

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

G.H., Appellant	)	
	)	
and	)	<b>Docket No. 19-0770</b>
	)	<b>Issued: March 5, 2020</b>
DEPARTMENT OF HOMELAND SECURITY,	)	
U.S. CUSTOMS & BORDER PATROL,	)	
Sonoita, AZ, Employer	)	
	)	

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
CHRISTOPHER J. GODFREY, Deputy Chief Judge  
JANICE B. ASKIN, Judge  
PATRICIA H. FITZGERALD, Alternate Judge

**JURISDICTION**

On February 22, 2019 appellant filed a timely appeal from a September 28, 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 \$2,896.81 for the period June 13, 2016 to October 2, 2017, for which he was not at fault; (2) whether it properly denied waiver of recovery

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

<sup>2</sup> The Board notes that, following the September 28, 2018 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 evidence for the first time on appeal. *Id.*

of the overpayment; and (3) whether OWCP properly required recovery of the overpayment by deducting \$200.00 every 28 days from appellant's continuing compensation payments.

### **FACTUAL HISTORY**

On January 27, 2016 appellant, then a 35-year-old patrol agent, filed a traumatic injury claim (Form CA-1) alleging that on January 26, 2016 he injured his ankles, knees, and left elbow in the performance of duty. He explained that an unstable rock shifted and caused his ankles to roll, and he fell forward and landed on his knees and left elbow. Appellant stopped work on January 27, 2017. On March 26, 2016 OWCP accepted appellant's claim for cervical region radiculopathy, left elbow contusion, sprain of an unspecified ligament of the right ankle, and strain of an unspecified muscle, fascia, and tendon in the left shoulder and upper left arm. Acceptance of his claim was later expanded to include left ulnar nerve lesion. Appellant received wage-loss compensation on the supplemental rolls as of June 13, 2016. He returned to part-time light-duty work on July 19, 2016. OWCP paid appellant wage-loss compensation based upon his loss of wage-earning capacity as of February 12, 2017.

In August 8, 2016 CA-110 notes, OWCP indicated that, as of June 13, 2016, appellant's annual base pay was \$80,593.00.

An October 14, 2016 OWCP memorandum indicated that it updated appellant's pay rate information by listing appellant's pay for the year prior to his date of injury of January 26, 2016. OWCP listed appellant's base pay as \$80,593.00, night differential as \$2,097.50, Sunday premium pay as \$2,691.81, holiday pay as \$2,569.28 and administratively uncontrollable overtime (AUO) as \$5,589.36. The AUO was reflected as Integrated Federal Employees' Compensation System (iFECS) weekly rate of \$107.49. OWCP noted that, as appellant was a level 1 border patrol agent, his base salary was multiplied by 25 percent, equaling \$100,741.25. It calculated the weekly payment amount of appellant's base pay multiplied by 25 percent, night differential, Sunday premium pay, holiday pay, and AUO. It then added these totals, and multiplied by the augmented compensation rate to calculate the weekly pay rate of \$2,186.33

On an October 17, 2016 supplemental rolls payment worksheet, OWCP calculated the difference between what it had already paid in wage-loss compensation benefits between June 13 and August 17, 2016, when it used appellant's base pay rate of \$80,593.00 in its calculations, and the amount it would have paid appellant had it used \$100,741.25 as appellant's adjusted base salary. On that date OWCP issued a compensation payment to correct its identified underpayment. November 1, 2016 Form CA-110 notes reflect that the employing establishment related that level 1 and level 2 border agents were paid 8 hours of holiday pay/leave and that, as appellant was level 1 agent, he worked 10 hours a day, which included 8 hours of regular pay and 2 hours of overtime pay.

In a January 25, 2018 letter, OWCP informed appellant that it made a preliminary determination that he received an overpayment of compensation in the amount of \$2,896.81 for the period June 13, 2016 to October 2, 2017 because it included premium pay as calculated under the Border Patrol Agent Pay Reform Act (BPAPRA) of 2014, but also included AUO in his payments. It calculated the overpayment by subtracting appellant's weekly AUO of \$107.49 from appellant's weekly pay rate of \$2,186.33 to find his correct weekly pay rate of \$2,078.84. OWCP recalculated appellant's total wage-loss compensation from the period June 13, 2016 to October 2,

2017 using the corrected weekly pay rate and then subtracted that number from the total wage-loss compensation appellant had received for that period. It found that appellant was not at fault in the creation of the overpayment because he was not aware nor could he have reasonably been expected to know that OWCP paid the compensation incorrectly. Additionally, OWCP informed appellant that within 30 days he could request a telephone conference, a final decision based on the written evidence, or a prerecoupment hearing. It requested that appellant complete an enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documentation.

On February 21, 2018 appellant requested a telephone conference with OWCP. He noted that he contested the overpayment because he disagreed that it occurred. Appellant explained that the information relayed to OWCP about his earnings was accurate, and the letter he received from OWCP indicated that the overpayment was not his fault. He requested waiver of recovery of the overpayment.

An accompanying February 20, 2018 OWCP-20 indicated that appellant's total monthly income was \$4,600.00, with one dependent. Appellant's total monthly expenses were noted as \$4,050.00 and he listed \$1,600.00 in assets. He explained that he was without fault in the creation of his overpayment because he was not involved in calculating his wage-loss compensation, and that he was under the impression that he was being paid the correct amount.

By decision dated September 28, 2018, OWCP finalized the overpayment of compensation in the amount of \$2,896.81 for the period June 13, 2016 to October 2, 2017. It determined that appellant was not at fault in the creation of the overpayment, but denied waiver of recovery of the overpayment based on the financial information provided. OWCP required recovery of the overpayment through monthly payments of \$200.00.

### **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>3</sup> 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."<sup>4</sup>

The 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>5</sup>

In computing pay rate, section 8114(e) provides for the inclusion of certain premium pay received and, where the evidence indicates additional amounts received in Sunday premium or night differential pay fluctuated or may have fluctuated, OWCP determines the amount of

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<sup>3</sup> 5 U.S.C. § 8102(a).

<sup>4</sup> *Id.* at 8129(a).

<sup>5</sup> *Id.* at § 8101(4).

additional pay received during the one-year period prior to injury.<sup>6</sup> Section 8114(e)(1) provides that, in computing an employee's monthly pay for compensation purposes, overtime pay is not included.<sup>7</sup> OWCP has administratively determined that, while premium pay for AUO under 5 U.S.C. § 5545(c)(2), is not included in pay rate calculations, AUO pay is replaced by the availability of the supplement of 25 percent of basic pay for criminal investigators pursuant to 5 U.S.C. § 5545.<sup>8</sup>

The relevant part of section 5545(c)(2) provides:

“The head of an agency, with the approval of the [Office of Personnel Management (OPM)] may provide that -- an employee in a position in which the hours of duty cannot be controlled administratively, and which requires substantial amounts of irregular, unscheduled, overtime duty with the employee generally being responsible for recognizing, without supervision, circumstances which require the employee to remain on duty, shall receive premium pay for this duty on an annual basis instead of premium pay provided by other provisions of this subchapter, except for regularly scheduled overtime, night, and Sunday duty, and for holiday duty. Premium pay under this paragraph is an appropriate percentage, not less than 10 percent nor more than 25 percent, of the rate of basic pay for the position, as determined by taking into consideration the frequency and duration of irregular, unscheduled overtime duty required in the position.”<sup>9</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 in the amount of \$2,869.81 for the period June 13, 2016 to October 2, 2017 because it incorrectly included his AUO pay of \$5,589.36, a weekly FECA rate of \$107.49 in calculating appellant's pay rate. It has administratively determined that premium pay for AUO under 5 U.S.C. § 5545(c)(2), is not to be included in pay rate calculations for criminal investigators who receive the 25 percent premium pay adjustment to their basic pay rate.<sup>10</sup>

OWCP has not properly explained how multiplying the number of weeks during the period June 13, 2016 through October 2, 2017 by \$107.49 results in the amount of \$2,869.81. The Board notes that the calculation of appellant's overpayment should also explain how appellant's receipt

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<sup>6</sup> 5 U.S.C. § 8114(e); *Lottie M. Williams*, 56 ECAB 302 (2005).

<sup>7</sup> *Id.* at § 8114(e)(1); *L.C.*, Docket No. 19-0310 (issued July 26, 2019); *Calvin E. King*, 51 ECAB 394 (2000).

<sup>8</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.6(b)(7) (March 2011).

<sup>9</sup> 5 U.S.C. § 5545(c)(2); *see also* FECA Program Memorandum No. 106 (issued October 30, 1969) (provides for inclusion of premium pay in pay rate for compensation purposes under section 5545(c)(2)); FECA Bulletin No. 89-26 (September 29, 1989) (by administrative determination, pursuant to section 5545(c)(2), OWCP includes premium pay for AUO in computing compensation).

<sup>10</sup> *Supra* note 8.

of compensation based on his loss of wage-earning capacity during the period in question impacts the overpayment calculation.

A claimant is entitled to an overpayment decision that clearly explains how the amount was calculated.<sup>11</sup> As OWCP has not provided a clear explanation of its calculations, the Board finds that OWCP has not established the amount of the overpayment in question. Therefore, the case will be remanded to OWCP for such further development as deemed necessary to be followed by a *de novo* decision regarding the overpayment.<sup>12</sup>

### **CONCLUSION**

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

### **ORDER**

**IT IS HEREBY ORDERED THAT** the September 28, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion.

Issued: March 5, 2020  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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

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<sup>11</sup> *E.R.*, Docket No. 19-1365 (issued December 23, 2019); *see M.M.*, Docket No. 17-0560 (issued August 23, 2017); *R.H.*, Docket No. 08-2025 (issued July 20, 2009); *see also O.R.*, 59 ECAB 432 (2008).

<sup>12</sup> In light of the Board's disposition of the first issue, the issues of waiver and recovery of overpayment are rendered moot.