

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

L.F., Appellant)	
)	
and)	Docket No. 14-1765
)	Issued: December 10, 2014
U.S. POSTAL SERVICE, POST OFFICE,)	
Louisville, KY, Employer)	
)	

Appearances:
A.V. Conway, II, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On August 14, 2014 appellant, through her attorney, filed a timely appeal from the February 28, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 this case.²

ISSUES

The issues are: (1) whether appellant received an \$18,894.75 overpayment of compensation; and (2) whether OWCP abused its discretion by refusing to waive recovery of the overpayment.

¹ 5 U.S.C. §§ 8101-8193.

² Appellant submitted additional evidence after OWCP's February 28, 2014 decision, including evidence regarding her finances, but the Board cannot consider such evidence for the first time on appeal. See 20 C.F.R. § 501.2(c).

FACTUAL HISTORY

On June 12, 2012 appellant, then a 39-year-old temporary relief carrier, sustained a mild concussion with brief loss of consciousness (mild traumatic brain injury) during a motor vehicle accident at work. She stopped work on June 12, 2012 and received compensation for temporary total disability on the periodic rolls.

In a February 28, 2013 document, Geta J. Gordon, a human resources specialist at the employing establishment, indicated that appellant was a temporary intermittent employee and that she earned \$14,514.49 in gross earnings and worked 1,112.22 hours in the year prior to her June 12, 2012 work injury. An accompanying chart regarding appellant's work year prior to June 12, 2012 supported that she earned \$14,514.49 by working 1,112.22 hours at a rate of \$13.05 per hour.³ Additional worksheets show that, for the period November 17, 2012 to May 3, 2013, appellant was paid compensation based on a pay rate of \$36.64 per hour rather than the correct pay rate of \$13.05 per hour. She received \$25,593.63 in compensation for the period November 17, 2012 to May 3, 2013 rather than the correct amount of \$6,698.88.

In a June 14, 2013 notice, OWCP advised appellant of its preliminary determination that she received an \$18,894.75 overpayment of compensation for the period November 17, 2012 to May 3, 2013 because she was paid at an improper pay rate. It also made a preliminary determination that she was not at fault in the creation of the overpayment in that she would not have been expected to understand the complicated process of the calculation of her pay rate. OWCP advised appellant that she could submit evidence challenging the fact, amount, or finding of fault and request waiver of the overpayment. It informed her that she could submit additional evidence in writing or at precoupment hearing, but that a precoupment hearing must be requested within 30 days of the date of the written notice of the overpayment. OWCP requested that appellant complete and return an enclosed financial information questionnaire (Form OWCP-20) within 30 days even if she was not requesting waiver of the overpayment.

In an accompanying memorandum, OWCP provided further explanation of how appellant was paid compensation based on an improper pay rate for the period November 17, 2012 to May 3, 2013. It noted that, as a temporary relief carrier, appellant did not have a set schedule and was not guaranteed a set number of hours per week. OWCP stated:

“[E]ach consecutive period claimed during November 17, 2012 through May 3, 2013 represented nonintermittent periods of wage loss for straight disability which should not be processed based on intermittent loss of hours, but as nonintermittent calendar days of disability. However, [OWCP] processed compensation based on reported intermittent hours lost and on workdays versus calendar days.”

* * *

“During the one year prior to the date of injury, the claimant's actual gross earnings excluding overtime was \$14,514.49 which divided by 52, equates to \$279.12. This is the claimant's correct weekly pay rate for compensation

³ The chart shows that appellant worked throughout the year prior to her June 12, 2012 work injury.

purposes. During the one year prior, the claimant worked a total of 1,112.22 hours. 1,112.22 divided by 52 weeks in a year results in 21.39 average hours per week during one year prior to date of injury.

“It should be noted by reviewing the figures that, although the claimant earned \$14,514.49 for a period of working more than 11 months, she received compensation almost double that amount for a period of less than 6 months of wage loss. When the compensation was processed based on hours lost, the claimant erroneously received compensation as though she earned approximately \$37.64 per hour in contrast to \$13.05 per hour.”

Appellant submitted a Form OWCP-20 which she completed on July 3, 2013. She indicated that she had \$0.00 in monthly income, \$2,186.69 in monthly expenses and \$10,000.00 in checking account assets from an income tax refund. Appellant claimed three minor children as dependents. She requested waiver of the overpayment and indicated that she wished to have a prerecoupment hearing with the Branch of Hearings and Review.

During a telephonic prerecoupment hearing held on November 27, 2013, counsel argued that appellant could not repay the overpayment debt due to financial hardship. Appellant testified that she was employed as a temporary rural carrier prior to her June 12, 2012 work injury. She discussed her work schedule noting that she began to receive an increased number of work hours per week beginning in late 2011. Appellant confirmed that her rate of pay was \$13.05 per hour. She claimed that she had spent all of the \$10,000.00 in assets she had reported in the Form OWCP-20 on her necessary living expenses and that she was overdrawn at her bank. Despite reporting that she had no income on the Form OWCP-20, appellant stated that she received wage-loss compensation from OWCP on the periodic rolls. She indicated that she had three dependent children, but that they had no income and that she received no support payments from their father. OWCP hearing representative informed appellant that in order to support her alleged change in financial status she should complete a new Form OWCP-20 showing her present monthly income, monthly expenses and assets. She was advised that she needed to provide financial documentation to verify the accuracy of the figures reported on the Form OWCP-20. Appellant was provided 30 days to submit the requested information and documentation.⁴

In a February 28, 2014 decision, OWCP hearing representative determined that appellant received an \$18,894.75 overpayment of compensation for the period November 17, 2012 to May 3, 2013 because she was paid at an improper pay rate during his period. He noted that the employing establishment provided information showing that appellant earned \$14,514.49 in gross earnings and worked 1,112.22 hours in the year prior to her June 12, 2012 work injury. Appellant averaged 21.39 work hours per week and was paid at a rate of \$13.05 per hour. The hearing representative noted that, because appellant worked the entire year prior to her June 12, 2012 work injury, her pay rate should have been calculated under section 8114(d)(1) of FECA. Dividing appellant's \$14,514.49 in gross earnings in the year prior to June 12, 2012 by 52 weeks yielded a pay rate of \$279.12 per week. However, during the period November 17, 2012 through May 3, 2013, she actually received compensation at a higher provisional weekly pay rate. The

⁴ The record does not support that appellant submitted additional financial information within the allotted period after the November 27, 2013 prerecoupment hearing.

hearing representative noted that appellant was effectively paid compensation based on a pay rate of \$36.64 per hour rather than the correct pay rate of \$13.05 per hour. Appellant received \$25,593.63 in compensation for the period November 17, 2012 to May 3, 2013 rather than the correct amount of \$6,698.88, thereby creating an \$18,894.75 overpayment. The hearing representative found that appellant was not at fault in creating the overpayment but that the overpayment was not subject to waiver. He determined that appellant failed to establish that recovery of the overpayment would defeat the purpose of FECA because she had not shown both that she needs substantially all of her current income to meet ordinary and necessary living expenses and that her assets do not exceed the allowable resource base. OWCP hearing representative indicated that appellant did not meet the second prong of this test because her \$10,000.00 in assets, as reported on a July 3, 2013 Form OWCP-20, exceeded the allowable resource base. Appellant's resource base was \$9,920.00 because she had three dependents and she was allowed \$8,000.00 in assets for herself and one dependent plus \$960.00 for each of her two other dependents.

Although appellant alleged at the precoupment hearing that she had spent the \$10,000.00 in assets, she did not present sufficient evidence to support this assertion. The hearing representative also found that appellant had not established that recovery of the overpayment would be against equity and good conscience as she failed to establish that she would experience severe financial hardship in attempting to repay the debt or that she relinquished a valuable right or changed her position for the worse in reliance on the payment which created the overpayment

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 or her duty.⁵ Section 8129(a) of FECA 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.”⁶

Section 8105(a) of FECA provides: “If the disability is total, the United States shall pay the employee during the disability monthly monetary compensation equal to 66 2/3 percent of his monthly pay, which is known as his basic compensation for total disability.”⁷ Section 8101(4) of FECA defines “monthly pay” for purposes of computing compensation benefits as follows: “[T]he 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,

⁵ 5 U.S.C. § 8102(a).

⁶ *Id.* at § 8129(a).

⁷ *Id.* at § 8105(a). Section 8110(b) of FECA provides that total disability compensation will equal three fourths of an employee's monthly pay when the employee has one or more dependents. 5 U.S.C. § 8110(b).

whichever is greater....”⁸ OWCP’s regulations define “disability” as “the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury.”⁹

With respect to the calculation of appellant’s pay rate for compensation purposes, FECA provides for different methods of computation of average annual earnings depending on whether the employee worked in the employment in which he or she was injured substantially for the entire year immediately preceding the injury and would have been afforded employment for substantially a whole year, except for the injury.¹⁰ Section 8114(d)(1) 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 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; or

(B) was not fixed, the average annual earnings are the product obtained by multiplying his daily wage for the 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....”¹¹

ANALYSIS -- ISSUE 1

The Board finds that appellant received an \$18,894.75 overpayment of compensation. OWCP correctly determined that she was paid at an improper higher pay rate for the period November 17, 2012 to May 3, 2013. In determining that appellant received an \$18,894.75 overpayment, OWCP’s calculation of her proper amount of compensation for the period November 17, 2012 to May 3, 2013 was in accordance with the documentation of earnings provided by the employing establishment. It properly noted that because appellant worked the entire year prior to her June 12, 2012 work injury, her pay rate should have been calculated under section 8114(d)(1) of FECA.¹² Dividing appellant’s \$14,514.49 in gross earnings in the

⁸ 5 U.S.C. § 8101(4). In an occupational disease claim, the date of injury is the date of last exposure to the employment factors which caused or aggravated the claimed condition. *Patricia K. Cummings*, 53 ECAB 623, 626 (2002). The Board has held that, if an employee has one recurrence of disability which meets the requirements of 8101(4), any subsequent recurrence would also meet such requirements and would entitle the employee to a new recurrence pay rate. *Carolyn E. Sellers*, 50 ECAB 393 (1999).

⁹ 20 C.F.R. § 10.5(f).

¹⁰ 5 U.S.C. § 8114(d)(1), (2).

¹¹ *Id.* at § 8114(d)(1).

¹² *See supra* notes 7 through 11.

year prior to June 12, 2012 by 52 yielded a pay rate of \$279.12 per week. However, during the period November 17, 2012 through May 3, 2013, she actually received compensation at a higher provisional weekly pay rate. OWCP hearing representative noted that appellant was effectively paid compensation based on a pay rate of \$36.64 per hour rather than the correct pay rate of \$13.05 per hour. Appellant has not provided evidence or argument disputing the \$18,894.75 amount of overpayment.¹³ OWCP correctly determined that she received \$25,593.63 in compensation for the period November 17, 2012 to May 3, 2013 when she was only entitled to receive \$6,698.88. Therefore, it properly found that appellant received an \$18,894.75 overpayment.

LEGAL PRECEDENT -- ISSUE 2

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.¹⁴ 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 this subchapter or would be against equity and good conscience."¹⁵ If OWCP finds a claimant to be without fault in the matter of an 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.

According to 20 C.F.R. § 10.436, recovery of an overpayment would defeat the purpose of FECA if recovery would cause hardship because the beneficiary needs substantially all of his or her income (including compensation benefits) to meet current ordinary and necessary living expenses, and also, if the beneficiary's assets do not exceed a specified amount as determined by OWCP from data provided by the Bureau of Labor Statistics.¹⁶ According to 20 C.F.R. § 10.437, 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.¹⁷ To establish that a valuable right has been relinquished, it must be shown that the

¹³ It does not appear from the record that appellant has contested the amount of the overpayment as calculated by OWCP.

¹⁴ See *Robert Atchison*, 41 ECAB 83, 87 (1989).

¹⁵ 5 U.S.C. § 8129(b).

¹⁶ 20 C.F.R. § 10.436. An individual is deemed to need substantially all of his or her monthly income to meet current and ordinary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. Assets must not exceed a resource base of \$4,800.00 for an individual or \$8,000.00 for an individual with a spouse or dependent plus \$960.00 for each additional dependent. See Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a) (October 2004); *B.F.*, Docket No. 13-785 (issued September 20, 2013).

¹⁷ 20 C.F.R. § 10.437(a), (b).

right was in fact valuable, that it cannot be regained and that the action was based chiefly or solely in reliance on the payments or on the notice of payment.¹⁸

ANALYSIS -- ISSUE 2

Appellant has not established that recovery of the overpayment would defeat the purpose of FECA because she has not shown both that she needs substantially all of her current income to meet ordinary and necessary living expenses and that her assets do not exceed the allowable resource base. OWCP properly found that appellant did not meet the second prong of this test because her \$10,000.00 in assets, as reported on a July 3, 2013 Form OWCP-20, exceeded the allowable resource base. Appellant's resource base was \$9,920.00 because she had three dependents and she was allowed \$8,000.00 in assets for herself and one dependent plus \$960.00 for each of her two other dependents.¹⁹ Before OWCP and on appeal, she alleged that she had spent the \$10,000.00 in assets, but she did not present sufficient evidence to support this assertion.²⁰

Because appellant has not met the second prong of the two-prong test of whether recovery of the overpayment would defeat the purpose of FECA, it is not necessary for OWCP to consider the first prong of the test, *i.e.*, whether appellant needs substantially all of her current income to meet ordinary and necessary living expenses. Appellant also has not established that recovery of the overpayment would be against equity and good conscience because she has not shown that she would experience severe financial hardship in attempting to repay the debt or that she relinquished a valuable right or changed her position for the worse in reliance on the payment which created the overpayment.²¹

Because appellant has failed to establish that recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience, she has failed to show that OWCP abused its discretion by refusing to waive the overpayment.

CONCLUSION

The Board finds that appellant received an \$18,894.75 overpayment of compensation. The Board further finds that OWCP did not abuse its discretion by refusing to waive recovery of the overpayment.

¹⁸ *Id.* at § 10.437(b)(1).

¹⁹ *See supra* note 16.

²⁰ Despite the assertion of counsel on appeal, the record does not support that appellant submitted additional financial information within the allotted period after the November 27, 2013 prerecoupmnt hearing. Appellant submitted additional evidence after OWCP's February 28, 2014 decision, including evidence regarding her finances, but the Board cannot consider such evidence for the first time on appeal. *See supra* note 2.

²¹ *See* 20 C.F.R. § 10.437; *William J. Murphy*, 41 ECAB 569, 571-72 (1989).

ORDER

IT IS HEREBY ORDERED THAT the February 28, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 10, 2014
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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