

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

F.L., Appellant)	
)	
and)	Docket No. 20-0724
)	Issued: November 18, 2020
U.S.POSTAL SERVICE, JACKSONVILLE)	
PROCESSING & DISTRIBUTION CENTER,)	
Jacksonville, FL, 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 13, 2020 appellant filed a timely appeal from an August 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 to consider the merits of this case.³

¹ The Board notes that appellant timely requested oral argument pursuant to section 501.5(b) of the Board's *Rules of Procedure*. 20 C.F.R. § 501.5(b). Given the disposition of the case, appellant's request for oral argument is denied.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the August 26, 2019 decision, OWCP received additional evidence. Appellant also submitted new 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.*

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$48,251.64 because he received schedule award compensation at an incorrect pay rate for the period November 27, 2012 to January 24, 2014; (2) whether it properly found that appellant was at fault in creation of the overpayment, thereby precluding waiver of recovery of the overpayment; and (3) whether OWCP properly required recovery of the overpayment by deducting \$1,132.00 from appellant's continuing compensation payments every 28 days.

FACTUAL HISTORY

On November 3, 2010 appellant, then a 53-year-old electronic technician, filed an occupational disease claim (Form CA-2) alleging that he had aggravated conditions previously accepted under File No. xxxxxx718 due to factors of his federal employment including pulling, pushing, and strenuous movements. OWCP accepted that appellant sustained an aggravation of primary osteoarthritis of both knees, and cervical, thoracic, and lumbar sprains.

On October 18, 2012 appellant filed a claim for a schedule award (Form CA-7). On November 27, 2012 OWCP obtained a second opinion report by Dr. Michael Shawn Smith, a Board-certified physiatrist, who opined that appellant had attained maximum medical improvement (MMI). Following additional development, it determined that appellant had sustained 4 percent permanent impairment of the right lower extremity and 17 percent permanent impairment of the left lower extremity. The period of the schedule award equated to 423.36 days or 60.48 weeks of compensation.

In development of the schedule award claim, OWCP also requested information from the employing establishment regarding appellant's pay rate as of November 27, 2012, the date of Dr. Smith's second opinion report. In a March 27, 2013 telephone memorandum (Form CA-110), it notified appellant that it had contacted the employing establishment to obtain his pay rate information.

In a March 27, 2013 Form CA-110, OWCP noted that the employing establishment indicated that, as of November 27, 2012, appellant's hourly base pay rate was \$61.30, with a Sunday premium pay rate of \$76.63 for eight hours. In a March 28, 2013 e-mail, the employing establishment noted that appellant also received \$2.03 an hour as night differential compensation for all hours from 6:00 p.m. to 11:30 p.m., which was also added to the Sunday premium pay amount.

In April 4, 2013 schedule award payment worksheets, OWCP calculated that, based on a weekly pay rate of \$2,584.46 at the 75 percent compensation rate for a claimant with a spouse, appellant would be paid a schedule award at the rate of \$1,938.35 per week.

By decision dated April 9, 2013, OWCP granted appellant a schedule award for 4 percent permanent impairment of the right lower extremity and 17 percent permanent impairment of the left lower extremity. The period of the award ran from November 27, 2012 to January 24, 2014.

OWCP issued an initial payment of \$34,958.84 for the period November 27, 2012 to April 6, 2013, and \$7,472.12 for the period April 7 to May 4, 2013.

Appellant retired from federal employment, effective December 31, 2014.

In a file memorandum dated July 16, 2019,⁴ OWCP noted that, as of November 27, 2012, the date appellant attained MMI, appellant's annual salary was \$64,580.00, equal to \$1,241.92 a week. Appellant also received night differential for 32.5 hours a week equaling \$64.03, and 16 hours of Sunday pay equaling \$119.58 a week.

In a July 18, 2019 manual adjustment form, OWCP noted that appellant had been paid \$113,011.43 for the period November 27, 2012 to January 24, 2014 whereas he was entitled to only \$64,759.79, a difference of \$48,251.64.

In a July 18, 2019 schedule award payment memorandum superseding the prior memorandum, OWCP noted that, according to July 16, 2019 information from the employing establishment, appellant's November 27, 2012 base pay rate was \$1,241.92 a week. Appellant also received \$64.03 in night differential and \$119.58 Sunday premium pay, for a total weekly salary of \$1,425.53.

On July 18, 2019 OWCP issued a preliminary determination that appellant was overpaid compensation in the amount of \$47,475.92 for the period November 27, 2012 to January 24, 2014 because he was overpaid for his schedule award. It explained that he received \$47,475.92 in error during the stated period because the award had been calculated at an incorrect pay rate. OWCP found that appellant was without fault as he "could not have reasonably known that an improper payment occurred due to an inaccurate pay rate." It informed him that, in calculating the schedule award decision dated April 9, 2013, it used an incorrect pay rate of \$61.30 an hour, equaling \$2,452.00 a week or \$127,504.00 per year. Appellant also received \$55.82 a week in night differential and \$76.63 Sunday premium pay. However, the correct weekly pay rate was \$1,241.92 a week or \$64,580.00 a year, with \$64.03 a week in night differential pay and \$119.58 Sunday pay. OWCP paid appellant \$113,011.00 in schedule award compensation for the period November 27, 2012 to January 24, 2014, whereas the correct entitlement was \$64,759.00, a difference of \$48,251.64.

On July 19, 2019 OWCP noted corrections superseding its July 18, 2019 preliminary determination, and issued a modified preliminary determination that appellant was overpaid compensation in the amount of \$48,251.64 for the period November 27, 2012 to January 24, 2014. It clarified the preliminary determination to find him with fault in the creation of the overpayment as he failed to provide material information and accepted a payment that he knew, or reasonably should have known, to be incorrect. OWCP requested that appellant submit a completed overpayment recovery questionnaire (Form OWCP-20) to determine a reasonable payment method and advised that he could request waiver of recovery of the overpayment. It further requested that

⁴ OWCP had prepared the July 16, 2019 memorandum pursuant to appellant's February 26, 2019 claim for an increased schedule award. (Form CA-7). By decision dated August 7, 2019, it granted appellant an increased schedule award for 46 percent permanent impairment of the right lower extremity. The August 7, 2019 schedule award decision is not considered in the present appeal.

he provide supporting financial documentation, including copies of income tax returns, bank account statements, bills, pay slips, and any other records to support income and expenses. OWCP further notified appellant that, within 30 days of the date of the letter, he could request a telephone conference, a final decision based on the written evidence, or a prerecoument hearing. Appellant did not complete the questionnaire or provide financial information.

In an August 1, 2019 worksheet, the employing establishment noted that, as of November 27, 2012, appellant was a Grade 11, Step P, “maintenance worker” earning \$64,580.00 a year. The employing establishment indicated that appellant received \$2.03 in night differential, \$62.10 Sunday premium pay, and \$238.38 holiday premium pay for unspecified periods.

By decision dated August 26, 2019, OWCP determined that appellant had received an overpayment of compensation in the amount of \$48,251.64 because he received schedule award compensation at an incorrect pay rate for the period November 27, 2012 to January 24, 2014. It further found that he was at fault in creation of the overpayment as he knew or should have known the payments were based on an incorrect pay rate and was therefore not eligible for waiver of recovery of the overpayment. The hearing representative required recovery of the overpayment by determining that the sum of \$1,132.00 would be withheld from appellant’s continuing compensation payments every 28 days.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provisions of FECA⁵ and its implementing regulations⁶ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members or functions of the body. Section 20 C.F.R. § 10.404 states that compensation is provided for specified periods of time for the permanent loss or loss of use of certain members.⁷

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.⁸ 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.”⁹

⁵ *Supra* note 2.

⁶ 20 C.F.R. § 10.404.

⁷ *Id.* Effective May 1, 2009, OWCP began using the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009). See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (March 2017); *id.* at Chapter 3.700, Exhibit 1 (January 2010).

⁸ 5 U.S.C. § 8102(a).

⁹ *Id.* at § 8129(a).

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.¹⁰

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 additional pay received during the one-year period prior to injury.¹¹

ANALYSIS -- ISSUE 1

The Board finds that OWCP has not met its burden of proof to establish that appellant received an overpayment of schedule award compensation due to an incorrect pay rate for the period November 27, 2012 to January 24, 2014.

The Board finds that there is conflicting evidence contained in the case record as submitted to the Board as to the appropriate pay rate, and the calculation of night differential, Sunday pay, and holiday premium pay.

OWCP based its schedule award calculation on March 27 and 28, 2013 e-mails in which the employing establishment indicated that, as of November 27, 2012, appellant earned \$2,584.46 a week, with a base salary of \$61.30 an hour for 32 hours a week, \$76.63 an hour for eight hours a week Sunday premium pay, and an additional \$2.03 an hour night differential for unspecified periods. Subsequently, in its July 16, 2019 memoranda, it determined that, as of November 27, 2012, appellant earned only \$1,241.92 a week, with 32.5 hours of night differential, and 16 hours Sunday premium pay. Additionally, in an August 1, 2019 worksheet, the employing establishment indicated that, as of November 27, 2012, appellant earned \$64,580.00 a year, or \$1,241.92 a week, \$62.10 in Sunday premium pay, and \$238.38 in holiday premium pay, a pay category not previously addressed in the case record. The Board finds that despite this conflicting evidence in the case record, the record was not further developed by OWCP and thus it is not presently possible to determine appellant's actual weekly compensation rate as the record does not contain pay stubs, statements of earnings and leave, or similar records verifying any of the three sets of calculations. There is no explanation as to how or why OWCP determined appellant's actual earnings for schedule award compensation purposes. As the Board is unable to determine the appropriate weekly compensation rate based on the present record, it is not possible to determine that appellant actually received an overpayment of schedule award compensation benefits.

A claimant is entitled to an overpayment decision that clearly explains how the amount was calculated.¹² OWCP's overpayment finding does not set forth an explanation as to why one calculation was correct and the other two calculations were incorrect, nor did it cite to the actual

¹⁰ *Id.* at § 8101(4).

¹¹ 5 U.S.C. § 8114(e); *G.H.*, Docket No. 19-0770 (issued March 5, 2020); *Lottie M. Williams*, 56 ECAB 302 (2005).

¹² *G.H.*, *id.*; *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).

wage-earning records relied upon as a basis for the proper calculation. As there are significant discrepancies between the three sets of pay calculations of record, the Board finds that OWCP has not met its burden of proof to establish the fact of overpayment.¹³

CONCLUSION

The Board finds that OWCP has not met its burden of proof to establish that appellant received an overpayment of schedule award compensation due to an incorrect pay rate for the period November 27, 2012 to January 24, 2014.

ORDER

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

Issued: November 18, 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

¹³ In light of the Board's disposition of the first issue, Issues 2 and Issue 3 are rendered moot.