

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

V.D., Appellant	)	
	)	
and	)	<b>Docket No. 13-1101</b>
	)	<b>Issued: September 8, 2014</b>
U.S. POSTAL SERVICE, POST OFFICE,	)	
Merrifield, VA, Employer	)	
	)	

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
COLLEEN DUFFY KIKO, Judge  
PATRICIA HOWARD FITZGERALD, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On April 3, 2013 appellant filed a timely appeal from a March 15, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUES**

The issues are: (1) whether appellant received a \$116,115.03 overpayment of compensation for the period July 9, 2009 to March 12, 2011; and (2) whether she was at fault in the creation of the \$116,115.03 overpayment and, therefore, ineligible for waiver of recovery.

**FACTUAL HISTORY**

On March 15, 1995 appellant, then a 31-year-old letter carrier, filed a traumatic injury claim (Form CA-1) after a private automobile struck her postal vehicle. OWCP accepted the claim for nasal bone fracture, right middle finger contusion, cervical sprain, lumbosacral

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

sprain and cervical intervertebral disc disorder with myelopathy. Appellant stopped work on March 15, 1995 and received wage-loss compensation for total disability.

By letter dated April 25, 2003, OWCP informed appellant that she was being placed on the periodic rolls effective April 1, 2003. Appellant was advised that her compensation was based on her date-of-injury weekly pay rate of \$370.04 and her compensation rate was based on the 75 percent augmented rate for dependents. Her weekly pay rate was set at \$493.38.

On September 16, 2005 appellant was awarded a schedule award for 43 percent impairment of the left upper extremity and 25 percent impairment of the left lower extremity in the amount of \$88,557.52. The award covered the period August 7, 2005 through July 8, 2009. The pay rate used to calculate appellant's schedule award was based on her date-of-injury (March 15, 1995) salary of \$493.38.

During this period appellant was off the rolls but elected OPM benefits. At the conclusion of the period of her schedule award, she elected to return to the periodic rolls effective July 9, 2009.

An OWCP memorandum dated March 22 and 29, 2011 found that an overpayment had occurred in the amount of \$116,155.03 for the period July 9, 2009 through March 12, 2011. It noted that the pay rate used to calculate appellant's compensation from July 9, 2009 through March 12, 2011 was \$1,827.00 weekly based on the 75 percent augmented rate. However, appellant's compensation should have been calculated at a rate of \$493.38 weekly, which was her date-of-injury pay. OWCP calculated that, from July 9, 2009 through March 12, 2011, she had received a total of \$148,070.05 based on the weekly pay rate of \$1,827.00. Appellant should have been paid \$31,915.02 for the period July 9, 2009 through March 12, 2011 at the correct weekly pay rate of \$493.38. OWCP subtracted the \$31,915.02 amount she should have received for the period July 9, 2009 through March 12, 2011 from the \$148,070.05 amount she incorrectly received to calculate a total overpayment of \$116,155.03.

On March 29, 2011 OWCP issued a preliminary finding that appellant received an overpayment of \$116,155.03 for the period July 9, 2009 to March 12, 2011 because she had been paid at an incorrect pay rate. It found that she was at fault in its creation because she was aware or reasonably should have been aware that she was not entitled to the weekly pay rate at which she was being paid, noting that it exceeded the amount of her federal pay and salary.

On April 4, 2011 appellant requested a prerecoumpment hearing before the Branch of Hearings and Review. She stated that she was issued a letter in 2010 stating the amount she would be paid. Appellant had been denied benefits for several months due to negligence by OWCP and thought the increased benefits were a result of her not getting paid.

On April 25, 2011 appellant submitted an overpayment recovery questionnaire (Form OWCP-20). She stated that her total monthly income was \$1,600.00 and her monthly expenses totaled \$4,193.36. Appellant stated that she thought the overpayment was because she had not been paid for approximately one year due to OWCP's negligence. She argued that she thought that she should have been paid for that period as well as for the schedule award.

By decision dated May 2, 2011, OWCP finalized the preliminary determination finding that appellant was overpaid in the amount of \$116,155.03 from July 9, 2009 to March 12, 2011,

because she was paid at an incorrect pay rate. It found that appellant was at fault in the creation of the overpayment.

By decision dated May 5, 2011, OWCP set aside its May 2, 2011 overpayment determination noting that appellant timely requested a prerecoupment hearing before the Branch of Hearings and Review.

By decision dated March 15, 2013, OWCP finalized the preliminary determination finding that appellant was overpaid in the amount of \$116,155.03 for the period July 9, 2009 to March 12, 2011 because she was paid at an incorrect pay rate. It found that she was at fault in the creation of the overpayment.

### **LEGAL PRECEDENT**

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.<sup>2</sup> 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.”<sup>3</sup>

Section 8116(a) of FECA provides that while an employee is receiving compensation or if he has been paid a lump sum in commutation of installment payments until the expiration of the period during which the installment payments would have continued, the employee may not receive salary, pay or remuneration of any type from the United States, except in limited specified instances.<sup>4</sup>

A FECA beneficiary may not receive wage-loss compensation concurrently with a federal retirement annuity.<sup>5</sup> When a claimant is entitled to disability benefits under FECA and annuity benefits from OPM under either the Civil Service Retirement System or the Federal Employees Retirement System, the employee must make an election between FECA benefits and OPM benefits.<sup>6</sup> The employee has the right to elect the monetary benefits that is most advantageous.<sup>7</sup> The election, once made, is revocable.<sup>8</sup> While concurrent wage-loss

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<sup>2</sup> 5 U.S.C. § 8102(a).

<sup>3</sup> *Id.* at § 8129(a).

<sup>4</sup> *Id.* at § 8116(a).

<sup>5</sup> *Id.*

<sup>6</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.4a (January 1997).

<sup>7</sup> *Id.*

<sup>8</sup> 20 C.F.R. § 10.421(a).

compensation and OPM benefits constitute a prohibited dual benefits, a schedule award for permanent impairment under 5 U.S.C. § 8107 is payable concurrent with an OPM annuity.<sup>9</sup>

Pay rate for compensation purposes is defined in section 8101(4) as the monthly pay at the time of injury, the time disability begins or the time disability recurs, if the recurrence is more than six months after returning to full-time work, whichever is greater.<sup>10</sup>

The basic rate of compensation paid under FECA is 66 2/3 percent of the injured employee's monthly pay.<sup>11</sup> Under section 8110 of FECA, an employee is entitled to compensation at the augmented rate of three-fourths of his or her weekly pay if he or she has one or more dependents.

### ANALYSIS

The Board finds that appellant received an overpayment of compensation in the amount of \$116,155.03 for the period July 9, 2009 to March 12, 2011 because of an incorrect pay rate.

The record contains evidence showing that, between July 9, 2009 and March 12, 2011, appellant received compensation based on an improper pay rate. She was placed on the periodic rolls beginning April 1, 2003 and was paid a weekly rate of \$493.38. By letter dated April 25, 2003, OWCP informed appellant of her \$493.38 weekly pay rate and advised her that it was based on her March 15, 1995 date-of-injury pay rate. On September 16, 2005 appellant received a schedule award for 43 percent impairment of the left upper extremity and 25 percent impairment of the left lower extremity in the amount of \$88,557.52, covering the period August 7, 2005 through July 8, 2009. The pay rate used to calculate her schedule award was based on her date-of-injury (March 15, 1995) salary of \$493.38. During the period of her schedule award, appellant elected to receive OPM benefits. At the expiration of that period, she elected to return to FECA benefits.

By letters dated May 10 and June 14, 2010, OWCP informed appellant that she had been placed back on the periodic rolls and that the weekly pay rate used to compute her compensation was \$1,827.00 at a 75 percent augmented rate.

The evidence of record shows that appellant received total compensation in the amount of \$148,070.05 for the period July 9, 2009 to March 12, 2011, based on an incorrect weekly pay rate of \$1,827.00. Documentation provided by OWCP establishes that she should have received the amount of \$31,915.02 for the applicable period, based upon a weekly pay rate of \$493.38, resulting in an overpayment of \$116,155.03. The Board will affirm the March 15, 2013 decision as to the fact and amount of the overpayment.<sup>12</sup>

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<sup>9</sup> *Supra* note 6 at Chapter 2.1000.6b (February 1995).

<sup>10</sup> 5 U.S.C. §§ 8101(4), 8114; *see also* 20 C.F.R. § 10.5(s).

<sup>11</sup> *Id.* at § 8105(a); *see also Ralph P. Beachum, Sr.*, 55 ECAB 442, 445 (2004).

<sup>12</sup> *N.B.*, Docket No. 12-539 (issued May 24, 2012).

## LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of FECA<sup>13</sup> provides that an overpayment of compensation shall be recovered by OWCP unless 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.<sup>14</sup> Thus, OWCP may not waive the overpayment of compensation unless appellant was without fault.<sup>15</sup> Adjustment or recovery must, therefore, be made when an incorrect payment has been made to an individual who is with fault.<sup>16</sup>

On the issue of fault, section 10.433 of OWCP's regulations, provides that an individual will be found at fault if he or she has done any of the following:

“(1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect;

“(2) Failed to provide information which he or she knew or should have known to be material; or

“(3) Accepted a payment which he or she knew or should have known was incorrect....”<sup>17</sup>

With respect to whether an individual is without fault, section 10.433(b) of OWCP's regulations provides in relevant part:

“Whether or not OWCP determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid.”<sup>18</sup>

## ANALYSIS -- ISSUE 2

OWCP found that appellant was at fault in the creation of the overpayment based on the third criterion, that she accepted payments, which she knew or should have known to be incorrect.<sup>19</sup>

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<sup>13</sup> 5 U.S.C. § 8129(b).

<sup>14</sup> *Michael H. Wacks*, 45 ECAB 791, 795 (1994).

<sup>15</sup> *Norman F. Bligh*, 41 ECAB 230 (1989).

<sup>16</sup> *Diana L. Booth*, 52 ECAB 370, 373 (2001); *William G. Norton, Jr.*, 45 ECAB 630, 639 (1994).

<sup>17</sup> 20 C.F.R. § 10.433(a).

<sup>18</sup> *Id.* at § 10.433(b); *Diana L. Booth*, *supra* note 16.

<sup>19</sup> *Steven R. Cofrancesco*, 57 ECAB 62 (2006).

For OWCP to establish that appellant was at fault in creating the overpayment, it must show that, when she received the compensation in question, she knew or should have known that the payment was incorrect.<sup>20</sup> With respect to whether an individual is with fault, section 10.433(b) of OWCP regulations provide that whether OWCP determines that an individual was with fault with respect to the receipt of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that he or she was being overpaid.<sup>21</sup>

The Board finds that appellant was at fault in creating the overpayment. Appellant was placed on periodic rolls and received weekly compensation at \$493.38 beginning April 1, 2003. On September 16, 2005 she received a lump-sum schedule award in the amount of \$88,557.52 for the period August 7, 2005 to July 8, 2009 based on her \$493.38 weekly pay rate. Appellant received her schedule award and OPM benefits concurrently. When the period of her schedule award ceased, she elected to return to OWCP benefits beginning July 9, 2009. However, when appellant's compensation benefits were reinstated, she received compensation at a weekly pay rate of \$1,827.00, in error.

The Board finds that appellant knew or should have known that her compensation payments were incorrect. The record indicates that the first payment she received based upon the improper pay rate occurred on February 19, 2010 when she received a check in the amount of \$10,442.44, for the period January 1 to February 13, 2010. Appellant thereafter received checks on March 19 and May 7, 2010, at the improper pay rate. She argues that she believed that she was due this sum of money because she had not received compensation benefits for approximately one year. The record does substantiate that appellant did not receive compensation benefits for the period July 9 through December 9, 2009, until December 10, 2010. However, pursuant to regulations,<sup>22</sup> OWCP includes on each periodic check a clear indication of the period for which payment is being made.<sup>23</sup> A form is also sent to the recipient with each supplemental check which states the date and amount of the payment. As of the first payment appellant received on February 19, 2010 she should have known the period of time for which the payments were made and she should have known that the paid amounts were clearly higher than that to which she was entitled exorbitant. Following the first three checks she received in 2010, OWCP summarized her year to date compensation payments of \$30,542.91. The exorbitant amount of compensation benefits received, compared to appellant's date-of-injury wages, should have again placed her on notice that she was in receipt of compensation to which she was not entitled. The weekly pay rate of \$1,827.00 was almost what she was entitled to for an entire 28-day period at her correct pay rate. The \$43,059.56 lump sum appellant received for compensation benefits for the period July 9 to December 31, 2009 was significantly more than her annual salary when compensation payment was for less than half a year. Thus, she knew or should have known that the payments made at the \$1,827.00 pay rate were incorrect. Appellant

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<sup>20</sup> See *J.D.*, Docket No. 10-640 (issued December 17, 2010); *Otha J. Brown*, 56 ECAB 228 (2004); *Karen K. Dixon*, 56 ECAB 145 (2004).

<sup>21</sup> 20 C.F.R. § 10.433(b).

<sup>22</sup> *Id.* at § 10.430(a).

<sup>23</sup> See also *D.B.*, Docket No. 12-1492 (issued January 28, 2013).

is at fault in creating the overpayment and is not eligible for waiver of recovery. OWCP is required by law to recover the overpayment.

On appeal, appellant also argues that she thought she was being paid for the stopped period as well as a schedule award. The Board notes that she is not entitled to receive compensation for wage-loss concurrent with a schedule award. Appellant was entitled to wage-loss compensation beginning July 9, 2009 after the period for her schedule award had ceased. While she did not receive compensation for the period July 9 to December 31, 2009 until December 10, 2010, her benefits statement clearly noted that the weekly pay rate used to calculate her lump-sum payment of \$43,059.56 was \$1,827.00. The Board further notes that, even if an overpayment resulted from negligence by OWCP, this does not excuse a claimant from accepting payments that the claimant knew or should have been expected to know was incorrect.<sup>24</sup> Finally, appellant emphasizes that recovery of the overpayment would pose a severe financial hardship. As she is not without fault in the creation of the overpayment, she is not eligible for waiver of recovery of the overpayment. OWCP is required by law to recover the overpayment.<sup>25</sup>

### **CONCLUSION**

The Board finds that appellant was at fault in creating an overpayment of \$116,155.03 for the period July 9, 2009 to March 12, 2011 because of an incorrect pay rate and thus, is not eligible for consideration of waiver.<sup>26</sup>

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<sup>24</sup> *Danny E. Haley*, 56 ECAB 393 (2005).

<sup>25</sup> No waiver of an overpayment is possible if the claimant is at fault in creating the overpayment. *L.J.*, 59 ECAB 264 (2007). With respect to recovery of the overpayment, the Board's jurisdiction is limited to those cases where OWCP seeks recovery from continuing compensation benefits under FECA. *L.D.*, Docket No. 08-678 (issued August 7, 2008).

<sup>26</sup> The Board does not have jurisdiction over recovery of the overpayment as OWCP has not issued a final decision directing recovery from continuing compensation benefits. *See* 20 C.F.R. § 501.2(c); *see D.R.*, 59 ECAB 148 (2007).

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 15, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 8, 2014  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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