

mail processing clerk. The claim was accepted for bilateral flexor tenosynovitis, right tunnel radial neuropathy, right ulnar neuropathy, right carpal tunnel median neuropathy, left upper extremity overuse syndrome and cervical strain. The Board affirmed OWCP's denial claim for a recurrence of disability commencing September 23, 2009. The history of the case as provided in the prior Board decision is incorporated herein by reference.

In a letter dated December 1, 2009, OWCP noted that appellant had claimed her mother as a dependent on a claim for compensation. It advised her that a parent was a dependent if wholly dependent on the employee. On December 11, 2009 appellant responded that her mother received \$892.00 per month in Social Security Administration (SSA) benefits and \$507.00 per month from a pension plan.

As the Board noted in its prior decision, appellant worked four hours a day as of October 1, 2009. In a January 13, 2010 report, Dr. Scott Fried, an attending osteopath, indicated that appellant was working three days a week. In an August 5, 2010 report, he stated that appellant continued to work part time in a modified position. The record reflects that on September 4, 2010 appellant was offered and accepted a full-time, light-duty position. As of October 25, 2010 she began intermittently working less than eight hours a day and claimed compensation for the remaining hours.³ Appellant received compensation for wage loss.

With respect to appellant's pay rate, the employing establishment provided a November 18, 2010 memorandum that established her base pay was \$49,518.00 annually as a level 6, Step K full-time employee. In addition, the employing establishment noted that appellant earned \$55.88 per week in night differential and \$95.23 per week in Sunday premium pay.

An OWCP memorandum dated January 12, 2011 calculated that appellant's weekly base pay was 952.40, with an additional \$380.96 per week in Sunday premium pay and \$55.88 in night differential. Commencing December 18, 2010, OWCP used a pay rate for compensation purposes of \$1,389.24 per week, with a two-thirds compensation rate for no dependents.

In a letter dated August 28, 2012, OWCP advised appellant of a preliminary determination that an overpayment of \$2,486.37 occurred from October 25, 2010 to July 13, 2012, as she was paid at an incorrect pay rate. Appellant was paid from October 25 to November 5, 2010 using a pay rate of \$908.88, from November 6 to December 17, 2010 using a pay rate of \$890.85 and from December 18, 2010 to July 13, 2012 using a pay rate of \$1,389.24 per week. The correct pay rate should have been \$1,103.38 based on the information provided by the employing establishment. OWCP calculated that appellant had received \$13,156.41 in net compensation during the overpayment period, but should have received \$10,607.04. It found she was not at fault in creating the overpayment and requested financial information to consider waiver of the overpayment.

Appellant submitted a September 4, 2012 letter contending that her mother should be considered a dependent and her compensation rate should be based on having a dependent. In an overpayment recovery questionnaire (OWCP-20), she reported \$5,728.50 in monthly income,

³ The compensation claimed generally was one and a half hours per day, although appellant's work hours varied and intermittently she worked eight hours and did not claim compensation.

which included \$4,350.50 in earnings, plus her mother's SSA and pension benefits. Appellant noted \$4,350.50 was "gross" income, dividing annual earnings of \$52,206.00. She reported \$3,213.00 in monthly expenses. With respect to assets, appellant reported \$3,525.00.

By decision dated November 6, 2012, OWCP finalized its determination that an overpayment of \$2,486.37 was created due to an incorrect pay rate. With respect to waiver, it found that appellant had income of \$4,350.00, with expenses totaling \$3,172.00. OWCP did not use income or expenses related to appellant's mother,⁴ but concluded that the evidence did not warrant waiver of the overpayment based on her income.

LEGAL PRECEDENT -- ISSUE 1

Under 5 U.S.C. § 8101(4), "monthly pay" means the monthly pay at the time of injury, or the monthly pay at the time disability begins, or the monthly pay at the time compensable disability recurs, if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater...."

Section 8114(d) of FECA 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 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 he was employed at the time of his 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 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 he was working at the time of the injury having regard to the previous earnings of the employee in Federal employment, and of other

⁴ Appellant listed \$41.25 expense for her mother's life insurance.

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 his injury.”

A claimant is entitled to augment compensation for a “dependent” pursuant to 5 U.S.C. § 8110. A parent is a dependent if “wholly dependent on and supported by the employee.”⁵ The Board has defined wholly dependent to mean that the person claiming dependent status must have no other consequential sources of maintenance.⁶

ANALYSIS -- ISSUE 1

To determine the fact and amount of overpayment in this case, the record must establish the correct pay rate for compensation purposes. The Board is unable to determine if OWCP’s finding that the correct weekly pay rate was \$1,103.38 is accurate. OWCP found the correct pay rate was based on a full-time level 6, Step K position with night differential and Sunday premium pay as of October 25, 2010. The employing establishment provided some information in a November 18, 2010 memorandum that appellant’s pay rate on October 25, 2010 was a base salary of \$49,518.00 (\$952.27 a week), plus \$55.88 a week in night differential and \$95.23 a week of Sunday differential. OWCP did not, however, make any findings with respect to either 5 U.S.C. § 8101(4) or 5 U.S.C. § 8114(d). It is not clear the nature and extent of appellant’s work following her injury, but it appears that she worked part time for certain periods. OWCP did not make any findings under 5 U.S.C. § 8101(4) as to whether a recurrence of disability on October 25, 2010 was more than six months after appellant resumed regular full-time employment. Moreover, there are no findings as to how the pay rate was calculated according to the provisions of 5 U.S.C. § 8114(d) noted above. The case will be remanded to OWCP for proper findings after securing any additional relevant information as to appellant’s work history and pay.

Appellant contended that the overpayment was incorrect because she should have been paid at the augmented rate for a claimant with a dependent. It is her contention that her mother is a dependent under 5 U.S.C. § 8110, but in this case, appellant’s mother was receiving both SSA benefits of \$842.00 a month as well as \$507.00 a month in pension benefits. In *L.E.*, the employee’s parent received SSA benefits of \$470.00 per month and the Board found that the parent was not “wholly dependent” on the employee.⁷ For a parent to be considered as a dependent there must be no other consequential sources of maintenance. The SSA and pension benefits received by appellant’s mother are not considered inconsequential and she cannot be considered a dependent.

With respect to the period and amount of the overpayment, the Board notes that OWCP found the overpayment period was October 25, 2010 to July 13, 2012, but under OWCP’s calculations from October 25 to December 17, 2010 appellant was paid compensation based on a

⁵ *Id.*

⁶ *William L. Rogers*, 1 ECAB 191 (1948).

⁷ Docket No. 09-1750 (issued March 12, 2010).

pay rate lower than \$1,103.38. It is well established that OWCP should not attempt to offset underpayments of compensation in determining the amount of an overpayment, as they are separate issues.⁸ On return of the case, it should properly calculate the period and amount of any overpayment.

Based on the Board's determination as to the fact and amount of overpayment, the issue of waiver is rendered moot.

The case will accordingly be remanded to OWCP for proper findings. After such further development as OWCP deems necessary, it should issue an appropriate decision.

CONCLUSION

The Board finds the case is not in posture as to the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 6, 2012 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: August 23, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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

⁸ See *Robert L. Curry*, 54 ECAB 675 (2003). If a claimant pursues waiver and the overpayment is waived, the claimant has lost due process rights with respect to recovery of the offset amount.