



## **FACTUAL HISTORY**

Appellant, a 58-year-old forfeiture specialist, has an accepted traumatic injury claim for left rotator cuff tear with arthroscopy, which arose on October 29, 1996. He last worked on January 31, 1997 and the Office placed him on the periodic compensation rolls effective June 22, 1997. The Office later expanded the claim to include left elbow cubital tunnel syndrome as an accepted condition and right elbow epicondylitis as a consequential injury. Between March 24, 1997 and July 8, 2004 appellant underwent 11 Office-approved surgical procedures involving his left and right upper extremities, including left shoulder total arthroplasty. He continues to receive wage-loss compensation for total disability.

On May 26, 2005 the Office issued a decision finding that appellant forfeited his wage-loss compensation for the period June 20, 2002 to September 21, 2003 because he had not reported his involvement in a family-owned business venture. He requested an oral hearing on June 15, 2005.<sup>2</sup>

The Office also issued a May 26, 2005 preliminary finding that an overpayment was created in the amount of \$52,472.62, as a result of appellant's forfeiture of compensation. The Office advised him that he was at fault in the creation of the overpayment and also informed appellant of his right to submit evidence or argument in response to preliminary determination. He was afforded 30 days to request a telephone conference, request a precoupment hearing or request a decision on the written evidence only.

On June 24, 2005 the Office issued a final overpayment decision, noting that appellant had not responded to May 26, 2005 preliminary finding. The \$52,472.62, overpayment was to be recovered by deducting \$1,030.00, every 28 days from his continuing compensation.

## **LEGAL PRECEDENT**

Under section 8129 of the Federal Employees' Compensation Act and the implementing regulations, an overpayment must be recovered unless 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.<sup>3</sup>

Section 10.431 of the implementing regulations provides that, before seeking to recover an overpayment or adjust benefits, the Office will advise the individual in writing that the overpayment exists and the amount of the overpayment.<sup>4</sup> The written notification must also include a preliminary finding regarding whether the individual was at fault in the creation of the

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<sup>2</sup> A hearing request must be sent within 30 days (as determined by the postmark or other carrier's date marking) of the date of the Office decision for which a hearing is sought. 20 C.F.R. § 10.616(a) (1999). Where the Office neglects to retain the postmarked envelope that contained the request, the date of the letter requesting a hearing shall be used for the purposes of determining the timeliness of the request. *James B. Moses*, 52 ECAB 465, 468 (2001).

<sup>3</sup> 5 U.S.C. § 8129(b); 20 C.F.R. §§ 10.433, 10.434, 10.436, 10.437 (1999).

<sup>4</sup> 20 C.F.R. § 10.431(a) (1999).

overpayment.<sup>5</sup> Additionally, the Office is obliged to advise the individual of his or her right to inspect and copy the government records relating to the overpayment.<sup>6</sup> Lastly, the preliminary notice must inform the individual of his or her right to challenge the fact or amount of the overpayment, the right to contest the preliminary finding of fault in the creation of the overpayment, if applicable and the right to request a waiver of recovery of the overpayment.<sup>7</sup> The recipient of the alleged overpayment may present evidence in response to the Office's preliminary notice either in writing or at a prerecoument hearing.<sup>8</sup> The evidence must be presented or the hearing requested within 30 days of the date of the written notice of overpayment.<sup>9</sup> Failure to request the hearing within this 30-day time period shall constitute a waiver of that right.<sup>10</sup>

### ANALYSIS

Appellant argued that he timely submitted evidence in response to the May 26, 2005 preliminary overpayment determination, which the Office neglected to consider in its June 24, 2005 final decision.<sup>11</sup> He also argued that the Office issued its final overpayment decision prior to the expiration of the 30-day time period allotted in the May 26, 2005 preliminary determination.

In computing a time period the date of the event from which the designated period of time begins to run shall not be included, while the last day of the period so computed shall be included unless it is a Saturday, Sunday or a legal holiday.<sup>12</sup> The Office issued its preliminary overpayment finding on May 26, 2005 which advised appellant that he had 30 days within which to respond. Therefore, he had at least until June 25, 2005 to respond to the preliminary determination. However, because June 25, 2005 fell on a Saturday the Office should have delayed issuing its final overpayment decision until Monday, June 27, 2005 at the earliest.

The Board finds that the Office infringed upon appellant's procedural rights under 20 C.F.R. §§ 10.431 and 10.432 when it prematurely issued its June 24, 2005 final overpayment decision. Accordingly, the June 24, 2005 decision is set aside. The case will be remanded to the Office to address appellant's June 15, 2005 request for a telephone conference and consideration of all relevant evidence prior to the issuance of a *de novo* decision.

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<sup>5</sup> 20 C.F.R. § 10.431(b) (1999).

<sup>6</sup> 20 C.F.R. § 10.431(c) (1999).

<sup>7</sup> 20 C.F.R. § 10.431(d) (1999).

<sup>8</sup> 20 C.F.R. § 10.432 (1999).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> The Board's review is limited to the evidence of record that was before the Office at the time it issued its final overpayment decision on June 24, 2005. 20 C.F.R. § 501.2.

<sup>12</sup> *Afegalai L. Boone*, 53 ECAB 533, 537 n.12 (2002).

**CONCLUSION**

The Board finds that the case is not in posture for decision.

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 24, 2005 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further consideration consistent with this decision.

Issued: November 23, 2005  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge  
Employees' Compensation Appeals Board

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