



## **FACTUAL HISTORY**

On February 23, 2016 appellant, then a 48-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that she developed severe osteoarthritis in her left hip that was caused or aggravated by her repetitive work duties, including lifting up to 35 pounds, walking and climbing stairs, bending, twisting, and stooping. She noted that she first became aware of her condition on May 17, 2014 and realized its relationship to her federal employment on September 27, 2015. On April 18, 2017 appellant underwent left total hip arthroplasty. OWCP, on October 24, 2018, accepted permanent aggravation of left hip arthritis.

Appellant subsequently filed claims for compensation (Form CA-7) for disability from work.

In a June 25, 2019 memorandum, OWCP indicated that appellant was paid compensation at the weekly rate of \$1,238.71, effective December 29, 2018, for the period of compensation as May 4 through 31, 2019 at the annual rate of \$64,413.00, weekly rate of \$1,238.71.

On August 12, 2019 appellant returned to part-time, limited-duty work, two hours per day. OWCP paid her wage-loss compensation for the period August 12 through 17, 2019 and August 19 through September 13, 2019 at the weekly rate of \$1,238.71, effective December 29, 2018.

OWCP, by decision dated August 16, 2019, denied appellant's claim for compensation for disability from work during the period July 9, 2016 through December 28, 2018. It found that the medical evidence of record was insufficient to establish that she was totally disabled from work during the claimed period as a result of her accepted condition.

On August 14, 2020 appellant requested reconsideration.

In a memorandum dated October 20, 2020, OWCP found that appellant's date of last exposure to accepted work factors was July 8, 2016 and that her weekly pay rate on that date was \$1,151.13.

In an October 21, 2020 decision, OWCP modified in part and affirmed in part the August 16, 2019 decision. It found that the medical evidence of record was sufficient to establish that the April 18, 2017 total left hip arthroplasty was medically necessitated and causally related to appellant's accepted condition. OWCP authorized a payment of wage-loss compensation in the amount of \$68,699.99 for the period April 18, 2017 through December 28, 2018, based on appellant's July 9, 2016 pay rate of \$1,151.13 weekly. However, appellant's claim remained denied for the period July 9, 2016 through April 17, 2017 as the medical evidence was insufficient to establish that she was totally disabled from work during the claimed period. OWCP next determined that appellant received an overpayment of compensation in the amount of \$1,701.10 for the period, commencing December 29, 2018, as she was previously paid compensation commencing that date, based on a pay rate of \$1,238.71, effective that date, but she should have received compensation based on a pay rate of \$1,151.13, effective July 9, 2016, the date she stopped work. It noted that she did not return to work until August 12, 2019 in a part-time, limited-duty position.

In a preliminary overpayment determination dated May 17, 2021, OWCP notified appellant that she had received an overpayment of compensation in the amount of \$1,701.10 for the period December 29, 2018 through May 5, 2020. It explained that she should have received compensation based on a weekly pay rate of \$1,151.13, effective July 9, 2016, instead of \$1,238.71, effective December 29, 2018, during the above-noted period. OWCP calculated that, from December 29, 2018 through May 5, 2020, appellant had received a total of \$1,701.10 in wage-loss compensation based on the weekly pay rate of \$1,238.71. It further advised appellant of its preliminary determination that she was without fault in the creation of the overpayment and requested that she complete an overpayment action request form and an overpayment recovery questionnaire (Form OWCP-20). OWCP further requested that appellant 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. Additionally, it notified her that she could request a telephone conference, a final decision based on the written evidence, or a prerecoumpment hearing. Appellant was allotted 30 days to respond.

In a letter dated June 16, 2021, appellant contended that she was not aware that she was being overpaid. She noted that she was unable to repay the overpayment because she had just returned to work on May 17, 2021 after recuperating from COVID-19 and she had to borrow money from her family to pay her bills since she was not paid while off work.

In a Form OWCP-20 completed by appellant on June 16, 2021, she reported total monthly income of \$2,845.52. Appellant noted total monthly expenses of \$2,325.57. She listed assets of \$47.00 in bank accounts. Appellant submitted supporting financial documentation.

By decision dated June 24, 2021, OWCP finalized its preliminary overpayment determination of May 17, 2021, finding that appellant received an overpayment of compensation in the amount of \$1,701.10 for the period December 29, 2018 through May 5, 2020 because she received wage-loss compensation based on the incorrect weekly pay rate of \$1,238.71, when she should have received wage-loss compensation based upon her pay rate on the date disability began of \$1,151.13 per week. It also found that she was without fault in the creation of the overpayment, but denied waiver of recovery of the overpayment as her income exceeded her expenses by more than \$50.00 per month. OWCP requested that appellant forward \$100.00 each month to recover the overpayment.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8102(a) 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>2</sup> 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>3</sup>

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<sup>2</sup> *Id.* at § 8102(a).

<sup>3</sup> *Id.* at § 8101(4).

For occupational disease claims where the claimant remains exposed to the work factors claimed, the date-of-injury pay rate is the rate of pay effective the date of the last exposure to causal employment factors.<sup>4</sup>

Section 8129(a) of FECA provides, in pertinent part, that 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>5</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that appellant received an overpayment of compensation in the amount of \$1,701.10 for the period December 29, 2018 through May 5, 2020 for which she was without fault, because she received wage-loss compensation at an incorrect pay rate.

OWCP found that appellant received an overpayment of compensation because she received wage-loss compensation at an inaccurate pay rate for the period December 29, 2018 through May 5, 2020. It paid her wage-loss compensation beginning December 29, 2018 using a weekly pay rate of \$1,238.71, effective that date, when the correct weekly pay rate was \$1,151.13, effective July 9, 2016. As previously noted, pay rate for compensation purposes is defined in section 8101(4) of FECA 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>6</sup> As appellant's date of injury, the date she was last exposed to the accepted employment factors was July 8, 2016, she stopped work on July 9, 2016 and she had not sustained recurrent disability more than six months after returning to full-time work as of December 29, 2018, the correct pay rate was based upon appellant's date of injury and disability. Her weekly pay rate on the dates of injury and disability was \$1,151.13.

As appellant received compensation based on the incorrect date-of-injury weekly pay rate for the period December 29, 2018 through May 5, 2020, she received an overpayment of compensation.<sup>7</sup>

The Board has reviewed OWCP's calculation of benefits received by appellant for the period December 29, 2018 through May 5, 2020 and finds that an overpayment of compensation in the amount of \$1,701.10 was created.

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<sup>4</sup> See *L.M.*, Docket No. 16-1305 (issued November 27, 2017).

<sup>5</sup> *Id.* at § 8129(a).

<sup>6</sup> *Id.* at § 8101(4).

<sup>7</sup> See *D.P.*, Docket No. 21-0327 (issued July 1, 2021); *C.G.*, Docket No. 18-1655 (issued June 14, 2019); *N.C.*, Docket No. 18-1070 (issued January 9, 2019); *C.Y.*, Docket No. 18-0263 (issued September 14, 2018); *E.E.*, Docket No. 14-1908 (issued April 22, 2015).

## LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA provides that an individual who is without fault in creating or accepting an overpayment is still subject to recovery of the overpayment unless adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.<sup>8</sup>

Recovery of an overpayment will defeat the purpose of FECA when such recovery would cause hardship to a currently or formerly entitled beneficiary because the beneficiary from whom OWCP seeks recovery needs substantially all of his or her current income, including compensation benefits, to meet current ordinary and necessary living expenses, and the beneficiary's assets do not exceed a specified amount as determined by OWCP.<sup>9</sup> Section 10.437 of OWCP's implementing regulations provides that recovery of an overpayment is considered to be against equity and good conscience when an individual who received an overpayment would experience severe financial hardship attempting to repay the debt; and when an individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.<sup>10</sup> OWCP's procedures provide that, to establish that a valuable right has been relinquished, an individual must demonstrate that the right was in fact valuable, that he or she was unable to get the right back, and that his or her action was based primarily or solely on reliance on the payment(s) or on the notice of payment.<sup>11</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>12</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 \$2,845.52 exceeds her monthly expenses of \$2,325.57 by more than \$50.00, in this case, \$519.95, she has not shown that she needs substantially all of her current income to meet current ordinary and necessary living

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<sup>8</sup> 5 U.S.C. § 8129; 20 C.F.R. §§ 10.433, 10.434, 10.436, and 10.437; *see A.S.*, Docket No. 17-0606 (issued December 21, 2017).

<sup>9</sup> 20 C.F.R. § 10.436. OWCP's procedures provide that a claimant is deemed to need substantially all of his or her current net income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Determinations*, Chapter 6.400.4a(3) (September 2020). OWCP's procedures further provide that assets must not exceed a resource base of \$6,200.00 for an individual or \$10,300.00 for an individual with a spouse or dependent, plus \$1,200.00 for each additional dependent. *Id.* at Chapter 6.400.4a(2).

<sup>10</sup> 20 C.F.R. § 10.437; *see E.H.*, Docket No. 18-1009 (issued January 29, 2019).

<sup>11</sup> *Supra* note 9 at Chapter 6.400.4(d)(2) (September 2020).

<sup>12</sup> 20 C.F.R. § 10.436; *see S.H.*, Docket No. 20-1585 (issued August 4, 2021).

expenses.<sup>13</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>14</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 \$1,701.10 overpayment.

### CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$1,701.10 for the period December 29, 2018 through May 5, 2020 for which she was without fault because she received wage-loss compensation at an incorrect pay rate. The Board further finds that OWCP properly denied waiver of recovery of the overpayment.

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<sup>13</sup> 20 C.F.R. § 10.437(a), (b).

<sup>14</sup> *Id.*

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 24, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 10, 2022  
Washington, DC

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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

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