

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

A.F., Appellant

and

**DEPARTMENT OF JUSTICE, BUREAU OF
PRISONS, Fort Worth, TX, Employer**

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**Docket No. 13-1514
Issued: September 25, 2014**

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 June 12, 2013 appellant filed a timely appeal from the March 14, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to 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 \$12,588.57 overpayment of compensation; (2) whether OWCP abused its discretion by refusing to waive recovery of the overpayment; and (3) whether OWCP properly required repayment of the overpayment by deducting \$445.00 from appellant's compensation payments every four weeks.

FACTUAL HISTORY

On October 28, 2011 appellant, then a 50-year-old correctional officer, filed a traumatic injury claim (Form CA-1) alleging that on October 28, 2011 he used a mouse to click on telephone calls for approximately six hours and began to feel pain radiating in his right arm. OWCP accepted the claim for other tenosynovitis of the right hand and wrist, chronic pain syndrome, and sprains of the right shoulder, upper arm, wrist and neck. Appellant stopped work

on October 28, 2011 and did not return. He received compensation for total disability on the periodic compensation rolls.¹

In a September 21, 2012 letter, OWCP advised appellant of its preliminary determination that he received an overpayment in the amount of \$12,588.57 for the period January 1 to August 25, 2012. It indicated that the overpayment occurred “because your employing agency provided the incorrect figure for your night differential pay and you were overpaid from January 1 to August 25, 2012.” OWCP also made a preliminary determination that appellant was not at fault in creating the overpayment. In an accompanying memorandum, it indicated that he was not paid premium pay to which he was entitled from January 1 through February 11, 2012 and therefore on April 18, 2012 it adjusted his compensation to include \$1,517.08 per week of base pay, \$1,258.79 per week of night differential, \$58.15 per week of Sunday premium pay and \$178.61 per week of “other” pay for a total of \$3,012.64. OWCP indicated that it paid appellant \$2,920.85 for the pay rate adjustment covering the period January 15 to February 11, 2012 and \$10,429.69 for the pay rate adjustment covering the period January 1 to June 2, 2012.² It noted that, on June 11, 2012, his night differential was determined to be \$151.72 per week and his Sunday premium pay was found to be \$75.86 per week. After the base pay of \$1,517.08 per week was added to these figures, appellant had total pay of \$1,744.66 per week. OWCP explained that on July 24, 2012 the employing establishment indicated that his yearly base salary was \$78,883.00 and that he earned premium pay for one year prior to the date of injury in the amount of \$3,622.19 for night differential, \$945.00 for Sunday premium pay, and \$820.26 for Sunday premium pay with night differential.³ Based upon these figures, OWCP calculated appellant’s weekly base pay as \$1,516.98, night differential as \$69.66, Sunday premium as \$18.17, and Sunday premium pay with night differential pay as \$15.77, for total weekly pay of \$1,620.59. It calculated that he received a \$12,588.57 overpayment by subtracting \$37,402.44 (the amount he was owed based on the \$1,620.59 weekly pay rate for the period January 1 to August 25, 2012) from \$50,491.01 (the amount he was paid at the incorrect rate for this period).⁴ OWCP advised appellant of his options if he disagreed with the preliminary finding, including requesting a prerecoupment hearing with an OWCP hearing representative, and requested that he complete and return an enclosed Overpayment Recovery Questionnaire (Form OWCP-20) within 30 days.

Appellant disagreed with the preliminary overpayment determination, and requested a hearing with an OWCP hearing representative on the issues of fact and amount of overpayment, fault and waiver. He stated that he believed the overpayment calculations were incorrect given the relevant figures for base pay, night differential, Sunday premium pay and Sunday premium

¹ OWCP previously accepted that appellant sustained lumbar and right knee strains on December 16, 2010.

² The record reveals that appellant received the \$2,920.85 check on April 27, 2012 and the \$10,429.69 check on June 15, 2012.

³ The record contains a July 24, 2012 e-mail in which an employing establishment official indicated that, for the period October 24, 2010 to November 5, 2011, appellant had base pay of \$78,883.00, night differential of \$3,622.19, Sunday premium pay of \$945.00 and Sunday premium pay with night differential of \$820.26.

⁴ The record contains a pay rate memorandum dated September 11, 2012 containing the \$37,402.44 figure (*i.e.*, the amount OWCP felt appellant should have received from January 1 to August 25, 2012), but the memorandum does not clearly show how this figure was derived.

pay with night differential. Appellant completed and returned the Form OWCP-20 in late October 2012 and asserted that it would be against equity and good conscience for him to repay the overpayment. He indicated that he had used the compensation checks he received to pay bills that were past due, including bills for braces for his son and child custody fees. Appellant reported his monthly income as \$6,700.00. For monthly expenses, he reported \$3,100.00 for rent/mortgage, \$700.00 for food, \$500.00 for clothing, \$1,300.00 for utilities, \$400.00 for credit card payments, \$75.00 for a retail store bill, \$205.00 for a time share bill, and \$1,200.00 for "other expenses." Appellant claimed that his assets consisted of \$950.00 in cash on hand and balances of checking and savings accounts.

A prerecoupment hearing was held with an OWCP hearing representative on February 4, 2013. Appellant's representative spoke on his behalf and alleged that an overpayment did not occur because OWCP had not paid appellant the proper amount of compensation between January 1 and August 25, 2012.⁵ She stated that, according to his salary, appellant was supposed to receive 75 percent of \$78,883.00 and asserted that her calculations revealed that OWCP did not pay him this amount. Appellant's representative stated that he was entitled to Sunday premium pay with night differential at a rate of \$51.03 per hour, which was \$408.24 per day. She contended that appellant's regular night differential working Monday, Thursday, Friday and Saturday was \$331.84 per day. Appellant's representative asserted that he was only being paid the net amount of \$4,440.13 per month, when he was entitled to \$4,804.14 per month.⁶ She noted that appellant should have received the gross amount of \$5,234.01 with the only deductions being health and life insurance and indicated that the amounts he received tended to fluctuate. Appellant's representative stated that, even when considering that appellant's health insurance premiums went up, his pay was still off by about \$400.00 every month. She asserted that when he went to his personnel office he was told that his calculations were correct. Appellant's representative stated that it would be a hardship for appellant to pay back the overpayment as he was totally disabled and had already used the compensation he received for various purposes.

In a March 14, 2013 decision, an OWCP hearing representative determined that appellant received a \$12,588.57 overpayment of compensation. She found that appellant was not at fault in creating the overpayment but that the overpayment was not subject to waiver. The hearing representative required repayment of the overpayment by deducting \$445.00 from appellant's compensation payments every four weeks. Regarding the manner in which the overpayment occurred, OWCP's hearing representative stated, "I find the evidence establishes that an overpayment occurred, as the district office initially calculated the claimant's pay rate based on incorrect information initially provided by the employing agency." She briefly discussed the pay rate calculation that appellant's representative provided at the February 4, 2013 prerecoupment hearing and stated that, although appellant's representative based her calculations on hourly

⁵ The Board notes that appellant's representative at that time of the prerecoupment hearing is not representing appellant in the present appeal.

⁶ Appellant's representative stated that she was using the \$3,622.19 figure for night differential, the \$945.00 figure for Sunday premium pay and the \$820.26 figure for Sunday premium pay with night differential in her calculations.

figures, OWCP “calculates weekly compensation by dividing the annual salary and premium pay amounts by the 52 weeks in the work year.”⁷

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 duty.⁸ 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.”⁹

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.¹⁰

In deciding matters pertaining to a given claimant’s entitlement to compensation benefits, OWCP is required by statute and regulation to make findings of fact.¹¹ OWCP procedure further specifies that a final decision of OWCP “should be clear and detailed so that the reader understands the reason for the disallowance of the benefit and the evidence necessary to overcome the defect of the claim.”¹² These requirements are supported by Board precedent.¹³

ANALYSIS -- ISSUE 1

The Board finds that the case is not in posture for decision regarding whether appellant received a \$12,588.57 overpayment of compensation and the case must be remanded to OWCP for further development.

⁷ In a footnote, OWCP’s hearing representative made a general reference to Chapter 2.900.10 of OWCP’s procedure manual. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.10 (March 2011).

⁸ 5 U.S.C. § 8102(a).

⁹ *Id.* at § 8129(a).

¹⁰ *Id.* at § 8116(a).

¹¹ *Id.* at § 8124(a) provides that OWCP “shall determine and make a finding of facts and make an award for or against payment of compensation.” 20 C.F.R. § 10.126 provides in pertinent part that the final decision of OWCP “shall contain findings of fact and a statement of reasons.”

¹² *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.5c(3)(e) (February 2013).

¹³ *See James D. Boller, Jr.*, 12 ECAB 45, 46 (1960).

In its preliminary determination, OWCP provided a discussion of the amounts of premium pay appellant received in addition to base pay for various periods. It noted that adjustments were made based on newly obtained evidence and that he received two checks intended to correct errors in the amount of compensation he received for various periods. OWCP concluded that appellant received \$50,491.01 in compensation for the period January 1 to August 25, 2012. The Board has reviewed the record, including the Case Management section of the Integrated Federal Employees Compensation System (IFECS), and notes that the record does in fact support that he received \$50,491.01 in compensation for the period January 1 to August 25, 2012.

OWCP then determined that appellant should have received \$37,402.44 in compensation for the period January 1 to August 25, 2012. It subtracted this figure from the \$50,491.01 in compensation he actually received for the period January 1 to August 25, 2012 and concluded that appellant received a \$12,588.57 overpayment for this period.

The Board finds that OWCP has not provided adequate facts and findings for its determination that appellant received a \$12,588.57 overpayment for the period January 1 to August 25, 2012. In particular, OWCP did not explain why appellant should have properly received only \$37,402.44 in compensation for the period January 1 to August 25, 2012.

Although it is not clear from OWCP's preliminary or final determination, it appears that OWCP might have determined that appellant was entitled to receive \$1,620.59 for each of the 34 weeks during the period January 1 to August 25, 2012. Determining a claimant's pay rate for compensation purposes is a complicated process requiring reference to the relevant precedent. However, in making this ostensible determination, OWCP did not make any detailed reference to its precedent (such as the controlling statute, OWCP regulations or OWCP procedure) or explain how this precedent applied in the present case.¹⁴ In her March 14, 2013 decision, OWCP's hearing representative briefly discussed the pay rate calculation that appellant's representative provided at the February 4, 2013 preresoupment hearing and stated that, although appellant's representative based her calculations on hourly figures, OWCP "calculates weekly compensation by dividing the annual salary and premium pay amounts by the 52 weeks in the work year."¹⁵ The Board notes that this statement does not adequately clarify any of the above-noted

¹⁴ In her March 14, 2013 decision, OWCP hearing representative made a general reference to Chapter 2.900.10 of OWCP's procedure manual, but she did not provide a clear explanation of how such procedure should be applied in the present case. See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.10 (March 2011). See also 5 U.S.C. §§ 8101(4), 8114; 20 C.F.R. § 10.216 (regarding pay rate calculations). The Board notes that multiplying \$1,620.59 times the 34 weeks during the period January 1 to August 25, 2012 yields the figure \$55,100.06, a figure greater than the \$50,491.01 in compensation appellant received for the period January 1 to August 25, 2012. While it is unclear from the record, a worksheet suggests that OWCP multiplied this amount by the $\frac{3}{4}$ compensation rate for a claimant with at least one dependent under FECA and then subtracted amounts for several forms of insurance premiums. See 5 U.S.C. § 8110(b) (regarding the pay rate for a claimant with at least one dependent).

¹⁵ Appellant and his representative provided their own calculations of the pay rate for compensation purposes. During the February 4, 2013 preresoupment hearing, appellant's representative provided calculations showing that she felt appellant should have received the gross amount of \$5,234.01 per month. On appeal, appellant provided calculations showing that he believed he should have received the gross amount of \$5,206.80 per month. The Board has reviewed these calculations but is unable to determine from the record whether they accurately reflect his entitlement to compensation.

deficiencies in OWCP's explanation of how it calculated the claimed \$12,588.57 overpayment in the present case. In the absence of a detailed explanation of how and why OWCP calculated the amount of compensation to which appellant is entitled for the period of the claimed overpayment, appellant would not understand the specific defect of his claim and the kind of evidence which would tend to overcome it.¹⁶

Therefore, the case shall be remanded to OWCP for further development, with regard to the fact and amount of the claimed overpayment of compensation. After carrying out this development, OWCP shall issue an appropriate decision containing adequate facts and findings explaining its determinations regarding this overpayment.

CONCLUSION

The Board finds that the case is not in posture for decision regarding whether appellant received a \$12,588.57 overpayment of compensation. The case is remanded to OWCP for further development.¹⁷

ORDER

IT IS HEREBY ORDERED THAT the March 14, 2013 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to OWCP for further proceedings consistent with this decision of OWCP.

Issued: September 25, 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

¹⁶ See *supra* notes 11 through 13.

¹⁷ Given the Board's disposition of the first issue of this case, it is premature for the Board to consider the second and third issues at the present time.