

FACTUAL HISTORY

The case was before the Board on a prior appeal. In a decision dated August 24, 2012, the Board remanded the case for further development of the overpayment issue.² The Board noted that the pay rate for compensation purposes determined by OWCP for the period March 1, 2010 to July 7, 2011 (\$958.77 per week) appeared to be incorrect. OWCP did not clearly explain whether appellant's pay rate for the date of recurrence on March 1, 2010 was considered. If the pay rate on the date of recurrence of disability was greater than that on the date of injury (\$550.39), then the overpayment calculations were incorrect. The case was remanded for further adjudication of the proper pay rate under 5 U.S.C. § 8114(d).

By letter dated September 21, 2012, OWCP requested that appellant provide information with respect to her employment prior to March 1, 2010. It requested that she provide evidence of earnings commencing March 1, 2009.

On October 1, 2012 OWCP received a September 27, 2012 response from appellant, who was employed from March 1 to June 1, 2009 with a private employer. Appellant submitted a copy of an Internal Revenue Service tax form (1099-Misc) showing \$5,700.00 in 2009 earnings.

By decision dated October 29, 2012, OWCP determined that appellant's pay rate on the date of recurrence, March 1, 2010, was less than the pay rate on the date of injury. It found that, since her private employer would not have provided employment during substantially the whole year prior to March 1, 2010, the pay rate was determined under 5 U.S.C. § 8114(d)(3). The decision noted that if the average daily wage was multiplied by 150, this would result in a weekly pay rate for compensation purposes of \$252.96. As this was less than the December 12, 2002 date-of-injury pay rate of \$550.39, the pay rate was based on the date of injury.

In a letter dated January 7, 2013, OWCP advised appellant of a preliminary determination that an overpayment of \$17,097.19 was created from March 1, 2010 to July 7, 2011. Appellant was found without fault in creating the overpayment. With respect to waiver, OWCP enclosed an overpayment recovery questionnaire (OWCP-20) and requested that she complete the form and submit supporting financial documentation, such as bank account statements, pay slips and other relevant documents. It advised appellant that failure to submit the requested information within 30 days would result in denial of waiver.

Appellant submitted an OWCP-20 form dated January 10, 2013. She reported \$2,416.00 in monthly income and \$3,286.00 in monthly expenses. Appellant reported zero balances with respect to her bank accounts and noted that there was no cash on hand, stocks, bonds or other personal property. She did not provide any supporting financial documentation.

The record contains a memorandum of telephone call dated February 11, 2013. An OWCP claims examiner left a message on appellant's telephone to request clarification as to her stated income and expenses. Appellant was told to respond by telephone prior to the close of business on February 12, 2013.

² Docket No. 12-566 (issued August 24, 2012).

By decision dated February 13, 2013, OWCP finalized an overpayment of \$17,087.19. It found that compensation paid from March 1, 2010 to July 7, 2011 was based on an incorrect pay rate. OWCP also found that the evidence submitted was not sufficient to warrant waiver of the overpayment. Appellant was directed to repay the overpayment by submitting monthly payments of \$200.00.³

LEGAL PRECEDENT -- ISSUE 1

Under 5 U.S.C. § 8101(4), “‘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....”

5 U.S.C. § 8114(d) 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 his 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 annual rate of pay; or

(B) was not fixed, the average annual earnings are the product obtained by multiplying his daily wage for 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 5½-day week and 260 if employed on the basis of a 5-day week.

(2) If the employee did not work in employment in which he was employed at the time of his injury during substantially the whole year immediately preceding the injury, but the position was one which would have afforded employment for substantially a whole year, the average annual earnings are a sum equal to the average annual earnings of an employee of the same class working substantially the whole immediately preceding year in the same or similar employment by the United States in the same or neighboring place, as determined under paragraph (1) of this subsection.

³ With respect to recovery of the overpayment, the Board’s jurisdiction is limited to recovery from continuing compensation benefits. See *Levon H. Knight*, 40 ECAB 658, 665 (1989). There is no indication that appellant was currently receiving continuing compensation benefits.

(3) If either of the foregoing methods of determining the average annual earnings cannot be applied reasonably and fairly, the average annual earnings are a sum that reasonably represents the annual earning capacity of the injured employee in the employment in which he was working at the time of the injury having regard to the previous earnings of the employee in [f]ederal employment and of other employees of the United States in the same or most similar employment in the same or neighboring location, other previous employment of the employee or other relevant factors. However, the average annual earnings may not be less than 150 times the average daily wage the employee earned in the employment during the days employed within 1 year immediately preceding his injury.”

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly found an overpayment of compensation in the amount of \$17,097.19.

Appellant advised that she worked for three months in private employment from March 1 to June 1, 2009 and earned \$5,700.00. Therefore, she did not work in the position for substantially a whole year prior to March 1, 2010 nor is there evidence that the job would have afforded her employment for substantially the whole year. Appellant’s pay rate is accordingly determined under 5 U.S.C. § 8114(d)(3). As she only worked for three months in private employment, a reasonable representation of her earnings would be to apply the 150 times the average daily wage for the period worked. Based on earnings of \$5,700.00 for the 13 weeks from March 1 to June 1, 2009, the daily average wage is \$87.69. If the daily wage is multiplied by 150, the annual earnings are \$13,153.84 or a weekly pay rate of \$252.96.

The evidence of record establishes that appellant’s pay rate on the date of injury, December 12, 2002, was \$550.39. Since the date of injury pay rate is greater than the date of recurrence of disability pay rate, OWCP found the date-of-injury pay rate was the proper pay rate under 5 U.S.C. § 8101(4).

The Board will affirm OWCP’s determination as to fact and amount of overpayment.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA provides: “Adjustment or recovery 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 [FECA] or would be against equity and good conscience.”⁴ Since OWCP found appellant to be without fault in the creation of the overpayment, OWCP may only recover the overpayment if recovery would neither defeat the purpose of FECA nor be against equity and good conscience. The guidelines for determining whether recovery of an overpayment would defeat the purpose of FECA or would be against

⁴ 5 U.S.C. § 8129(b).

equity and good conscience are set forth in sections 10.434 to 10.437 of Title 20 of the Code of Federal Regulations.

According to section 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 current 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.⁵ For waiver under the “defeat the purpose” of FECA standard, appellant must show that he or she needs substantially all of his or her current income to meet current ordinary and necessary living expenses and that his assets do not exceed the resource base.⁶

Section 10.437 provides that recovery of an overpayment would be against equity and good conscience if: (a) the overpaid individual would experience severe financial hardship in attempting to repay the debt; (b) the 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.

With respect to the submission of financial evidence, OWCP’s regulations at 20 C.F.R. § 10.438 provide:

“(a) 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 of an overpayment would defeat the purpose of FECA or be against equity and good conscience. This information will also be used to determine the repayment schedule, if necessary.

“(b) Failure to submit the requested information within 30 days of the request shall result in denial of waiver and no further request for waiver shall be considered until the requested information is furnished.”

ANALYSIS -- ISSUE 2

OWCP found appellant to be without fault in creating the overpayment. The issue is whether recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience. OWCP provided appellant with an OWCP-20 form and requested in the January 7, 2013 preliminary determination that she submit supporting financial documentation with respect to her monthly income and expenses. Appellant was notified of the provisions of 20 C.F.R. § 10.438.

⁵ OWCP’s procedures provide that the 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. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a) (June 2009).

⁶ See *Robert E. Wenholz*, 38 ECAB 311 (1986).

The evidence submitted by appellant consisted of an OWCP-20 form stating that she had \$2,416.00 in monthly income and \$3,286.00 in monthly expenses. Appellant advised that she had no assets, either in cash, personal property or bank accounts. No documentation or additional explanation was provided. There is no documentation of pay slips or other evidence as to income or any documentation regarding appellant's expenses. On February 11, 2013 OWCP provided her an additional opportunity to submit financial documentation but she did not respond.

The Board finds that appellant did not submit sufficient financial documentation for OWCP to make a proper determination as to waiver. When a claimant submits only an OWCP-20 form without any supporting documentation, OWCP does not have the necessary financial information to determine if recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.⁷ Appellant has the responsibility to submit the necessary evidence. Pursuant to 20 C.F.R. § 10.438, OWCP may properly deny waiver of the overpayment.⁸ For this reason, it properly denied waiver in conformance with the implementing federal regulations.

Appellant contends that the overpayment was not her fault and that she does not have the resources to repay the debt and it should not be her responsibility. To be entitled to waiver of the overpayment, the evidence must establish that recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience. The issue of waiver is determined by the relevant evidence of record. Appellant did not submit the financial records to support her claimed monthly income or expenses.

Appellant may submit new evidence or argument with respect to the waiver issue or the fact of overpayment in a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that an overpayment of \$17,087.19 was created and that OWCP properly denied waiver of the overpayment.

⁷ See also *D.I.*, Docket No. 13-469 (issued July 1, 2013). See *N.R.*, Docket No. 12-1853 (issued June 10, 2013).

⁸ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 13, 2013 is affirmed.

Issued: January 17, 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