

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

L.C., Appellant

and

**U.S. POSTAL SERVICE, NEWHALL ANNEX,
Newhall, CA, Employer**

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**Docket No. 19-0320
Issued: July 26, 2019**

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
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On November 26, 2018 appellant filed a timely appeal from an October 16, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

ISSUES

The issues are: (1) whether OWCP properly determined that appellant abandoned her request for a prerecoupment hearing before an OWCP hearing representative; (2) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that appellant submitted additional evidence on appeal. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

\$3,761.38 for the period November 11, 2017 through March 3, 2018, for which she was without fault; and (3) whether OWCP abused its discretion by denying waiver of recovery of the overpayment.

FACTUAL HISTORY

On February 28, 2017 appellant, then a 65-year-old rural carrier associate, filed an occupational disease claim (Form CA-2) alleging that she developed overuse syndrome in her right hip due to repeatedly entering and exiting her mail truck while in the performance of duty. She noted that she first became aware of her claimed condition and related it to her federal employment on December 31, 2013. On the reverse side of the claim form, appellant's supervisor indicated that appellant's work hours varied and that she worked six days a week. On May 16, 2017 OWCP accepted her claim for right hip tendon tear and bursitis of the right trochanteric bursa. Appellant underwent right hip surgery on October 17, 2017.

On August 26, 2017 appellant began filing claims for compensation (Form CA-7) for the period August 23 through December 8, 2017. She noted that in addition to her federal employment, she worked approximately 20 hours a week as a care taker. The employing establishment indicated that appellant started her federal job on December 31, 2013 with a base pay of \$19.94 per hour and that her average weekly work hours were 32.80. Appellant stopped work on September 2, 2017 and her pay rate was \$21.54 per hour and her weekly hours were 37.80. She did not work 40 hours a week. On November 8, 2017 OWCP contacted the employing establishment which reported that appellant's hourly pay rate on April 3, 2017 was \$21.54.

In a letter dated November 14, 2017, OWCP requested additional information from the employing establishment regarding appellant's gross earnings for one year prior to August 23, 2017. It noted that as she was a rural carrier associate, to compute her weekly pay rate, it needed to obtain the total gross earnings, less overtime, for one year prior to the pay rate date and divide by 52. OWCP also notified appellant that on November 14, 2017 it had processed a payment from October 17 through November 10, 2017 in the amount of \$1,118.43 based on a temporary provisional pay rate of \$469.74 per week. It based this pay rate on an hourly wage of \$21.54 and average weekly work hours of 37.80 divided by 5 workdays and multiplied by 150 days divided by 52 weeks. OWCP informed appellant that if her actual pay rate was greater than \$469.74, it would process an adjustment based on the difference in pay upon receipt of the necessary information from the employing establishment.

On November 30, 2017 the employing establishment reported that appellant's total gross earnings, exclusive of overtime, for one year prior to August 23, 2017 was \$61,393.14. It also noted that appellant used a combination of sick and annual leave from August 23 through September 1, 2017 resulting in an overpayment of compensation.

On December 12, 2017 OWCP calculated appellant's weekly pay rate as \$1,180.64 based on her yearly earnings of \$61,393.14 from August 2016 through August 2017. Appellant's annual salary of \$61,393.14 was divided by 52 weeks to equal \$1,180.64. It determined that she had been overpaid from August 23 through September 1, 2017, as she used leave, and underpaid from September 2 through November 10, 2017. OWCP paid appellant wage-loss compensation in the amount of \$3,260.82 for the period November 11 through December 9, 2017 based on a weekly

pay rate of \$1,180.64. It also paid appellant wage-loss compensation in the amount of \$3,148.37 for the period December 10, 2017 through January 6, 2018 based on a weekly pay rate of \$1,180.64.

On December 15, 2017 OWCP entered appellant on the periodic rolls based on her weekly pay rate of \$1,180.64.

In a January 26, 2018 preliminary determination, OWCP informed appellant that she had received an overpayment of compensation in the amount of \$447.37 for the period August 23 through September 1, 2017 as she received wage-loss compensation for total disability and used sick and annual leave. It found that she was without fault in the creation of the overpayment. OWCP requested that appellant complete an overpayment recovery questionnaire (Form OWCP-20) and afforded her 30 days to pay the debt in full or to follow her appeal options.

In a letter dated February 1, 2018, the employing establishment notified OWCP that it had provided incorrect earnings for appellant for the period August 2016 through August 2017. The yearly earnings in the amount of \$61,393.14 improperly included overtime. It provided the corrected yearly salary of \$43,218.73. The employing establishment requested that OWCP calculate an overpayment.

On February 2, 2018 appellant provided one page of the overpayment recovery questionnaire (Form OWCP-20) indicating that she had none of the incorrectly paid checks in her possession and that she had not transferred by loan, gift, or sale any property or case since she was notified of the overpayment. She requested that OWCP process the \$447.37 overpayment with her pending underpayment.

On March 13, 2018 OWCP determined that wage-loss compensation in the amount of \$2,216.35 was due for the period March 4 through 31, 2018 based on appellant's corrected weekly pay rate of \$831.13. It reached this amount by dividing \$42,218.73 by 52 to equal \$831.13. OWCP also found that appellant received the net amount of \$3,578.97 for the period September 2 through November 10, 2017 based on a temporary weekly pay rate of \$469.74 or \$3,131.60. It determined that based on the February 1, 2018 letter from the employing establishment, her weekly pay rate was \$831.13 resulting in \$5,540.87 of wage-loss compensation for the September 2 through November 10, 2017 period. As she had previously received \$3,131.60, appellant was entitled to an additional \$2,409.27 due to underpayment. OWCP also recovered the \$447.37 overpayment which resulted in a net payment of \$1,961.90 on March 12, 2018.

On March 12, 2018 OWCP completed worksheets and determined that based on the corrected weekly pay rate of \$831.13 appellant was entitled to receive \$5,540.87 in wage-loss compensation for the period September 2 through November 10, 2017 and \$8,944.55 in wage-loss compensation for the period November 11, 2017 through March 3, 2018.

In a March 27, 2018 preliminary determination, OWCP notified appellant that she had received an overpayment of compensation in the amount of \$3,761.38 due to incorrect pay rate information provided by the employing establishment. It determined that she had received wage-loss compensation in the amount of \$12,705.93, for the period November 11, 2017 through March 3, 2018 based on a reported yearly salary of \$61,393.14, while she was entitled to receive

compensation in the amount of \$8,944.55, based on her yearly salary of \$43,218.73 (properly calculated without overtime earnings) for the period November 11, 2017 through March 3, 2018 resulting in the finding of a \$3,761.38 overpayment of wage-loss compensation. OWCP found that appellant was without fault in the creation of the overpayment of wage-loss compensation. It requested that she complete an overpayment recovery questionnaire (Form OWCP-20) and afforded her 30 days to pay the debt in full or to follow her appeal options.

On April 19, 2018 appellant contested the fact and amount of the overpayment. She also requested waiver of recovery of the overpayment. Appellant asserted that the salary calculation of \$61,393.14 for August 2017 through August 2018 was correct.

In a letter dated April 23, 2018, OWCP noted that appellant had not selected an appeal option on the overpayment action request form and asked that she do so. On May 22, 2018 appellant requested a prerecoument hearing on the issues of fact, amount, and waiver with OWCP's Branch of Hearings and Review. She also provided a completed overpayment recovery questionnaire (Form OWCP-20) dated May 15, 2018. Appellant listed her income as \$2,058.00 in social security benefits and \$500.00 in guest house rental, totaling \$2,558.00. She did not report FECA benefits or earnings. Appellant asserted that she supported two minor granddaughters. She listed her monthly expenses as \$3,174.86 for housing, \$400.00 for food, \$200.00 for clothing, \$1,250.00 for utilities, and \$675.00 for miscellaneous expenses. Appellant also reported a monthly car payment of \$179.86 and monthly credit card payments of \$750.00 for total monthly expenses of \$6,629.72. She indicated that her checking account balance was \$1,500.00 and that she had \$9,050.00 in savings for total funds of \$10,550.00.

On May 24, 2018 appellant returned to full-duty work.³

In an August 16, 2018 letter, an OWCP hearing representative advised appellant that a telephonic prerecoument hearing was scheduled for October 4, 2018 at 12:00 p.m. Eastern Standard Time.⁴ The hearing notice included a toll-free number and pass code to enable access to the telephonic hearing. The hearing notice was mailed to appellant's Newhall, California, address. In a separate letter of the same date and to the same address, OWCP's hearing representative requested that appellant complete an overpayment recovery questionnaire (Form OWCP-20).

By decision dated October 16, 2018, an OWCP hearing representative found that appellant had abandoned her oral prerecoument hearing scheduled for October 4, 2018. She had afforded appellant notice 30 days prior to the scheduled hearing, which she failed to attend. There was no indication in the file that appellant contacted the Branch of Hearings and Review either prior to or subsequent to the scheduled hearing to explain her failure to appear. She further issued a final decision determining that appellant had received an overpayment of wage-loss compensation in the amount of \$3,761.38 for the period November 11, 2017 through March 3, 2018 due to the employing establishment's error in calculating her yearly salary, and that she was not at fault in the creation of this overpayment. OWCP's hearing representative denied waiver of recovery as

³ Fiscal worksheets of record indicate that OWCP terminated appellant's compensation.

⁴ As appellant resided in the Pacific Standard Time zone, OWCP advised her to make certain that her local time was adjusted accordingly.

appellant had not submitted financial documentation in support of her completed Form OWCP-20. She further noted that appellant's assets of \$10,550.00 exceeded the resource base required to be eligible for waiver such that recovery would not defeat the purpose of FECA. The hearing representative determined that the \$3,761.38 overpayment of compensation was due and payable in full.

LEGAL PRECEDENT -- ISSUE 1

A claimant dissatisfied with a decision on his or her claim is entitled, upon timely request, to a hearing before an OWCP representative.⁵ Unless otherwise directed in writing by the claimant, the hearing representative will mail a notice of the time, place, and method of the oral hearing to the claimant and to any representative at least 30 days before the scheduled hearing date.⁶

A hearing before OWCP's Branch of Hearings and Review can be considered abandoned only under very limited circumstances.⁷ With respect to abandonment of hearing requests, Chapter 2.1601(g) of OWCP's procedures⁸ and section 10.622(f) of its regulations⁹ provide in relevant part that failure of the claimant to appear at the scheduled hearing, failure to request a postponement, and failure to request in writing within 10 days after the date set for the hearing that another hearing be scheduled shall constitute abandonment of the request for a hearing. Under these circumstances, the Branch of Hearings and Review will issue a formal decision finding that the claimant has abandoned his or her request for a hearing and return the case to the district office.¹⁰

ANALYSIS -- ISSUE 1

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

OWCP's Branch of Hearings and Review received appellant's March 27, 2018 request for an oral hearing. In a letter dated May 22, 2018, OWCP's hearing representative provided appellant 30 days written notice of the hearing, which was scheduled for October 4, 2018 at 12:00 p.m. Eastern Standard Time. OWCP mailed the May 22, 2018 notice of hearing to appellant's last known address, and it was not returned as undeliverable. Absent evidence to the contrary, a notice mailed in the ordinary course of business is presumed to have been received by the intended

⁵ 5 U.S.C. § 8124(b).

⁶ 20 C.F.R. § 10.617(b).

⁷ *C.Y.*, Docket No. 18-0263 (issued September 14, 2018); *Claudia J. Whitten*, 52 ECAB 483 (2001).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6(g) (October 2011).

⁹ 20 C.F.R. § 10.622(f).

¹⁰ *Id.*

recipient.¹¹ The presumption is commonly referred to as the “mailbox rule.”¹² It arises when the record reflects that the notice was properly addressed and duly mailed.¹³ The current record is devoid of evidence to rebut the presumption that appellant received the Branch of Hearings and Review’s May 22, 2018 notice of hearing.

The hearing notice was properly addressed to appellant’s last known address.¹⁴ Appellant did not call-in as instructed for the October 4, 2018 scheduled telephonic hearing and there is no indication that she requested postponement of same.¹⁵ Moreover, she did not submit a written request within the 10 days after the date set for the hearing and request that another hearing be scheduled. Under the circumstances, OWCP’s hearing representative properly found that appellant abandoned her hearing request.¹⁶

LEGAL PRECEDENT -- ISSUE 2

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.¹⁷ 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.”¹⁸

An employee is paid compensation for total disability equal to a percentage of his or her monthly pay.¹⁹ To calculate monthly pay, the initial issue is the determination of the specific time when the employee’s monthly pay will be calculated. Under 5 U.S.C. § 8101(4), the monthly pay is determined at the time of injury, the time disability begins, or the time compensable disability recurs, if the recurrence begins more than six months after a return to regular full-time employment.²⁰

¹¹ C.Y., Docket No. 18-0263 (issued September 14, 2018); *Kenneth E. Harris*, 54 ECAB 502, 505 (2003).

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*; *K.F.*, Docket No. 17-1035 (issued August 24, 2017).

¹⁵ 20 C.F.R. § 10.622(c).

¹⁶ C.Y., *supra* note 11; *M.V.*, Docket No. 17-1795 (issued March 1, 2018).

¹⁷ 5 U.S.C. § 8102(a).

¹⁸ *Id.* at § 8129(a).

¹⁹ *Supra* note 17 at § 8106(a).

²⁰ 5 U.S.C. § 8101(4).

Once the proper time period is determined, the pay rate is determined under 5 U.S.C. § 8114(d). This section provides a specific methodology for determining pay rate:

“(1) If the employee worked in the employment in which he was employed at the time of his injury during substantially the whole year immediately preceding the injury and the employment was in a position for which an annual rate of pay--”

* * *

“(B) was not fixed, the average annual earnings are the product obtained by multiplying his daily wage for the particular employment, or the average thereof if the daily wage has fluctuated, by 300 if he 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.”²¹

Section 8114(e) of FECA provides that the pay does not include overtime pay.²²

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$3,761.38 for the period November 11, 2017 through March 3, 2018 because she received compensation based on a weekly pay rate of \$1,180.64 rather than the proper weekly pay rate of \$831.13.²³ Beginning November 11, 2017 OWCP paid appellant compensation for total disability using the weekly pay rate of \$1,180.64 per week, based on the November 30, 2017 letter from the employing establishment which listed her yearly income as \$61,393.14. However, the employing establishment corrected appellant’s annual pay rate on February 1, 2018 to \$43,218.73 noting that the prior annual pay rate of \$61,393.14 improperly included appellant’s earned overtime pay. Therefore, OWCP correctly determined that the compensation appellant received from November 11, 2017 to March 3, 2018 should have been based on the weekly pay rate of \$831.13 as that pay rate did not include overtime pay.²⁴

The Board further notes that the record contains evidence which shows that, given the above-noted payments at an improper pay rate, appellant received \$12,705.93 in compensation for the period November 11, 2017 through March 3, 2018 based on a reported yearly salary of \$61,393.14, when she was only entitled to receive \$8,944.55, based on her yearly salary of

²¹ See also Federal (FECA) Procedure Manual, Part 2-- Claims, *Determining Pay Rates*, Chapter 2.900.4.a.(4) (March 2011) noting that the pay rate of a rural carrier associate or part-time flexible employee of the Postal Service who works substantially the entire year prior to injury would be computed under section 8114(d)(1)(B) of FECA because an annual rate of pay can be established by obtaining the yearly earnings, without overtime, for the year prior to the injury.).

²² 5 U.S.C. § 8114(e)(1).

²³ *P.J.*, Docket No. 18-0248 (issued August 14, 2018).

²⁴ *Supra* note 22.

\$43,218.73. Therefore, OWCP properly determined that she received a \$3,761.38 overpayment of compensation.

LEGAL PRECEDENT -- ISSUE 3

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.²⁵ 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."²⁶ 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.²⁷ 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 \$50.00.²⁸

OWCP's procedures in effect at the time of the October 16, 2018 decision provide that the assets must not exceed a resource base of \$6,200.00 for an individual or \$10,300.00 for an individual with a spouse or dependent plus \$1,200.00 for each additional dependent.²⁹ An individual's liquid assets include, but are not limited to cash, the value of stocks, bonds, saving accounts, mutual funds, and certificate of deposits. Liquid assets include, but are not limited to, the fair market value of an owner's equity in property such as a camper, boat, second home, and furnishings/supplies.³⁰

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

²⁵ See *P.J.*, *supra* note 23; *Robert Atchison*, 41 ECAB 83, 87 (1989).

²⁶ 5 U.S.C. § 8129(b).

²⁷ 20 C.F.R. § 10.436. See Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Final Overpayment Determinations*, Chapter 6.400.4.a.(2) (September 2018); *P.J.*, *supra* note 17; *B.F.*, Docket No. 13-0785 (issued September 20, 2013).

²⁸ *M.A.*, Docket No. 18-1666 (issued April 26, 2019); *id.* at Chapter 6.400.4.a(3).

²⁹ *Supra* note 27 at Chapter 6.400.4.a(2).

³⁰ *Id.* at Chapter 6.400.4.b(3).

or her position for the worse.³¹ 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.³²

The individual who received the overpayment is responsible for providing information about income, expenses, and assets as specified by OWCP. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of FECA, or be against equity and good conscience. This information will also be used to determine the repayment schedule, if necessary.³³

ANALYSIS -- ISSUE 3

Appellant has not established that recovery of the overpayment would defeat the purpose of FECA because her assets exceed the allowable resource base of \$6,200.00 for an individual, as provided in OWCP's procedures. Her overpayment recovery questionnaire (Form OWCP-20) established that she currently had assets of \$10,550.00. Because appellant has not met the second prong of the two-prong test of whether recovery of the overpayment would defeat the purpose of FECA, it is not necessary to consider the first prong of the test *i.e.*, whether her monthly income exceeded her monthly ordinary and necessary expenses by more than \$50.00.³⁴ She did not establish that she was entitled to waiver on the basis of defeating the purpose of FECA.³⁵

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.³⁶

Because appellant has not established that recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience, the Board finds that she has not shown that OWCP abused its discretion by denying waiver of recovery of the overpayment.³⁷

³¹ 20 C.F.R. § 10.437(a), (b).

³² *Id.* at § 10.437(b)(1).

³³ *Id.* at § 10.438.

³⁴ *Supra* note 27 at Chapter 6.400.4.a.

³⁵ *M.A.*, *supra* note 28; *A.C.*, Docket No. 18-1550 (issued February 21, 2019).

³⁶ *See P.J.*, *supra* note 23; *William J. Murphy*, 41 ECAB 569, 571-72 (1989).

³⁷ *Supra* note 35.

CONCLUSION

The Board finds that OWCP properly determined that appellant abandoned her request for a prerecoupment hearing before an OWCP hearing representative. The Board also finds that appellant received an overpayment of compensation in the amount of \$3,761.38 for the period November 11, 2017 through March 3, 2018, for which she was without fault, and that OWCP did not abuse its discretion by refusing to waive recovery of the overpayment.³⁸

ORDER

IT IS HEREBY ORDERED THAT the October 16, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 26, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

³⁸ With respect to recovery of the overpayment of compensation, the Board notes that appellant returned to full-duty work on May 24, 2018. The Board's jurisdiction is limited to reviewing those cases where OWCP seeks recovery from continuing compensation benefits under FECA. As appellant was 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. *See R.E.*, Docket No. 17-1625 (issued July 18, 2018).