

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

S.P., Appellant)	
)	
and)	Docket No. 19-1318
)	Issued: July 31, 2020
U.S. POSTAL SERVICE, POST OFFICE,)	
Columbus, MS, Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 26, 2019 appellant filed a timely appeal from an April 26, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP).¹ 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.³

¹ The Board notes that the record also contains an April 29, 2019 decision denying wage-loss compensation for the period September 1 through 24, 2015. By decision dated January 11, 2019, OWCP had denied her claim for compensation for this period. On February 10, 2019 appellant requested reconsideration. By decision dated April 29, 2019, OWCP denied modification of its prior decision. Appellant did not file an appeal of the April 29, 2019 decision with the Board, and the record contains further development on that decision, including that on November 12, 2019 she requested reconsideration with OWCP from that decision.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that following the April 26, 2019 decision, OWCP 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.*

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$1,232.03 for the period September 28 through November 24, 2015 because the pay rate used to determine her compensation was calculated incorrectly, for which she was without fault; and (2) whether OWCP properly denied waiver of recovery of the overpayment.

FACTUAL HISTORY

On February 4, 2016 appellant, then a 45-year-old lead sales and service associate, filed a traumatic injury claim (Form CA-1) alleging that on May 13, 2015 she injured her lower back when lifting an armload of flats from a tub on the floor while in the performance of duty. She stopped work on September 9, 2015, and returned to full-duty work without restrictions on February 25, 2016. On August 9, 2018 OWCP accepted the claim for herniated intervertebral disc at L5-S1. In a separate decision of even date, it denied continuation of pay, as appellant had not reported the injury on a form approved by OWCP within 30 days following the injury.

On September 5, 2018 appellant filed a claim for compensation (Form CA-7) for intermittent leave without pay (LWOP) for the period September 1, 2015 through February 24, 2016. In attached documentation, S.C., an employing establishment human resources specialist, indicated that appellant worked a fixed 40-hour per week schedule Monday through Friday, and that at the time she stopped work on September 1, 2015, her base pay was \$57,987.00 per year with additional holiday pay of \$27.88 per hour. Time analysis forms (Form CA-7a) showed the number of hours of leave claimed by appellant for this period. S.C. noted that appellant had been paid eight hours for the Thanksgiving holiday on November 26, 2015, and noted other unpaid holidays during the claimed time period.

In a pay rate memorandum dated November 5, 2018, OWCP calculated appellant's pay rate for compensation purposes. It noted that her annual salary was \$57,987.00 and, by dividing that figure by 52, her calculated base weekly rate was \$1,115.13. In an automated compensation payment system (ACPS) note of even date, for the period September 28 through November 24, 2015, OWCP issued a gross payment on the supplemental role for \$7,391.80, based on a weekly pay rate of \$1,338.17.

By letter dated November 30, 2018, appellant indicated that there was incorrect information on a compensation check for the period September 28 to November 24, 2018. On January 2, 2019 she forwarded OWCP an e-mail that she had sent S.C. that day. Appellant indicated that, for the period September 28 through November 24, 2015, she had been paid at a rate of \$1,338.17, but her correct weekly pay was \$1,115.13. In an e-mail dated January 3, 2019, S.C. indicated that she had included holiday premium pay of \$27.88 on appellant's Form CA-7 to advise OWCP that she had received pay from the employing establishment for the holidays while in an LWOP status. She explained that she did so in order that OWCP would not pay her again and found it unclear why OWCP included this in computing appellant's wage-loss compensation.

In a manual adjustment form dated March 14, 2019, a claims examiner calculated that appellant had been overpaid in the amount of \$1,232.03 for the period September 28 through November 24, 2015.

By letter dated March 15, 2019, OWCP informed appellant that her pay rate for compensation purposes was established on November 5, 2015, based on her pay rate on September 28, 2015, the beginning date of temporary total disability. It noted that the pay rate provided by the employing establishment was \$57,987.00 annually with some holiday pay that yielded a weekly pay rate of \$1,338.17, but that, based on additional information it had received, this weekly pay rate was incorrect. OWCP then recalculated appellant's weekly pay rate without a holiday premium which yielded a weekly pay rate of \$1,115.13. It indicated that payments for November 25, 2015 and for the period November 27, 2015 through February 24, 2016 were paid at the correct pay rate. However, the payment for the period September 28 through November 24, 2015 was paid at the incorrect pay rate of \$1,338.17 weekly, which had resulted in an overpayment of compensation.

On March 15, 2019 OWCP issued a preliminary determination, finding that an overpayment of compensation in the amount of \$1,232.03 had been created because the pay rate used to determine appellant's compensation for the period September 28 through November 24, 2015 was calculated incorrectly. It found that she was without fault in the creation of the overpayment. OWCP explained its calculation of the overpayment.⁴ It forwarded an overpayment action request and an overpayment recovery questionnaire (Form OWCP-20) for appellant's completion. OWCP explained that she was to attach supporting financial documentation including income tax returns, bank account statements, bills and cancelled checks, pay slips, and any other records. It advised appellant that it would deny waiver of recovery if she failed to furnish the requested financial information and it afforded her 30 days to submit the requested information.

In a correspondence dated March 19, 2019, appellant maintained that OWCP had miscalculated her overpayment. She indicated that it should have calculated her overpayment on 42 workdays and not 58 calendar days and thus, the overpayment of compensation should have been \$1,147.07. No additional evidence was received.

By decision dated April 26, 2019, OWCP finalized the preliminary determination that appellant received an overpayment of compensation in the amount of \$1,232.03 for the period September 28 through November 24, 2015 because she was paid FECA compensation based on an incorrect pay rate. It found that appellant was without fault in the creation of the overpayment, but denied waiver of recovery because she had not submitted the evidence requested in the March 15, 2019 preliminary determination.

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

⁴ OWCP multiplied her correct and incorrect base pay rates of \$1,338.71 and \$1,115.13 respectively by 2/3, which resulting in weekly compensation rates of \$892.11 and \$743.45. It divided each of those rates by seven days to determine a daily compensation rate of \$127.44 and \$106.20, respectively, and then multiplied each by the 58 days of disability (from September 28 through November 24, 2015) for a total compensation of \$7,391.80 under the incorrect pay rate, which it had paid, and \$6,159.77, the correct pay rate it should have paid. OWCP determined the difference between the incorrect compensation paid and the correct compensation, and determined that an overpayment of compensation in the amount of \$1,232.03 had been created.

performance of duty.⁵ Section 8129(a) 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.”⁶ Section 8116 limits the right of an employee to receive compensation. While an employee is receiving compensation, he or she may not receive salary, pay, or remuneration of any type from the United States.⁷

Once the proper time period is determined, section 8114(d)(1)(A) provides a specific methodology for determining pay rate:

“(d) Average annual earnings are determined as follows:

(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--,

(A) was fixed, the average annual earnings are the annual rate of pay.”⁸

OWCP’s procedures provide that, if the employee did not stop work on the date of injury or immediately afterwards, defined as the next day, the record should indicate the pay rate for the date of injury and the date disability began. The greater of the two should be used in computing compensation and if they are the same, the pay rate should be effective on the date disability began.⁹ In computing the weekly pay rate for an employee who receives an annual salary, including postal workers, the annual salary is divided by 52.¹⁰ The procedures further indicate that administrative inclusions should be included in computing an employee’s pay rate, including night differential, shift differential, holiday pay, and premium pay for weekend work.¹¹

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$1,232.03 for the period September 28 through November 24, 2015, because the pay rate used to determine her compensation was calculated incorrectly, for which she was without fault.

⁵ 5 U.S.C. § 8102(a).

⁶ *Id.* at § 8129(a).

⁷ *Id.* at § 8116(a); *see G.H.*, Docket No. 19-0770 (issued March 5, 2020); *Danny E. Haley*, 56 ECAB 393 (2005).

⁸ 5 U.S.C. § 8114(d)(1)(A).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.5a(3) (September 2011).

¹⁰ *Id.* at Chapter 2.900.10a (March 2011).

¹¹ *Id.* at Chapter 2.900.6b (March 2011).

Herein, OWCP initially paid appellant total disability compensation for the period September 28 through November 24, 2015 using a weekly pay rate of \$1,338.71, which included premium holiday pay. However, on January 2, 2019, appellant forwarded OWCP an e-mail she had sent S.C. that day in which she indicated that her weekly pay rate was incorrect. She also forwarded an e-mail dated January 3, 2019 in which S.C. indicated that she had included holiday premium pay of \$27.88 on appellant's Form CA-7 to advise OWCP that it had paid her for the holidays while she was in LWOP status. Appellant explained that she did this so that OWCP would not pay her again and indicated that she found it unclear why OWCP included this in computing appellant's wage-loss compensation.

As noted, while an employee is receiving FECA compensation, he or she may not receive salary, pay or remuneration of any type from the United States.¹² As such, because the employing establishment had paid appellant for holidays during the period September 28 through November 24, 2015, when OWCP recalculated appellant's pay rate for compensation purposes, it properly excluded her premium holiday pay and recalculated her weekly compensation rate in determining the amount of overpayment for this period. The Board further finds that, as provided in its procedures, OWCP properly calculated the amount of the overpayment. It properly determined appellant's weekly pay by dividing her annual salary of \$57,987.00 by 52 to reach a weekly salary of \$1,115.13. OWCP correctly determined a daily amount by utilizing 7 calendar days which it multiplied by 58 days, the period of the overpayment, to find an overpayment of compensation in the amount of \$1,232.03.¹³ As appellant received compensation based on the incorrect rate of pay that included holiday premium pay when she had already received holiday pay from the employing establishment, she received an overpayment of compensation for the period September 28 through November 24, 2015.¹⁴

The record demonstrates that appellant's FECA compensation was based on an incorrect pay rate for the period September 28 through November 24, 2015 as OWCP paid her \$7,391.80 in gross compensation when she was only entitled to \$6,159.77. The Board therefore finds that OWCP properly determined that she received an overpayment of compensation in the amount of \$1,232.03.¹⁵

On appeal appellant alleges that she should be paid by workdays, not calendar days, and therefore the amount of the overpayment was incorrect. As explained above, OWCP correctly determined the amount of the overpayment of compensation.

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA provides that an overpayment of compensation shall be recovered by OWCP unless incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of FECA or would be against equity and good

¹² *Supra* note 9.

¹³ *See L.D.*, Docket No. 19-0320 (issued July 26, 2019).

¹⁴ *Id.*

¹⁵ *Id.*

conscience.¹⁶ Section 10.438 of OWCP's regulations provides that 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. Failure to submit the requested information within 30 days of the request shall result in denial of waiver.¹⁷

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied waiver of recovery of the overpayment of compensation.

As OWCP found appellant not at fault in the creation of the overpayment, waiver of recovery of the overpayment must be considered, and repayment is still required unless adjustment or recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience. Appellant, however, had the responsibility to provide financial information to OWCP,¹⁸ and she did not do so.

In its preliminary determination dated March 14, 2019, OWCP requested that appellant provide a completed Form OWCP-20 and supporting financial documentation, including copies of income tax returns, bank account statements, bills, pay slips, and any other records. It advised her that it would deny waiver of recovery if she failed to furnish the requested financial information within 30 days. Appellant maintained that the amount of the overpayment was incorrect, but did not provide the requested Form OWCP-20 or submit the financial information necessary for OWCP to determine if recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.

As appellant did not submit the information required under 20 C.F.R. § 10.438 of OWCP's regulations, which was necessary to determine her eligibility for waiver, OWCP properly denied waiver of recovery of the overpayment.

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$1,232.03 for the period September 28 through November 24, 2015, because the pay rate used to determine her compensation was calculated incorrectly, for which she was without fault. The Board further finds that OWCP properly denied waiver of recovery of the overpayment.

¹⁶ 5 U.S.C. § 8129.

¹⁷ 20 C.F.R. § 10.438; *see D.M.*, Docket No. 19-1369 (issued June 30, 2020).

¹⁸ *Id.* at § 10.438; *P.W.*, Docket No. 19-1984 (issued June 11, 2020).

ORDER

IT IS HEREBY ORDERED THAT the April 26, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 31, 2020
Washington, DC

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

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

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