

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

C.G., Appellant	)	
	)	
and	)	<b>Docket No. 18-1655</b>
	)	<b>Issued: June 14, 2019</b>
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Tampa, FL, Employer	)	
	)	

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
CHRISTOPHER J. GODFREY, Chief Judge  
ALEC J. KOROMILAS, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On August 30, 2018 appellant filed a timely appeal from an August 20, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>2</sup>

**ISSUES**

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$8,152.66 for the period April 6, 2017 through

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> The Board notes that, following the August 20, 2018 decision, OWCP and the Board received additional evidence. 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.*

April 28, 2018, for which appellant was without fault; (2) whether OWCP properly denied waiver of recovery of the overpayment; and (3) whether OWCP properly required recovery of the overpayment by deducting \$100.00 every 28 days from appellant's continuing compensation payments.

### **FACTUAL HISTORY**

On February 4, 2017 appellant, then a 54-year-old postal support employee mail processing clerk, filed a traumatic injury claim (Form CA-1) alleging that on that day she was hit on the head by a shelf cage door while in the performance of duty. OWCP accepted the claim for cervical sprain and herniated nucleus pulposus at C5-6 with radiculopathy. Appellant stopped work on February 4, 2017 and returned to light-duty work, four hours a day on June 14, 2017. On August 1, 2017 she suffered a heart attack and underwent open heart surgery on August 3, 2017. Appellant returned to light-duty work, four hours a day on November 11, 2017. She subsequently stopped work at a later date. Effective April 29, 2018, appellant received compensation on OWCP's periodic compensation rolls.

Based on pay rate information submitted from the employing establishment, OWCP paid appellant total disability for the period April 6 to June 13, 2017 and partial disability from June 14, 2017 to April 28, 2018 with a reported date-of-injury weekly pay rate of \$910.31.<sup>3</sup>

In letters dated February 23 and March 22, 2018, the employing establishment reported a discrepancy with the date-of-injury weekly pay rate and indicated that the correct date-of-injury weekly pay rate was \$676.84.<sup>4</sup> This was comprised of a base pay rate of \$656.80 plus \$20.04 for night differential.

On April 30, 2018 OWCP advised appellant that she had been retained on the periodic compensation rolls effective April 29, 2018. It adjusted her periodic rolls compensation payments effective April 29, 2018 based on the corrected date-of-injury weekly pay rate of \$676.84.

On June 21, 2018 OWCP advised appellant of its preliminary determination that she had received an overpayment of wage-loss compensation in the amount of \$8,152.66 because it paid her at an inaccurate pay rate for the period April 5, 2017 to April 28, 2018. It calculated the overpayment by subtracting the amount it should have paid her using the proper weekly pay rate of \$676.84 from the date of injury from the amount it paid her using the incorrect weekly pay rate of \$910.31 from the date of injury. OWCP found that for the period April 6, 2017 to April 28, 2018 it paid her \$21,049.24 using the incorrect weekly pay rate of \$910.31 when it should have paid her \$13,821.64 based on the correct weekly pay rate of \$676.84. It noted that this amounted to an overpayment of \$7,227.60. OWCP further notified appellant of its preliminary determination that she was without fault in creation of the overpayment of compensation. It requested that she

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<sup>3</sup> This was based on a similar PSE-MPC, Level 6, Step A, working the same base work schedule, at the same facility, earning \$16.42 per hour, and working 40 hours per week plus an average of 34 hours night differential per week, for one year prior to the February 4, 2017 date of injury.

<sup>4</sup> This calculation was also based on a similar PSE-MPC employee, Level 6, Step A, working the same base schedule, at the same facility, earning \$16.42 an hour, 40 hours a week plus 17.5 hours night differential.

complete an enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documents. Additionally, OWCP notified appellant that, within 30 days of the date of the letter, she could request a telephone conference, a final decision based on the written evidence, or a precoupment hearing.

Included in the record were copies of OWCP's manual adjustment forms for the period April 6, 2017 through April 28, 2018 and copies of appellant's wage-earning capacity calculations. Overpayments for the following periods were calculated as: for the period April 6 to June 13, 2017, \$1,534.23; for the period June 14 to July 21, 2017, \$925.06; for the period August 5 to 24, 2017, \$420.20; and for the period September 2, 2017 to April 28, 2018, \$5,273.17, for a total overpayment amount of \$8,152.66.

On July 18, 2018 appellant disagreed that she had received an overpayment of compensation and requested a telephonic conference with OWCP on the issue of waiver. She also submitted a completed Overpayment Recovery Questionnaire (Form OWCP-20) and provided detailed financial documentation.

On August 16, 2018 a telephonic conference was held on the overpayment of compensation. In a memorandum of conference, the claims examiner noted that the overpayment in the amount of \$8,152.66 for the period April 6, 2017 through April 28, 2018 was calculated as follows: for the period April 6 to June 13, 2017, \$1,534.23; for the period June 14 to July 21, 2017, \$925.06; for the period August 5 to 24, 2017, \$420.20; and for the period September 2, 2017 to April 28, 2018, \$5,273.17. The claims examiner found appellant's total monthly income was \$2,405.93 (\$1,845.00 income plus \$560.03 adult children's income) and total monthly expenditures were \$1,990.65. Appellant advised that her monthly mortgage of \$2,089.02 was paid by her sister as she could not afford the monthly payment. She further indicated that she has a personal loan from her sister and paid only when she could. The claims examiner explained that appellant's mortgage could not be considered as a monthly expense as it was being paid by someone else. As appellant's monthly income was greater than her monthly expenses by \$415.28, the claims examiner advised that waiver of recovery of the overpayment could not be granted. Both parties agreed to repayment of \$100.00 from her continuing compensation. A copy of the memorandum of conference was sent to appellant.

By decision dated August 20, 2018, OWCP finalized the preliminary determination that appellant received an overpayment of compensation in the amount of \$8,152.55 for the period April 5, 2017 through April 28, 2018 as she was paid at an incorrect pay rate. The claims examiner further found that appellant was without fault in the creation of the overpayment, but denied waiver of recovery of the overpayment based upon the finding that appellant's monthly income was more than her monthly expenses by \$415.28 and that she had not provided information to support a finding that the adjustment of recovery would either defeat the purpose of FECA or be against equity and good conscience. OWCP directed recovery of the overpayment by deducting \$100.00 every 28 days from continuing compensation payments until the overpayment was absorbed.

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

Section 8102 of FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the

performance of duty.<sup>5</sup> 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.<sup>6</sup>

Section 8129(a) of FECA provides that when an overpayment of compensation has been made to an individual 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 the individual is entitled.<sup>7</sup>

If the claimant is entitled to compensation for partial wage loss after return to work, the claims examiner should compute entitlement using the *Shadrick* formula and authorize compensation on a 28-day payment cycle.<sup>8</sup>

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

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

OWCP found that appellant received an overpayment of compensation because she received wage-loss compensation at an inaccurate pay rate for the period April 5, 2017 through April 28, 2018. It paid her wage-loss compensation beginning April 5, 2017 using a date-of-injury weekly pay rate of \$910.31. The employing establishment indicated that the correct date-of-injury weekly pay rate should have been \$676.84. As appellant received compensation based on the incorrect date-of-injury weekly pay rate for the period April 5, 2017 through April 28, 2018, she received an overpayment of compensation.<sup>9</sup> The Board therefore finds that appellant received an overpayment of compensation.

However, the Board further finds that the case is not in posture for decision with regard to the amount of the overpayment. In its June 21, 2018 preliminary overpayment determination, OWCP found an overpayment of compensation in the amount of \$8,152.66, for which appellant was without fault, because it had used an incorrect weekly pay rate of \$910.31. It noted that for the period April 6, 2017 to April 28, 2018 appellant received \$21,049.24 based on an incorrect weekly pay rate of \$910.31 instead of using the correct weekly pay rate of \$676.84 which should have resulted in a payment of \$13,821.64. When subtracting \$13,821.64 from \$21,049.24 during the period in question, this results in a \$7,227.60 overpayment, which OWCP found on page 5 of its memorandum to file incorporated into the June 21, 2018 preliminary overpayment determination. However, it reemphasized in that same memorandum that the overpayment amount for the period in question was \$8,152.66. Similarly, in its memorandum of conference on August 16, 2018, OWCP found an overpayment of compensation in the amount of \$8,152.66 and

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<sup>5</sup> 5 U.S.C. § 8102(a).

<sup>6</sup> *Id.* at § 8101(4).

<sup>7</sup> *Id.* at § 8129(a).

<sup>8</sup> *See N.C.*, Docket No. 18-1070 (issued January 9, 2019); *C.Y.*, Docket No. 18-0263 (issued September 14, 2018).

<sup>9</sup> *See id.*; *E.E.*, Docket No. 14-1908 (issued April 22, 2015).

finalized this amount in its August 20, 2018 decision. It did not mention the amount of \$7,227.60 again and provided no further explanation concerning that amount. Due to these inconsistencies, the Board is unable to adequately review this aspect of the case. A claimant is entitled to an overpayment decision that clearly explains how the amount was calculated.<sup>10</sup> The Board finds that the overpayment decision in this case does not provide such an explanation. Therefore, the amount of overpayment has not been established.

On remand OWCP shall determine the exact amount of overpayment in compensation which occurred when it paid appellant at an inaccurate pay rate for the period April 5, 2017 to April 28, 2018. It should then issue a new preliminary overpayment determination, with an appropriate overpayment action request form, an overpayment recovery questionnaire, and instructions for her to provide supporting financial information. After OWCP has further developed the case record, a *de novo* decision shall be issued.<sup>11</sup>

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<sup>10</sup> See *A.J.*, Docket No. 18-1152 (issued April 1, 2019); *J.W.*, Docket No. 15-1163 (issued January 13, 2016); see also *O.R.*, 59 ECAB 432 (2008) with respect to overpayment decisions, OWCP must provide clear reasoning showing how the overpayment was calculated); see *Jenny M. Drost*, 56 ECAB 587 (2005) (to comply with OWCP's overpayment procedures, an overpayment decision must contain a clearly written explanation indicating how the overpayment was calculated).

<sup>11</sup> As the case is not in posture for decision regarding the amount of overpayment, the issues of waiver and recovery are moot. See *S.F.*, Docket No. 18-0003 (issued April 19, 2018); see also *R.L.*, Docket No. 11-1251 (issued January 27, 2012).

**CONCLUSION**

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

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 20, 2018 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part and the case is remanded for further proceedings consistent with this opinion.

Issued: June 14, 2019  
Washington, DC

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

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

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