

condition were employment related.¹ The Office accepted the claim for a left shoulder strain on July 21, 1994. It authorized left shoulder diagnostic arthroscopic surgery, performed on March 4, 1994, and left shoulder arthroscopic surgery with arthroscopic subacromial decompression, on October 3, 2005.² Subsequently the Office expanded the claim to include left shoulder joint derangement, bilateral shoulder impingement syndrome, bicipital tenosynovitis, displacement of cervical intervertebral disc without myelopathy and authorized discectomy fusion and arthodesis surgery, performed on March 14, 2005.³

The Office received copies of appellant's time analysis form (CA-7a), leave breakdown for the period March 14 to May 27, 2005 and claim for compensation (Form CA-7) for the period March 14 to May 27, 2005. Appellant used sick leave for March 14 to 18, 2005 and four hours of leave without pay (LWOP) for the period March 21 to May 27, 2005. The time analysis form also noted that she used 200 hours of LWOP and 200 hours of annual leave for the period March 19 to May 27, 2005, which she attributed to cervical surgery. On the claim for compensation form, appellant indicated she used LWOP for the period March 14 to May 27, 2005 and checked "no" to the question of whether it was intermittent. The employing establishment noted on the back of the form that appellant used 8 hours daily of sick leave for the period March 14 to 18, 2005 and effective March 19, 2005 thru May 27, 2005 employee is claiming 200 hours of LWOP and will take 200 hours sick leave.

By letter dated May 27, 2005, the Office placed appellant on the periodic rolls for temporary total disability and noted her first payment would be for the period March 14 to 19, 2005 and notified her as to the amount and period for regular payments. The letter informed appellant to immediately notify the Office when she returned to work to avoid an overpayment of compensation. She was also instructed to return any compensation received for the period in which she worked.

The record contains evidence that the Office issued a periodic rolls payment for the period March 14 to 19, March 20 to April 16, April 17 to May 14, May 15 to June 11, June 12 to July 9 and July 10 to August 6, 2005.

In a memorandum of a July 29, 2005 conference call, the Office noted the issue "whether [appellant] intended to claim total disability with [the Office] or only four hours per day since

¹ This was assigned file number 06-053667. The record contains evidence that appellant filed a traumatic injury claim on September 2, 1991 alleging that on September 1, 1991 she injured her left hand, thumb and wrist while keying pallets on the belt. The record also contains an August 10, 1995 occupational disease claim alleging that on October 13, 1994 she first realized her right shoulder weakness was employment related. This was accepted by the Office and assigned file number 06-0634098. On September 9, 1997 appellant filed an occupational disease claim alleging that on April 15, 1997 she first realized her right hand, arm and forearm condition were employment related, which was denied by decision dated December 3, 1997. This was assigned file number 06-0686833. On June 17, 1998 the Office doubled file numbers 06-0686833 and 06-053667, with the latter as the master file number.

² By decision dated August 14, 2005, the Office granted appellant a schedule award for a seven percent impairment of the left upper extremity.

³ On January 21, 1997 the Office issued a loss of wage-earning capacity decision which found appellant's employment as a service monitor clerk at the employing establishment fairly and reasonably represented her wage-earning capacity.

her recurrence/surgery on March 14, 2005.” Appellant informed the Office that she had been receiving four hours of leave from the employing establishment. She verified payment of eight hours per day for the period March 14 to 18, 2005 and four hours of leave for the period March 21 to July 22, 2005. In summarizing the conference call, the Office noted:

“Since the issue was resolved as we had clarified that she only intended to claim [four] hours LWOP per day for the period March 21 to July 21, 2005 and will be paid [eight] hours of LWOP July 23, 2005 to August 2, 2005, [appellant] agreed to finalizing the conference at this time.”

On August 16, 2005 the Office issued a preliminary determination that appellant received an overpayment of compensation in the amount of \$5,346.54. It arose because she received both compensation and sick leave from March 14 to 18, 2005. She was paid compensation for total disability for the period March 22 to July 22, 2005 while receiving four hours of leave per day, and she was paid compensation for total disability for the period July 23 to August 6, 2005. The Office found that appellant was entitled only to 440 hours of LWOP from March 22 through July 22, 2005. It found her at fault for accepting payments she knew or should have known were incorrect. The Office found that she was at fault in the creation of the overpayment because appellant knew or should have known that she was not entitled to receive compensation for total disability after she returned to work on August 3, 2005. The Office stated that it had advised appellant by a letter dated May 27, 2005 to return any compensation payments received after she returned to work. The Office requested that appellant submit a completed overpayment recovery questionnaire (Form OWCP-20) and copies of supporting financial documents within 30 days if she disagreed with the fact or amount of the overpayment. The Office further advised of her right to request a precoupment hearing or a telephone conference.

On September 1, 2005 appellant requested the Office to issue a decision based on a review of the written record and submitted a completed overpayment questionnaire. In an attached letter, appellant contended that she was not at fault in the creation of the overpayment due to being under the influence of several medications at the time she received the May 27, 2005 letter. She also noted that she returned to work on August 9, 2005 with reduced hours. Appellant contended that the overpayment was the fault of the Office as her CA-7 clearly listed her usage of leave to cover part of the hours used. She also contended that she was entitled to waiver of the overpayment as she was not at fault in the creation of the overpayment and did not understand how the Office computed the overpayment.

By decision dated September 20, 2005, the Office found that appellant received an overpayment of compensation in the amount of \$5,346.54 that arose because she received both compensation and sick leave from March 14 to 18, 2005 and received compensation for total disability for the period March 22 through July 22, 2005 while using leave for four hours per day and received compensation for total disability while using leave for eight hours per day for the period July 23 to August 6, 2005. The Office found that appellant was only entitled to 440 hours of leave without pay from March 22 through July 22, 2005 but received compensation for temporary total disability from March 14 to August 6, 2005. The Office provided the calculation of the overpayment as requested by appellant, indicating that she was due a net amount of \$6,311.52 for the period March 21, 2005, the day after she was placed on the periodic rolls, to August 6, 2005, after she returned to work. As appellant received a net amount of \$11,658.06

during the period March 14 to August 6, 2005 instead, the Office determined that it overpaid her by \$5,346.54. The Office was unaware that appellant had applied for and had received leave during this period or that there was an overpayment until the employing establishment notified it. It found she was at fault in the matter of the overpayment for the reason that she was knew or should have known that she was receiving leave and compensation. The Office rejected appellant's contention that she was highly medicated when she received the Office's May 27, 2005 letter and thus did not understand the content of the letter to return compensation payments and should not be deemed at fault. The Office explained that appellant had received compensation payments since March 20, 2005 which was prior to the release of the May 27, 2005 letter, was aware she was overpaid, was able to complete leave slips and perform other functions during this period.

LEGAL PRECEDENT -- ISSUE 1

Section 8116(a) of the Federal Employees' Compensation Act provides that, while an employee is receiving compensation under the Act the employee may not receive salary, pay or remuneration of any type from the United States, except in limited specified instances.⁴

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$5,346.54. An employee cannot receive paid leave and compensation for the same period.⁵ That is what occurred in this case. The record contains copies of appellant's time analysis form (Form CA-7a), leave breakdown for the period March 14, to May 27, 2005 and claim for compensation (Form CA-7) for the period March 14 to May 27, 2005. Appellant used sick leave for March 14 to 18, 2005 and four hours of LWOP for the period March 21 to May 27, 2005. She used 200 hours of leave without pay and 200 hours of annual leave for the period March 19 to May 27, 2005 due to her cervical surgery. On the claim for compensation form, appellant indicated that she used LWOP for the period March 14 to May 27, 2005 and checked "no" to the question of whether it was intermittent. The employing establishment noted on the back of the form that appellant used 8 hours daily of sick leave for the period March 14 to 18, 2005 and claimed 200 hours of LWOP and 200 hours of sick leave for the period March 19 to May 27, 2005. Appellant received both wage-loss compensation for temporary total disability and paid leave for the period March 14 to August 6, 2005. She was only entitled to 440 hours of leave without pay from March 22 through July 22, 2005. The amount of compensation paid for the hours she used leave during this period, \$5,346.54, is an overpayment of compensation.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Act⁶ provides that adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault

⁴ 5 U.S.C. § 8116(a).

⁵ See *Lee B. Bass*, 40 ECAB 334 (1988); 5 U.S.C. §§ 8116, 8118.

⁶ 5 U.S.C. § 8129(b).

and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience. Section 10.433 of the Office's implementing regulations⁷ provides that, in determining whether a claimant is at fault, the Office will consider all pertinent circumstances. An individual is with fault in the creation of an overpayment who:

In determining whether an individual is not without fault or, alternatively, with fault, section 10.320 of Title 20 of the Code of Federal Regulations states in pertinent part:

"An individual is with fault in the creation of an overpayment who --

- (1) Made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or
- (2) Failed to furnish information which the individual knew or should have known to be material; or
- (3) With respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect."⁸

ANALYSIS -- ISSUE 2

The Board also finds that appellant was at fault in the creation of the overpayment. In a letter dated May 27, 2005, the Office informed appellant that she was being placed on the periodic rolls for temporary total disability and advised of the compensation payments. The Office also informed appellant that she could not receive paid leave and compensation during the same period. Nonetheless, she accepted the Office's compensation payments, knowing that she had already applied for and had received paid leave from the employing establishment. In addition for the period March 14 to May 27, 2005, appellant was aware that she had received an incorrect payment, but made no effort to return any of the overpaid compensation. The record contains appellant's request for paid leave from the employing establishment. In addition, appellant verified payment of eight hours per day for the period March 14 to 18, 2005 using sick leave, four hours of leave for the period March 21 to July 22, 2005 in the July 29, 2005 memorandum of conference call. She knew or should have known that the Office's payment of compensation for the same period was incorrect. Even though the Office erred by paying compensation for periods when appellant had already received paid leave, this does not excuse appellant's fault in accepting compensation payments she knew or should have known were incorrect.⁹

⁷ 20 C.F.R. § 10.433.

⁸ 20 C.F.R. § 10.320(b).

⁹ *Ricky Greenwood*, 57 ECAB ____ (Docket No. 05-1739, issued March 10, 2006).

CONCLUSION

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$5,346.54 and that she was not without fault in the creation thereof, thereby precluding waiver of the recovery of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 20, 2005 is affirmed.

Issued: August 25, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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