United States Department of Labor
Employees' Compensation Appeals Board

V.C., Appellant **and** **U.S. POSTAL SERVICE, POST OFFICE, Kechi, KS, Employer**	)	**Docket No. 07-2373 & 08-581** **Issued: October 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 18, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated August 31, 2007 regarding an overpayment of compensation. On October 31, 2007 appellant filed an appeal of an Office decision dated September 13, 2007 on the overpayment.[1] Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

[1] The August 31 and September 13, 2007 decisions involve the same overpayment. Both of these decisions find an overpayment of $21,639.71, deny waiver and require repayment at $300.00 every 28 days from continuing compensation. The only difference in the decisions is that the September 13, 2007 decision requested appellant submit a payment for the entire overpayment amount, and if a payment was not received, then $300.00 would be deducted from continuing compensation. The Board will issue a single decision reviewing both the August 31 and September 13, 2007 Office decisions.

ISSUES

The issues are: (1) whether the Office properly found that an overpayment of $21,639.71 was created due to an incorrect pay rate; (2) whether the Office properly denied waiver of the overpayment; and (3) whether the Office properly found the overpayment should be recovered by deducting $300.00 from continuing compensation.

FACTUAL HISTORY

The Office accepted that appellant sustained bilateral carpal tunnel syndrome, bilateral ulnar nerve lesions left arm tendinitis and right trigger finger causally related to her federal employment. In a June 20, 2003 statement, appellant indicated that she generally worked six days a week on a part-time basis. She stopped working on July 29, 2003. According to an employing establishment letter dated December 5, 2003, appellant averaged 34.99 hours per week in the year prior to July 29, 2003, and worked 1,819.73 hours. The Office determined that the pay rate for compensation purposes was $556.50 per week, based on an hourly rate of $15.90 at 35 hours per week. Appellant began receiving compensation for temporary total disability. She was paid compensation from July 29 to November 4, 2003 and December 11, 2003 to June 9, 2007 at a pay rate of $556.50 per week.

In correspondence dated May 17, 2007, the employing establishment indicated that appellant earned $21,033.19 from July 29, 2002 to July 28, 2003. By decision dated July 9, 2007, the Office issued a wage-earning capacity determination based on the selected position of receptionist.[2] On July 27, 2007 the Office issued a preliminary determination that an overpayment of $21,639.71 occurred from July 29 to November 4, 2003 and December 11, 2003 to June 9, 2007 due to an incorrect pay rate. It included a worksheet showing appellant's pay rate at $404.48 per week. According to the Office, appellant was paid $79,210.46 during the relevant period, but should have been paid $57,570.75, resulting in an overpayment of $21,639.71. With respect to fault, it found appellant was not at fault in creating the overpayment.

Appellant completed an overpayment recovery questionnaire on August 17, 2007. She reported income of approximately $3,224.00 per month and expenses of $2,930.00, with assets of over $69,000.00.[3]

By decisions dated August 31 and September 13, 2007, the Office finalized the overpayment determination. It found that an overpayment of $21,639.71 occurred, and waiver was denied as appellant had assets exceeding the minimum resource base. The Office found appellant could repay the overpayment by deducting $300.00 from continuing compensation.

[2] Appellant did not request review of this decision.

[3] The reported income included $1,330.00 in compensation benefits. By decision dated July 9, 2007, the Office had reduced appellant's compensation to $599.00 every 28 days based on her wage-earning capacity. Appellant did not request that the Board review this decision.

LEGAL PRECEDENT -- ISSUE 1

The Federal Employees' Compensation Act provides that monthly pay means the monthly pay at the time of injury, or the time disability begins, or the time compensable disability recurs, if the recurrence begins more than six months after the injured employee resumes regular full-time employment, whichever is greater.[4] Section 8114(d) of the Act provides:

> "Average annual earnings are determined as follows:
>
> "(1) If the employee worked in the employment in which he was employed at the time of his 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 he was employed on the basis of a 6-day workweek, 280 if employed on the basis of a 5½-day week, and 260 if employed on the basis of a 5-day week."

ANALYSIS

The Office found an overpayment in this case on the grounds that appellant had received compensation based on an incorrect pay rate. The initial pay rate used by the Office, as of the date disability began July 29, 2003, was $556.50 per week. This was based on an hourly wage of $15.90 per hour at 35 hours per week.

While the Office advised appellant that this pay rate was incorrect, neither the preliminary determination nor the final decision offer a clear explanation as to the correct pay rate. The Office did not clearly explain how the new pay rate was calculated. Based on a worksheet provided, it appears the Office found the correct pay rate was $404.48 per week. This amount was apparently based on the employing establishment's May 17, 2007 letter that appellant earned $21,033.19 in the year prior to July 29, 2003. $404.48 represents 5½ of the reported total amount earned.

A pay rate determination must be made in accord with the specific provisions of 5 U.S.C. § 8114. The record indicated that appellant worked in the date-of-injury job during substantially the whole year preceding the injury. It appears that appellant was paid an hourly wage, and she worked a varying number of hours per week. If her average annual earnings were not fixed, then the Office must determine pay rate under 5 U.S.C. § 8114(d)(1)(B). As noted, this requires determining the average daily wage and multiplying by the appropriate number. The Office must secure sufficient evidence to determine appellant's average daily wage, and whether she was employed on the basis of a 6, 5½, or 5-day workweek.

[4] 5 U.S.C. § 8101(4).

The case will be remanded for a proper determination as to the correct pay rate for compensation purposes. Once this issue is resolved, the Office may properly determine the amount of any overpayment and issue an appropriate decision. The Board will not address the remaining overpayment issues. If the Office finds an overpayment and establishes recovery from continuing compensation payments, the Office must consider the relevant factors.[5]

CONCLUSION

The case will be remanded to the Office to properly determine appellant's pay rate for compensation purposes under 5 U.S.C. § 8114 and issue an appropriate decision regarding any overpayment of compensation.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated September 13 and August 31, 2007 are set aside and the case remanded for further action consistent with this decision of the Board.

Issued: October 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

[5] "When an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to [the Office] the amount of the overpayment as soon as the error is discovered or his or her attention is called to the same. If no refund is made, [the Office] shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize hardship." 2 0 C.F.R. § 10.441.