

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

MICHELLE DUDLEY, Appellant

and

**DEPARTMENT OF THE ARMY, NUTRITION
CARE DIVISION PRODUCTION & SERVICE
BRANCH, Fort Stewart, GA, Employer**

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**Docket No. 04-2112
Issued: June 10, 2005**

Appearances:
Michelle Dudley, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On August 25, 2004 appellant filed a timely appeal of the Office of Workers' Compensation Programs' merit decision dated May 25, 2004, finding that appellant received an overpayment of compensation benefits, denied waiver of recovery of the overpayment and required repayment from continuing compensation in the amount of \$144.91 every four weeks. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this overpayment.

ISSUES

The issues are: (1) whether the Office properly determined that appellant received an overpayment in the amount of \$43,403.70 for the period July 18, 2001 to September 6, 2003 because of an incorrect pay rate; (2) whether the Office properly denied waiver of recovery of the overpayment; and (3) whether the Office properly required repayment of the overpayment by deducting \$144.91 every four weeks from appellant's continuing compensation payments.

FACTUAL HISTORY

On April 25, 2001 appellant, a 41-year-old food service worker, filed an occupational disease claim alleging that her right wrist carpal tunnel syndrome was employment related. The Office accepted the claim for right wrist carpal tunnel syndrome and authorized right carpal tunnel release surgery, which was performed on June 28, 2001. The Office placed appellant on the rolls for temporary total disability effective July 18, 2001 and noted a weekly pay rate of \$987.92.

Computer printouts for the periods covering July 18, 2001 to September 6, 2003 note a pay rate of \$987.92.

On February 26, 2003 the Office issued a proposed notice of reduction of compensation. The Office informed appellant that the reduction in her compensation benefits was due to an incorrect pay rate being used to calculate her benefits since July 18, 2001. The Office indicated that the correct pay rate was \$407.03 and not \$987.92. In determining her correct pay rate, as of June 27, 2001, the Office stated that the CA-7 forms showed her hourly pay rate on the date she stopped work as \$9.32 and her regular work schedule included one day with Sunday pay and one day with holiday pay. The Office calculated appellant's pay rate based upon an hourly rate of \$9.32 or a weekly rate of \$374.05, a Sunday premium of \$18.64 per week and holiday pay of \$14.34 per week, which resulted in a weekly pay rate of \$407.03.

In a letter dated May 17, 2003, appellant disagreed with the Office's proposal to reduce her compensation benefits. She agreed that her hourly wage rate at the time she stopped work was \$9.32, but contended that the Office's calculations were wrong in finding she was being paid at an incorrect pay rate.

On June 6, 2003 the Office received a copy of a Form SF-50 indicating appellant's pay rate as \$10.39 per hour effective July 30, 2000. Based upon this information, the Office calculated appellant's pay rate based upon an hourly rate of \$10.34 or a weekly rate of \$416.99, a Sunday premium of \$20.80 per week and holiday pay of \$31.97 per week, which resulted in a weekly pay rate of \$469.76.

By decision dated August 28, 2003, the Office reduced appellant's compensation finding that appellant was being paid at an incorrect rate of pay of \$987.92. The Office noted appellant's hourly pay rate for a WG 2, step 3 as of June 14, 2001 as \$9.32 based upon a June 25, 2001 Form CA-7. The Office noted that it received a copy of an SF-50 on June 6, 2003 indicating she was a WG 2, step 3 with an hourly rate of \$10.39 effective July 30, 2000. The Office then calculated appellant's correct hourly pay rate based upon a weekly pay of \$416.99, Sunday premium pay of \$20.80 per week, and holiday pay of \$31.97, the Office found appellant's correct pay rate was \$469.76 as of June 14, 2001. Thus, the Office adjusted appellant's compensation payments accordingly.

On April 21, 2004 the Office issued a preliminary notice finding appellant without fault in the creation of an overpayment in the amount of \$43,403.70 on the grounds that she received compensation based upon an incorrect pay rate.

On May 24, 2004 the Office received appellant's completed overpayment recovery questionnaire dated May 20, 2004 and the financial information she submitted to support her request for waiver of recovery of the overpayment.

By decision dated May 25, 2004, the Office finalized the overpayment in its preliminary determination regarding an overpayment in the amount of \$43,403.70. The Office denied waiver of recovery of the overpayment and ordered that \$144.91 be deducted every four weeks from appellant's continuing compensation.

LEGAL PRECEDENT -- ISSUE 1

Compensation benefits are computed based on an employee's pay rate during the relevant time frame.¹ In computing one's pay rate, section 8114(e) of the Federal Employees' Compensation Act provides for the inclusion of certain "premium pay" received.² However, overtime pay, among other things, is excluded from consideration in determining one's rate of pay.³ As pay rate is a critical component in the determination of the amount of compensation to which one is entitled, an incorrect pay rate may result in either the underpayment or overpayment of compensation. In cases where compensation payments were based erroneously on a pay rate greater than that to which the employee was entitled, the difference between the compensation the employee should have received and did receive constitutes an overpayment of compensation.⁴

ANALYSIS -- ISSUE 1

In the instant case, the record reflects that appellant received compensation for the period July 18, 2001 to September 6, 2003 in the amount of \$82,766.46. The payment was calculated based on an erroneous pay rate of \$987.92. In determining appellant's correct pay rate, the Office noted that appellant's hourly pay rate was \$10.39 or a weekly rate of \$416.99. The Office then included her Sunday premium pay of \$20.80 per week and holiday pay of \$31.97 when it found her correct pay rate was \$469.76 as of June 14, 2001. Applying the correct weekly pay rate of \$469.76, the Office determined that appellant should have received \$39,362.76 for the period July 18, 2001 to September 6, 2003. The Office, therefore, subtracted the amount appellant should have received from the amount she was paid and correctly calculated an overpayment of compensation in the amount of \$43,403.70.

LEGAL PRECEDENT -- ISSUE 2

Under section 8129 of the Act and the implementing regulations, an overpayment must be recovered unless incorrect payment has been made to an individual who is without fault and

¹ 5 U.S.C. §§ 8101(4), 8114; *see Marco A. Padilla*, 51 ECAB 202 (1999).

² 5 U.S.C. § 8114(e).

³ *Id.*

⁴ *See generally Monte Fuller*, 51 ECAB 571 (2000) (discussion of proper determination of pay rate).

when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience.⁵

Waiver of recovery of an overpayment is not possible if the individual is at fault in creating the overpayment.⁶ However, a finding that appellant is without fault is insufficient, of itself, for the Office to waive recovery of the overpayment.⁷ The Office must determine whether recovery of the overpayment would defeat the purpose of the Act or would be against equity and good conscience.⁸

Recovery of an overpayment will defeat the purpose of the Act if such recovery would cause hardship to a currently or formerly entitled beneficiary because the beneficiary from whom the Office 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 the Office.⁹ Additionally, recovery of an overpayment is considered to be against equity and good conscience when any individual who received an overpayment would experience severe financial hardship in attempting to repay the debt or when any individual, in reliance on such payment or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.¹⁰

Section 10.438 of the regulations provides that “the individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by [the Office].”¹¹ As the regulation indicates, this information is necessary to determine whether or not recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience.¹² Appellant's financial information is also used to determine any necessary repayment schedule.¹³ The regulation further specifies that “failure to submit the requested information ... shall result in denial of waiver, and no further request for waiver shall be considered until the requested information is furnished.”¹⁴

⁵ 5 U.S.C. § 8129(b); 20 C.F.R. §§ 10.433, 10.434, 10.436, 10.437.

⁶ 20 C.F.R. § 10.433(a).

⁷ *Jorge O. Diaz*, 51 ECAB 124 (1999).

⁸ 20 C.F.R. § 10.434.

⁹ 20 C.F.R. § 10.436.

¹⁰ 20 C.F.R. § 10.437.

¹¹ 20 C.F.R. § 10.438(a).

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 10.438(b).

ANALYSIS -- ISSUE 2

The Office found in its May 25, 2004 decision that appellant failed to respond to its April 21, 2004 preliminary determination of overpayment and thus had not submitted the financial information necessary to establish waiver. A review of the record, however, reveals that, on May 24, 2004, the Office received a request for waiver dated April 20, 2004 from appellant, a complete overpayment recovery questionnaire and supporting financial information. In response to an overpayment questionnaire, appellant listed her monthly income and expenses and provided supporting financial information.

As the Board's jurisdiction of a case is limited to reviewing that evidence which is before the Office at the time of its final decision,¹⁵ it is necessary that the Office review all evidence submitted by a claimant and received by the Office prior to issuance of its final decision. Since the Board's decisions are final as to the subject matter appealed,¹⁶ it is crucial that all evidence which was properly submitted to the Office prior to the time of issuance of its final decision be addressed.¹⁷ This is particularly important in this appeal where, as noted above, appellant submitted a completed overpayment recovery questionnaire and requested waiver but there is no indication that this was considered by the Office before issuing its final decision. As the Office did not consider the evidence that it received on May 24, 2004 in reaching its May 25, 2004 decision, the Board cannot review such evidence for the first time on appeal.¹⁸ The Board finds that the case must be remanded for the Office to consider appellant's overpayment recovery questionnaire, financial information and request for waiver. Following this and such other development as deemed necessary, the Office shall issue an appropriate merit decision on this aspect of the claim.¹⁹

CONCLUSION

The Board finds that the Office properly determined that appellant received an overpayment in the amount of \$43,403.70 for the period July 18, 2001 to September 6, 2003. The case will be remanded for an appropriate decision on whether appellant is entitled to waiver of the overpayment. In view of the Board's holding, the issue of recovery of the overpayment will not be addressed at this time.

¹⁵ 20 C.F.R. § 501.2(c).

¹⁶ 20 C.F.R. § 501.6(c).

¹⁷ See *William A. Couch*, 41 ECAB 548 (1989).

¹⁸ 20 C.F.R. § 501.2(c).

¹⁹ In view of its determination on the issue of waiver of the overpayment, the issue of whether the Office properly found that it should withhold \$144.91 per month from appellant's continuing compensation to recover the overpayment is moot.

ORDER

IT IS HEREBY ORDERED THAT the May 25, 2004 decision of the Office of Workers' Compensation Programs is affirmed as to fact and amount of overpayment and set aside as waiver and remanded for further consideration consistent with this opinion.

Issued: June 10, 2005
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member