

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

---

**S.H., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Bellmawr, NJ, Employer**

---

)  
)  
)  
)  
)  
)  
)  
)  
)  
)  
)  
)

**Docket No. 20-1585  
Issued: August 4, 2021**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
JANICE B. ASKIN, Judge  
PATRICIA H. FITZGERALD, Alternate Judge

**JURISDICTION**

On September 8, 2020 appellant filed a timely appeal from a March 13, 2020 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 \$55,286.21, for which she was without fault, for the period June 19, 2012 through July 20, 2019, because the pay rate used to determine her

---

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

<sup>2</sup> The Board notes that appellant submitted additional evidence to OWCP following the March 13, 2020 decision. 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.*

compensation was calculated incorrectly; (2) whether OWCP properly denied waiver of recovery of the overpayment; and (3) whether OWCP properly required recovery of the overpayment by deducting \$891.40 from appellant's continuing compensation payments.

### **FACTUAL HISTORY**

On March 22, 2012 appellant, then a 49-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that, earlier that day, she sustained a right upper extremity injury when a high-speed tray sorter bar struck her right hand as she cleared a jam while in the performance of duty. She stopped work on March 22, 2012 and returned to work on April 2, 2012. On April 11, 2012 OWCP accepted the claim for right hand contusion.

On June 18, 2012 appellant accepted a part-time modified position as a mail handler, working three hours a day with restrictions. On June 29, 2012 she filed a claim for compensation (Form CA-7) for intermittent leave without pay from June 18 through 28, 2012, with night differential. On the reverse side of the claim form, the employing establishment noted that on March 22, 2012 appellant's pay rate as a Grade 5, Step J was \$52,080.00 a year, with \$50.03 a day in night differential pay, and \$55.50 a week in Sunday premium pay. Appellant filed additional claims for compensation for intermittent disability through July 27, 2012.

In an August 1, 2012 pay rate memorandum, based on information from the employing establishment, OWCP calculated that appellant's annual base salary as of March 22, 2012 was \$52,028.00 or \$1,000.54 per week, with an additional \$55.50 per week in Sunday premium pay, and \$250.15 per week in night differential pay.

OWCP paid appellant wage-loss compensation on the supplemental rolls commencing June 19, 2012, based on a weekly pay rate of \$1,306.19 and placed her on the periodic rolls, effective June 28, 2015.

On November 9, 2015 appellant returned to full-time modified-duty work as a sales solution team member, with annual earnings of \$56,257.00. OWCP paid her wage-loss compensation for lost Sunday premium and night differential pay on the supplemental rolls. It returned appellant to the periodic rolls, effective November 12, 2017 as there was no work available within her restrictions.

In July 22, 2019 memoranda, OWCP noted that the employing establishment clarified that appellant's date-of-injury base pay rate was \$1,000.54 per week, with Sunday premium pay of \$50.03 per week and night differential of \$55.50 per week, to equal \$1,106.07 per week. Appellant's current pay rate was \$55,221.00 per year or \$1,061.94 per week, with combined night differential and premium pay of \$112.00 per week, to equal \$1,173.95 per week. OWCP calculated that her actual weekly wage-earning capacity was \$56,605.00 a year or \$1,088.55 a week.

In a January 9, 2020 overpayment memorandum, OWCP noted that it identified a potential overpayment in appellant's case as she had been paid compensation for the period June 19, 2012 through July 20, 2019 based on night differential pay of \$55.50 per day instead of \$55.50 per week, and Sunday premium pay at \$55.50 per week instead of \$50.03 per week. It calculated that, from

June 19, 2012 through July 20, 2019, she had been paid \$299,109.41 in wage-loss compensation, but was entitled to only \$243,823.20, a difference of \$55,286.21.

On January 10, 2020 OWCP issued a preliminary determination, finding that an overpayment of compensation in the amount of \$55,286.21 had been created because the pay rate used to determine appellant's compensation for the period June 19, 2012 through July 20, 2019 was calculated incorrectly. It had included night differential pay of \$55.50 per day instead of \$55.50 per week, and calculated Sunday premium pay at \$55.50 per week instead of \$50.03 per week. OWCP found that appellant was without fault in creation of the overpayment. It forwarded an overpayment recovery questionnaire (Form OWCP-20) for her completion. OWCP explained that appellant 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 her that it would deny waiver of recovery if she failed to furnish the requested financial information. 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.

In response, appellant submitted a completed Form OWCP-20 signed on February 8, 2020. She contended that recovery of the overpayment would cause significant financial hardship. Appellant listed total monthly household income of \$12,288.00, which included \$3,565.00 in wage-loss compensation benefits. She listed assets of \$9,958.00 in cash and bank accounts. Appellant noted expenses of \$2,778.00 a month for mortgage payments and homeowner's insurance, \$525.00 for food, \$763.00 for clothing, and \$1,350.00 in miscellaneous expenses. She also listed monthly debt repayments of \$1,328.00 on a home equity line of credit, and \$1,106.00 in other debt repayment for a total of \$7,850.00 in living expenses. Appellant submitted detailed financial documentation of the listed income, assets, and expenses.

By decision dated March 13, 2020, OWCP finalized the preliminary determination that appellant received an overpayment of compensation in the amount of \$55,286.21, for the period June 19, 2012 through July 20, 2019, because she was paid FECA wage-loss compensation based on an incorrect pay rate. It found her without fault in the creation of the overpayment, but denied waiver of recovery based on its consideration of the financial evidence submitted. OWCP found that appellant had established monthly income of \$12,288.00 and monthly expenses of \$7,850.00, resulting in monthly net income greater than \$50.00. It required recovery of the overpayment by deducting \$891.40 every 28 days from her continuing compensation payments.

### **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

---

<sup>3</sup> 5 U.S.C. § 8102(a).

to which an individual is entitled.”<sup>4</sup> 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.<sup>5</sup>

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.”<sup>6</sup>

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.<sup>7</sup> In computing the weekly pay rate for an employee who receives an annual salary, including postal workers, the annual salary is divided by 52.<sup>8</sup> 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.<sup>9</sup>

### ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$55,286.21, for which she was without fault, for the period June 19, 2012 through July 20, 2019, because the pay rate used to determine her wage-loss compensation was calculated incorrectly.

OWCP paid appellant compensation for the period July 19, 2012 through July 20, 2019 based on a weekly pay rate of \$1,000.54 per week, with night differential pay of \$55.50 a day and Sunday premium pay of \$55.50 per week. In a January 9, 2020 memorandum, it explained that it

---

<sup>4</sup> *Id.* at § 8129(a).

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

<sup>6</sup> *Id.* at § 8114(d)(1)(A).

<sup>7</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.5a(3) (September 2011).

<sup>8</sup> *Id.* at Chapter 2.900.10a (March 2011).

<sup>9</sup> *Id.* at Chapter 2.900.6b (March 2011).

had erred by paying her compensation based of night differential premium pay of \$55.50 per day when she was entitled to only \$55.50 per week, and Sunday premium pay of \$55.50 per week whereas the correct amount was \$50.03 per week. OWCP calculated that appellant had been paid \$299,109.41 in compensation for the period at issue, but was entitled to only \$243,823.20. OWCP, therefore, properly determined fact of overpayment.

The Board further finds that OWCP properly calculated the amount of the overpayment. OWCP properly determined appellant's weekly pay rate by dividing her annual base pay of \$52,028.00 by 52 to reach a weekly salary of \$1,000.54.<sup>10</sup> As appellant received compensation based on an incorrect rate of Sunday premium and night differential pay, she received an overpayment of compensation for the period June 19, 2012 through July 20, 2019 in the amount of \$55,286.21.<sup>11</sup>

### **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 conscience.<sup>12</sup> 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.<sup>13</sup>

### **ANALYSIS -- ISSUE 2**

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

As OWCP found appellant without fault in the creation of the overpayment, waiver 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.<sup>14</sup>

Appellant has not established that recovery of the overpayment would defeat the purpose of FECA because she has not shown that she needs substantially all of her current income to meet ordinary and necessary living expenses. As her monthly household income of \$12,288.00 exceeds her monthly expenses of \$7,850.00 by more than \$50.00, in this case, \$ 4,438.00, she has not shown that she needs substantially all of her current income to meet current ordinary and necessary

---

<sup>10</sup> See *S.P.*, Docket No. 19-1318 (issued July 31, 2020); *L.D.*, Docket No. 19-0320 (issued July 26, 2019).

<sup>11</sup> *Id.*

<sup>12</sup> 5 U.S.C. § 8129.

<sup>13</sup> 20 C.F.R. § 10.438; see *D.M.*, Docket No. 19-1369 (issued June 30, 2020).

<sup>14</sup> *L.S.*, 59 ECAB 350 (2008).

living expenses.<sup>15</sup> Because appellant has not met the first prong of the two-prong test of whether recovery of the overpayment would defeat the purpose of FECA, it is unnecessary for OWCP to consider the second prong of the test based on her assets.

Appellant also has not established that recovery of the overpayment would be against equity and good conscience because she has not shown, for the reasons noted above, that she would experience severe financial hardship in attempting to repay the debt or that she relinquished a valuable right or changed her position for the worse in reliance on the payment which created the overpayment.<sup>16</sup>

Because appellant has not established that recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience, the Board finds that OWCP properly denied waiver of recovery of the \$55,286.21 overpayment.

### **LEGAL PRECEDENT -- ISSUE 3**

The Board's jurisdiction over recovery of an overpayment is limited to reviewing those cases where OWCP seeks recovery from continuing compensation under FECA.<sup>17</sup>

Section 10.441(a) of OWCP's regulations<sup>18</sup> provides in pertinent part:

When an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to OWCP the amount of the overpayment as soon as the error is discovered or his or her attention is called to same. If no refund is made, OWCP shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual, and any other relevant factors, so as to minimize any hardship.<sup>19</sup>

### **ANALYSIS -- ISSUE 3**

The Board finds this case is not in posture for decision regarding recovery of the overpayment.

OWCP found that appellant had total monthly income of \$12,288.00 and expenses of \$7,850.00, and that her monthly income exceeded her expenses by more than \$50.00. Its regulations provide that the overpaid individual is responsible for providing information about

---

<sup>15</sup> 20 C.F.R. § 10.437(a), (b).

<sup>16</sup> *Id.*

<sup>17</sup> 20 C.F.R. § 10.441; *see M.P.*, Docket No. 18-0902 (issued October 16, 2018).

<sup>18</sup> *Id.* at § 10.441(a).

<sup>19</sup> *P.L.*, Docket No. 20-0709 (issued March 18, 2021); *J.K.*, Docket No. 20-1190 (issued January 8, 2021); *see C.M.*, Docket No. 19-1451 (issued March 4, 2020).

income, expenses, and assets as specified by OWCP.<sup>20</sup> When an individual fails to provide requested financial information, OWCP should follow minimum collection guidelines designed to collect the debt promptly and in full.<sup>21</sup> The Federal (FECA) Procedure Manual provides that, in these instances, OWCP should set the rate of repayment at 25 percent of the 28-day net compensation amount until the balance of the overpayment is paid in full.<sup>22</sup>

In this case, appellant responded to the preliminary overpayment determination and submitted detailed financial information and supporting documentation for OWCP's consideration. OWCP, however, erroneously applied a rate of repayment at 25 percent of the net 28-day compensation, ordering that \$891.40 be deducted from her continuing compensation every 28 days. It should have applied the appropriate standard for when the requested financial information is received in response to the preliminary overpayment determination.<sup>23</sup>

The case will, therefore, be remanded to OWCP for further consideration of the rate of recovery of the \$55,286.21 overpayment from appellant's continuing compensation benefits to be followed by a *de novo* decision.

### **CONCLUSION**

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$55,286.21, for which she was without fault, for the period June 19, 2012 through July 20, 2019, because the pay rate used to determine her compensation was calculated incorrectly. The Board also finds that OWCP properly denied waiver of recovery of the overpayment of compensation. The Board further finds that this case is not in posture for decision regarding recovery of the overpayment.

---

<sup>20</sup> 20 C.F.R. § 10.438. *See also A.F.*, Docket No. 19-0054 (issued June 12, 2019).

<sup>21</sup> *See A.S.*, Docket No. 19-0171 (issued June 12, 2019); *Frederick Arters*, 53 ECAB 397 (2002).

<sup>22</sup> *Supra* note 8 at Chapter 6.500.8(c)(1) (September 2018); *D.H.*, Docket No. 20-1064 (issued December 14, 2020).

<sup>23</sup> *Supra* note 8 at Chapter 6.500.8(c)(2) (September 2018); *see also P.L.*, *supra* note 19.

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 13, 2020 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: August 4, 2021  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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