

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

|                                                  |   |                                 |
|--------------------------------------------------|---|---------------------------------|
| N.C., Appellant                                  | ) |                                 |
|                                                  | ) |                                 |
| and                                              | ) | <b>Docket No. 16-0441</b>       |
|                                                  | ) | <b>Issued: October 21, 2016</b> |
| <b>DEPARTMENT OF HOMELAND SECURITY,</b>          | ) |                                 |
| <b>TRANSPORTATION SECURITY</b>                   | ) |                                 |
| <b>ADMINISTRATION, Los Angeles, CA, Employer</b> | ) |                                 |
|                                                  | ) |                                 |

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
COLLEEN DUFFY KIKO, Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On January 4, 2016 appellant filed a timely appeal from a July 6, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP).<sup>1</sup> Pursuant to the Federal Employees'

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<sup>1</sup> Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of issuance of an OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. See 20 C.F.R. § 501.3(e)-(f). One hundred and eighty days from July 6, 2015, the date of OWCP's last decision was January 2, 2016, a Saturday. Consequently, the period for filing the appeal ran to the next business day, Monday, January 4, 2016. Since using January 11, 2016, the date the appeal was received by the Clerk of the Appellate Boards would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is January 4, 2016, rendering the appeal timely filed. See 20 C.F.R. § 501.3(f)(1).

Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>3</sup>

### **ISSUES**

The issues are: (1) whether OWCP properly found that appellant received an overpayment of compensation in the amount of \$16,955.80 because it paid compensation at an inaccurate pay rate for the period October 30, 2005 to June 28, 2014; and (2) whether it properly denied waiver of recovery of the overpayment.

### **FACTUAL HISTORY**

On August 9, 2004 appellant, then a 50-year-old screener, filed a traumatic injury claim (Form CA-1) alleging that on August 3, 2004 he strained a muscle in his shoulder and arm when lifting a bag. He stopped work on August 7, 2004. OWCP accepted the claim for right shoulder strain, cervical strain, acromioclavicular joint arthritis and tendinitis of the right shoulder, cervical discogenic disc disease at C5-6, reflex sympathetic dystrophy of the right upper extremity, causalgia, and psychogenic pain. It paid compensation beginning September 21, 2004 at a weekly pay rate of \$583.14 using a pay rate date of August 3, 2004, the date of injury. OWCP included night differential.

Appellant accepted a December 13, 2004 offer of modified employment from the employing establishment. The duties of the position of modified lead transportation security screener were within those set by his attending physician. Appellant received a salary of \$30,146.00 as a “D” Band employee.

OWCP accepted that appellant sustained a recurrence of disability on March 26, 2005.

On April 13, 2005 the employing establishment offered appellant a position as a modified lead transportation security screener with an annual salary of \$39,158.00 in the “F” Band. The position required no lifting over 20 pounds or reaching above the right shoulder level. Appellant accepted the position and returned to work on May 7, 2005 at a base pay of \$39,158.00.<sup>4</sup>

Appellant, on September 4, 2005, stopped work as the employing establishment no longer had a position available within his restrictions. OWCP paid compensation beginning October 30, 2005 based on a recurrent pay rate date of September 4, 2005. Including night shift differential of \$4.71, it calculated appellant’s weekly pay rate as \$757.75.

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<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The record also contains a September 10, 2015 decision denying modification of its reduction in appellant’s wage-earning capacity as he failed to cooperate with vocational rehabilitation under 5 U.S.C. § 8113(b). Appellant appealed the September 10, 2015 decision to the Board on March 4, 2016. The Board will consider his appeal of the September 10, 2015 decision under Docket No. 16-1152.

<sup>4</sup> By decision dated May 9, 2005, OWCP found that appellant received an overpayment of compensation in the amount of \$471.74 because he returned to work on December 17, 2004 but received compensation through December 25, 2004. It further determined that he was at fault in creating the overpayment.

In a decision dated December 18, 2008, OWCP reduced appellant's compensation under 5 U.S.C. § 8113(b) effective that date as he failed without good cause to participate in vocational rehabilitation. In applying the formula set forth in *Albert C. Shadrick*,<sup>5</sup> it used a pay rate date of September 4, 2005. Based on its calculations, OWCP determined that he was entitled to net compensation of \$786.78 each four weeks.

By decision dated January 16, 2009, OWCP granted appellant a schedule award for 17 percent permanent impairment of the right arm. The period of the award ran from January 18, 2009 to January 24, 2010. OWCP used an effective pay rate date of September 4, 2005 in determining his pay rate for compensation purposes for the schedule award.

Appellant requested an oral hearing, which was held before an OWCP hearing representative on November 5, 2009. In a decision dated February 1, 2010, an OWCP hearing representative affirmed the December 18, 2008 decision.

On January 26, 2011 appellant requested reconsideration, arguing that he cooperated with vocational rehabilitation and that his injury did not allow him to undergo vocational rehabilitation or employment. He noted that he had obtained disability retirement from the Social Security Administration (SSA).

In a decision dated April 25, 2011, OWCP denied modification of the February 1, 2010 decision. On April 12, 2012 appellant again requested reconsideration of OWCP's finding that he did not cooperate with vocational rehabilitation. By decision dated August 13, 2012, OWCP denied modification of its April 25, 2011 decision.

On October 30, 2012 OWCP requested that the employing establishment clarify appellant's salary as of August 3, 2004 and as of September 4, 2005.

By letter dated April 16, 2013, the employing establishment advised that appellant sustained an injury on August 3, 2004, returned to work on May 6, 2005, and stopped work in September 2005. It noted that he received compensation from OWCP at a recurrent pay rate even though he had not returned to work for six months following his injury. The employing establishment further advised that OWCP should calculate the amount appellant received for his loss of wage-earning capacity by applying the formula applicable to determining pay rate under performance-based pay systems.<sup>6</sup>

The employing establishment, in a May 16, 2014 e-mail, related that on August 3, 2004, the date of injury, it paid appellant using pay band "D at an adjusted base salary of \$30,146.00. At the time of his September 4, 2005 recurrence of disability, it paid him using pay band "F" at an adjusted base salary of \$39,158.00. The employing establishment provided the minimum and maximum salary for each pay band. In a telephone call, it indicated that appellant received a promotion on September 4, 2005 to the "F" Band. In a May 19, 2014 e-mail, the employing

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<sup>5</sup> 5 ECAB 376 (1953); codified by regulation at 20 C.F.R. § 10.403.

<sup>6</sup> The employing establishment indicated that appellant sustained a recurrence of disability on October 31, 2005 rather than September 4, 2005.

establishment provided updated information for pay band minimum and maximum salaries for 2014.

In a letter dated May 27, 2013, the employing establishment informed appellant that he should not have been paid at a recurrent pay rate as he had not returned to his usual employment for six months after his injury. Appellant had returned to a modified lead transportation screener.

On August 13, 2013 appellant requested reconsideration. He argued that he should be paid at an "F" band rate as he was promoted on October 3, 2004. Appellant also advised that the date of his recurrence of disability was March 26, 2005.

OWCP, on May 20, 2014, notified appellant of its proposed modification of the December 18, 2008 loss of wage-earning capacity determination. It found that it had incorrectly calculated his recurrent pay rate effective September 4, 2005 as it failed to include eight hours of Sunday premium pay and 25 hours of night differential. OWCP also determined that it failed to apply the formula applicable to performance-based pay systems, or pay banding, prior to calculating appellant's pay rate.

On June 20, 2014 OWCP advised appellant of its preliminary determination that he had received an overpayment of compensation in the amount of \$16,955.80 because it had paid him compensation from October 30, 2005 to June 28, 2014 using an inaccurate pay rate. It calculated that during this period it underpaid him \$10,059.42 in wage-loss compensation from October 30, 2005 to December 20, 2008 and underpaid him \$3,392.76 in schedule award compensation from January 18, 2009 to January 24, 2010 due to its failure to include Sunday premium pay and night shift differential in calculating his pay rate. OWCP next found that it overpaid appellant \$492.99 from December 1, 2008 to January 17, 2009 and \$29,914.99 from January 25, 2010 to June 28, 2014 as it did not apply the formula for calculating pay rates under performance-based pay systems. It subtracted the overpayment from the underpayment to find a total overpayment of \$16,955.80. OWCP informed appellant of its preliminary determination that he was without fault in the creation of the overpayment. It requested that he complete the enclosed overpayment recovery questionnaire and submit supporting financial documents. Additionally, OWCP notified appellant that, within 30 days of the date of the letter, he could request a telephone conference, a final decision based on the written evidence, or a prerecoupment hearing.

By decision dated June 20, 2014, OWCP modified its December 18, 2008 loss of wage-earning capacity determination as it based its original determination on an incorrect pay rate. It found that it failed to include 8 hours of Sunday premium pay and 25 hours of night differential in calculating appellant's recurrent pay rate and failed to properly calculate his weekly compensation rate using the formula applicable for performance-based pay systems. OWCP again used a recurrent pay rate date of September 4, 2005 in its calculations.

In a separate decision dated June 20, 2014, OWCP vacated in part and affirmed in part the August 13, 2012 decision as it used an inaccurate pay rate in its loss of wage-earning capacity determination.

Appellant, in a response dated July 13, 2014, argued that he did not receive an overpayment of compensation. He noted that he earned a “D” Band salary of \$30,146.00 on the date of injury with a promotion scheduled for October 3, 2004. Appellant worked as a lead screen at an “F” Band salary effective September 4, 2005 and earned \$39,158.00 including locality pay. He contended that he was promoted on October 3, 2004 rather than September 4, 2005. Appellant advised that he initially returned to work on December 17, 2004 as an “F” Band level 3 lead screener earning \$37,336.00. On March 1, 2005 he returned to light duty as an “F” Band lead screener earning \$39,158.00. Appellant questioned why OWCP used a recurrent pay rate date of September 4, 2005 when he initially returned to work on December 17, 2004.

On July 16, 2014 appellant requested a prerecoupment hearing. A telephone hearing was held on February 18, 2015. Appellant asserted that OWCP had not adequately explained the overpayment. He maintained that he was promoted on October 3, 2004 rather than September 5, 2005. Appellant’s representative advised that it was the policy at the employing establishment not to promote injured workers.

In a decision dated July 6, 2015, an OWCP hearing representative found that appellant received an overpayment of compensation in the amount of \$16,955.80 for the period October 30, 2005 to June 28, 2014 because he received compensation at an incorrect rate. He further found that appellant was not at fault in the creation of the overpayment but denied waiver of recovery as he failed to provide the required financial information. The hearing representative determined that the overpayment of compensation would be recovered in full.<sup>7</sup>

On appeal appellant contends that OWCP owes him money as it did not pay him based on his lead screener pay rate of \$39,158.00 per year or include night shift differential or Sunday premium pay in his compensation. He provides his calculations.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8102 of FECA<sup>8</sup> provides that the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.<sup>9</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>10</sup>

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<sup>7</sup> Appellant, on June 19, 2015, requested reconsideration of the June 20, 2014 decision modifying his loss of wage-earning capacity. By decision dated September 10, 2015, OWCP denied modification of its June 20, 2014 decision. It found that appellant had not demonstrated cooperation with vocational rehabilitation such that it would remove the sanction of section 8113(b). As noted, the Board will adjudicate appellant’s appeal of the September 10, 2015 decision under a separate docket number.

<sup>8</sup> 5 U.S.C. § 8101 *et seq.*

<sup>9</sup> *Id.* at § 8102.

<sup>10</sup> *Id.* at § 8129(a).

OWCP pays an employee compensation for total disability equal to a percentage of his monthly pay. Section 8101(4) provides that monthly pay means the monthly pay at the time of injury or the monthly pay at the time disability begins or the monthly pay at the time compensable disability recurs, if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater.<sup>11</sup>

If the disability is partial, the United States shall pay the employee during the disability monthly monetary compensation equal to 66 2/3 percent of the difference between monthly pay and monthly wage-earning capacity after the beginning of the partial disability.<sup>12</sup>

Where an employee has a recurrence of disability more than six months after resuming regular, full-time employment with the employing establishment, under section 8101(4) of FECA, the employee is entitled to have his compensation increased based on his pay at the time of this first recurrence of disability.<sup>13</sup> The Board has defined regular employment as established and not fictitious, odd-lot, or sheltered and has contrasted it with a job that was created especially for the claimant. The duties of regular employment are covered by a specific job classification and such duties would have been performed by another employee if the claimant did not perform them. The test is not whether the tasks the claimant performed during his limited duty would have been done by someone else, but instead whether he occupied a regular position that would have been performed by another employee.<sup>14</sup>

OWCP's procedures provide a method for calculating compensation under performance-based alternate pay systems, also known as pay banding.<sup>15</sup>

### ANALYSIS -- ISSUE 1

The Board finds that the case is not in posture for decision regarding whether appellant received an overpayment of compensation and the amount of any overpayment as OWCP utilized an incorrect effective pay rate date in calculating his pay rate for compensation purposes from October 30, 2005 to June 28, 2014.

Appellant sustained an injury on August 3, 2004. He stopped work following his injury on August 7, 2004 and returned to modified employment in December 2004. Appellant experienced a recurrence of disability beginning March 26, 2005. On May 7, 2005 he resumed modified work with the employing establishment. Appellant again stopped work on September 4, 2005.

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<sup>11</sup> *Id.* at § 8101(4). *See also K.B.*, Docket No. 13-569 (issued June 17, 2013).

<sup>12</sup> 5 U.S.C. § 8106(a).

<sup>13</sup> *Id.* at § 8101(4); *see Jon L. Hoagland*, 57 ECAB 635 (2006).

<sup>14</sup> *See Jeffrey T. Hunter*, 52 ECAB 503 (2001).

<sup>15</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on Actual Earnings*, Chapter 2.815e(3) (June 2013).

OWCP paid compensation for total disability beginning October 30, 2005 using a recurrent pay rate date of September 4, 2005. Beginning December 18, 2008, it paid compensation based on a loss of wage-earning capacity. In calculating appellant's loss of wage-earning capacity, OWCP used a pay rate effective date of September 4, 2005. From January 18, 2009 to January 24, 2010 OWCP paid schedule award compensation based on a recurrent pay rate of September 4, 2005. Following the expiration of appellant's schedule award, it again paid compensation based on its loss of wage-earning capacity determination.

On June 20, 2014 OWCP modified its December 18, 2008 loss of wage-earning capacity determination after finding that it had not included Sunday premium pay and night differential in appellant's recurrent pay rate or properly determined his pay rate under the performance-based pay system used by the employing establishment.

OWCP found that appellant received an overpayment of compensation in the amount of \$16,955.80 because it underpaid him \$10,059.42 in wage-loss compensation from October 30, 2005 to December 20, 2008 and underpaid him \$3,392.76 in schedule award compensation from January 18, 2009 to January 24, 2010 due to its failure to include Sunday premium pay and night differential in calculating his pay rate. It further determined that it overpaid appellant \$492.99 from December 1, 2008 to January 17, 2009 and \$29,914.99 from January 25, 2010 to June 28, 2014 as it did not apply the formula set forth in its procedures applicable in calculating pay rates under performance-based pay systems. OWCP subtracted the underpayment from the overpayment to find an overpayment of \$16,955.80. The Board notes that such an offset permits an unrestricted recovery of the offset portion of the overpayment without regard to the relevant factors set forth in 20 C.F.R. § 10.441(a). This practice denies administrative due process with respect to the amount offset.<sup>16</sup>

In determining appellant's pay rate for compensation purposes OWCP utilized a recurrent pay rate date of September 4, 2005. Appellant did not, however, return to his usual employment for six months following his August 3, 2004 employment injury. As discussed, a recurrent pay rate applies only if the work stoppage began more than six months after a return to regular full-time employment.<sup>17</sup> The positions appellant accepted in December 2004 and May 2005 were designated as modified-duty work designed to comply with his medical restrictions. The Board thus finds that OWCP improperly utilized a recurrent pay rate day in calculating his pay rate for compensation purposes from October 30, 2005 to June 28, 2014.

As noted, OWCP computes compensation using the pay rate in effect on either the date of injury, the date disability began, or the date disability recurred if the recurrence began more than six months after an employee resumed regular full-time federal employment. Appellant, as discussed, is not entitled to a recurrent pay rate as he had not returned to regular employment following his injury. His date of injury is August 3, 2004 and the date disability began is August 7, 2004. OWCP should utilize the pay rate that is the greater of these two days as the applicable pay rate date. If the pay rate is the same, the pay rate should be set as the date

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<sup>16</sup> See *Michael A. Grossman*, 51 ECAB 673 (2000); see also *G.T.*, Docket No. 07-793 (issued September 13, 2007).

<sup>17</sup> 5 U.S.C. § 8101(4); *J.R.*, Docket No. 14-1728 (issued June 17, 2015).

disability begins.<sup>18</sup> The case will be remanded for OWCP to determine appellant's pay rate for compensation purposes using the appropriate pay rate date. It should also utilize the pay banding formula and include any applicable Sunday premium pay and night differential.<sup>19</sup> Following this and any further development, OWCP should determine whether an overpayment exists and the amount of any overpayment.<sup>20</sup>

**CONCLUSION**

The Board finds that the case is not in posture for decision.

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 6, 2015 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: October 21, 2016  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>18</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.5(a)(3) (September 2011).

<sup>19</sup> *Id.* at Chapter 2.900.6(b) and 2.900.12(g) (September 2011).

<sup>20</sup> In view of the Board's dispositions of the issue of fact and amount of overpayment, it is premature to address the denial of waiver of recovery of the overpayment.