, 2013, it informed appellant that the November 12, 2013 decision was vacated, based on new information regarding her pay rate with the VA.

⁸ 5 U.S.C. § 8102(a).

⁹ *Id.* at § 8116(a); see *Danny E. Haley*, 56 ECAB 393 (2005).

¹⁰ 20 C.F.R. § 10.500.

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 used in computing compensation and if they are the same, the pay rate should be effective on the date disability began.¹¹ The procedures further indicate that administrative inclusions should be included in computing an employee's pay rate, including night differential, shift differential, holiday pay, and premium pay for weekend work.¹²

ANALYSIS -- ISSUE 1

The Board finds this case is not in posture for decision. The record supports that appellant received wage-loss compensation for the period September 24, 2012 to January 29, 2013, totaling \$10,961.80, from which an outstanding overpayment of \$8,577.25 was deducted. Appellant returned to work on December 3, 2012. She would not be entitled to wage-loss compensation for any period after her return to work and an overpayment of compensation would exist for the period December 3, 2012 to January 29, 2013.¹³ Another basis for finding the overpayment of \$6,715.67 at issue in this case is that appellant was compensated at an incorrect pay rate. OWCP obtained pay rate information from the VA, appellant's employer on the day disability began on September 24, 2012. The VA indicated that appellant's pay rate, effective February 23, 2012, was \$32,204.00 per year, with sporadic increments of \$904.68 for Sunday premium, \$20.02 for night differential, and \$915.84 for holiday pay. An overpayment worksheet indicates that, in calculating appellant's sporadic pay, the holiday pay of \$915.84, or \$17.61 weekly, was included by OWCP in finding a weekly pay rate of \$636.92. OWCP did not address whether her sporadic Sunday premium pay and night differential should be included in its calculations. As noted above, in calculating pay rate, administrative inclusions include night differential and Sunday premium pay, as well as holiday pay.¹⁴ An annual rate of pay of \$32,204.00 yields a weekly pay rate of \$619.31. The annual total for appellant's sporadic increments is \$1,840.54, for an additional \$35.40 weekly, or a total weekly pay rate of \$654.71.

OWCP did not adequately address the basis for fact or amount of the overpayment in this case. The case will therefore be remanded to OWCP to determine appellant's correct pay rate, recalculate the overpayment, and then issue an appropriate final decision with a clear explanation of how it calculated her pay rate and the overpayment. After this and such further development deemed necessary, OWCP should render a *de novo* overpayment decision.

As the amount of the overpayment is not yet established, it is premature to address appellant's eligibility for waiver.

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.5(a)(3) (September 2011).

¹² *Id.* at Chapter 2.900.6(b) (March 2011).

¹³ 20 C.F.R. § 10.500.

¹⁴ *Supra* note 12; see *Madelyn Y. Grant*, 57 ECAB 533 (2006).

CONCLUSION

The Board finds this case is not in posture for decision regarding the amount of the overpayment of compensation.¹⁵

ORDER

IT IS HEREBY ORDERED THAT the December 30, 2013 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this decision.

Issued: December 9, 2014
Washington, DC

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

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

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

¹⁵ The Board notes that appellant submitted evidence with her appeal to the Board. The Board cannot consider this evidence, however, as its review of the case is limited to the evidence that was before OWCP at the time it rendered its final decision. 20 C.F.R. § 501.2(c)(1); *P.W.*, Docket No. 12-1262 (issued December 5, 2012).