

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

N.D., Appellant)

and)

DEPARTMENT OF TRANSPORTATION,)
FEDERAL AVIATION ADMINISTRATION,)
St. Petersburg, FL, Employer)

Docket No. 17-0233
Issued: December 20, 2017

Appearances:
*Stephanie M. Leet, Esq., for the appellant*¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On November 10, 2016 appellant, through counsel, filed a timely appeal from a May 16, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$59,807.99 because OWCP used an incorrect pay rate for the period March 1, 2001 through April 2, 2016; (2) whether appellant is entitled to waiver of the overpayment; and (3) whether OWCP properly determined that it would recover \$500.00 every 28 days from continuing compensation as repayment of the overpayment.

FACTUAL HISTORY

On December 21, 1998 appellant, then a 49-year-old air traffic controller, filed a traumatic injury claim (Form CA-1) alleging that on November 15, 1998 he injured his low back and groin when he slipped on a wet floor. OWCP accepted the claim, assigned OWCP File No. xxxxxx744, for cervical and lumbosacral strain, cervical and lumbar disc displacement, sciatica, lumbar neuritis, an aggravation of brachial neuritis, and chronic pain syndrome.

OWCP had previously accepted on July 4, 1977 thoracic, lumbar, and cervical strain and cervical radiculitis under File No. xxxxxx162. It combined the cases under File No. xxxxxx744.

Appellant stopped work following his November 15, 1998 work injury and received compensation for total disability beginning January 31, 1999. He resumed his regular full-time employment on June 15, 1999.

By letter dated January 13, 2001, the employing establishment advised that appellant had not worked active duty “since January 24, 2000 duty to an unrelated [employing establishment] issue. [Appellant] has been certified in a variety of pay and nonpay statuses since his last day of duty on January 24, 2001.” It indicated that he was medically disqualified from work “due to an unrelated medical issue.”

Appellant, on February 5, 2001, filed a claim for recurrence of disability (Form CA-2a) on January 11, 2001 causally related to his July 4, 1977 employment injury under File No. xxxxxx162.

By decision dated July 10, 2001, OWCP found that appellant had not established a recurrence of disability beginning January 11, 2001 due to his work injury. It found that the employing establishment had terminated his employment because he no longer met the medical certifications for his position due to a nonwork-related psychological condition.

Appellant requested a hearing and by decision dated March 19, 2002, an OWCP hearing representative affirmed the July 10, 2001 decision. The hearing representative noted that appellant had not been working since January 2000 due to a personnel issue not related to work injury, but was continued on the rolls of the employing establishment after that time. Appellant initially sought medical treatment for the alleged recurrence of disability on January 23, 2001. The hearing representative determined that the medical evidence then of record was insufficient to establish a recurrence of disability beginning January 2001.

On March 13, 2001 the employing establishment noted that appellant had been off active duty work since January 24, 2000, but had “been carried in a variety of pay and nonpay status

since his last day of work in January 24, 2000.” It noted that he was permanently disqualified from work as a result of the nonwork-related medical issue.

The employing establishment, in a letter dated October 23, 2002, advised the Office of Personnel Management (OPM) that, based on a decision of the Merit Systems Protection Board (MSPB), appellant was retroactively restored to his position as an air traffic control specialist effective January 25, 2000, the date he began receiving leave without pay, until his removal on July 7, 2001. The decision required the employing establishment to pay back pay from January 2000 to July 7, 2001.

On November 6, 2002 OPM indicated that appellant had received disability retirement beginning March 1, 2001.

Appellant, on July 14, 2004, filed a claim for compensation (Form CA-7) requesting wage-loss benefits from March 1, 2001 to July 9, 2003 due to his November 15, 1998 employment injury.

On May 4, 2005 OWCP found that appellant was entitled to compensation for total disability beginning March 1, 2001 and requested that he elect between OPM benefits and workers’ compensation. Appellant elected to receive FECA benefits effective March 1, 2001. OWCP paid him compensation using an effective pay rate date of November 15, 1998, the date of injury.

In a November 18, 2005 report of telephone call, appellant maintained that he was being paid at an inaccurate pay rate. On December 15, 2005 the employing establishment advised OWCP by telephone that he had stopped work on January 24, 2001 at a pay rate of \$36.24 per hour.

In a February 21, 2006 internal memorandum, OWCP found that appellant was entitled to a weekly base pay rate of \$1,454.44 based on a recurrent pay rate date of January 11, 2001. It paid compensation for total disability from March 1, 2001 to August 31, 2005 using an effective pay rate date of January 11, 2001.

Appellant, on April 26, 2006, again telephoned OWCP and asserted that it was paying him compensation at an inaccurate pay rate.

By letter dated August 25, 2006, OWCP requested that the employing establishment provide the date that appellant last worked and his rate of pay at that time. It noted that it had received conflicting information regarding whether he stopped work in January 2000 or January 2001.

On October 25, 2006 the employing establishment advised that appellant “last day of actual work was on January 24, 2000” with a pay rate at that time of \$67,099.00 a year. It related, “Although [appellant] did not return to duty, [he] continued to be carried in a combination of annual, sick and administrative leave until the following year, through January 24, 2001.” Appellant used leave without pay beginning February 11, 2001. The employing establishment advised that he earned \$67,099.00 per year on January 24, 2001.

By letter dated December 21, 2006, OWCP advised that it was using a pay rate of \$75,631.00 per year with a pay rate date of January 21, 2001 based on earnings and leave statements.³ On January 16, 2007 it paid appellant supplemental net compensation in the amount of \$9,961.37 as a pay rate adjustment.

Appellant, on August 26, 2015, maintained that OWCP should pay him premium pay “for the last 14 years.”

On October 22, 2015 the employing establishment provided earnings and leave statements for appellant.

OWCP, on November 19, 2015, notified appellant of its preliminary determination that he received an overpayment of compensation in the amount of \$226,825.46 because it paid compensation at an inaccurate pay rate from March 1, 2001 to November 14, 2015. It found that it had paid compensation using a recurrent pay rate date of January 11, 2001. OWCP subsequently received information that appellant last worked on January 24, 2000, but received sick, annual, and administrative leave through January 24, 2001. It concluded that he was not entitled to a recurrent pay rate and calculated the overpayment using his date-of-injury pay rate. OWCP further preliminarily determined that appellant was not at fault in creating the overpayment.

In a December 9, 2015 response, appellant related that he returned to his usual employment after his injury on May 10, 1999 rather than October 11, 1999. He maintained that his last day at work was not January 24, 2000. Appellant submitted a claim for compensation (Form CA-7) dated June 21, 1999 indicating that he resumed work on May 10, 1999. On the form he requested compensation from May 9 to June 3, 1999.

On January 4, 2016 OWCP telephoned the employing establishment to determine the date that appellant resumed work after his November 15, 1998 work injury. By letter dated January 4, 2016, it advised him that it had voided the November 19, 2015 preliminary determination of overpayment pending a determination of whether he was entitled to a recurrent pay rate.

On January 8, 2016 OWCP received time and attendance reports showing that appellant returned to work full time beginning June 10, 1999.

By letter dated February 10, 2016, OWCP advised that after his work injury appellant returned to part-time work on May 10, 1999 and to his usual employment on June 10, 1999. Appellant last worked on January 24, 2000. OWCP found that it should have paid him based on a pay rate of \$1,307.67 per week and effective recurrent pay rate date of January 24, 2000 rather than at a rate of \$1,454.44 and a recurrent pay rate date of January 11, 2001. It indicated that it had included premium pay in the January 24, 2000 pay rate. In a pay rate calculation form,

³ In another letter dated December 21, 2006, OWCP informed the employing establishment that while it had advised that appellant earned \$67,099.00 per year effective January 24, 2001, earnings and leave statements reflected a pay rate of \$75,631.00 per year.

OWCP determined that appellant earned \$94.36 per week in holiday, Sunday premium, and night differential pay, which it added to his base pay of \$1,307.67 to find a pay rate of \$1,402.03.

In a memorandum dated February 12, 2016, OWCP found that appellant returned to his regular employment from June 10, 1999 to January 24, 2000. On July 9, 2003 appellant requested disability compensation beginning March 1, 2001. OWCP determined that he should have been paid based on a yearly pay rate of \$67,099.00 effective January 24, 2000 rather than a yearly pay rate of \$75,631.00 and weekly pay rate of \$1,454.55 effective January 11, 2001. It concluded that it should have paid appellant based on a recurrent pay rate of January 24, 2000 and a weekly pay rate of \$1,402.03 per week with premium pay.

On April 8, 2016 OWCP received premium pay rate information from the employing establishment.

OWCP, by letter dated April 12, 2016, notified appellant of its preliminary determination that he received an overpayment of compensation in the amount of \$59,807.99 because it incorrectly calculated his compensation pay rate from March 1, 2001 through April 2, 2016. It found that he last worked on January 24, 2000 and thus was entitled to a recurrent pay rate date of January 25, 2000. OWCP calculated the pay rate, with holiday and premium pay, as a base rate of \$1,290.37 per week plus \$9.28 in Sunday pay, \$2.61 in night differential, \$5.73 in holiday pay, and \$5.41 in controller-in-charge pay. It determined that appellant received a greater amount using the date of recurrence pay rate than his date-of-injury pay rate. OWCP found that it paid him compensation of \$952,965.95 from March 1, 2001 through April 2, 2016 when it should have paid him compensation of \$892,887.96, which created an overpayment of \$59,807.99. It advised appellant of its preliminary determination that he was not at fault in creating the overpayment. OWCP requested that he complete the enclosed overpayment recovery questionnaire and submit supporting financial documents. Additionally, it 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 precoupment hearing.

In a May 9, 2016 response, appellant argued that he sustained a recurrence of disability on January 23, 2001 and that he filed his notice of recurrence of disability under File No. xxxxxx162, which was separate from the current case. He advised that OWCP paid him compensation at a date-of-injury pay rate, which it subsequently adjusted on February 21, 2006 to reflect a recurrent pay rate of \$1,454.55 per week or \$75,631.00 per year. Appellant advised that he was not in a leave without pay status until February 26, 2001, and that an MSPB decision restored him to his position until July 7, 2001.

Appellant submitted a December 21, 2006 letter from the employing establishment acknowledging that the MSPB had instructed it to retroactively restore him to his position as air traffic controller from January 25, 2000 until the date of his removal on July 7, 2001. The employing establishment advised that it was reviewing his leave usage during that period to determine the amount of back pay owed.

By decision dated May 16, 2016, OWCP found that appellant received a \$59,807.99 overpayment of compensation because it paid him using an inaccurate compensation pay rate from March 1, 2001 through April 2, 2016. It determined that he was without fault in creating

the overpayment, but was not entitled to waiver, noting that he had not submitted the overpayment recovery questionnaire. OWCP found that it would recover the overpayment by deducting \$500.00 from continuing compensation payments.

On appeal counsel argues that appellant is entitled to a recurrent pay rate based on the date that his physician found that he was unable to work, January 23, 2001. He further maintains that the overpayment should be waived.

LEGAL PRECEDENT -- ISSUE 1

Section 8102 of FECA 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.⁴ 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.⁵

OWCP's procedures provide: "The dates when compensable 'disability began' or 'disability recurred' are the dates the employee stopped work due to the injury, not the dates pay stopped."⁶

When an overpayment has been made to an individual under FECA, 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.⁷

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained cervical and lumbosacral strain and disc displacement, sciatica, lumbar neuritis, an aggravation of brachial neuritis, and chronic pain syndrome due to a November 15, 1998 employment injury. Appellant had a prior accepted claim for cervical radiculitis and thoracic, lumbar, and cervical strain due to a July 4, 1977 work injury, assigned File No. xxxxxx162.

OWCP paid appellant disability compensation for total disability from January 31 until June 15, 1999, when he returned to his regular full-time employment. On January 24, 2000 the employing establishment placed him in an off-work status due to an administrative issue unrelated to his work injury. It advised OWCP that appellant was medically disqualified from employment due to a medical condition unrelated to his employment. Appellant used a combination of sick, annual, and administrative leave until January 24, 2001.

⁴ 5 U.S.C. § 8102.

⁵ *Id.* at §§ 8101(4); 8114; *see also* 20 C.F.R. § 10.5(s).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.5(a)(1) (September 2011).

⁷ 5 U.S.C. § 8129; *see also* *Ricky Greenwood*, 57 ECAB 462 (2006).

Appellant alleged that he experienced a recurrence of disability beginning January 11, 2001 due to his July 4, 1977 work injury under File No. xxxxxx162. OWCP found, however, that the medical evidence of record was insufficient to support that he was unable to work due to his accepted employment injury.

The MSPB retroactively restored appellant to his position of air traffic control specialist from January 25, 2000 until the date of his removal on July 7, 2001.

On July 14, 2004 appellant requested compensation for total disability beginning March 1, 2001. OWCP, by letter dated May 4, 2005, found that he was entitled to disability compensation beginning March 1, 2001. It initially found that appellant was entitled to compensation based on a date-of-injury pay rate of November 15, 1998, but subsequently determined that he was entitled to compensation using a recurrent pay rate date of January 11, 2001.

Appellant, on August 26, 2015, maintained that his pay rate was inaccurate because it failed to include premium pay. In February 2016, OWCP found that it should have paid him based on a recurrent pay rate date of January 24, 2000, the date he last worked, instead of January 11, 2001. It calculated that it should have paid appellant based on a yearly pay rate in effect on January 24, 2000 of \$67,099.00, rather than the pay rate of \$75,631.00 in effect on January 11, 2001.

The Board finds that the case is not in posture for decision. As noted, the pay rate for compensation purposes is 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.⁸ After his November 15, 1998 employment injury, appellant resumed his usual full-time employment on June 15, 1999. He worked until January 24, 2000, when the employing establishment placed him in a nonpay status for administrative reasons unrelated to his work injury. As appellant returned to his regular employment for more than six months, he is entitled to a recurrent pay rate for any recurrence of disability.⁹ He did not, however, stop work on January 24, 2000 as a result of disability due to his employment injury and thus did not sustain a recurrence of disability on that date. Consequently, OWCP erred in finding January 24, 2000 as the applicable pay rate date.

OWCP determined that appellant was entitled to disability compensation beginning March 1, 2001. In finding an overpayment of compensation, it used January 24, 2000 as the pay rate date as it was the last day that he performed work for the employing establishment. A work stoppage, however, is unnecessary for a claimant to be entitled to a recurrent pay rate if he sustains a new period of total disability due to the accepted employment injury.¹⁰ In *D.W.*,¹¹

⁸ *Supra* note 5.

⁹ See *Johnny A. Muro*, 19 ECAB 104 (1967).

¹⁰ See *D.W.*, Docket No. 14-0912 (issued September 29, 2014); *R.N.*, Docket No. 10-0470 (issued September 9, 2010).

¹¹ See *D.W.*, *id.*

OWCP had determined that the claimant was not entitled to a recurrent pay rate date of April 19, 2008 because he stopped work in January 2008 under another file number. The Board found, however, that a work stoppage was not required for application of a recurrent pay rate, but is instead based on whether the claimant experienced a new period of employment-related disability.

The Board finds that the case is not in posture for decision. Following this and any further development, it should determine whether an overpayment exists and the amount of any overpayment.¹²

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the May 16, 2016 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.¹³

Issued: December 20, 2017
Washington, DC

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

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

¹² In view of the Board's disposition of the overpayment, it is premature to address the issues of whether OWCP properly denied waiver and set the rate recovery of the overpayment.

¹³ Colleen Duffy Kiko, Judge, participated in the original decision, but was no longer a member of the Board effective December 11, 2017.