



(3) whether OWCP properly required recovery of the overpayment by deducting \$900.00 from appellant's continuing compensation payments every 28 days.

### **FACTUAL HISTORY**

On March 1, 2001 OWCP accepted (under OWCP File No. xxxxxx548) that appellant, then a 39-year-old legal instrument examiner, sustained an occupational disease (Form CA-2) in the form of bilateral carpal tunnel syndrome due to the repetitious duties of her job.<sup>2</sup> Appellant underwent several OWCP-approved surgeries, including right carpal tunnel release on November 4, 1999, left carpal tunnel release on March 5, 2001, and anterior cervical fusion/foraminal decompression at C5-6 on July 7, 2015.

Appellant stopped work on March 12, 2001 and OWCP paid her disability compensation beginning March 12, 2001 based on a pay rate of \$691.52 per week. She returned to part-time work (four hours per day) for the employing establishment on September 4, 2007 and stopped work on September 20, 2007. Beginning June 8, 2008, OWCP paid appellant disability compensation based on a weekly pay rate of \$868.63.<sup>3</sup>

By decision dated September 29, 2016, OWCP granted appellant a schedule award for nine percent permanent impairment of her left upper extremity due to spinal nerve impairment. The award ran for 28.08 weeks from August 16, 2016 to February 28, 2017. OWCP indicated that appellant had a weekly pay rate of \$691.52, effective September 20, 2007.<sup>4</sup>

In a December 20, 2016 memorandum, OWCP indicated that an overpayment of compensation in the amount of \$20,237.63 occurred during the period June 8, 2008 to March 5, 2016 because appellant was paid compensation based on an improper weekly pay rate during that period. It provided detailed calculations regarding the actual compensation that she received for the period June 8, 2008 to March 5, 2016 and the compensation she should have received for the

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<sup>2</sup> OWCP previously accepted that on April 19, 1999 appellant sustained a traumatic injury due to reaching for a file in a file rack. It accepted that claim (under OWCP File No. xxxxxx385) for intervertebral cervical disc disorder with myelopathy, cervical sprain, myalgia/myositis (unspecified), brachial neuritis/radiculitis, and right shoulder/arm sprain. OWCP administratively combined OWCP File Nos. xxxxxx548 and xxxxxx385, with xxxxxx548 serving as the master file.

<sup>3</sup> Between September 20, 2007 and June 7, 2008, OWCP paid appellant a lesser amount of compensation based on her loss of wage-earning capacity as calculated relative to her ability to earn wages in a constructed position. This period of compensation is not part of the \$20,237.63 overpayment of compensation in the present case.

<sup>4</sup> By decision dated December 5, 2016, OWCP indicated that it was issuing a "corrected schedule award decision" and it noted that March 12, 2001 (rather than September 20, 2007) was the effective date of the weekly pay rate of \$691.52.

period June 8, 2008 to March 5, 2016 if the proper weekly pay rate was used.<sup>5</sup> OWCP noted, in relevant part:

“The overpayment occurred because--

‘The incorrect pay rate was used to pay compensation for wage loss during the above period [*i.e.*, June 8, 2008 to March 5, 2016]. For wage loss beginning on June 8, 2008 [OWCP] paid compensation for total disability using the pay rate of \$868.63 per week with an effective date of September 20, 2007, the date of the claimant’s most recent recurrence of disability. However, when the recurrence of disability occurred on September 20, 2007, the claimant was working four hours per day, five days per week. [The] \$868.63 figure is the weekly salary of a full[-]time employee, working [eight] hours per day, five days per week. The correct pay rate that the claimant was earning at the time of the September 20, 2007 recurrence is \$434.32 per week. [Appellant] returned to work on September 4, 2007 at a salary of \$45,169 per year. However, her job was for four hours per day, 20 hours per week. Therefore, her weekly salary as of September 20, 2007 was \$434.32 ( $\$45,169/52$  [=]  $\$868.63/2$  [=] \$434.32).

‘Our records show that, prior to the September 20, 2007 work stoppage, the claimant last worked on March 11, 2001. She stopped work on March 12, 2001 and began receiving compensation based on her pay rate at that time, which was \$17.23 per hour, \$691.52 per week ( $\$17.23 \times 2087$  hours [=]  $35,959.01/52$  [=] \$691.52).

‘OWCP procedures indicate that where a claimant’s pay rate for a recurrence of disability is lower than the prior compensation pay rate then the higher compensation pay rate should be used for payment of compensation. Therefore, the correct compensation pay rate for this case following the September 20, 2007 recurrence is \$691.52 per week with the effective pay rate date of March 12, 2001 since that is higher than the \$434.32 weekly pay rate of September 20, 2007.’”

In a January 4, 2017 notice, OWCP advised appellant of its preliminary determination that she received an overpayment of compensation in the amount of \$20,237.63 for the period June 8, 2008 to March 5, 2016 because she received compensation during this period which was paid at an incorrect pay rate. It explained that, beginning June 8, 2008, it paid her compensation for total disability using the weekly pay rate of \$868.63 per week with an effective date of September 20,

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<sup>5</sup> OWCP provided calculations showing that appellant received \$237,590.11 in compensation for the period June 8, 2008 to March 5, 2016 when she was only entitled to receive \$217,352.48 for this period given the error in the pay rate for compensation purposes. The difference between \$237,590.11 and \$217,352.48 is \$20,237.63. The record contains payment documents supporting that appellant received \$237,590.11 in compensation for the period June 8, 2008 to March 5, 2016.

2007, the date of her most recent recurrence of disability. OWCP noted, however, that when appellant's recurrence of disability occurred on September 20, 2007 she was only working four hours per day, five days per week. The weekly pay rate of \$868.63 was the weekly salary of a full-time employee who worked eight hours per day, five days per week. OWCP indicated that appellant's actual weekly pay rate as of September 20, 2007 was \$434.32.<sup>6</sup> It further noted that, prior to the September 20, 2007 recurrence of disability, her last recurrence of disability had occurred on March 12, 2001. On March 11, 2001 appellant's last workday before the recurrence, she was earning \$17.23 per hour or \$691.52 per week (\$17.23 times 2,087 hours equals \$35,959.01 and \$35,959.01 divided by 52 weeks equals \$691.52 per week). OWCP further advised that OWCP procedures provide that, where a claimant's pay rate for a recurrence of disability is lower than the prior compensation pay rate, than the higher compensation pay rate should be used for payment of compensation. Therefore, the correct compensation appellant should have received on and after June 8, 2008 was the weekly pay rate of \$691.52 per week since that weekly pay rate is higher than the weekly pay rate of \$434.32.

OWCP also advised appellant of its preliminary determination that she was not at fault in the creation of the overpayment because she could not have been expected to know that she was paid at an incorrect pay rate. It advised her that she could submit evidence challenging the fact, amount, or finding of fault, and that she could request waiver of recovery of the overpayment. OWCP informed appellant that she could submit additional evidence in writing or at a prerecoupment hearing, but that a prerecoupment hearing must be requested within 30 days of the date of the written notice of overpayment. It requested that she complete and return an enclosed overpayment recovery questionnaire (Form OWCP-20) within 30 days even if she was not requesting waiver of recovery of the overpayment.

Appellant submitted an overpayment recovery questionnaire, completed on January 25, 2017, in which she challenged the finding of overpayment and requested a telephonic prerecoupment hearing with a representative of OWCP's Branch of Hearings and Review. During the hearing held on June 28, 2017, she testified that she had monthly income of \$3,265.50 and monthly expenses of \$1,906.00.<sup>7</sup>

By decision dated August 3, 2017, OWCP's hearing representative determined that appellant received an overpayment of compensation in the amount of \$20,237.63 because she was paid compensation at an improper pay rate from June 8, 2008 to March 5, 2016. The hearing representative found that she was not at fault in the creation of the overpayment, but that the overpayment was not subject to waiver of recovery because her monthly income of \$3,265.50

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<sup>6</sup> OWCP noted that appellant returned to work on September 4, 2007 at a salary of \$45,169.00 per year. However, because appellant's job was for 20 hours per week, her weekly salary as of September 20, 2007 was \$434.32 (\$45,169.00 divided by 52 weeks equals \$868.63 and \$868.63 divided in half equals the weekly pay rate of \$434.32).

<sup>7</sup> Appellant testified that she received \$1,879.50 in FECA benefits and \$1,386.00 in Social Security Administration (SSA) benefits each month. Her monthly expenses were comprised of rent (\$1,027.00), clothing (\$300.00), utilities (\$350.00), credit union payments (\$139.00), and miscellaneous expenses (\$90.00).

exceeded her monthly expenses of \$1,906.00 by more than \$50.00.<sup>8</sup> Therefore, appellant did not establish that recovery of the overpayment would defeat the purpose of FECA. The hearing representative discussed her financial circumstances and required recovery of the overpayment by deducting \$900.00 from her continuing compensation payments every 28 days.

### **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 or her 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>

Section 8105(a) of FECA provides: “If the disability is total, the United States shall pay the employee during the disability monthly monetary compensation equal to 66 2/3 percent of his monthly pay, which is known as his basic compensation for total disability.”<sup>11</sup> Section 8101(4) of FECA defines “monthly pay” for purposes of computing compensation benefits as follows: “[T]he 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>12</sup> OWCP’s regulations define “disability” as “the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury.”<sup>13</sup>

OWCP procedures provide that a recurrent pay rate may be lower than the pay rate in effect on the date of injury, date disability began, or previous date of recurrence. This can happen when the claimant is originally injured in full-time employment, and the recurrence occurs when the

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<sup>8</sup> Appellant discussed her financial situation in the overpayment recovery questionnaire completed on January 25, 2017, but the hearing representative used the more recent financial information provided in the June 28, 2017 prereducement hearing.

<sup>9</sup> 5 U.S.C. § 8102(a).

<sup>10</sup> *Id.* at § 8129(a).

<sup>11</sup> *Id.* at § 8105(a). Section 8110(b) of FECA provides that total disability compensation will equal three fourths of an employee’s monthly pay when the employee has one or more dependents. 5 U.S.C. § 8110(b).

<sup>12</sup> *Id.* at § 8101(4). In an occupational disease claim, the date of injury is the date of last exposure to the employment factors which caused or aggravated the claimed condition. *Patricia K. Cummings*, 53 ECAB 623, 626 (2002). The Board has held that, if an employee has one recurrence of disability which meets the requirements of 8101(4), any subsequent recurrence would also meet such requirements and would entitle the employee to a new recurrence pay rate. *Carolyn E. Sellers*, 50 ECAB 393 (1999).

<sup>13</sup> 20 C.F.R. § 10.5(f).

claimant is working part time or has been rated for loss of wage-earning capacity. Even if the employing establishment reports a higher hourly pay rate for a date of recurrence, the recurrent pay rate should be considered the actual weekly amount the claimant earned. In such cases, the pay rate on the date of injury, date disability began, or previous date of recurrence, with the applicable effective date, would be used because it was higher.<sup>14</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that appellant received an overpayment of compensation in the amount of \$20,237.63 for the period June 8, 2008 to March 5, 2016, because she received compensation based on a weekly pay rate of \$868.63 rather than the proper weekly pay rate of \$691.52. Beginning June 8, 2008, OWCP paid her compensation for total disability using the weekly pay rate of \$868.63 per week with an effective date of September 20, 2007, the date of her most recent recurrence of disability. When appellant's recurrence of disability occurred on September 20, 2007 she was only working four hours per day, five days per week. The weekly pay rate of \$868.63 was the weekly salary of a full-time employee who worked eight hours per day, five days per week. Appellant returned to work on September 4, 2007 at a salary of \$45,169.00 per year. However, because her job was for 20 hours per week, her weekly salary as of September 20, 2007 was \$434.32.<sup>15</sup> OWCP further noted that, prior to the September 20, 2007 recurrence of disability, appellant's last recurrence of disability had occurred on March 12, 2001. On March 11, 2001 appellant's last workday before the recurrence, she was earning \$17.23 per hour or \$691.52 per week (\$17.23 times 2,087 hours equals \$35,959.01 and \$35,959.01 divided by 52 weeks equals \$691.52 per week). OWCP properly noted that OWCP procedures provide that, where a claimant's pay rate for a recurrence of disability is lower than the prior compensation pay rate, than the higher compensation pay rate should be used for payment of compensation.<sup>16</sup> Therefore, it correctly determined that the compensation appellant received on and after June 8, 2008 should have been based on the weekly pay rate of \$691.52 since that weekly pay rate is higher than the weekly pay rate of \$434.32.

The Board further notes that the record contains evidence which shows that, given the above-noted payments at an improper pay rate, appellant received \$237,590.11 in compensation for the period June 8, 2008 to March 5, 2016 when she was only entitled to receive \$217,352.48. Therefore, OWCP properly determined that she received a \$20,237.63 overpayment of compensation.

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<sup>14</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, 2.900.5a(6) (September 2011).

<sup>15</sup> OWCP noted that \$45,169.00 divided by 52 weeks equals \$868.63 and \$868.63 divided in half equals the weekly pay rate of \$434.32.

<sup>16</sup> See *supra* note 14.

## LEGAL PRECEDENT -- ISSUE 2

The waiver or refusal to waive an overpayment of compensation by OWCP is a matter that rests within OWCP's discretion pursuant to statutory guidelines.<sup>17</sup> These statutory guidelines are found in section 8129(b) of FECA which provide: "Adjustment or recovery [of an overpayment] by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience."<sup>18</sup> If OWCP finds a claimant to be without fault in the matter of an overpayment, then, in accordance with section 8129(b), OWCP may only recover the overpayment if it determined that recovery of the overpayment would neither defeat the purpose of FECA, nor be against equity and good conscience.

According to 20 C.F.R. § 10.436, recovery of an overpayment would defeat the purpose of FECA if recovery would cause hardship because the beneficiary needs substantially all of his or her income (including compensation benefits) to meet current ordinary and necessary living expenses, and also, if the beneficiary's assets do not exceed a specified amount as determined by OWCP from data provided by the Bureau of Labor Statistics.<sup>19</sup> According to 20 C.F.R. § 10.437, 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.<sup>20</sup> To establish that a valuable right has been relinquished, it must be shown that the right was in fact valuable, that it cannot be regained, and that the action was based chiefly or solely in reliance on the payments or on the notice of payment.<sup>21</sup>

## ANALYSIS -- ISSUE 2

Appellant has not established that recovery of the overpayment would defeat the purpose of FECA because she has not shown that she needs substantially all of her current income to meet ordinary and necessary living expenses. As noted above, her monthly income exceeds her monthly ordinary and necessary expenses by approximately \$1,360.00. As appellant's current income exceeds her current ordinary and necessary living expenses by more than \$50.00 she has not shown that she needs substantially all of her current income to meet current ordinary and necessary living

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<sup>17</sup> See *Robert Atchison*, 41 ECAB 83, 87 (1989).

<sup>18</sup> 5 U.S.C. § 8129(b).

<sup>19</sup> 20 C.F.R. § 10.436. An individual is deemed to need substantially all of her monthly income to meet current and ordinary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. Assets must not exceed a resource base of \$4,800.00 for an individual or \$8,000.00 for an individual with a spouse or dependent plus \$960.00 for each additional dependent. See Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a) (October 2004); *B.F.*, Docket No. 13-0785 (issued September 20, 2013).

<sup>20</sup> 20 C.F.R. § 10.437(a), (b).

<sup>21</sup> *Id.* at § 10.437(b)(1).

expenses.<sup>22</sup> Because she has not met the first prong of the two-prong test of whether recovery of the overpayment would defeat the purpose of FECA, it is not necessary for OWCP to consider the second prong of the test, *i.e.*, whether her assets do not exceed the allowable resource base.

Appellant also has not established that recovery of the overpayment would be against equity and good conscience because she has not shown, for the reasons noted above, that she would experience severe financial hardship in attempting to repay the debt or that she relinquished a valuable right or changed her position for the worse in reliance on the payment which created the overpayment.<sup>23</sup>

Because appellant has failed to establish that recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience, the Board finds that she has failed to show that OWCP abused its discretion by refusing to waive recovery of the overpayment.

### **LEGAL PRECEDENT -- ISSUE 3**

Section 10.441 of Title 20 of the Code of Federal Regulations provides in pertinent part:

“When an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to OWCP the amount of the overpayment as soon as the error is discovered or his or her attention is called to the same. If no refund is made, OWCP shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual, and any other relevant factors, so as to minimize any hardship.”<sup>24</sup>

### **ANALYSIS -- ISSUE 3**

The record supports that, in requiring recovery of the overpayment by deducting \$900.00 from appellant’s continuing compensation payments every 28 days, OWCP took into consideration the financial information submitted by her as well as the factors set forth in section 10.441 and found that this method of recovery would minimize any resulting hardship on her. Therefore, it properly required recovery of the overpayment by deducting \$900.00 from her continuing compensation payments every 28 days.

### **CONCLUSION**

The Board finds that appellant received a \$20,237.63 overpayment of compensation for the period June 8, 2008 to March 5, 2016, for which she was not at fault. The Board further finds that OWCP did not abuse its discretion by refusing to waive recovery of the overpayment and that

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<sup>22</sup> See *supra* note 19.

<sup>23</sup> See *William J. Murphy*, 41 ECAB 569, 571-72 (1989).

<sup>24</sup> 20 C.F.R. § 10.441(a); see *Donald R. Schueler*, 39 ECAB 1056, 1062 (1988).

OWCP properly required repayment of the overpayment by deducting \$900.00 from appellant's continuing compensation payments every 28 days.

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 3, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 14, 2018  
Washington, DC

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

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

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