

On appeal appellant contends that she should not be responsible to repay a debt for which she was found to be without fault and requests a waiver of recovery, indicating that she is a single mother with two dependents and not financially capable of repayment. She argues that she is not prepared to pay \$100.00 a month from the minimum income that she has each month. Appellant further contends that she never received notice of the hearing date and, therefore, could not have abandoned her hearing.

FACTUAL HISTORY

OWCP accepted that on May 21, 2013 appellant, a 27-year-old city carrier associate, sustained a left hip strain on May 21, 2013 while walking in the performance of duty. Appellant filed a claim for compensation (Form CA-7) for the period June 29 to September 20, 2013. On December 3, 2013 OWCP paid compensation for the period July 8 to September 16, 2013.

On August 28, 2014 OWCP issued a preliminary determination that appellant received an overpayment in compensation in the amount of \$1,165.50 for the period July 8 to September 16, 2013 because she had been incorrectly paid compensation based on a weekly pay rate of \$534.33 when she should have been paid based on a weekly pay rate of \$315.57.

Appellant's pay rate on the date of injury was calculated to be \$534.33 per week. She was a transitional employee who worked 38 hours per week for 54 days, 417.09 hours total. Appellant had not worked in her position for 11 months prior to the injury. During the year prior to the injury, she earned a total of \$5,907.45. The position would have afforded employment for substantially the whole year but for the injury, but the employing establishment advised that there was no other employee with the same or similar appointment. Therefore, it could not provide the actual earnings of another employee with the same kind of appointment working in a job with the same or similar duties.

OWCP determined that appellant's compensation was incorrect because it should have been calculated based on the 150 formula which is appropriate for city carrier associates who had not worked one year prior to the date of injury. It divided the total amount earned (\$5,907.45) by the total number of days worked (54) to determine appellant's average daily wage, then multiplied the average daily wage by 150 to determine average annual earnings, and divided that number by 52 weeks to find her weekly pay rate (\$315.57).³

Payment records show that appellant had been paid at the weekly rate of \$534.33 and received \$4,093.84 for this period, but should have been paid at the weekly rate of \$315.57 to receive \$2,928.34. This was an overpayment in the amount of \$1,165.50.⁴ OWCP found that appellant was not at fault in the creation of the overpayment, making her eligible for waiver of recovery of the overpayment. On August 28, 2014 appellant was provided an overpayment recovery questionnaire and advised that she could request a preresumption hearing on the issues of fault and possible waiver of the overpayment. Appellant was advised that the overpayment

³ \$5,907.54 divided by 54 multiplied by 150 divided by 52 = \$315.57.

⁴ \$4,093.84 - \$2,928.34 = \$1,165.50.

action request must be returned to OWCP within 30 days, along with supporting financial information, to determine whether she would be eligible for waiver.

On October 2, 2014 appellant requested a prerecoupment hearing. She submitted an overpayment recovery questionnaire (Form OWCP-20) indicating that she had two dependent children, a monthly income of \$771.00 from supplemental security income payments and state or local welfare, and monthly expenses of \$1,460.00 for rent or mortgage, food, clothing, utilities, and other expenses. Appellant stated that she worked at Open Systems Healthcare earning \$350.00 per week, had \$65.00 cash on hand, and \$24.87 in savings. She further submitted a television bill for \$126.71, a cell phone bill for \$50.00, a gas bill for \$100.31, a water bill for \$74.15, an electric bill for \$70.34, and a statement from American Heritage Federal Credit Union stating a balance of \$24.64.

In a February 18, 2015 notice, OWCP's Branch of Hearings and Review scheduled a prerecoupment hearing for 9:45 a.m. Eastern Standard Time (EST) on March 30, 2015. It provided appellant with a toll free number and pass code for the telephone hearing. OWCP advised appellant that postponement of the hearing would only be permitted upon receipt of documentation showing her nonelective hospitalization or that the death of a spouse, parent, or child prevented her attendance. The notice was mailed to appellant's address of record.⁵

On March 30, 2015 appellant failed to participate in the telephone prerecoupment hearing.

By decision dated April 10, 2015, an OWCP hearing representative found that appellant failed to appear at the prerecoupment hearing and had abandoned her request. The hearing representative found no evidence that appellant had contacted OWCP prior to or subsequent to the scheduled hearing.

In an April 14, 2015 decision, OWCP finalized its preliminary overpayment determination. It found that appellant had received an overpayment of compensation in the amount of \$1,165.50, but was not at fault in its creation. OWCP further found that the circumstances of the case did not warrant waiver of recovery, as no financial information established a basis for waiver. As appellant was not receiving continuing compensation payments, OWCP found that she should repay the debt at a rate of \$100.00 a month.

LEGAL PRECEDENT -- ISSUE 1

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of her duty.⁶

⁵ Appellant had supplied OWCP with a change of address on July 29, 2013. OWCP properly used the revised address on all subsequent correspondence.

⁶ 5 U.S.C. § 8102(a).

Section 8114(d) of FECA provides four different methods for determining the average annual earnings depending on the character and duration of the employment:

“(1) If the employee worked in the employment in which she was employed at the time of her 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 her daily wage for the particular employment or the average thereof if the daily wage has fluctuated, by 300 if she 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 she was employed at the time of her 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) 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 she 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 class working 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 [one] year immediately preceding her injury.⁷

(4) If the employee served without pay or at nominal pay, paragraphs (1), (2), and (3) of the subsection apply as far as practicable, but the average annual earnings of the employee may not exceed the minimum rate of basic pay for GS-15. If the average annual earnings cannot be determined reasonably and fairly in the manner otherwise provided by this section, the average annual earnings shall be determined at the reasonable value of the service performed but not in excess of \$3,600.00 a year.”

⁷ *Id.* at § 8114(d).

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly found an overpayment of compensation in the amount of \$1,165.50 because on an incorrect pay rate for the period July 8 to September 16, 2013 and properly found appellant without fault.

Appellant did not work in the employment position in which she was employed at the time of her injury during substantially the whole year immediately preceding the injury. The position would have afforded employment for substantially the whole year but for the injury. The employing establishment advised that there was no other employee with the same or similar appointment, therefore, it could not provide the actual earnings of another employee with the same kind of appointment working in a similar job with the same or similar duties.⁸

Under the circumstances, the Board finds that OWCP properly determined average annual earnings under section 8114(d)(3).⁹ OWCP gave due regard to relevant factors and properly applied the 150 formula to determine average annual earnings and a weekly pay rate of \$315.57. It divided the total amount she earned (\$5,907.45) by the total number of days worked (54) to determine appellant's average daily wage, then multiplied the average daily wage by 150 to determine average annual earnings, and divided that number by 52 weeks to find her weekly pay rate (\$315.57).¹⁰ At that pay rate, appellant should have received \$2,928.34 for the period July 8 to September 16, 2013 rather than the \$4,093.84 she did receive. The Board will therefore affirm OWCP's finding of an overpayment of compensation in the amount of \$1,165.50.¹¹

LEGAL PRECEDENT -- ISSUE 2

According to section 8129(a) of FECA, adjustment or recovery shall be made under regulations prescribed by the Secretary of Labor when an overpayment of compensation was made because of an error of fact or law.¹² The only exception is if the individual is without fault in the creation of the overpayment and when adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.¹³ Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from OWCP are proper.¹⁴ A recipient is at fault in the creation or acceptance of an overpayment 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

⁸ See *L.M.*, Docket No. 12-1423 (issued November 7, 2012).

⁹ See 5 U.S.C. § 8114(d)(3).

¹⁰ \$5,907.54 divided by 54 multiplied by 150 divided by 52 = \$315.57.

¹¹ \$4,093.84 - \$2,928.34 = \$1,165.50.

¹² 5 U.S.C. § 8129(a).

¹³ *Id.* at § 8129(b).

¹⁴ 20 C.F.R. § 10.433(a). See *K.C.*, Docket No. 11-1307 (issued January 10, 2012).

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 to be incorrect.¹⁵

Section 10.436 of the implementing federal regulations provide that recovery of an overpayment will defeat the purpose of FECA if recovery would cause undue hardship by depriving a presently or formerly entitled beneficiary of income and resources needed for ordinary and necessary living expenses and outlines the specific financial circumstances under which recovery may be considered to defeat the purpose of FECA.¹⁶

Section 10.437 provides that 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 a position for the worse, the individual must show that he made a decision he otherwise would not have made in reliance on the overpaid amounts and that this decision resulted in a loss. Conversion of the overpayment into a different form from which the claimant derived some benefit does not constitute loss for this purpose.¹⁸

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied waiver of recovery of the overpayment of compensation.

Regarding the \$1,165.50 overpayment of compensation, OWCP found that appellant was without fault in the creation of the overpayment, but denied waiver of recovery because appellant had not provided sufficient evidence to establish the need for waiver or a reasonable monthly repayment amount. The record reflects that appellant has a monthly income of \$771.00 from supplemental security income payments and state or local welfare and an approximate monthly income of \$1,516.67 from her earnings from Open Systems Healthcare at \$350.00 per week, totaling \$2,287.67 in monthly income.¹⁹ She reported monthly expenses of \$1,460.00 for rent or mortgage, food, clothing, utilities, and other expenses. Accepting these amounts as accurate, her monthly income exceeds her monthly expenses by \$827.67.²⁰ As appellant's monthly income exceeds her expenses by more than \$50.00, appellant is not deemed to need substantially all of her current income (including compensation benefits) to meet current ordinary and necessary

¹⁵ *Id.* See *B.H.*, Docket No. 09-292 (issued September 1, 2009).

¹⁶ *Id.* at § 10.436.

¹⁷ *Id.* at § 10.437.

¹⁸ See *Jorge O. Diaz*, 51 ECAB 124 (1999).

¹⁹ \$350.00 multiplied by 52 weeks divided by 12 = \$1,516.67.

²⁰ \$2,287.67 - \$1,460.00 = \$827.67.

living expenses.²¹ OWCP properly concluded that recovery of the overpayment would not defeat the purpose of FECA, be against equity or good conscience, or cause hardship to appellant. Thus, the Board finds that OWCP properly denied waiver of recovery of the overpayment in the amount of \$1,165.50.

Appellant contends on appeal that she should not be responsible to repay a debt for which she was found to be without fault and requests a waiver of recovery, indicating that she is a single mother with two dependents who is not financially capable of repayment. Although OWCP found that appellant was without fault in the matter of the overpayment, repayment is still required unless adjustment or recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.²²

On appeal appellant argues that she is not prepared to pay \$100.00 a month from the minimum income that she has each month. The Board's jurisdiction to review the collection of an overpayment, however, is limited to cases of adjustment, where OWCP decreases later payments of compensation to which the individual is entitled.²³ Because appellant is no longer receiving compensation, collection of the overpayment in this case cannot be made by adjusting later payments but must be recovered by other means. The Board therefore lacks jurisdiction to review the amount of recovery determined by OWCP to be appropriate.

LEGAL PRECEDENT -- ISSUE 3

Under FECA and its implementing regulations, a claimant who has received a final adverse decision by OWCP is entitled to receive a hearing upon writing to the address specified in the decision within 30 days of the date of the decision for which a hearing is sought.²⁴ Unless otherwise directed in writing by the claims examiner, an OWCP hearing representative will mail a notice of the time and place of the hearing to the claimant and any representative at least 30 days before the scheduled date.²⁵ OWCP has the burden of proving that it mailed notice of a scheduled hearing to a claimant.²⁶ Section 10.622(f) of OWCP regulations provide that a claimant who fails to appear at a scheduled hearing may request in writing within 10 days after the date set for the hearing that another hearing be scheduled.²⁷ Where good cause for failure to

²¹ See *L.C.*, Docket No. 14-0725 (issued August 13, 2014); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.0200.6a(1)(b) (June 2009). An individual is deemed to need substantially all of his or her current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. In other words, the amount of monthly funds available for debt repayment is the difference between current income and adjusted living expenses (*i.e.*, ordinary and necessary living expenses plus \$50.00).

²² See *Wade Baker*, 54 ECAB 198 (2002).

²³ 5 U.S.C. § 8129; *Levon H. Knight*, 40 ECAB 658 (1989).

²⁴ *Id.* at § 8124(b)(1); 20 C.F.R. § 10.616(a).

²⁵ 20 C.F.R. § 10.617(b).

²⁶ See *M.B.*, Docket No. 10-1077 (issued March 17, 2011).

²⁷ 20 C.F.R. § 10.622(f).

appear is shown, another hearing will be scheduled and conducted by teleconference. The failure of the claimant to request another hearing within 10 days, or the failure of the claimant to appear at the second scheduled hearing without good cause shown, shall constitute abandonment of the request for a hearing. Where good cause is shown for failure to appear at the second scheduled hearing, review of the matter will proceed as a review of the written record.²⁸ Where it has been determined that a claimant has abandoned her right to a hearing, OWCP will issue a formal decision finding that the claimant has abandoned her request for a hearing.²⁹

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly determined that appellant had abandoned her request for a prerecoumpment hearing.

Appellant contends on appeal that she never received notice of the hearing date and, therefore, could not have abandoned her hearing. The record establishes that on February 18, 2015, in response to appellant's timely request for a prerecoumpment hearing, the Branch of Hearings and Review mailed an appropriate notice of the hearing scheduled to be held on March 30, 2015 at 9:45 a.m. EST by telephone. The hearing notice was properly mailed to appellant's last known address of record. As the Board has held, in the absence of evidence to the contrary, a letter properly addressed and mailed in the due course of business is presumed to have arrived at the mailing address in due course. This is known as the mailbox rule.³⁰ The Board finds that the notice was sent more than 30 days prior to the scheduled hearing date of March 30, 2015. The record establishes that appellant did not appear at the appointed time. Further, she did not request a postponement of the hearing prior to March 30, 2015 or explain her failure to appear at the hearing within 10 days of the scheduled hearing. Thus, the Board finds that appellant abandoned her request for an oral hearing.

CONCLUSION

The Board finds that OWCP properly found an overpayment of compensation in the amount of \$1,165.50 because an incorrect pay rate had been used for the period July 8 to September 16, 2013, and properly found appellant without fault. The Board finds that OWCP properly denied waiver of recovery of the overpayment and that appellant abandoned her request for a prerecoumpment hearing.

²⁸ *Id.*

²⁹ See *N.L.*, Docket No. 15-0713 (issued July 14, 2015); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6(g) (October 2011).

³⁰ See *R.M.*, Docket No. 14-1512 (issued October 15, 2014).

ORDER

IT IS HEREBY ORDERED THAT the April 14 and 10, 2015 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: December 21, 2015
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board