

(3) whether OWCP properly denied waiver of recovery of the overpayment; and (4) whether it properly required recovery of the overpayment by deducting \$706.00 every 28 days from appellant's continuing compensation payments.

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances as set forth in the Board's prior decision and orders are incorporated herein by reference. The relevant facts are as follows.

On September 13, 1983 appellant, then a 36-year-old editor, filed an occupational disease claim (Form CA-2) alleging that she sustained allergic contact dermatitis causally related to factors of her federal employment. OWCP accepted the claim for allergic contact dermatitis and resolved vaginitis.

Appellant lost intermittent time from work beginning July 19, 1983. She stopped work on January 10, 1986 and utilized sick leave and annual leave until March 14, 1986. OWCP placed appellant on the periodic rolls on March 20, 1986 using a recurrent pay rate date of October 13, 1985.⁴ Appellant returned to modified work as a clerk on March 16, 1987, but stopped work on March 20, 1987. OWCP paid her wage-loss compensation beginning March 20, 1987 using a recurrent pay rate date of October 13, 1985.

By decision dated October 12, 1987, OWCP reduced appellant's wage-loss compensation, effective March 16, 1987, based on its finding that her actual earnings as a clerk fairly and reasonably represented her wage-earning capacity.⁵

By decision dated February 11, 1999, OWCP found that appellant was not entitled to compensation at a higher pay rate due to a promotion that others in her position had received after she stopped work due to disability. It noted that she had lost intermittent time from work from July 19, 1983 until April 13, 1986, when it paid her wage-loss compensation on the periodic rolls. OWCP indicated that appellant resumed work on March 16, 1987 in a limited-duty position as a

³ *Order Dismissing Appeal*, Docket No. 88-0561 (issued April 19, 1988); *Order Dismissing Appeal*, Docket No. 01-1710 (issued November 29, 2001); *Order Remanding Case*, Docket No. 03-0318 (issued June 4, 2004); Docket No. 05-0536 (issued October 24, 2006), *petition for recon. denied*, Docket No. 05-0536 (issued April 17, 2007).

⁴ On February 21, 1986 OWCP found that appellant was entitled to 78 hours of leave buy back for intermittent time lost from work for the period June 19, 1983 to January 9, 1984 using July 15, 1983, the date of injury, as the pay rate. It determined that she was entitled to leave buy back for intermittent time lost from work for the period February 7 to April 13, 1984 using a recurrent pay rate date of February 7, 1984, from August 22 to September 9, 1985 using a recurrent pay rate date of January 1985, and from October 23 to November 11, 1985 using a recurrent pay rate date of October 1985.

⁵ By decision dated October 13, 1987, OWCP denied appellant's claim for disability compensation after March 20, 1987. Appellant appealed to the Board. By order dated April 19, 1988, the Board dismissed her appeal in response to the Director's motion to dismiss. *Supra* note 3. By decisions dated August 30, 1988 and February 13, 1989, OWCP denied modification of its October 13, 1987 decision. By decision dated June 28, 1989, it vacated its October 13, 1987 decision and reinstated wage-loss compensation retroactive to March 20, 1987.

secretary, but had stopped work on March 20, 1987 and received wage-loss compensation due to her recurrence of disability.⁶

By decision dated January 8, 2002, OWCP denied appellant's request for leave buy back for 377 hours of leave used from January 18, 1983 to March 5, 1986. It further determined that appellant was not entitled to an increased pay rate or interest on back pay. OWCP additionally found that the medical evidence was insufficient to show that she sustained a cinnamic alcohol allergy causally related to her employment.

By decision dated September 9, 2002, an OWCP hearing representative affirmed the January 8, 2002 decision. Appellant appealed to the Board. By order dated June 4, 2004, the Board remanded the case for reconstruction of the case record followed by an appropriate decision to protect her appeal rights.⁷

By decision dated November 24, 2004, OWCP reissued the September 9, 2002 decision.

Appellant appealed to the Board. By decision dated October 24, 2006, the Board affirmed in part and set aside in part the November 24, 2004 decision.⁸ The Board found that appellant was not entitled to additional compensation for intermittent time off work from July 18, 1983 to March 14, 1986 or interest on retroactive compensation. The Board further determined that the case was not in posture for decision regarding whether her allergic reaction to cinnamic alcohol was causally related to her employment. Regarding the pay rate issue, the Board noted that OWCP had paid appellant wage-loss compensation beginning March 20, 1986 using a recurrent pay rate date of October 13, 1985. The Board advised that once an employee had sustained a recurrence of total disability meeting the requirements of 5 U.S.C. § 8101(4), any subsequent recurrence of disability would also meet such requirements and would entitle the employee to a new recurrent pay rate. The Board indicated that appellant would be entitled to receive compensation based on her pay rate at the time of her March 20, 1987 recurrence of disability and remanded the case for OWCP to recalculate her pay rate for compensation purposes.

OWCP continued to pay appellant wage-loss compensation using an effective pay rate date of October 13, 1985.

On August 14, 2018 OWCP advised appellant of its preliminary determination that she had received a \$3,562.97 overpayment of compensation because her spouse died on January 26, 2017, but she continued to receive wage-loss compensation at the augmented rate (75 percent) through November 11, 2017. It further advised her of its preliminary determination that she was at fault in the creation of the overpayment. OWCP requested that appellant complete the enclosed

⁶ By decision dated August 5, 1999, an OWCP hearing representative affirmed the February 11, 1999 decision. By decision dated May 4, 2001, OWCP denied appellant's request for reconsideration of the August 5, 1999 decision as it was untimely filed and failed to demonstrate clear evidence of error. Appellant appealed to the Board. By decision dated November 29, 2001, the Board dismissed her appeal of the May 4, 2001 decision in response to the Director's motion to dismiss as all of the evidence was not contained in the case record. *Supra* note 3.

⁷ *Supra* note 3.

⁸ *Id.*

overpayment recovery questionnaire and submit supporting financial documents. Additionally, it notified her 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 preresoupment hearing.

Thereafter, appellant submitted a February 28, 2017 letter to OWCP advising of her husband's death. She maintained that her wage-loss compensation should have been based on her salary in April 1986 rather than July 1983. Appellant indicated that she was submitting copies of personnel actions and earnings and leave statements from January 4 through March 29, 1986.

In a letter dated August 21, 2018, appellant maintained that she had informed OWCP in correspondence dated February 28, 2017 of her husband's passing. She asserted that it had incorrectly found that her pay rate date was October 13, 1985 as she had not stopped work until January 13, 1986. Appellant advised that she ultimately stopped work on March 13, 1987 at a higher pay rate. She submitted a notification of personnel action (SF-50) indicating her pay rate effective March 16, 1987.

In a September 5, 2018 overpayment action request form, appellant requested a decision based on the written evidence. She contended that she was entitled to waiver of recovery of the overpayment as she had notified OWCP on February 28, 2017 of the change in her dependent status. Appellant further asserted that she had not received the appropriate compensation for step increases that she had received before stopping work.

On September 12, 2018 appellant provided earnings and leave statements dated March 15, 1986 and maintained that she was entitled to a pay rate based on her work stoppage in 1986. A notification of personnel action (SF-50) indicated that she had received a within-grade increase effective August 3, 1986, and that she had been in a nonpay status beginning January 13, 1986.

By decision dated November 26, 2018, OWCP found that appellant had received an overpayment of compensation in the amount of \$3,562.97 because it paid her wage-loss compensation from January 27 through November 11, 2017 at an augmented rate when she had no dependents. It determined that she was not at fault in the creation of the overpayment as she had provided proof that she had advised OWCP on March 1, 2017 of her husband's death on January 26, 2017. OWCP denied waiver of recovery of the overpayment of compensation based on its finding that appellant's income exceeded her expenses by more than the allowed amount. It found that she had requested leave buy back in 1985, and that consequently the appropriate pay rate date was October 13, 1985. OWCP noted that appellant subsequently had returned to work as a secretary and received compensation based on a loss of wage-earning capacity beginning March 16, 1987.

LEGAL PRECEDENT -- ISSUE 1

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."⁹ Section 8101(4) of

⁹ 5 U.S.C. § 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).

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....”¹⁰ 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.”¹¹

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 recurrent pay rate.¹²

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 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.¹³

ANALYSIS -- ISSUE 1

The Board finds that the case is not in posture for decision regarding whether OWCP properly determined appellant’s pay rate for compensation purposes.

On prior appeal, by decision dated October 24, 2006, the Board instructed OWCP to recalculate appellant’s pay rate for compensation purposes. The Board noted that OWCP had paid her wage-loss compensation beginning March 20, 1986 using a recurrent pay rate date of October 13, 1985. The Board advised that after an employee had sustained a recurrence of total disability meeting the requirements of 5 U.S.C. § 8101(4), any subsequent recurrence of disability would also meet such requirements and entitle the employee to a new recurrent pay rate. The Board thus remanded the case for OWCP to recalculate appellant’s pay rate for compensation purposes. OWCP, however, failed to take any further action in developing appellant’s pay rate for compensation purposes as instructed by the Board.

In its November 26, 2018 decision, OWCP found that appellant was entitled to a pay rate date of October 13, 1985 based on her request for leave buy back in 1985. As discussed, however, an employee is entitled to compensation at a recurrent pay rate if he/she resumed regular full-time

¹⁰ *Id.* at § 8101(4).

¹¹ 20 C.F.R. § 10.5(f).

¹² *See G.L.*, Docket No. 16-0744, n.8 (issued September 16, 2016); *Carolyn E. Sellers*, 50 ECAB 393 (1999).

¹³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, 2.900.5a (6) (September 2011).

employment with the United States for six months after returning to full-time work.¹⁴ The case will, therefore, be remanded to OWCP for further development to determine appellant's pay rate for compensation purposes. On remand, OWCP should obtain information from the employing establishment regarding whether she resumed her regular full-time employment for six months following her injury and the dates of any subsequent recurrences of disability. After such further development as deemed necessary, it shall issue a *de novo* decision.

In view of the Board's disposition of the pay rate issue, it is premature to address the issues of whether appellant received an overpayment of wage-loss compensation, whether OWCP properly denied waiver of recovery of the overpayment, and whether it properly determined the rate of recovery.

CONCLUSION

The Board finds that the case is not in posture for decision regarding whether OWCP properly determined appellant's pay rate for compensation purposes.

ORDER

IT IS HEREBY ORDERED THAT the November 26, 2018 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.

Issued: January 9, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

¹⁴ *Supra* note 12; *see also* N.C., Docket No. 16-0441 (issued October 21, 2016).