

partial medial meniscectomy, arthroscopic patellofemoral chondroplasty and arthroscopic medial compartment chondroplasty of the tibial and medial surface.

On September 19, 2005 appellant filed a claim for wage-loss compensation for the period September 10 to October 5, 2005. He later submitted copies of pay and leave records.

In an October 31, 2005 letter, an employing establishment injury compensation specialist notified the Office that appellant advised that he had received an overpayment of compensation for the period September 28 to October 5, 2005 because he had returned to work on September 28, 2005. In a November 1, 2005 letter, the injury compensation specialist advised the Office that appellant utilized sick leave for September 24 to 27, 2005.

By letter dated December 8, 2005, the Office advised appellant of its preliminary determination that there was a \$2,488.22 overpayment of compensation. It found that he accepted compensation for wage loss for the period September 10 to October 5, 2005 and received sick leave during that period. The Office found that he was at fault in the creation of the overpayment because he should have known that he was not entitled to receive wage-loss compensation during the same period that he received sick leave and therefore accepted incorrect compensation payments. Appellant was given 30 days in which to request a telephone conference, a precoupment hearing before the Branch of Hearings and Review or a final decision.

On January 2, 2006 appellant submitted an overpayment recovery questionnaire and a letter stating that he was in leave without pay (LWOP) status from September 10 to 23, 2005. He also submitted financial information. Appellant requested a final decision on the issues of fault and possible waiver of recovery of the overpayment.

By decision dated May 4, 2006, the Office found that there was a \$2,488.22 overpayment of compensation for the period September 10 to October 5, 2005 and that appellant was at fault in the creation of the overpayment, thus precluding waiver of the overpayment.¹

LEGAL PRECEDENT -- ISSUE 1

Section 8129(a) of the Federal Employees' Compensation Act provides that when an overpayment has been made to an individual because of an error of fact or law, adjustment shall be made under regulations prescribed by the Office by decreasing later payments to which the individual is entitled.²

Section 8116(a) of the Act provides that an employee who is receiving compensation for an employment injury may not receive wages for the same time period.³ Section 8118(c) of the

¹ Appellant submitted additional evidence subsequent to the Office decision of May 4, 2006. The Board's jurisdiction is limited to the evidence that was before the Office at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c). The Board may not consider this evidence for the first time on appeal.

² 5 U.S.C. § 8129.

³ 5 U.S.C. § 8116(a).

Act provides that compensation for disability does not begin until termination of continuation of pay or the use of annual or sick leave ends.⁴

ANALYSIS -- ISSUE 1

The Board finds that the Office correctly found that an overpayment occurred in this case for the period September 24 to October 5, 2005. The record shows that appellant received wage-loss compensation from the Office in the amount of \$2,488.22 for the period September 10 to October 5, 2005. However, he received sick leave or worked for the period September 24 to October 5, 2005.⁵ Because appellant received regular full-time wages from the employing establishment during the period September 24 to October 5, 2005, he was not entitled to disability compensation from the Office for the same period. Thus, he received an overpayment of compensation for the period September 24 to October 5, 2005 based on the dual payments.

The Board further finds that the Office incorrectly found that appellant received an overpayment of compensation for the period September 10 to 23, 2005. The record shows that appellant was in LWOP status from September 10 to 23, 2005. Therefore, he was not in receipt of dual benefits and was entitled to receive wage-loss compensation from the Office for temporary total disability. Consequently, no overpayment was created for September 10 to 23, 2005.

LEGAL PRECEDENT -- ISSUE 2

Under section 8129 of the 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.⁶ Section 10.433 of the implementing regulations specifically provides that the Office may consider waiving an overpayment if the individual to whom it was made was not at fault in accepting or creating the overpayment.⁷ The regulation further provides that each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from the Office are proper.⁸ Under the regulations, a recipient will be found to be at fault with respect to creating an overpayment if he or she “[a]ccepted a payment which he or she knew or should have known to be incorrect.”⁹ Whether or not the

⁴ 5 U.S.C. § 8118(c).

⁵ As noted, the employing establishment advised the Office that appellant was paid for sick leave for September 24 to 27, 2005 and returned to work on September 28, 2005.

⁶ 5 U.S.C. § 8129(b); 20 C.F.R. §§ 10.433, 10.434, 10.436, 10.437.

⁷ 20 C.F.R. § 10.433(a).

⁸ *Id.*

⁹ 20 C.F.R. § 10.433(a)(3).

Office determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment.¹⁰

ANALYSIS -- ISSUE 2

The Office found that appellant was at fault in the creation of the overpayment based on the third criterion above, that he accepted payments which he knew or should have known to be incorrect. In order for the Office to establish that appellant was at fault in creating the overpayment, the Office must show that, at the time appellant received the compensation checks in question, he knew or should have known that the payment was incorrect.¹¹ With respect to whether an individual is with fault, section 10.433(b) provides that whether or not the Office determines that an individual was with fault with respect to the creation of an overpayment 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.¹²

The record in this case establishes that appellant received sick leave pay from the employing establishment while also receiving compensation for temporary total disability from the Office for the period September 24 to 27, 2005. From September 28 to October 5, 2005 appellant received wage-loss compensation from the Office while working and receiving regular wages from the employing establishment. As noted, an employee who is receiving compensation for an employment injury may not receive wages for the same time period. The only matter left to be determined is whether appellant accepted payments he knew or should have known to be incorrect when he accepted the Office's compensation check.

The Board finds that appellant was at fault in creating the overpayment for the period September 24 to October 5, 2005. Appellant acknowledged and the record establishes that he received a compensation check for the period which included September 24 to October 5, 2005. The evidence establishes that he was aware that he received sick leave pay from the employing establishment for September 24 to 27, 2005 and was working and receiving wages for September 28 to October 5, 2005. The Board finds that appellant is with fault in the creation of the overpayment from September 24 to October 5, 2005 on the grounds that he accepted a payment that he knew or should have known to be incorrect. That the Office may have negligent in issuing the check does not mitigate this finding.¹³ As appellant is with fault in the creation of the overpayment from September 24 to October 5, 2005, he is not eligible for waiver. The Office is required by law to recover this overpayment.¹⁴

¹⁰ 20 C.F.R. § 10.433(b).

¹¹ See *Otha J. Brown*, 56 ECAB ____ (Docket No. 03-1916, issued December 23, 2004); *Karen K. Dixon*, 56 ECAB ____ (Docket No. 03-2265, issued November 9, 2004).

¹² *Supra* note 10.

¹³ See 20 C.F.R. § 10.435(a); *William E. McCarty*, 54 ECAB 525 (2003).

¹⁴ Recovery of the overpayment is not an issue in this case as appellant is not in receipt of continuing total disability payments. 20 C.F.R. § 10.441(a); see also *Bob R. Gilley*, 51 ECAB 377 (2000).

CONCLUSION

The Board finds that the Office properly determined that an overpayment occurred for the period September 24 to October 5, 2005. However, the Office improperly determined that an overpayment was created for September 10 to 23, 2005. On remand, the Office should determine the amount of the overpayment that occurred for the period September 24 to October 5, 2005.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 4, 2006 is affirmed as to an overpayment for September 24 to October 5, 2005. The determination that an overpayment occurred for September 10 to 23, 2005 is set aside.

Issued: September 18, 2006
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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