

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

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<b>W.A., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 12-1810</b>
	)	<b>Issued: April 17, 2013</b>
<b>U.S. POSTAL SERVICE, PROCESSING &amp; DISTRIBUTION CENTER, Kearny, NJ,</b>	)	
<b>Employer</b>	)	
	)	

<i>Appearances:</i>	<i>Case Submitted on the Record</i>
<i>Thomas R. Uliase, Esq., for the appellant</i>	
<i>Office of Solicitor, for the Director</i>	

**DECISION AND ORDER**

Before:  
 RICHARD J. DASCHBACH, Chief Judge  
 COLLEEN DUFFY KIKO, Judge  
 PATRICIA HOWARD FITZGERALD, Judge

**JURISDICTION**

On August 29, 2012 appellant, through her attorney, filed timely appeals of June 15, 21 and 25, 2012 decisions of the Office of Workers' Compensation Programs (OWCP) finalizing three separate and distinct overpayments of disability compensation. 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 the case.

**ISSUES**

The issues concern whether OWCP properly determined the following: (1) appellant received an overpayment in the amount of \$777.42 for the period November 12 to 19, 2011 because she returned to work; (2) appellant was at fault in the creation of the \$777.42 overpayment; (3) appellant received an overpayment in the amount of \$27,270.72 for the period May 15, 2004 to November 11, 2011 due to erroneous calculations of compensation due to night differential and life insurance; (4) appellant, while without fault in the creation of the \$27,270.72

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

overpayment, was not entitled to waiver of recovery; (5) appellant received an overpayment in the amount of \$2,243.29 for the period June 1 to November 11, 2011 due to erroneous dependent exemption; and (6) appellant, while without fault in the creation of the \$2,243.29 overpayment, was not entitled to waiver of recovery.<sup>2</sup>

### **FACTUAL HISTORY**

On March 15, 2004 appellant, then a 48-year-old mail processing clerk, injured her right arm at work. OWCP accepted her traumatic injury claim for right rotator cuff tear and paid disability compensation for the period May 15, 2004 to November 19, 2011.

In the “Employee Portion” of CA-7 forms dated May 28 and June 12, 2004, appellant identified her husband, son and grandson as dependents. Subsequent EN1032 forms from April 23, 2006 to February 25, 2011 listed her husband as the sole dependent. In the “Employing Agency Portion” of a Form CA-7 dated June 1, 2004, an injury compensation specialist indicated that appellant received a base annual salary of \$43,872 plus an hourly night differential of \$4.58, applied to 6.5 hours per workday. In addition, appellant participated in the Federal Employees’ Group Life Insurance (FEGLI) Program, her scope of coverage categorized under code Z5.<sup>3</sup> Subsequent CA-7 forms dated June 12 and 29 and July 13, 2004 amended the hourly night differential to \$1.58.

OWCP informed appellant in a July 12, 2004 letter that she was entitled to \$2,649.64 in disability compensation per 28-day cycle. This amount was calculated by multiplying her weekly pay of \$992.55<sup>4</sup> by four weeks to obtain \$3,970.20 per month, multiplying this monthly pay by the augmented compensation rate of 75 percent to arrive at \$2,977.65 and deducting \$271.60 for health benefits, \$13.80 for basic life insurance (BLI) and \$42.60 for optional life insurance (OLI). OWCP reminded appellant that she was entitled to disability compensation so long as she remained unable to perform her regular job duties due to her accepted condition. Appellant was further advised to notify OWCP immediately when she returned to work and to send back any periodic roll checks subsequently issued. Disability compensation payment reports for the combined period May 15, 2004 to November 19, 2011 confirmed that OWCP

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<sup>2</sup> Counsel does not appeal OWCP’s June 6 and July 25, 2012 and January 11, 2013 decisions denying a claim for recurrence of disability arising on November 12, 2011. He also does not appeal an August 24, 2012 decision denying a request for a hearing with regard to the \$2,243.29 overpayment finding.

<sup>3</sup> According to FEGLI reference material, code Z5 indicates that a federal employee did not waive automatic enrollment in basic insurance and elected standard optional insurance (Option A), additional optional insurance (Option B) in an amount equal to five times the employee’s annual rate of basic pay and family optional insurance (Option C) in multiples of five. See Office of Personnel Management (OPM), Benefits Administration Letter No. 98-210 (December 29, 1998).

<sup>4</sup> Appellant’s \$992.55 weekly pay was the sum of her \$843.69 base weekly pay (*i.e.*, \$43,872 base annual salary divided by 52 weeks) and \$148.85 weekly night differential. The weekly night differential was calculated by multiplying a \$4.58 hourly night differential by 32.5 eligible hours per week.

withheld basic and OLI premiums and then disbursed \$2,649.64 in compensation per payment cycle.<sup>5</sup> Appellant's scope of coverage was categorized under code Z1.<sup>6</sup>

Appellant was reemployed as a modified mail processing clerk on November 12, 2011. The position paid \$1,076.12 per week. On November 16, 2011 OWCP terminated appellant's disability compensation retroactive to November 12, 2011 on the grounds that her present wage rate exceeded what she had been earning until her injury. It instructed her to return the periodic rolls check issued for the period October 23 to November 19, 2011 to avoid an overpayment. OWCP did not receive this check.

In a November 16, 2011 fiscal memorandum, an OWCP examiner explained that the hourly night differential constituted 7.5 percent of an employee's base hourly pay. Dividing appellant's base annual salary of \$43,872 by 2,080 hours in a work year resulted in a base hourly pay of \$21.09. Thus, the proper hourly night differential was \$1.58 (*i.e.*, 7.5 percent of \$21.09).

On November 22, 2011 OWCP made preliminary findings that appellant received an overpayment of \$777.42 for the period November 12 to 19, 2011. Appellant was paid \$2,720.98 in disability compensation for the period October 23 to November 19, 2011, but was only entitled to \$1,943.56 for the first 20 days of this cycle because she returned to work on November 12, 2011. She was at fault in creating the overpayment because she knew or should have known that she accepted compensation to which she was not entitled. OWCP informed appellant of her options if she wished to contest the fact or amount of overpayment.

Appellant notified OWCP in a November 29, 2011 letter that she no longer lived with her husband as of June 1, 2011. She added that she had legal custody of her grandson.<sup>7</sup>

On December 1, 2011 OWCP made preliminary findings that appellant received an overpayment of \$27,270.72 for the period May 15, 2004 to November 11, 2011. In particular, it erroneously applied an hourly night differential of \$4.58 instead of \$1.58 from May 15, 2004 to November 11, 2011. OWCP also incorrectly deducted for OLI coverage categorized under code Z1 instead of Z5 from May 29, 2004 to November 11, 2011. Consequently, appellant received a total of \$257,310.03 in disability compensation when she should have received \$230,039.31, a difference of \$27,270.72.<sup>8</sup> She was found to be without fault in creating the overpayment, informed of her options if she wished to contest the overpayment or request waiver and afforded 30 days to submit a Form OWCP-20 and financial documentation.

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<sup>5</sup> The amount deducted for BLI remained \$13.80 while the amount deducted for OLI varied: OWCP initially withheld \$42.60, then \$66.20 and finally \$131.50.

<sup>6</sup> Code Z1 indicates that a federal employee did not waive automatic enrollment in basic insurance and elected standard optional insurance (Option A), additional optional insurance (Option B) in an amount equal to five times the employee's annual rate of basic pay and family optional insurance (Option C) in multiples of one. *See* OPM, Benefits Administration Letter No. 98-210, *supra* note 3.

<sup>7</sup> Appellant attached an illegible copy of a civil action order issued by the Superior Court of New Jersey.

<sup>8</sup> An attached fiscal memorandum dated November 17, 2011 related that the \$27,270.72 overpayment had not yet been adjusted for the OLI underwithholding.

On January 20, 2012 OWCP made a preliminary finding that appellant received a \$2,243.29 overpayment for the period June 1 to November 11, 2011. As of June 1, 2011, appellant was no longer entitled to the augmented compensation rate of 75 percent because she no longer lived with her husband and her grandson was not an eligible dependent. Therefore, she should have received \$13,693.88 at the basic compensation rate of 66 2/3 percent instead of \$15,937.17, a difference of \$2,243.29.<sup>9</sup> Appellant was at fault in creating the overpayment because she knew or should have known that she accepted compensation to which she was not entitled. OWCP informed her of her options if she wished to contest the overpayment.

Appellant stated in a Form OWCP-20 dated February 2, 2012 that she had a monthly income of \$471.00 and monthly expenses of \$3,190.00.<sup>10</sup>

Counsel requested a prerecoupment hearing, which was held *via* video teleconference on March 30, 2012, to address all three preliminary overpayment findings. At the hearing, appellant testified that she and her husband separated on June 1, 2011. She retained legal custody of her grandson, but did not adopt him. Appellant returned to work on November 12, 2011 but stopped immediately.<sup>11</sup> Regarding the OWCP-20 Form, she remarked that she did not include any debt pursued by collection agencies and defaulted on mortgages for her home and another property in Allentown, Pennsylvania, in or around August 2011. Appellant maintained that she was unaware of the overpayments.

After the prerecoupment hearing, counsel submitted additional financial documentation. A March 29, 2012 statement from the Social Security Administration (SSA) confirmed that appellant received \$143.00 per month, effective December 2011. She previously received \$85.00 per month from December 2009 to November 2011. Bank statements for the closing dates January 20 and February 17, 2010 showed deposit account balances of \$153.91 and \$307.16, respectively. An annual mortgage statement for 2011 showed that appellant paid \$686.54 in interest and \$4,319.74 in real estate taxes. The ending principal balance was \$134,312.05. In a March 8, 2012 letter, the mortgage lender denied appellant's application for loan modification. Medical bills dated June 22 and November 28, 2011 amounted to \$597.40. A January 2012 billing statement from the electric and gas company showed a balance of \$476.75. A retail home improvement and appliance store's billing statement for the period closing February 16, 2012 showed a balance of \$146.15 and a minimum payment of \$15.00 due March 13, 2012. A department store's billing statement for the period closing February 18, 2012 showed a balance of \$220.07 and a minimum payment of \$25.00 due March 16, 2012. A second department store's billing statement for the period closing March 4, 2012 showed a balance of \$301.93 and a minimum payment of \$25.00 due March 27, 2012. A credit card company's

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<sup>9</sup> OWCP calculated \$15,937.17 by multiplying appellant's \$992.55 weekly pay by 164 days, dividing by 7 days and multiplying by the augmented compensation rate of 75 percent. Aside from substituting the basic compensation rate of 66 2/3 percent, OWCP calculated \$13,693.88 in the same manner.

<sup>10</sup> Appellant detailed that she received \$328.00 in child support from her grandson's father and \$143.00 in social security benefits. She paid \$1,400.00 for the mortgage, \$400.00 for food, \$100.00 for clothing, \$520.00 for utilities, \$150.00 for miscellaneous expenses and \$620.00 installments for credit card debt totaling \$11,400.00.

<sup>11</sup> The record indicates that appellant filed a Form CA-2a alleging that she sustained a recurrence of disability on November 12, 2011. This claim was denied and is not presently before the Board. *See supra* note 2.

billing statement for the period closing March 18, 2012 showed a balance of \$565.35 and a minimum payment of \$25.00 due April 15, 2012. A women's clothing store's billing statement for the period closing March 19, 2012 showed a balance of \$15.96 and a minimum payment of \$12.48 due April 13, 2012. A March 22, 2012 letter from a home security company threatened cancellation of service because appellant did not pay the outstanding balance of \$257.92 for at least two months. A March 2012 billing statement from the City of Newark's Department of Water and Sewer Utilities showed a balance due of \$108.57. Notices from various debt collection agencies for the period December 16, 2011 to March 7, 2012 advised appellant to settle her outstanding balances, which totaled \$27,647.74.

In a June 15, 2012 decision, an OWCP hearing representative finalized the \$27,270.72 overpayment and found that appellant was not entitled to waiver as she did not submit financial documentation showing that recovering the overpayment would deprive her of resources needed to meet ordinary and necessary living expenses or impose severe financial hardship.

By decision dated June 21, 2012, the hearing representative finalized the \$2,243.29 overpayment, but found appellant to be without fault in its creation. Nevertheless, appellant was not entitled to waiver of recovery because she did not submit financial documentation demonstrating that collection of the overpayment would deprive her of resources needed to meet ordinary and necessary living expenses or impose a severe financial hardship.

By decision dated June 25, 2012, OWCP finalized the \$777.42 overpayment and found that appellant was at fault in its creation.

### **LEGAL PRECEDENT -- ISSUES 1 & 2**

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>12</sup> Nonetheless, the statute qualifies an employee's right to receive disability compensation. Section 8116 provides that, while an employee is receiving such compensation, he or she may not receive salary, pay or remuneration of any type from the United States, except in limited circumstances.<sup>13</sup>

Temporary total disability is defined as the inability to return to the position held at the time of injury or earn equivalent wages or perform other gainful employment, due to the work-related injury.<sup>14</sup> An employee is not entitled to compensation for temporary total disability after

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<sup>12</sup> 5 U.S.C. § 8102(a).

<sup>13</sup> *Id.* at § 8116; *R.H.*, Docket No. 09-1981 (issued June 11, 2010).

<sup>14</sup> 20 C.F.R. § 10.400(b).

he or she returns to work.<sup>15</sup> If he or she returns to work and receives actual earnings and disability compensation during the same period, an overpayment arises.<sup>16</sup>

A waiver of recovery is not possible if the claimant is at fault in the creation of the overpayment.<sup>17</sup> A claimant who has done any of the following will be found to be at fault with respect to creating an overpayment: (1) made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; (2) failed to provide information which he or she knew or should have known to be material; or (3) accepted a payment which he or she knew or should have known to be incorrect. Whether or not an individual was at fault depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid.<sup>18</sup>

### ANALYSIS -- ISSUES 1 & 2

The Board finds that OWCP properly determined the fact and amount of overpayment, finalized by decision dated June 25, 2012. OWCP detailed that appellant received \$2,720.98 in disability compensation for the period October 23 to November 19, 2011, a daily rate of approximately \$97.178 per day (*i.e.*, \$2,720.98 divided by 28 days). However, appellant was no longer disabled as of November 12, 2011 because she has returned to work. Therefore, she was only entitled to \$1,943.56 in compensation for the period October 23 to November 11, 2011 (*i.e.*, \$97.178 multiplied by 20 days), resulting in an overpayment of \$777.42.

The Board further finds that OWCP properly determined that appellant was at fault in the creation of the overpayment under the third fault standard mentioned above. OWCP advised her in a July 12, 2004 letter that disability compensation was payable so long as she remained unable to perform her regular job duties due to her accepted right rotator cuff tear. It also instructed appellant on November 16, 2011 to return the final periodic rolls check issued to avoid an overpayment, which she failed to do. Although appellant alleged during the precoupment hearing that she was unaware of the overpayment, she should have reasonably known that she was accepting an incorrect amount. Therefore, she was at fault in creating the overpayment and not eligible for waiver of recovery.

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<sup>15</sup> *W.B.*, Docket No. 09-1440 (issued April 12, 2010).

<sup>16</sup> *D.C.*, Docket No. 09-1460 (issued April 19, 2010); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(a) (May 2004).

<sup>17</sup> *Donald L. Overstreet*, 54 ECAB 678 (2003); *Gregg B. Manston*, 45 ECAB 344 (1994).

<sup>18</sup> 20 C.F.R. § 10.433. *See also Ralph P. Beachum, Sr.*, 55 ECAB 442, 447 (2004) ("reasonable person" test).

### LEGAL PRECEDENT-- ISSUES 3, 4 & 6

If an employee is totally disabled, the United States shall pay the basic compensation rate of 66 2/3 percent of his or her monthly pay during the period of disability.<sup>19</sup> OWCP has administratively included night differential in computing an employee's pay rate.<sup>20</sup>

Under the FEGLI Program, most civilian employees of the Federal Government are eligible to enroll in BLI and OLI.<sup>21</sup> While an employee is receiving disability compensation, life insurance premiums are withheld.<sup>22</sup> When premiums are underwithheld, an overpayment arises because OWCP must pay the full amount to OPM upon discovery of the error.<sup>23</sup>

An overpayment in compensation shall be recovered by OWCP unless incorrect payment has been made to an individual who is not at fault with respect to its creation and when adjustment or recovery would either defeat the purpose of FECA or be against equity and good conscience.<sup>24</sup> A finding that a claimant was without fault does not automatically result in waiver of recovery.<sup>25</sup>

Recovery of an overpayment will defeat the purpose of FECA if such recovery would impose hardship because; (1) the beneficiary needs substantially all of his or her current income (including compensation benefits) to meet ordinary and necessary living expenses; and (2) the beneficiary's assets do not exceed the resource base of \$4,800.00 for an individual or \$8,000.00 for an individual with a spouse or one dependent, plus \$960.00 for each additional dependent.<sup>26</sup> An individual is deemed to need substantially all of his or her current income to meet ordinary and necessary living expenses if his or her monthly income does not exceed monthly expenses by more than \$50.00.<sup>27</sup>

Recovery of an overpayment is considered to be against equity and good conscience when; (1) the individual who received an overpayment would experience severe financial hardship attempting to repay the debt; or (2) the 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

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<sup>19</sup> 5 U.S.C. § 8105(a); *O.R.*, 59 ECAB 432, 436 (2008).

<sup>20</sup> FECA Procedure Manual, *supra* note 16, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.6(b)(1) (March 2011). *See also Madelyn Y. Grant*, 57 ECAB 533 (2006).

<sup>21</sup> *See* 5 C.F.R. §§ 870.101 *et seq.*

<sup>22</sup> 5 U.S.C. § 8707(b)(1).

<sup>23</sup> *S.H.*, Docket No. 12-166 (issued June 14, 2012); *J.R.*, Docket No. 11-285 (issued September 22, 2011).

<sup>24</sup> *See* 5 U.S.C. § 8129(b); *Linda E. Padilla*, 45 ECAB 768 (1994).

<sup>25</sup> *L.S.*, 59 ECAB 350, 354 (2008). OWCP must exercise its discretion to determine whether recovery would defeat the purpose of FECA or be against equity and good conscience. *Id.*

<sup>26</sup> *D.C.*, *supra* note 16.

<sup>27</sup> *J.O.*, Docket No. 09-264 (issued August 10, 2009).

position for the worse.<sup>28</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>29</sup>

### **ANALYSIS -- ISSUES 3 & 4**

The Board finds that OWCP properly determined the fact of overpayment, finalized by decision dated June 15, 2012. As noted in OWCP's November 16, 2011 fiscal memorandum, the hourly night differential constitutes seven and one-half percent of an employee's base hourly pay. Appellant's base hourly pay on the date of injury was \$21.09 (*i.e.*, \$43,872 base annual salary divided by 2,080 hours of work in a year). Seven and one-half percent of this base hourly pay is \$1.58, a figure that was reiterated in amended CA-7 forms dated June 12, 29 and July 13, 2004. Nonetheless, from the outset, OWCP erroneously applied an hourly night differential of \$4.58 from May 15, 2004 to November 11, 2011.<sup>30</sup> In addition, while a Form CA-7 dated June 1, 2004 established that appellant's scope of OLI coverage was categorized under code Z5, OWCP deducted for lesser coverage categorized under code Z1 from May 29, 2004 to November 11, 2011.

The Board finds, however, that the matter is not in posture for adjudication with respect to the amount of overpayment. OWCP found that appellant received \$257,310.03 in disability compensation from May 15, 2004 to November 11, 2011 when she should have received \$230,039.31, a difference of \$27,270.72. In contrast to its June 25, 2012 decision above, it did not clearly explain in writing how this overpayment was calculated.<sup>31</sup> Specifically, OWCP did not detail how the erroneous application of a \$4.58 hourly night differential from May 15, 2004 to November 11, 2011 and underwithholding of OLI premiums from May 29, 2004 to November 11, 2011 necessarily resulted in an overpayment of \$27,270.72. A final decision must include findings of fact and provide clear reasoning that allows a claimant to understand the precise defect of the claim and the kind of evidence that would tend to overcome it.<sup>32</sup> Moreover, OWCP failed to present probative evidence concerning the proper deduction for OLI coverage categorized under code Z5 and even conceded that its preliminary calculation did not account for the underwithholding.<sup>33</sup> Authorized documentation regarding the proper amount of life insurance premiums for a specific year or period should be provided so that appellant, as well as the Board or other reviewers, may be able to determine if the calculation of the overpayment amount was correct.<sup>34</sup>

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<sup>28</sup> *L.S.*, *supra* note 25, at 354.

<sup>29</sup> *J.O.*, *supra* note 27.

<sup>30</sup> *See supra* note 4.

<sup>31</sup> *See O.R.*, *supra* note 19; *Sandra K. Neil*, 40 ECAB 924 (1989).

<sup>32</sup> *S.C.*, Docket No. 10-1290 (issued April 7, 2011).

<sup>33</sup> *See supra* note 8.

<sup>34</sup> *J.R.*, *supra* note 23. For instance, computer worksheets that simply indicate the premium for enrollment codes for the period covered are not sufficient documentation. *Id.*



As the amount of the overpayment is not yet established, it is premature to address appellant's eligibility for waiver.

For these reasons, the June 15, 2012 decision is affirmed in part and set aside in part.

### **LEGAL PRECEDENT -- ISSUE 5**

If an employee is totally disabled, the United States shall pay the basic compensation rate of 66 2/3 percent of his or her monthly pay during the period of disability. If he or she has one or more dependents, the United States shall pay an augmented compensation rate of 75 percent.<sup>35</sup>

A spouse qualifies as a dependent if he or she is a member of the same household as the employee, he or she is receiving regular contributions from the employee for his or her support or the employee has been ordered by a court to contribute to his or her support.<sup>36</sup> Questions affecting relationship, such as the validity of marriage or divorce, are determined by the statutory and decisional domestic relations law of the jurisdiction where the alleged marriage took place.<sup>37</sup> An unmarried child who, while living with the employee or receiving regular contributions from the employee toward his or her support, is either under 18 years of age or over 18 years of age and incapable of self-support due to physical or mental disability qualifies as a dependent.<sup>38</sup>

If a claimant received compensation at the augmented rate during a period when he or she did not have an eligible dependent, the difference between the compensation that was disbursed at the 75 percent augmented rate and the compensation that should have been disbursed at the 66 2/3 percent basic rate constitutes an overpayment of compensation.<sup>39</sup>

### **ANALYSIS -- ISSUES 5 & 6**

The Board finds that OWCP properly determined the fact of overpayment, finalized by decision dated June 21, 2012. Multiple CA-7 and EN1032 forms for the period May 28, 2004 to February 25, 2011 listed appellant's husband as a dependent. OWCP was later notified in a November 29, 2011 letter that the couple no longer lived together as of June 1, 2011. This fact was confirmed during the March 30, 2012 precoupment hearing. The evidence of record also does not indicate that appellant paid the husband regular support payments or that a court ordered such payments. Thus, appellant was no longer entitled to disability compensation at the augmented rate of 75 percent for the period June 1 to November 11, 2011. Although she

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<sup>35</sup> 5 U.S.C. §§ 8105(a) & 8110(b).

<sup>36</sup> *Id.* at § 8110(a)(1)-(2); *Steven R. Cofrancesco*, 57 ECAB 662 (2006).

<sup>37</sup> *Andrew J. Kravic*, 57 ECAB 526 (2006).

<sup>38</sup> 5 U.S.C. § 8110(a)(3). A child is also considered a dependent if he or she is an unmarried student under 23 years of age who has not completed four years of education beyond the high school level and is currently pursuing a full-time course of study at a qualifying college, university or training program. *E.G.*, 59 ECAB 599 (2008).

<sup>39</sup> *Beachum*, *supra* note 18, at 445.

repeatedly asserted that her grandson, over whom she retained legal custody, qualified as a dependent, the Board has firmly held otherwise.<sup>40</sup>

The Board finds, however, that the matter is not in posture for adjudication with respect to the amount of overpayment. OWCP calculated that appellant received \$15,937.17 in compensation from June 1 to November 11, 2011 by multiplying appellant's \$992.55 weekly pay by 164 days, dividing by 7 days and multiplying by the augmented rate of 75 percent. It then calculated that she should have received \$13,693.88 by multiplying \$992.55 by 164 days, dividing by 7 days and multiplying by the basic rate of 66 2/3 percent, resulting in an overpayment of \$2,243.29.<sup>41</sup> While the method of computation appears sound, the Board points out that OWCP should have used a weekly pay figure that was less than \$992.55.<sup>42</sup> The weekly pay is the sum of appellant's base weekly pay and her weekly night differential. Her disability compensation of \$2,649.64 per 28-day cycle, based on a weekly pay of \$992.55, was inflated because OWCP applied the wrong hourly night differential of \$4.58 instead of \$1.58 and withheld premiums for lesser OLI coverage.<sup>43</sup> Hence, the weekly pay figure should have been below \$992.55.<sup>44</sup>

As the amount of the overpayment is not yet established, it is premature to address appellant's eligibility for waiver.

For these reasons, the June 21, 2012 decision is affirmed in part and set aside in part.

### CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment in the amount of \$777.42 for the period November 12 to 19, 2011 and was at fault in its creation.

The Board finds that OWCP properly determined that appellant received an overpayment for the period May 15, 2004 to November 11, 2011, but did not clearly explain in writing how it calculated the \$27,270.72 amount.

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<sup>40</sup> See, e.g., *Barbara J. Hill*, 50 ECAB 358 (1999); *Louis L. Jackson, Sr.*, 39 ECAB 423 (1988) (a grandchild is not a "child" dependent as defined under FECA).

<sup>41</sup> See *supra* note 9.

<sup>42</sup> The Board notes that OWCP's June 15, 2012 decision correctly determined that a separate overpayment occurred for the period May 15, 2004 to November 11, 2011. The Board further notes that part of the payment period implicated in this earlier decision overlapped with the period implicated in the June 21, 2012 overpayment decision (*i.e.*, June 1 to November 11, 2011). OWCP's failure to adjust the weekly pay in this case's third and final overpayment decision led to a calculation that appeared to penalize appellant for amounts that had already been included in this case's second overpayment decision.

<sup>43</sup> See *supra* note 4.

<sup>44</sup> Until the precise amount of overpayment is determined for the June 15, 2012 overpayment decision, OWCP cannot do likewise for the June 21, 2012 decision.

The Board finds that OWCP properly determined that appellant received an overpayment for the period June 1 to November 11, 2011, but did not properly calculate the \$2,243.29 amount.

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 25, 2012 decision of the Office of Workers' Compensation Programs is affirmed. **IT IS ALSO ORDERED THAT** the June 21 and 15, 2012 decisions of the Office of Workers' Compensation Programs are affirmed with respect to the fact of the overpayments and remanded for further action consistent with this decision of the Board.

Issued: April 17, 2013  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board