

employment-related aggravation of right foot tarsal tunnel syndrome. In a June 6, 2003 letter, the Office accepted appellant's claim for right-sided tarsal tunnel syndrome and authorized surgical release which was performed on February 27, 2003.

On April 13, 2004 appellant filed a claim (Form CA-7) requesting to buy back leave for the period June 14, 2002 through April 21, 2003. She indicated that she used 240.23 hours of annual leave and 168.52 hours of sick leave during the claimed period to attend medical appointments. On April 13, 2004 appellant also signed a leave buyback worksheet/certification and election document (Form CA-7b) which indicated that the employing establishment was owed \$7,741.10 to repurchase leave and that she was estimated to receive Federal Employees' Compensation Act (FECA) benefits in the amount of \$5,563.80. The later figure was subtracted from the former figure which resulted in \$2,177.30, the balance that appellant would owe the employing establishment to repurchase leave. Appellant elected to use her FECA compensation to repurchase leave from the employing establishment.

On July 20, 2004 the Office issued a check in the amount of \$5,493.04 to appellant for her leave buyback claim.

On December 28, 2005 the Office advised appellant that it erred in issuing the \$5,493.04 check, as payment should have been made directly to the employing establishment. Appellant responded that she recalled receiving the compensation check but did not know the purpose for it.

On December 30, 2005 the Office made a preliminary determination that appellant received an overpayment in the amount of \$5,493.04 on July 23, 2004 because she received a check for leave buyback compensation that should have been issued to the employing establishment. Appellant was found at fault in the creation of the overpayment because she requested to buy back leave and completed a CA-7b form which indicated that she owed the employing establishment \$2,000.00 while the employing establishment would receive over \$5,000.00 in FECA benefits. The Office stated that appellant should have reasonably been aware that she was not due the July 23, 2004 check since she had completed the CA-7b form and she had not lost a significant amount of income due to the accepted employment-related injury. Appellant was advised that she could request a telephone conference, a final decision based on the written evidence only or a hearing within 30 days if she disagreed that the overpayment occurred, with the amount of the overpayment or if she believed that recovery of the overpayment should be waived. The Office requested that she complete an accompanying overpayment recovery questionnaire (Form OWCP-20) and submit financial documents in support thereof within 30 days.

In the OWCP-20 form dated February 16, 2006, appellant requested waiver of the recovery of the overpayment. She contended that she was not at fault in the creation of the overpayment because she believed that the payment received was owed to her. Appellant stated that she had waited a long time for a check and did not know how much she was going to receive. She stated that she had not received payment for 36.50 hours of leave without pay. Appellant did not know of any change in her circumstance that affected her monthly payment which she had to report to the Office. She indicated that she had \$803.00 of the incorrectly paid check in her possession. Appellant reported monthly income of \$751.00 which represented a

state or local welfare payment for her special needs son. She also reported monthly expenses which included \$967.71 for rent or mortgage, \$500.00 for food, \$375.00 for clothing, \$375.00 for utilities and \$500.00 for babysitting, totaling \$2,342.71. Appellant had no cash on hand, \$491.99 in her checking account, \$803.00 in her savings account, no current value in stocks and bonds and \$1,000.00 in personal property and other funds, totaling \$2,294.99.

In an April 27, 2006 telephone conference with appellant, the Office addressed the overpayment and her entitlement to a schedule award. It rejected her offer to repay the overpayment in the amount of \$25.00 per pay period because the repayment would take eight or nine years. The Office confirmed with appellant that the employing establishment was not willing to move forward on the leave buyback issue until all amounts had been collected. It doubted that the employing establishment would be willing to complete a leave buyback in eight or nine years. The Office confirmed that she agreed an overpayment was created and that she was willing to repay it. Appellant suggested that repayment could be made by deducting the overpayment from any schedule award compensation. The Office responded that the overpayment could be held in abeyance until a decision was made regarding her entitlement to a schedule award.

On April 27, 2006 appellant filed a claim for a schedule award.

By decision dated July 18, 2006, the Office granted appellant a schedule award for a 15 percent impairment of the right leg based on a July 10, 2006 opinion of an Office medical adviser. On July 18, 2006 the Office issued a check in the amount of \$27,475.20 to appellant for her schedule award.

In a decision dated August 27, 2007, the Office finalized its preliminary determination that appellant received an overpayment in the amount of \$5,493.04 and that she was at fault in the creation of the overpayment because she reasonably knew or should have known that she was not entitled to wage-loss compensation for the period for which she also received payment for leave. It noted appellant's receipt of the July 18, 2006 schedule award and that the overpayment was not deducted from the award. The Office ordered repayment of the overpayment in full.

LEGAL PRECEDENT -- ISSUE 1

Section 10.425 of the Office's regulations, provides:

"The employee may claim compensation for periods of annual and sick leave which are restorable in accordance with the rules of the employing agency. Forms CA-7 and CA-7b are used for this purpose."¹

In a leave buyback case, an injured employee uses sick or annual leave to prevent wage loss after an employment injury. If a claim is accepted and the work absences would otherwise be compensable under the Act, the employee may buy back this leave from the employing establishment. An employee may decide to take sick and/or annual leave in order to avoid possible interruption of income. If such employee does so decide and his or her claim for

¹ 20 C.F.R. § 10.425; *see also Laurie S. Swanson*, 53 ECAB 517 (2002).

compensation is subsequently approved, such employee may arrange with his or her employing establishment to buy back the leave used and have it reinstated to such employee's account. The compensation, to which the employee is entitled, may be used to pay a part of the back cost and the employee shall be obligated to pay the balance. No compensation payments shall be paid, however, while the employee is still in leave status. Arrangements to buy back leave, shall be made with the employing establishment.²

ANALYSIS -- ISSUE 1

The record shows that the Office incorrectly issued a check in the amount of \$5,493.04 for leave buyback compensation covering the period June 14, 2002 through April 21, 2003 to appellant. Appellant acknowledged receiving and cashing this check. During the stated time period she had received sick and annual leave pay from the employing establishment for her medical appointments and wage-loss compensation for total disability. Fact of overpayment is established as a claimant is not entitled to receive compensation for total disability and earnings based on sick or annual leave for the same period.³ The Board, therefore, finds that an overpayment was created in the amount of \$5,493.04.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Act⁴ provides that an overpayment of compensation shall be recovered by the Office 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.⁵ Thus, the Office may not waive the overpayment of compensation unless appellant was without fault.⁶ Adjustment or recovery must, therefore, be made when an incorrect payment has been made to an individual who is with fault.⁷

On the issue of fault, section 10.433 of the Office's regulations, provides that an individual will be found at fault if he or she has done any of the following: (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 was incorrect.⁸

² *James R. Rowell*, 39 ECAB 869 (1988); *see also Louis H. Campbell*, Docket No. 01-587 (issued December 26, 2001).

³ *See Danny E. Haley*, 56 ECAB 393 (2005).

⁴ 5 U.S.C. § 8129(b).

⁵ *Michael H. Wacks*, 45 ECAB 791, 795 (1994).

⁶ *Norman F. Bligh*, 41 ECAB 230 (1989).

⁷ *Diana L. Booth*, 52 ECAB 370, 373 (2001); *William G. Norton, Jr.*, 45 ECAB 630, 639 (1994).

⁸ 20 C.F.R. § 10.433(a).

With respect to whether an individual is without fault, section 10.433(b) of the Office's regulations provides in relevant part:

“Whether or not [the Office] determines that an individual was at 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.”⁹

ANALYSIS -- ISSUE 2

The Office applied the third standard in determining that appellant was at fault in creating the overpayment. In order for the Office to establish that she was at fault in creating the overpayment of compensation, the Office must establish that, at the time appellant received the compensation check in question, she knew or should have known that the payment was incorrect.¹⁰

Based on the circumstances of this case, the Board finds that appellant is not with fault in creating the overpayment. The evidence of record is insufficient to establish that appellant knew or should have been expected to know that she accepted an incorrect payment.

The Board finds that the Office did not make sufficient factual findings to establish that appellant accepted a payment that she should have known to be incorrect. During the period June 14, 2002 to April 21, 2003 appellant utilized sick and annual leave. Following the acceptance of her claim, she accepted a check in the amount of \$5,493.04 for leave buyback compensation that should have been issued to the employing establishment. The Office found that appellant knew or should have known that she received an incorrect payment because she completed a CA-7b form which indicated that the employing establishment was owed over \$5,000.00 for the repurchase of leave. The record does not contain a photocopy of the compensation check in question. There is no evidence to show whether the period of compensation from June 14, 2002 to April 21, 2003 was imprinted on the check to place appellant on notice of the period covered by the payment. There is no evidence of record indicating that any information or letter accompanied the check with the above information. There is no evidence of record of information to have put appellant on notice that the compensation check was payment owed to the employing establishment to repurchase leave. For these reasons, the Board finds that appellant was not at fault in creation of the overpayment in the amount of \$5,483.94.

Since the Board has determined that appellant was without fault in the creation of the overpayment, the Office may only recover the overpayment in accordance with section 8129(b) of the Act¹¹ if a determination has been made that recovery of the overpayment would neither

⁹ *Id.* at § 10.433(b).

¹⁰ *Diana L. Booth, supra* note 7.

¹¹ 5 U.S.C. § 8129(b).

defeat the purpose of the Act nor be against equity and good conscience.¹² The case will be remanded to the Office for further development with respect to whether appellant is entitled to waiver of the \$5,483.94 overpayment. After such further development as the Office may find necessary, it should issue an appropriate decision on the issue of whether the overpayment should be waived.

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$5,483.93 from June 14, 2002 to April 21, 2003, because she incorrectly received a check for leave buyback compensation that should have been issued to the employing establishment. The Board, however, finds that she was not at fault in the creation of this overpayment

ORDER

IT IS HEREBY ORDERED THAT the August 27, 2007 decision of the Office of Workers' Compensation Programs is affirmed in part with respect to fact and amount of overpayment, is reversed with respect to fault in the creation of the overpayment and is set aside and remanded for further development with regard to whether waiver of the recovery of the overpayment is warranted.

Issued: April 28, 2008
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹² The guidelines for determining whether recovery of an overpayment would defeat the purpose of the Act or would be against equity and good conscience are set forth in 20 C.F.R. §§ 10.434, 10.436, 10.437.