

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

G.T., Appellant)

and)

DEPARTMENT OF HEALTH & HUMAN)
SERVICES, BUREAU OF PRIMARY HEALTH)
CARE, Bethesda, MD, Employer)

**Docket No. 07-2230
Issued: July 7, 2008**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 4, 2007 appellant filed a timely appeal of an August 6, 2006 merit decision of the Office of Workers' Compensation Programs concerning an overpayment of compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this overpayment appeal.

ISSUES

The issues are: (1) whether the Office properly computed appellant's pay rate for compensation purposes in determining her wage loss; (2) whether appellant received an overpayment in the amount of \$14,062.80 for the periods July 12, 2004 through June 20, 2005 and August 7 through September 30, 2005 because she received compensation at an incorrect pay rate; (3) whether appellant received an overpayment of compensation in the amount of \$3,884.32 for the period June 21 through August 6, 2005 as she received compensation for total disability when she had returned work and was paid at an incorrect pay rate; and (4) whether the Office properly denied waiver of the recovery of the overpayment.

FACTUAL HISTORY

On March 2, 1999 appellant, then a 50-year-old public health analyst, sustained injury to her lower back and hip when she leaned down to turn on her computer. The Office accepted the claim for a lumbar strain/sprain and authorized lumbar spine fusion with discectomy, which was performed on July 13, 2004. Appellant stopped work on March 3, 1999 and returned to light-duty work for eight hours on October 13, 1999, which were reduced to four hours per day effective October 18, 1999 and subsequently increased to six hours. Her yearly salary was \$61,895.00 with a weekly pay rate of \$1,190.29.

By letter dated September 27, 2004, the Office accepted appellant's claim for wage loss for the period July 12 to August 7, 2004 and informed her she would be placed on the periodic rolls for temporary total disability for five to six months. Appellant was placed on the periodic compensation rolls effective August 8, 2004, and was paid compensation to October 30, 2004 in the amount of \$13,346.50, and from October 31 through November 27, 2004 in the amount of \$4,473.30. The Office informed appellant that she had been placed on the automated rolls by letter dated October 26, 2004 and that her weekly pay rate was \$1,710.14.

The record reflects that appellant returned to work on a transitional basis on June 21, 2005. She initially returned to work for five hours per day twice a week on June 21, 2005 which increased to six hours per day twice a week on July 19, 2005. On August 23, 2005 appellant's hours were increased to seven hours per day twice a week and eight hours per day twice a week on September 20, 2005 and full duty on October 3, 2005.

Computer printout sheets show that appellant was paid at a weekly pay rate of \$1,710.14 for the period July 12, 2004 through September 30, 2005. The Office paid appellant \$56,029.59 for the period July 12, 2004 to June 20, 2005. For the period June 21 to August 6, 2005, she was paid \$7,752.63. Appellant was paid \$3,431.89 for the period August 7 to September 30, 2005.

On July 6, 2007 the Office made a preliminary determination that appellant received an overpayment in the amount of \$17,947.12 for the period July 12, 2004 through September 30, 2005. It paid compensation based on an incorrect pay rate for the above period and that this resulted in the overpayment. In an attached memorandum, the Office noted that appellant had been paid at a weekly rate of \$1,710.14 for the period July 12, 2004 through September 30, 2005 when she should have been paid at a weekly rate of \$1,190.25. Appellant had been paid a total of \$56,092.59 for the period July 12, 2004 through June 20, 2005 when she was only entitled to be paid \$42,998.80. An overpayment in the amount of \$13,103.79 was found for this period. The Office noted that she returned to work part time on June 21, 2005, but continued to receive compensation for total disability through August 6, 2005. Based on the incorrect pay rate of \$1,710.14 and being paid compensation for total disability instead of the 195 hours she did work, the Office found an overpayment in the amount of \$3,884.32. For the period August 7 through September 30, 2005, the Office found that appellant had been paid at the incorrect pay rate of \$1,710.14 which resulted in an overpayment of \$959.01. The total overpayment for the period July 12, 2004 through September 30, 2005 was \$17,947.12. The Office found that she was without fault in creating the overpayment. Appellant was advised that she could request a telephone conference, a final decision based on the written evidence only or a prerecoupment hearing within 30 days of the date of the letter if she believed that recovery of the

overpayment should be waived. The Office requested that she complete an accompanying overpayment recovery questionnaire (Form OWCP-20) and submit financial documents in support thereof within 30 days. It noted that waiver would be denied if appellant failed to furnish the information requested on the enclosed Form OWCP-20 or any other information needed to address a request for waiver within the 30 days.

In a decision dated August 6, 2007, the Office finalized its determination that appellant received an overpayment in the amount of \$17,947.12 as a result of being paid at the incorrect pay rate for the period July 12, 2004 through September 30, 2005 for which she was without fault. The Office denied waiver of recovery of the overpayment because she did not respond to its July 6, 2007 preliminary overpayment notice. It directed her to either repay the overpaid amount in full or contact the Office within 30 days to arrange a repayment plan.

LEGAL PRECEDENT -- ISSUE 1

The Office is directed by the statute to compute compensation based on an employee's monthly pay, which is defined under section 8101(4)¹ as the greater of the rate of pay at the time of injury, the rate of pay at the time disability begins, or the rate of pay at the time compensable disability recurs if the recurrence begins more than six months after an injured employee resumes regular full-time federal employment.²

ANALYSIS -- ISSUE 1

At the time of her injury on March 2, 1999, appellant was earning \$61,895.00, or \$1,190.29 weekly. She briefly returned to full-duty work when her work hours were reduced. On July 12, 2004 appellant stopped work to undergo back surgery and was out of work until June 21, 2005 when she returned to work part time. On July 12, 2004 she was making \$88,927.28 per year or \$1,710.14 per week. As appellant had not returned to full-duty work following her injury, the Office properly determined appellant's pay rate to be the date of her injury as directed by the statute, which was \$1,190.29 weekly.

LEGAL PRECEDENT -- ISSUES 2 & 3

Section 8129(a) of the Federal Employees' Compensation Act 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.”³

Section 8102(a) of the Act provides that the United States shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal

¹ 5 U.S.C. § 8101(4).

² See *Jeffrey T. Hunter*, 52 ECAB 503 (2001) (appellant did not return to regular full-time employment).

³ 5 U.S.C. § 8129(a).

injury sustained while in the performance of her duty.⁴ A claimant, however, is not entitled to receive temporary total disability compensation and actual earnings for the same period.⁵ Office procedures provide that an overpayment in compensation is created when a claimant returns to work but continues to receive wage-loss compensation.⁶

ANALYSIS -- ISSUES 2 & 3

The record indicates that appellant received an overpayment of compensation in the amount of \$13,103.79 for the period July 12, 2004 to June 20, 2005 and an overpayment of \$959.01 for the period August 7 to September 30, 2005 based upon an incorrect pay rate and an overpayment in the amount of \$3,884.32 for the period June 21 to August 6, 2005 as she was paid for total disability when she had returned to work part time on June 21, 2005 and was paid at an incorrect pay rate. A total overpayment of compensation of \$17,947.12 was found. Pay rate information provided by the employing establishment indicated that appellant was paid at the rate of a regular full-time employee, which at the time of her injury was \$1,190.29. However, the Office paid her at the weekly pay rate of \$1,710.14, which was her pay rate as of July 12, 2004. The record establishes that appellant had been paid a total of \$56,092.59 for the period July 12, 2004 through June 20, 2005 when she was only entitled to be paid \$42,998.80, which resulted in an overpayment of \$13,103.79. For the period August 7 through September 30, 2005, the Office found appellant had been paid a total for \$4,390.90 when she was only entitled to \$3,884.32, resulting in an overpayment of \$959.01. Appellant returned to work part time on June 21, 2005, but continued to receive compensation for total disability at the incorrect pay rate of \$1,710.14 for the period June 21 through August 6, 2005. She was paid \$7,752.63 for this period when she was only entitled to \$3,868.31, resulting in an overpayment of \$3,884.32. The total overpayment for the period July 12, 2004 through September 30, 2005 was determined to be \$17,947.12. The Board finds that an overpayment in compensation was created based upon appellant's receipt of compensation for total disability for the period June 21 to August 6, 2005 when she had returned to work on June 21, 2005, and for being paid at an incorrect pay rate of \$1,710.14 for the period July 12, 2004 through September 30, 2005. However, the Office calculated appellant's overpayment based upon the incorrect pay rate of \$1,190.25 when the correct pay rate was \$1,190.29. The Board will remand for the Office to recalculate the amount of the overpayment based upon the correct pay rate of \$1,190.29. Thus, the Board will affirm fact of overpayment, but set aside the amount of the overpayment. The case will be remanded for the Office to recalculate the amount of the overpayment based on the correct weekly pay rate of \$1,190.29.

⁴ 5 U.S.C. § 8102(a).

⁵ *Donna M. Rowan*, 54 ECAB 698 (2003).

⁶ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(a) (May 2004).

LEGAL PRECEDENT -- ISSUE 4

The waiver or refusal to waive an overpayment of compensation by the Office is a matter that rests within the Office's discretion pursuant to statutory guidelines.⁷ The statutory guidelines are found in section 8129(b) of the Act which states: "Adjustment or recovery of an overpayment by the United States may not be made when an incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience."⁸

Section 10.436 of the implementing regulations⁹ provide that recovery of an overpayment would defeat the purpose of the Act if such recovery would cause hardship to a currently or formerly entitled beneficiary because: (a) the beneficiary from whom the Office seeks recovery needs substantially all of his or her current income (including compensation benefits) to meet current or ordinary and necessary living expenses; and (b) the beneficiary's assets do not exceed a specified amount as determined by the Office from data furnished by the Bureau of Labor Statistics.¹⁰ An individual is deemed to need substantially all of his or her income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.¹¹

Section 10.437 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 in 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.¹²

Section 10.438 of the regulations provide that the individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by the Office. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of the Act or be against equity and good conscience. Failure to submit the requested information within 30 days of the request shall result in the denial of waiver.¹³

⁷ See *Robert Atchison*, 41 ECAB 83 (1989).

⁸ See 5 U.S.C. § 8129(b); *Carroll R. Davis*, 46 ECAB 361 (1994).

⁹ 20 C.F.R. § 10.436.

¹⁰ An individual's assets must exceed a resource based on \$4,800.00 for an individual or \$8,000.00 or an individual with a spouse or one dependent, plus \$960.00 for each additional dependent. This base includes all of the claimant's assets not exempted from recumbent. See Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a)(1)(b) (October 2004). See also *W.F.*, 57 ECAB 705 (2006).

¹¹ See *George A. Rodriguez*, 57 ECAB 224 (2005); *Sherry A. Hunt*, 49 ECAB 467 (1998).

¹² 20 C.F.R. § 10.437.

¹³ 20 C.F.R. § 10.438.

ANALYSIS -- ISSUE 4

The Office properly found that appellant was without fault in the creation of the overpayment as she did not meet any of the above-mentioned criteria for determining fault. Although it requested financial information, appellant did not provide it within 30 days of the July 6, 2007 request or at any time thereafter. As no financial information was provided, the Office was directed by 20 C.F.R. § 10.438(b) to deny waiver. Therefore, it properly denied her request for waiver of recovery of the overpayment.

On appeal appellant contends that she did not receive the July 6, 2007 preliminary notice of overpayment and was not aware of the existence of the overpayment or how it was calculated. The Office mailed the July 6, 2007 decision to appellant's address of record. Appellant did not assert that her address changed or that the address used by the Office was otherwise incorrect. The Board has found that, in the absence of evidence to the contrary, a letter properly addressed and mailed in the due course of business, such as in the course of the Office's daily activities, is presumed to have arrived at the mailing address in due course. This is known as the mailbox rule.¹⁴ Appellant submitted no evidence substantiating that she did not receive the Office's July 6, 2007 preliminary notice of overpayment. The Board finds that there is no error on the part of the Office in mailing the July 6, 2007 decision to the address provided by appellant.¹⁵

CONCLUSION

The Board finds that the Office properly determined the pay rate on which appellant's compensation was based. The Board also finds that the Office properly determined that an overpayment was created from July 12, 2004 through September 30, 2005. The Board finds that the Office incorrectly calculated the total amount of the overpayment as it used an incorrect date-of-injury pay rate. The Board finds that the Office properly denied waiver of the recovery of the overpayment of compensation.

¹⁴ *Jeffrey M. Sagrecy*, 55 ECAB 724 (2004).

¹⁵ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 6, 2007 is affirmed in part, set aside in part and the case remanded for further proceeding consistent with this decision.

Issued: July 7, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board