

FACTUAL HISTORY

On January 8, 2014 appellant, then a 33-year-old grade 7 step 5 firefighter, filed a traumatic injury claim alleging that at approximately 9:30 a.m. that day she slipped and fell while exiting the fire apparatus, fractured her radius and suffered a left ankle sprain. OWCP accepted a right radius fracture and a left ankle sprain. Appellant stopped work on January 8, 2014. She returned to full-time modified duty with restrictions on March 3, 2014.

On February 13, 2014 appellant filed a (Form CA-7) claim for compensation claiming leave without pay during the period February 23 through March 8, 2014. On March 20, 2014 she filed a Form CA-7 claim for compensation claiming leave without pay for the period March 9 through 22, 2014. Form CA-7a time analysis forms were filed for 104 hours for the period February 23 through March 8, 2014 and 81 hours for the period March 9 through 22, 2014.

On the original Form CA-7 claim of February 13, 2014, the employing establishment indicated that appellant received continuation of pay for the period January 9 through February 22, 2014, that she earned \$72,854.86 annually and was grade 7 step 5 at the time of injury. It stated that she was a firefighter who worked 144 hours per pay period. A nontitled note in the file regarding appellant's salary noted her annual salary as \$47,378.00 and the annual rate for a firefighter working 144 hours per pay period as \$72,854.86.

In the initial payment memorandum, OWCP noted that appellant works 144 hours per pay period as a firefighter with an annual salary of \$72,854.86. In the attached pay rate calculation worksheet, appellant's weekly pay rate was determined to be \$2,154.86.

On March 31, 2014 appellant received, by direct deposit, a net payment of \$1,566.61 for the period February 23 through March 1, 2014. This included a gross payment of \$1,616.15 less health benefit insurance of \$43.91 and a basic life insurance benefit of \$5.63. Compensation was paid at the augmented rate based on the weekly pay rate of \$2,154.86. On April 8, 2014 appellant received, by direct deposit, a net payment of \$2,909.06 for the period March 5 through 22, 2014. This included a gross payment of \$2,909.06 paid at the augmented rate based on a weekly pay rate of \$2,154.86. No deductions were taken out

Appellant filed additional CA-7 and CA-7a forms.

A firefighters pay worksheet, tour of a 144-hour pay period, noted appellant's annual grade 7, step 5 salary of \$46,910.00 with a weekly pay rate of \$1,387.21.

In an April 30, 2014 corrected payment memorandum and pay rate calculation worksheet, OWCP noted appellant's annual salary as \$47,378.00 with a weekly pay rate of \$1,401.08.

In an April 30, 2014 file note, OWCP noted that there were three figures in the file with regard to appellant's base salary at of the date of injury: \$47,378.00, \$46,910.00, and \$72,854.86. The employing establishment confirmed that her base salary at of the date of injury was \$47,378.00.

In an ACPS manual/fiscal payment worksheet, OWCP calculated an overpayment of \$1,988.28 for the period February 23 to March 22, 2014. It noted that calculations were

originally based on the base pay of \$72,854.86 instead of the correct base pay rate of \$47,378.00. During the period February 23 through March 1, 2014, appellant was paid gross pay of \$1,616.15 for seven days but was only entitled to \$1,050.81 which resulted in a difference of \$565.34. For the period March 5 through 22, 2014, she received \$2,909.06 gross, but was only entitled to \$1,486.14 which resulted in a difference of \$1,422.92. A copy of the April 30, 2014 corrected payment memorandum based on an annual salary of \$47,378.00 was attached along with corrected worksheets for the periods February 23 through March 1, 2014 and March 5 through 22, 2014.

On May 29, 2014 OWCP issued a preliminary determination that an overpayment of compensation in the amount of \$1,988.28 had been created for the period February 23 through March 22, 2014, for which appellant was not with fault. It noted that it had used an annual base pay of \$72,854.86 in calculating the pay rate instead of the correct annual base pay rate of \$47,378.00. OWCP referred to the above nontitled note in the file, which noted her annual salary as \$47,378.00 and the annual rate for a firefighter working 144 hours per pay period as \$72,854.86, and noted that the correct weekly pay rate was \$1,401.05² but was incorrectly calculated at \$2,154.86. It stated that appellant was paid a total of \$4,535.21 for the above period, but should only have been paid \$2,536.95, which generated an overpayment of \$1,988.26. Appellant was provided an overpayment action request form and an overpayment questionnaire.

By decision dated July 24, 2014, OWCP finalized the preliminary overpayment decision. It advised appellant to send a check in the amount of \$300.00 each month until the overpayment was repaid.

LEGAL PRECEDENT -- ISSUE 1

The Federal Firefighters Overtime Pay Reform Act of 1998³ is used to determine the rate of pay for firefighters with regular tours of duty which generally consist 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 8114.⁴ 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 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 two to equal the firefighter weekly pay rate.⁵

² This should have been listed as \$1,401.08.

³ 5 U.S.C. § 5545(b).

⁴ *Id.*

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.8(d) (August 2012).

The procedures further indicate that most 24-hour shift firefighters have a regular biweekly tour of 144 hours (6 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.⁶

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 duty.⁷ 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.”⁸

ANALYSIS -- ISSUE 1

The Board has reviewed the case record and concludes that OWCP properly determined that an overpayment of compensation was created based on an incorrect pay rate during the period February 23 to March 22, 2014.

On January 8, 2014 appellant fractured her right radius and suffered a left ankle sprain in the performance of duty. She stopped work that day and received continuation of pay for the period January 9 through February 22, 2014, and thereafter received wage-loss compensation based on an annual base pay of \$72,854.86 with a weekly pay rate of \$2,154.86, based on the firefighter pay rate formula, until her return to modified work for eight hours a day on March 3, 2014. On April 30, 2014 OWCP noted that appellant’s base pay was \$47,378.00. It thereafter declared an overpayment in compensation based on the incorrect pay rate during the period February 23 to March 22, 2014.

On appeal, appellant asserts that \$72,854.86 is her annual salary as a grade 7 step 5 firefighter with a 144-hour pay period as evidenced by her “Leave and Earnings Statement.” However, there is no evidence of record which supports her contention that her base pay is \$72,854.86. As noted, the employing establishment informed OWCP on April 30, 2014 that appellant’s correct base pay was \$47,378.00. As there is no evidence to the contrary, OWCP properly determined that her base pay is \$47,378.00.

The record supports that appellant’s annual salary as a grade 7 step 5 firefighter was \$47,378.00, including locality pay. By utilizing the firefighter pay rate formula described in OWCP’s procedures above, to determine the correct pay rate for compensation purposes, her annual salary of \$47,378.00 was divided by 2,756, which yielded a firefighter hourly rate of \$17.19; this in turn was multiplied by 106 hours to yield a biweekly base pay of \$1,822.14; the next step was to multiply the firefighter hourly rate of \$17.19 times 1.5 to find the firefighter overtime rate of \$25.79; this in turn was multiplied by 38, the number of hours in excess to 106,

⁶ *Id.*

⁷ 5 U.S.C. § 8102(a).

⁸ *Id.* at § 8129(a).

to determine the biweekly firefighter overtime of \$980.02. The biweekly base pay and biweekly firefighter overtime were then added to yield \$2,802.16, which was divided by 2, to yield a \$1,401.08 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 \$2,154.86 when her compensation should have been based on a weekly pay rate of \$1,401.08, an overpayment of compensation was created.⁹ The Board notes in this regard that the weekly pay rate of \$1,401.08, based on the annual salary of \$47,378.00, when adjusted to the overtime pay rate for a firefighter, equals the adjusted annual rate of \$72,854.86.

OWCP also properly calculated that an overpayment of \$1,988.26 was created, for which appellant was without fault. The overpayment worksheets reflect that during the period February 23 through March 1, 2014, appellant was paid \$1,566.61 but should have received \$1,001.27, a difference of \$565.34. During the period March 5 through 22, 2014, she was paid \$2,909.06 when she should have received \$1,486.14, a difference of \$1,422.92. Thus, an overpayment of \$1,988.26 (\$565.34 + \$1,422.92) was created.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA¹⁰ provides that an overpayment must be recovered 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. Thus, a finding that appellant was without fault does not automatically result in waiver of the overpayment. OWCP must then exercise its discretion to determine whether recovery of the overpayment would defeat the purpose of FECA or would be against equity and good conscience.¹¹

Section 10.438 of OWCP's regulations state that a claimant who received an overpayment of compensation is responsible for providing information about income, expenses, and assets to OWCP so that it may determine whether recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.¹² Failure to submit the information, which will also be used to determine a repayment schedule if necessary, more than 30 days after a request from OWCP, will result in a denial of a waiver of recovery of the overpayment and no further requests for waiver will be considered until the information is submitted.¹³

⁹ *Supra* note 5; *see J.P.*, Docket No. 14-1101 (issued October 8, 2014); *see G.W.*, Docket No. 11-1271 (issued October 25, 2012).

¹⁰ *See* 20 C.F.R. § 10.610; *Cary S. Brenner*, 55 ECAB 739 (2004); *Stephen N. Elliott*, 53 ECAB 659 (2002).

¹¹ *L.C.*, 58 ECAB 493 (2007).

¹² *Id.* at § 10.438(a).

¹³ *Id.* at § 10.438(b); *Robert B. Hutchins*, 52 ECAB 344 (2001).

ANALYSIS -- ISSUE 2

OWCP, in its preliminary notification to appellant of the existence of the overpayment, informed her that she needed to explain her reasons for seeking a waiver, complete the recovery questionnaire form, and submit financial documents to support her claimed income and expenses. The overpayment recovery questionnaire is designed to obtain the financial information to determine whether adjustment or recovery would defeat the purpose of FECA. Appellant did not return the overpayment recovery questionnaire provided by OWCP and did not otherwise submit financial evidence or supporting documentation to establish that recovery of the overpayment would defeat the purpose of FECA, or would be against equity and good conscience because, in reliance on the overpaid compensation, she relinquished a valuable right or changed her position for the worse. Although appellant is without fault in the creation of the overpayment, she nevertheless bears responsibility for providing the financial information necessary to support her request to waive recovery of the overpayment. As appellant did not meet the requirement of Section 10.438 of OWCP's regulations,¹⁴ the Board finds that OWCP properly denied waiver of recovery of the overpayment.

With respect to recovery of the overpayment in compensation, the Board's jurisdiction is limited to reviewing those cases where OWCP seeks recovery from continuing compensation benefits under FECA.¹⁵ As appellant is no longer receiving wage-loss compensation, the Board does not have jurisdiction with respect to the recovery of the overpayment under the Debt Collection Act.¹⁶

¹⁴ *Id.*

¹⁵ *Cheryl Thomas*, 55 ECAB 610 (2004).

¹⁶ *Id.*

CONCLUSION

The Board finds that OWCP properly found an overpayment of compensation was created based on the incorrect pay rate. The amount of overpayment was also properly calculated. OWCP properly denied waiver.

ORDER

IT IS HEREBY ORDERED THAT the July 24, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 14, 2015
Washington, DC

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

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

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board