

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

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T.D., Appellant

and

U.S. POSTAL SERVICE, POST OFFICE,  
Nashville, TN, Employer

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**Docket No. 17-0104  
Issued: July 17, 2017**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

CHRISTOPHER J. GODFREY, Chief Judge  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
COLLEEN DUFFY KIKO, Judge

**JURISDICTION**

On October 21, 2016 appellant filed a timely appeal from an October 4, 2016 merit decision and a June 30, 2016 nonmerit 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.

**ISSUES**

The issues are: (1) whether appellant received a \$2,859.01 overpayment of compensation for the period June 19 through August 7, 2015; (2) whether OWCP abused its discretion in denying waiver of recovery of the overpayment; and (3) whether OWCP properly determined that appellant had abandoned her request for a prereducement hearing.

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

## **FACTUAL HISTORY**

OWCP accepted that on May 4, 2015 appellant, then a 28-year-old city carrier assistant, sustained a lumbar sprain when her work vehicle was struck from behind. She stopped work on the date of injury and received wage-loss compensation and medical benefits. Appellant returned to modified duty on July 11, 2015 working in a part-time capacity.<sup>2</sup>

On July 21, 2015 appellant filed a claim for compensation (Form CA-7) for leave without pay for the period June 19 through July 10, 2015. Her time analysis form (Form CA-7a) indicated 16 days of wage-loss compensation amounting to 6 hours of leave for each full day worked. Appellant also filed CA-7 forms for the period July 11 through August 7, 2015 for intermittent wage loss.

On August 25, 2015 the employing establishment clarified that appellant was a temporary, part-time employee and that she had been employed for less than 11 months during the previous year. It submitted further information which indicated that, as a part-time employee appellant received \$15.68 per hour as a city carrier assistant, worked five days per week, and averaged 32 hours weekly as she was on a rotating or irregular schedule.

In a September 10, 2015 initial payment memorandum, appellant was reported as working an average of 6.4 hours per day, 5 days per week, resulting in 32 hours of work weekly. Appellant's hourly rate at \$15.68 was multiplied by 6.4 hours to calculate a daily rate of \$100.35.<sup>3</sup> The daily rate was multiplied by 260 to determine average annual earnings pursuant to 5 U.S.C. § 8114(d)(1)(B), then divided by 52 to calculate a new weekly pay rate of \$501.76.<sup>4</sup>

On October 13, 2015 OWCP issued a preliminary determination that appellant received an overpayment of compensation in the amount of \$2,859.01 for the period June 19 through August 7, 2015 because she was paid at an incorrect pay rate. It found that she was not at fault in the creation of the overpayment, making her eligible for waiver of recovery of the overpayment. OWCP explained that when appellant initially filed the July 21, 2015 claim for wage loss, her pay had been based on a temporary pay rate while her true pay rate was being developed. It noted that her pay rate was corrected once it had received information and calculated the rate of \$501.76 weekly. Appellant's average work hours were 6.4 hours per day, 5 days per week. OWCP explained that from June 19 through July 10, 2015, appellant received

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<sup>2</sup> On March 24, 2016 OWCP notified appellant of a proposal to terminate her wage-loss compensation benefits based on the report of her attending physician which found no further disability connected to the employment injury. By decision dated April 28, 2016, it terminated her wage-loss compensation benefits finding that the weight of the medical evidence established that she was no longer disabled from work as a result of the May 4, 2015 work injury. OWCP noted that appellant's medical benefits were not terminated and would remain open if treatment was needed for the accepted condition.

<sup>3</sup> OWCP had originally been provided payroll information reflecting an average daily wage rate of \$100.35. Using 5 U.S.C. § 8114(d)(3), it calculated the weekly pay rate at \$289.47 for an average of 32 hours a week.

<sup>4</sup> The average annual earnings are the product obtained by multiplying her daily wage for the particular employment or the average thereof if the daily wage has fluctuated, by 300 if she was employed on the basis of a 6-day workweek, 280 if employed on the basis of a 5½-day workweek, and 260 if employed on the basis of a 5-day workweek. 5 U.S.C. § 8114(d).

\$926.34 for 16 days of leave when she should have received \$1,204.22.<sup>5</sup> For the period July 11 through 24, 2015, appellant received payment in the amount of \$2,026.36 for 44.8 hours of leave; however, she should have only received pay for this period in the amount of \$362.21 for 30.8 hours of leave at \$15.68 an hour and 75 percent compensation rate. From July 25 through August 7, 2015, appellant had received \$1,990.18 for 44 hours of leave when she should have received \$517.44 for those 44 hours (44 hours times \$15.68 an hour times 75 percent). It concluded that for the period June 19 through August 7, 2015, appellant was paid \$4,942.88 when she should have been paid \$2,083.87, resulting in a \$2,859.01 overpayment.

OWCP provided appellant with an overpayment recovery questionnaire (Form OWCP-20) and advised that she could request a prerecoupment hearing if she wished to challenge the fact of overpayment or to request waiver of recovery of the overpayment. If she claimed a waiver of recovery, she was advised to submit supporting financial information and a completed overpayment recovery questionnaire within 30 days.

On October 20, 2015 appellant requested a prerecoupment hearing arguing that the overpayment should be waived because it occurred through no fault of her own. She reported that she had submitted the CA-7 and CA-7a forms on time and her manager was to file the remaining information. Appellant contended that she had never been told of any overpayment. She submitted a completed overpayment recovery questionnaire indicating that she had two dependent children, a monthly income of \$217.00 from earnings, monthly expenses of \$810.59, and \$187.00 in her bank account. No supporting financial documentation was submitted.

In a May 12, 2016 notice, OWCP's Branch of Hearings and Review scheduled a prerecoupment hearing for 9:30 a.m. Eastern Standard Time (EST) on June 14, 2016. It provided appellant with a toll-free number and passcode for the telephone hearing. OWCP advised appellant that postponement of the hearing would only be permitted upon receipt of documentation showing her nonelective hospitalization or that the death of a spouse, parent, or child prevented her attendance. The notice was mailed to appellant's address of record.

On June 14, 2016 appellant failed to participate in the telephone prerecoupment hearing.

By decision dated June 30, 2016, an OWCP hearing representative found that appellant failed to appear at the prerecoupment hearing and had therefore abandoned her request. The hearing representative found no evidence of record establishing that appellant had contacted OWCP prior to or subsequent to the scheduled hearing.

By decision dated October 4, 2016, OWCP finalized its preliminary overpayment decision. It found that appellant had received an overpayment of compensation in the amount of \$2,859.01 for the period June 19 through August 7, 2015. It further found that she was not at fault in the creation of the overpayment. OWCP determined that the overpayment was not subject to waiver of recovery, however, because appellant had failed to submit the requested financial information to support the figures provided in her OWCP-20 form. Thus, there was no evidence of record that recovery of the overpayment would defeat the purpose of FECA or be

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<sup>5</sup> As appellant had dependents, her compensation rate was at 75 percent. (\$100.35 @ day times 16 days equals \$1,605.60 times 75 percent equals \$1,204.22).

against equity and good conscience. OWCP requested repayment be made in full within 30 days.

### **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 his duty.<sup>6</sup> Section 8129(a) of FECA 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>7</sup>

An employee is paid compensation for total disability equal to a percentage of his or her monthly pay.<sup>8</sup> To calculate monthly pay, the initial issue is the determination of the specific time when the employee's monthly pay will be calculated. Under 5 U.S.C. § 8101(4), the monthly pay is determined at the time of injury, the time disability begins, or the time compensable disability recurs, if the recurrence begins more than six months after a return to regular full-time employment.<sup>9</sup>

Once the proper time period is determined, the pay rate is determined under 5 U.S.C. § 8114(d). This section provides a specific methodology for determining pay rate:

(1) If the employee worked in the employment in which she was employed at the time of her 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; or

(B) was not fixed, the average annual earnings are the product obtained by multiplying his daily wage for particular employment, or the average thereof if the daily wage has fluctuated, by 300 if she was employed on the basis of a 6-day workweek, 280 if employed on the basis of a 5 1/2-day week, and 260 if employed on the basis of a 5-day week.

(2) If the employee did not work in employment in which she was employed at the time of her injury during substantially the whole year immediately preceding the injury, but the position was one which would have afforded employment for substantially a whole year, the average annual earnings are a sum equal to the average annual earnings of an employee of the same class working substantially the whole immediately preceding year in the same or similar employment by the

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<sup>6</sup> 5 U.S.C. § 8102(a).

<sup>7</sup> *Id.* at § 8129(a).

<sup>8</sup> *Id.* at § 8106(c).

<sup>9</sup> *Id.* at § 8101(4).

United States in the same or neighboring place, as determined under paragraph (1) of this subsection.

(3) If either of the foregoing methods of determining the average annual earnings cannot be applied reasonably and fairly, the average annual earnings are a sum that reasonably represents the annual earning capacity of the injured employee in the employment in which she was working at the time of the injury having regard to the previous earnings of the employee in federal employment, and of other employees of the United States in the same or most similar employment in the same or neighboring location, other previous employment of the employee, or other relevant factors. However, the average annual earnings may not be less than 150 times the average daily wage the employee earned in the employment during the days employed within one year immediately preceding her injury.

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

The Board finds that appellant received an overpayment of compensation in the amount of \$2,859.01 for the period June 19 through August 7, 2015.

Appellant was employed as a city carrier assistant, in a part-time, temporary position. She had not worked in this position for 11 months prior to injury. Pursuant to 5 U.S.C. § 8114(d) since appellant had not worked in the employment in which she was employed at the time of injury during substantially the whole year prior to the injury, but the employing establishment did not dispute that the position was one which would have afforded employment for substantially a whole year, pursuant to 5 U.S.C. § 8114(d)(2) the pay rate calculation properly reverted back to 5 U.S.C. § 8114(d)(1). As appellant's annual earnings were not fixed, and she was employed on the basis of a 5-day week, OWCP utilized the daily rate multiplier of 260 under 5 U.S.C. § 8114(d)(1)(B).<sup>10</sup>

OWCP determined that she worked on average 6.4 hours daily, 5 times per week. Based on her hourly rate of \$15.68, OWCP properly determined that appellant's average daily wage amounted to \$100.35. Appellant's average annual earnings were calculated by multiplying her daily wage by 260, as she was employed on the basis of a 5-day week, which was then divided by 52 to calculate a weekly pay rate of \$501.76.<sup>11</sup>

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<sup>10</sup> See *T.M.*, Docket No. 15-149 (March 9, 2015) wherein the Board explained that the evidence from the employing establishment confirmed that the claimant had not worked in her position for substantially one whole year prior to the date of injury on September 7, 2013. Therefore the next step under 5 U.S.C. § 8114(d) was to determine if the position was one which would have afforded employment for substantially a whole year. As noted above, if the position would have afforded employment for substantially the whole year, then the pay rate is the earnings of a claimant of the same class working substantially the whole immediately preceding year in the same or similar employment by the United States in the same or neighboring place. OWCP applied 5 U.S.C. § 8114(d)(3), which required that the pay rate be no less than 150 times the average daily wage. This section was only to be used if 5 U.S.C. § 8114(d)(2) could not be applied reasonably and fairly. In the current case, OWCP originally had used 5 U.S.C. § 8114(d)(3). It later determined that 5 U.S.C. § 8114(d)(1)(B) was the proper method.

<sup>11</sup> 5 U.S.C. § 8114(d).

For the period June 19 through July 10, 2015, appellant's pay rate had been based on an incorrect rate of pay and she received \$926.34 for 16 days of wage loss. She should have received \$1,204.22 for the 16 days of wage loss at the daily rate of \$100.35 (times 75 percent).

With respect to the period July 11 through 24, 2015, appellant was incorrectly paid \$2,026.36. Based on the Form CA-7a, she worked a total of seven days for two hours on each day. As she typically worked 6.4 hours daily, appellant was entitled to leave without pay for the remaining 4.4 hours of each day worked. Thus, OWCP properly determined that she was only entitled to 30.8 hours for the 7 days, resulting in \$362.21 of wage-loss compensation for the period July 11 through 24, 2015 at the hourly rate of \$15.68 (times 75 percent).

For the period July 25 through August 7, 2015, appellant was paid \$1,990.18, but, based on the hourly pay rate of \$15.68 for 44 hours of leave without pay (times 75 percent), OWCP properly determined that appellant was entitled to \$517.44 for the period July 25 through August 7, 2015.

The Board finds that OWCP properly found that appellant should have received \$2,083.87 for the period June 19 to August 7, 2015 rather than the \$4,942.88 she received.<sup>12</sup> Appellant has not submitted any evidence disputing the fact and amount of the overpayment. The Board will therefore affirm OWCP's finding of an overpayment of compensation in the amount of \$2,859.01.<sup>13</sup>

### **LEGAL PRECEDENT -- ISSUE 2**

The waiver or refusal to waive an overpayment of compensation by OWCP is a matter that rests within OWCP's discretion pursuant to statutory guidelines.<sup>14</sup> These statutory guidelines are found in section 8129(b) of FECA which states: Adjustment or recovery of an overpayment by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience.<sup>15</sup> If OWCP finds a claimant to be without fault in the matter of an overpayment, then, in accordance with section 8129(b), OWCP may only recover the overpayment if it determined that recovery of the overpayment would neither defeat the purpose of FECA nor be against equity and good conscience.

According to 20 C.F.R. § 10.436, recovery of an overpayment would defeat the purpose of FECA if recovery would cause hardship because the beneficiary needs substantially all of her income (including compensation benefits) to meet current ordinary and necessary living expenses and also, if the beneficiary's assets do not exceed a specified amount as determined by

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<sup>12</sup> \$4,942.88 - \$2,083.87 = \$2,859.01. See *L.M.*, Docket No. 16-0144 (issued March 22, 2016).

<sup>13</sup> *B.A.*, Docket No. 15-1171 (issued December 21, 2015).

<sup>14</sup> See *Robert Atchison*, 41 ECAB 83, 87 (1989).

<sup>15</sup> 5 U.S.C. § 8129(b).

OWCP from data provided by the Bureau of Labor Statistics.<sup>16</sup> According to 20 C.F.R. § 10.437, 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 position for the worse.<sup>17</sup> To establish that a valuable right has been relinquished, it must be shown that the right was in fact valuable, that it cannot be regained, and that the action was based chiefly or solely in reliance on the payments or on the notice of payment.<sup>18</sup>

Section 10.438 of OWCP's regulations provide 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. This information will also be used to determine the repayment schedule, if necessary. Failure to submit the requested information within 30 days of the request shall result in denial of waiver, and no further request for waiver shall be considered until the requested information is furnished.<sup>19</sup>

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

The Board finds that OWCP properly denied waiver of recovery of the overpayment of compensation.<sup>20</sup>

As appellant was found to be without fault in the creation of the overpayment in compensation, waiver must therefore 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.

In its preliminary notice of overpayment dated October 13, 2015, OWCP requested that appellant provide supporting financial information and a completed overpayment recovery questionnaire. While she submitted the overpayment recovery questionnaire, appellant failed to submit any financial information outlining her income, expenses, and assets for OWCP to determine whether waiver of the overpayments was appropriate. Further, she made no argument that she gave up a valuable right or changed her position for the worse in reliance on the

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<sup>16</sup> 20 C.F.R. § 10.436. An individual is deemed to need substantially all of her monthly income to meet current and ordinary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. *Desiderio Martinez*, 55 ECAB 245 (2004). OWCP procedures provide that assets must not exceed a resource base of \$4,800.00 for an individual or \$8,000.00 for an individual with a spouse or dependent plus \$960.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a) (June 2009).

<sup>17</sup> *Id.* at § 10.437(a), (b).

<sup>18</sup> *Id.* at § 10.437(b)(1).

<sup>19</sup> *Id.* at § 10.438.

<sup>20</sup> *R.H.*, Docket No. 15-0392 (issued February 3, 2016).

overpaid compensation prior to the issuance of OWCP's October 4, 2016 decision. As appellant failed to submit complete financial information, the evidence before OWCP was insufficient to determine whether recovery of the overpayment would defeat the purpose of FECA or would be against equity or good conscience.<sup>21</sup> Accordingly, as required by section 10.438 of its regulations, appellant was not entitled to a waiver.<sup>22</sup> The Board therefore finds that OWCP properly denied waiver of recovery of the overpayment of compensation in the amount of \$2,859.01.<sup>23</sup>

On appeal, appellant argues that she did not know she was being overpaid and should not be responsible for repayment caused by someone else's mistake. Although OWCP found that appellant was without fault in the matter of the overpayment, 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>24</sup>

With respect to recovery of the overpayment of compensation, the Board's jurisdiction is limited to reviewing those cases where OWCP seeks recovery from continuing compensation benefits under FECA.<sup>25</sup> As appellant is no longer receiving wage-loss compensation, the Board does not have jurisdiction with respect to the recovery of the overpayment under the Debt Collection Act.<sup>26</sup>

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

Section 10.622(f) of OWCP's regulations and Chapter 2.1601.6(g) of OWCP's procedures provide that failure of appellant to appear at the scheduled hearing, failure to request a postponement, and failure to request a new hearing in writing within 10 days after the date of the scheduled hearing shall constitute abandonment of the request for a hearing.<sup>27</sup> Under these circumstances, the Branch of Hearings and Review will issue a formal decision finding that the claimant has abandoned her request for a hearing and return the case to the district office. In cases involving prerecoupment hearings, the Branch of Hearings and Review will also issue a final decision on the overpayment, based on the available evidence, before returning the case to the district office.<sup>28</sup>

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<sup>21</sup> 20 C.F.R. § 10.438(a) (in requesting waiver, the overpaid individual has the responsibility for providing financial information).

<sup>22</sup> *J.V.*, Docket No. 15-0140 (issued November 25, 2015).

<sup>23</sup> *M.S.*, Docket No. 11-96 (issued August 17, 2011).

<sup>24</sup> *See Wade Baker*, 54 ECAB 198 (2002).

<sup>25</sup> *Cheryl Thomas*, 55 ECAB 610 (2004).

<sup>26</sup> *Id.*

<sup>27</sup> 20 C.F.R. § 10.622(f); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Review of the Written Record*, Chapter 2.1601.6(g) (October 2011).

<sup>28</sup> *Id.*



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

In a letter dated May 12, 2016, OWCP advised appellant of a scheduled telephonic prerecoumment hearing with the hearing representative at a specific time on June 14, 2016. The evidence establishes that it mailed appropriate notice to appellant at her last known address. The record also reveals that appellant failed to request postponement, failed to appear for the scheduled hearing, and failed to provide any notification for such failure within 10 days of the scheduled date of the hearing. As this meets the condition for abandonment of a hearing as specified by OWCP's regulations and procedure manual, the Board finds that OWCP properly found that appellant abandoned her request for a prerecoumment hearing before an OWCP hearing representative and properly issued a final decision on the overpayment of compensation.<sup>29</sup>

### **CONCLUSION**

The Board finds that appellant received a \$2,859.01 overpayment of compensation for the period June 19 through August 7, 2015. The Board further finds that OWCP properly denied waiver of recovery of the overpayment and properly determined that appellant abandoned her request for a prerecoumment hearing.

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<sup>29</sup> *T.M.*, Docket No. 15-0147 (issued November 13, 2015); *M.G.*, Docket No. 14-1917 (issued January 22, 2015).

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 4 and June 30, 2016 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: July 17, 2017  
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board