

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

J.P., Appellant)

and)

DEPARTMENT OF THE ARMY, Fort Polk, LA,)
Employer)

**Docket No. 14-1101
Issued: October 8, 2014**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 16, 2014 appellant filed a timely appeal from a February 18, 2013 decision of the Office of Workers' Compensation Programs (OWCP) that found that he received an overpayment of compensation. 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 the case.

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$4,153.66 because compensation was based on an incorrect pay rate both before and after he returned to work; and (2) whether OWCP properly denied waiver of the overpayment.

On appeal appellant asserts that he was never given an explanation regarding how the overpayment was calculated and was therefore unable to complete the overpayment action request.

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On December 11, 2012 appellant, then a 42-year-old GS-8 firefighter (intermediate life support) filed a traumatic injury claim alleging that on December 6, 2012 he injured his left lower leg while participating in required physical training. OWCP accepted a left ruptured Achilles tendon. The employing establishment indicated that appellant received continuation of pay for the period December 7, 2012 to February 1, 2013, and appellant was placed on the periodic compensation rolls at the 75 percent augmented rate, based on a weekly pay rate of \$2,111.10, beginning February 2, 2010. A pay rate memorandum indicates that appellant's annual salary of \$52,981.00 yielded a biweekly pay rate of \$2,037.32 plus "extra pay" of \$1,095.54 for a total biweekly pay rate of \$3,132.86, or weekly pay of \$1,566.43. The memorandum further indicated that appellant was entitled to \$577.77 in "other pay" weekly, which yielded a pay rate for compensation purposes of \$2,111.20.

Appellant returned to modified duty, eight hours a day, on February 28, 2012. The employing establishment informed OWCP that appellant received continuation of pay only through January 20, 2013 and was therefore entitled to wage-loss compensation beginning January 21, 2013. OWCP paid this compensation.

On March 5, 2013 OWCP determined that an overpayment of compensation in the amount of \$2,019.04 was created because appellant returned to work on February 28, 2013 yet continued to receive wage-loss compensation through March 9, 2013. Appellant repaid the overpayment on April 17, 2013. On April 30, 2013 he was paid intermittent compensation for medical treatment. Appellant returned to full duty on June 11, 2013.

A memorandum to file dated August 6, 2013 indicates that appellant was paid wage-loss compensation at an incorrect pay rate. It states that the correct pay rate for compensation purposes was \$1,566.43 per week and indicated that appellant was compensated based on a weekly pay rate of \$2,111.20, which yielded an overpayment of \$577.77 per week. The memorandum stated that for the period January 21 to March 9, 2013, appellant was paid a total of \$10,171.41, when he should have been paid \$7,369.74, yielding an overpayment of compensation of \$2,801.67, less the \$2,019.04 overpayment that appellant repaid, for a total overpayment of compensation of \$782.63 for that period. It continued that when appellant returned to modified duty, he was paid based on a 40-hour workweek but since a firefighter worked a 72-hour week, he should have been compensation based on a loss of wage-earning capacity (LWEC). The memorandum noted that appellant was paid 146 hours of intermittent pay using the \$2,111.20 pay rate or \$5,779.41, when he should have received compensation based on an LWEC, for a total of \$2,408.38, which yielded an overpayment of compensation of \$3,668.21. The memorandum utilized the firefighter pay rate for compensation purposes formula described below.

On August 9, 2013 OWCP informed appellant of the overpayment and provided him with information regarding computation of the weekly pay rate for firefighters.²

² On September 19, 2013 OWCP processed a payment for intermittent hours claimed for medical treatment for the period June 11 through July 11, 2013, based on a weekly pay rate of \$1,566.43.

In correspondence dated October 25, 2013, the employing establishment informed OWCP that appellant's compensation since his return to work might not have been calculated properly. A worksheet for computing firefighters pay and a notification of personnel action were attached. The notice provided that, effective August 26, 2012, appellant's base pay was \$46,409.00 with an additional \$6,572.00 locality adjustment, which yielded an adjusted base pay of \$52,981.00 per year.

A memorandum to file dated December 5, 2013 regarding an LWEC determination listed appellant's weekly base pay rate, based on an annual salary of \$52,981.00 a year, for the date of injury was \$1,018.87, plus extra pay of \$544.77 per week, for a total weekly pay rate of \$1,566.43. When appellant returned to modified duty on February 28, 2013, his compensation was based solely on the base pay rate of \$1,018.87 but should have been based on an LWEC. The memorandum provided the formula used for calculating the LWEC, which indicated that appellant had an LWEC of \$1,644.75 each four-week compensation period. An attached worksheet noted that, as appellant was compensated for the period January 21 to March 9, 2013 based on an incorrect pay rate of \$2,111.20 per week, when his compensation should have been based on a weekly pay rate of \$1,566.43, an overpayment of compensation in the amount of \$2,801.67 was created. The worksheet noted that appellant had repaid \$2,019.04 of the overpayment, which reduced the amount to \$782.63. For the period after appellant returned to modified duty on February 28, 2013 until he returned to full duty on June 10, 2013, he was compensated for 146 intermittent hours, based on the incorrect weekly pay rate of \$2,111.20 when his compensation should have been based on the LWEC. The memorandum stated that this created an overpayment of compensation of \$3,668.21.

On January 6, 2014 OWCP issued a preliminary determination that an overpayment of compensation in the amount of \$4,450.84 had been created.³ Appellant was found without fault. The calculation of the overpayment was explained as follows:

“Pay rate computed incorrectly. Correct pay rate is \$1,566.43 per week -- [claimant] paid \$2,111.20 per week resulting in \$544.77 overpayment per week.

Overpayment from January 21 through February 28, 2013 -- [periodic rolls] payments

Overpayment March 10 through April 10, 2013. Paid loss hours at higher pay rate, which should have been based on LWEC.

Also, has overlapping periods on CA-7a's.

“Paid [periodic rolls] January 21 through March 9, 2013 @ \$2,111.20 per week for a total of \$10,171.41.

Correct pay @ \$1,566.43 per week results in \$7,369.74. \$10,171.41 -- \$7,369.74 = \$2,801.67 overpayment (-) \$2,019.04 returned, reducing OP amount to \$782.63.

³ OWCP initially issued a preliminary overpayment determination on January 6, 2014.

“Returned to work 8 h[ou]rs per day/5 days per week/40 h[ou]rs. Firefighter workweek equals 72 h[ou]rs. Therefore, [claimant] due 32 h[ou]rs per week plus “extra pay.”

Paid straight hours of 146 h[ou]rs @ incorrect pay rate of \$2,111.20 per week = \$5,779.41

Should have been LWEC for total of \$2,408.38. \$5,779.41 -- \$2,111.20 = OP amount of \$3,668.21

“\$782.63 + \$3,668.21 = Total Overpayment Amount: \$4,450.84”

On January 16, 2014 OWCP issued an amended preliminary overpayment determination finding a \$4,153.66 overpayment. The explanation of the calculation of the overpayment was different with regard to the period after appellant returned to modified duty, as follows:

“Should have been LWEC for total of \$2,408.38. \$5,779.41 -- \$2,408.38 = OP amount of \$3,371.03

“\$782.63 + \$3,668.21 = Total Overpayment Amount: \$4,153.66”

Appellant was provided an overpayment action request form and an overpayment questionnaire.

On January 16, 2014 appellant requested his case record on CD-ROM. This was forwarded to him on February 4, 2014. Appellant telephoned OWCP on February 4, 2011, asking to speak with a claims examiner about his case. A claims examiner returned his call on February 11, 2014; there was no answer and she left a message. Appellant did not respond further to the preliminary overpayment finding.

By decision dated February 18, 2014, OWCP finalized the preliminary overpayment decision. It found that appellant was not at fault in the creation of the overpayment but that, as he did not respond to the preliminary decision, he did not meet the criteria necessary to waive the overpayment. OWCP ordered repayment in full.

LEGAL PRECEDENT -- ISSUE 1

The Federal Firefighters Overtime Pay Reform Act of 1998,⁴ is used to determine the rate of pay for firefighters with regular tours of duty which generally consists of 24-hour shifts. Although overtime pay is normally not included in determining pay rate for compensation purposes under section 8114 of FECA, section 5545(b) was amended to establish that overtime pay for firefighters under that section shall be included in any computation of pay under section 8114.⁵ OWCP’s procedures established a formula for determining pay rate for these firefighters, as follows: The annual salary is divided by 2756 (53 hours of regular pay per week x 52 weeks) to equal firefighter hourly rate; the firefighter hourly rate is multiplied by 106 hours to equal

⁴ 5 U.S.C. § 5545(b).

⁵ *Id.*

biweekly base pay; the firefighter hourly rate is multiplied by 1.5 to equal firefighter overtime rate; the firefighter overtime rate is multiplied by the number of hours in a regular tour in excess of 106 hours to equal the biweekly firefighter overtime; the biweekly base pay is added to the biweekly firefighter overtime and then divided by 2 to equal the firefighter weekly pay rate.⁶ The procedures further indicate that most 24-hour shift firefighters have a regular biweekly tour of 144 hours (six 24-hour shifts) consisting of 106 regular hours and 38 firefighter overtime hours; thus 38 hours (144-106) would be used to determine the firefighter overtime pay rate.⁷

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.⁸ 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.”⁹

ANALYSIS -- ISSUE 1

The Board finds this case is not in posture for decision. The record supports that appellant was compensated based on an incorrect pay rate both before and after his return to modified duty and thus an overpayment of compensation was created. The record, however, does not include a sufficient explanation as to how the amount of the overpayment was calculated.

On December 6, 2012 appellant ruptured his Achilles tendon in the performance of duty. He stopped work that day and received continuation of pay for the period December 7, 2012 through January 20, 2013, and thereafter received wage-loss compensation based on a weekly pay rate of \$2,111.20, until his return to modified duty for eight hours a day on February 28, 2012. After his return to work, appellant received intermittent compensation for medical therapy and treatment, also based on the \$2,111.20 weekly pay rate. OWCP did not determine that he was being compensated based on an incorrect pay rate until August 2013. At that time, OWCP utilized the firefighter pay rate formula and properly determined that the correct pay rate for compensation purposes was \$1,566.43.

The record supports that appellant’s annual salary as a G8 firefighter was \$52,981.00, including locality pay. By utilizing the firefighter pay rate formula described in OWCP procedures above, to determine the correct pay rate for computation purposes, his annual salary of \$52,981.00 was divided by 2756, which yielded a firefighter hourly rate of \$19.22; this in turn

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.8(d) (August 2012).

⁷ *Id.*

⁸ 5 U.S.C. § 8102(a).

⁹ *Id.* at § 8129(a).

was multiplied by 106 hours to yield a biweekly base pay of \$2,037.32; the next step was to multiple the firefighter hourly rate of \$19.22 times 1.5 to find the firefighter overtime rate of \$28.83; this in turn was multiplied by 38, the number of hours in excess to 106, to determine the biweekly firefighter overtime of \$1,095.54. The biweekly base pay and biweekly firefighter overtime were then added to yield \$3,132.86, which was divided by two, to yield a \$1,566.43 weekly pay rate for compensation purposes. Appellant was compensated at the 75 percent augmented rate. As appellant was compensated based on an incorrect weekly pay rate of \$2,111.20 when his compensation should have been based on a weekly pay rate of \$1,566.43, an overpayment of compensation was created.¹⁰

The Board finds however that OWCP did not provide a sufficient explanation regarding the amount of the overpayment. The record includes several documents that include some explanation regarding how the overpayment was calculated. These include the August 6 and December 5, 2013 memoranda and the preliminary overpayment determinations dated January 6 and 16, 2014. None of these documents clearly explain how the final amount of the overpayment was determined and provide contradictory information regarding the amount of compensation appellant should have received for intermittent wage loss based on LWEC compensation following his return to work. The record does not include an overpayment worksheet or computer print-outs that compare compensation received with what should have been received. The case will be remanded to OWCP to further address the amount of overpayment, to be followed by an appropriate final decision.¹¹ As the amount of the overpayment is not yet established, it is premature to address appellant's eligibility for waiver. After this and such further development as deemed necessary, OWCP shall render a *de novo* overpayment decision.

CONCLUSION

The Board finds that an overpayment of compensation was created. The case is remanded for further development on the amount of the overpayment.

¹⁰ Federal (FECA) Procedure Manual, *supra* note 6; *see G.W.*, Docket No. 11-1271 (issued October 25, 2012).

¹¹ *See L.D.*, Docket No. 12-1408 (issued April 26, 2013).

ORDER

IT IS HEREBY ORDERED THAT the February 18, 2014 decision of the Office of Workers' Compensation Programs is affirmed, in part, and remanded, in part, for further proceedings consistent with this opinion of the Board.

Issued: October 8, 2014
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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