

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

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<b>J.D., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 23-1197</b>
	)	<b>Issued: February 7, 2024</b>
<b>U.S. POSTAL SERVICE, CHARLESTON</b>	)	
<b>PROCESSING &amp; DISTRIBUTION CENTER,</b>	)	
<b>Charleston, WV, Employer</b>	)	
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*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
JANICE B. ASKIN, Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge  
JAMES D. MCGINLEY, Alternate Judge

**JURISDICTION**

On September 25, 2023 appellant filed a timely appeal from a September 20, 2023 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 appellant received an overpayment of compensation in the amount of \$1,975.32 for the period January 14 through May 5, 2023, for which she was without

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

<sup>2</sup> The Board notes that, appellant submitted additional evidence on appeal to the Board. However, the Board's *Rules of Procedures* 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.*

fault, because she received wage-loss compensation at an incorrect pay rate; and (2) whether OWCP properly denied waiver of recovery of the overpayment.

### **FACTUAL HISTORY**

On November 4, 2022 appellant, then a 35-year-old postal support employee mail processing clerk, filed a traumatic injury claim (Form CA-1) alleging that on that date she sustained a sprain/strain or fracture of the right ankle when she stepped into a divot on the floor while in the performance of duty. She stopped work that same day. Appellant returned to part-time modified-duty work on May 15, 2023.

OWCP accepted the claim for sprain of unspecified ligament of right ankle. The record reflects that appellant received compensation on the supplemental rolls commencing December 20, 2022.

On June 6 and 12, 2023 the employing establishment verified that appellant was a term employee, who had not worked in the position for at least 11 months prior to the injury. It further verified that she was paid a night shift differential of \$4.07 weekly for 1.12 hours of night differential weekly. Appellant's work schedule was noted as variable, with gross annual earnings of \$40,916.17, her base weekly pay rate as of the date of injury was \$769.54, and her total weekly pay rate was \$773.61.

In a preliminary overpayment determination dated June 28, 2023, OWCP notified appellant that she had received an overpayment of compensation in the amount of \$1,975.32, for the period January 14 through May 5, 2023. It explained that she should have received compensation based on a weekly pay rate of \$773.61, which was her weekly base pay rate of \$769.54, plus a night shift differential of \$4.07 weekly. However, OWCP further explained that appellant incorrectly received compensation of \$938.22 weekly, which was her weekly base pay rate of \$769.54, plus an incorrect night shift differential of \$168.68 weekly, rather than the correct night shift differential of \$4.07 weekly. It noted that during the period January 14 through May 5, 2023, she received a total of \$10,668.00 at the incorrect rate of \$938.22 weekly, when she should have received a total of \$8,692.68 at the correct rate of \$773.61 weekly. OWCP calculated that appellant received an overpayment of \$1,975.32, which was the difference between the \$10,668.00 that she received and the \$8,692.68 in wage-loss compensation that she should have received ( $\$10,668.00 - \$8,692.68 = \$1,975.32$ ). It further advised her 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 final decision based on the written evidence, or a precoupment hearing. Appellant was allotted 30 days to respond.

On July 4, 2023 appellant requested that OWCP make a decision based on the written evidence regarding waiver of recovery of the overpayment.

Appellant noted that she had monthly income of \$3,000.00 and monthly expenses of \$1,800.00, including rent of \$680.00 (a lease agreement indicated that the base rent was \$600.00, the liability insurance fee was \$14.00, and the cable television fee was \$80.00, for a total rent of

\$694.00); food \$250.00; clothing \$150.00; utilities \$300.00 (a utility bill revealed a monthly water charge of \$34.00, sewer \$28.50, and electric \$89.91), and other expenses of \$500.00 (documentation included an insurance bill of \$49.34 and a \$27.00 minimum monthly payment on a credit card with a balance of \$396.37). With regard to her assets, she noted a checking account balance of \$400.00. Appellant submitted financial documentation.

By decision dated September 20, 2023, OWCP finalized its preliminary overpayment determination, finding that appellant received an overpayment of compensation in the amount of \$1,975.32 for the period January 14 through May 5, 2023, because she received wage-loss compensation based on an incorrect weekly pay rate of \$938.22, rather than the correct weekly pay rate of \$773.61. It also found that she was without fault in the creation of the overpayment, but denied waiver of recovery of the overpayment as her monthly income exceeded her expenses by more than \$50.00. OWCP requested that appellant forward \$55.00 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>3</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>4</sup> Section 8129(a) of FECA provides, in pertinent part, that when an overpayment has been made to an individual because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor.<sup>5</sup>

It has been administratively determined that certain pay elements will be included in computing an employee's pay rate, including night or shift differential, Saturday premium, Sunday premium, holiday, and retention pay.<sup>6</sup>

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

The Board finds that appellant received an overpayment of compensation in the amount of \$1,975.32 for the period January 14 through May 5, 2023, for which she was without fault, because she received wage-loss compensation at an incorrect pay rate.

As noted, appellant was entitled to compensation under FECA based on her pay rate at the time of injury.<sup>7</sup> As appellant received compensation based on an incorrect date-of-injury weekly

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<sup>3</sup> *Id.* at § 8102(a).

<sup>4</sup> *Id.* at § 8101(4).

<sup>5</sup> *Id.* at § 8129(a).

<sup>6</sup> *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.6b (March 2011).

<sup>7</sup> *Id.* at § 8101(4).

pay rate for the period January 14 through May 5, 2023, she received an overpayment of compensation.<sup>8</sup>

The Board has reviewed OWCP's calculation of benefits received by appellant for the period January 14 through May 5, 2023, and finds that an overpayment of compensation in the amount of \$1,975.32 was created. At the time of injury, appellant's weekly pay rate was \$773.61, which was her base weekly pay rate of \$769.54, plus her night shift differential of \$4.07 weekly, for 1.12 hours of night shift differential weekly. However, she received compensation of \$938.22 weekly, which was her base pay of \$769.54, plus an incorrect nightshift differential of \$168.68 weekly. As a result of the incorrect computation of appellant's pay rate at the time of injury, she received a total of \$10,668.00 in wage-loss compensation during the period January 14 through May 5, 2023, rather than the \$8,692.68 she should have received. As such, the Board finds that OWCP correctly determined that she received an overpayment of compensation in the amount of \$1,975.32 during the relevant period.

### **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>9</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>10</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>11</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

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<sup>8</sup> See *V.T.*, Docket No. 21-1157 (issued February 10, 2022); *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).

<sup>9</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>10</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, *Final 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>11</sup> 20 C.F.R. § 10.437; see *E.H.*, Docket No. 18-1009 (issued January 29, 2019).

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>12</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>13</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. Appellant responded to the Form OWCP-20 and indicated that she had monthly income of \$3,000.00 and monthly expenses of \$1,800.00. As her monthly income exceeded her monthly expenses by more than \$50.00, she has not shown that she needed substantially all of her current income to meet current ordinary and necessary living expenses.<sup>14</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 was 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>15</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 \$1,975.32 overpayment.

### **CONCLUSION**

The Board finds that appellant received an overpayment of compensation in the amount of \$1,975.32 for the period January 14 through May 5, 2023, 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>12</sup> *Supra* note 10 at Chapter 6.400.4c(3) (September 2020).

<sup>13</sup> 20 C.F.R. § 10.436; *see S.H.*, Docket No. 20-1585 (issued August 4, 2021).

<sup>14</sup> 20 C.F.R. § 10.437(a), (b).

<sup>15</sup> *Id.*

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 20, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 7, 2024  
Washington, DC

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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

James D. McGinley, Alternate Judge  
Employees' Compensation Appeals Board