

in the performance of duty. On December 12, 2006 the Office accepted his claim for right shoulder strain and right shoulder tendon tear and paid appropriate compensation benefits.¹

By letter dated February 16, 2007, the Office entered appellant on the periodic rolls at the gross rate of \$946.52 per week. Appellant was notified that he would receive a first payment of \$3,549.45 for the period January 14 to February 17, 2007, and that his next payment would cover the period February 18 to March 17, 2007. The Office instructed appellant to provide immediate notification if he returned to work and return any payment received after returning to work to avoid an overpayment.

The record reflects that the first payment covering the period January 14 to February 17, 2007 was originally issued on February 23, 2007; however, appellant did not receive it. A subsequent check was reissued on March 8, 2007 in a gross amount of \$3,549.45, less deductions for insurance, or a net amount of \$3,273.50.

In a March 14, 2007 report of termination of disability, Loretta Brown, a manager at the employing establishment, indicated that appellant was released to work on February 19, 2007 but did not return. She indicated that he was notified to return to work on Saturday, March 10, 2007 but he requested annual leave. Ms. Brown advised that appellant was off work on March 11, 2007 and used annual leave for March 12, 2007. Appellant reported for work on March 13, 2007.

By letter dated March 22, 2007, the employing establishment advised the Office that appellant returned to work with restrictions on March 13, 2007. The employing establishment informed the Office that appellant's nonscheduled days when he returned to work were March 11 and 14, 2007, and that appellant was overpaid from March 10 through 17, 2007.

In a May 31, 2007 file memorandum, the Office determined that an overpayment occurred because appellant returned to full-time employment on March 10, 2007. The Office determined that the overpayment period was from March 10 to 17, 2007 and that appellant continued to remain on the periodic rolls and received full compensation. The Office noted that appellant received \$811.30 minus the health and life insurance deductions taken by both the Office and the employing establishment during this period and found that he received an overpayment in the amount of \$748.22. The Office noted that appellant did not return the compensation check for the period February 18 through March 17, 2007, which he received after he returned to full-time employment on March 10, 2007.

On May 31, 2007 the Office made a preliminary finding that an overpayment of \$748.22 arose because appellant was paid compensation for temporary total disability after his return to full-time employment on March 10, 2007. The Office determined that the overpayment period was from March 10 to 17, 2007. The Office found that appellant was with fault in the creation of the overpayment because he was made aware, by letter dated February 16, 2007, of the conditions under which compensation for disability was paid and was advised to return any compensation checks after his return to work. However, the Office found that appellant did not

¹ On January 16, 2007 appellant underwent surgery for reconstruction of the right shoulder rotator cuff with augmentation.

return the compensation check for the period February 18 through March 17, 2007, which was received after appellant returned to full-time employment on March 10, 2007. Appellant was further informed of his right to challenge the amount of the overpayment or request a waiver of the overpayment. If appellant wished a waiver of the overpayment, he was specifically directed to submit financial information by completing an overpayment recovery questionnaire.

No response was received from appellant regarding the Office's preliminary determination.

In a decision dated July 31, 2007, the Office finalized the overpayment in the amount of \$748.22. The Office found that appellant was paid compensation for total disability through March 17, 2007 after he returned to full-time employment on March 10, 2007. The Office found that appellant was with fault because he should have been aware that he was not entitled to the check, as the period and the amount were printed on the benefits statement. The Office found that appellant was made aware by letter dated February 16, 2007 that he must return any compensation check after he returned to work. However, appellant did not return the compensation check for the period February 18 to March 17, 2007 after he returned to full-time employment on March 10, 2007. The Office determined that the amount of \$488.76 would be withheld from appellant's compensation check for the intermittent period March 21 to June 8, 2007. The Office informed appellant that a balance remained in the amount of \$259.46 and requested that he forward that amount or contact the Office to arrange repayment.

LEGAL PRECEDENT -- ISSUE 1

The Federal Employees' Compensation Act provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty.² 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 Secretary of Labor by decreasing later payments to which the individual is entitled.³

Section 8116 of the Act⁴ defines the limitations on the right to receive compensation benefits. This section of the Act provides that, while an employee is receiving compensation, he may not receive salary, pay or remuneration of any type from the United States, except in limited circumstances.⁵ The Office's regulations state in pertinent part: compensation for wage loss due to disability is available only for any periods during which an employee's work-related medical condition prevents him or her from earning the wages earned before the work-related injury.⁶

² 5 U.S.C. § 8102(a).

³ *Id.* at § 8129(a).

⁴ 5 U.S.C. § 8101-8193.

⁵ 5 U.S.C. § 8116(a).

⁶ 20 C.F.R. § 10.500(a).

The Act specifically provides that an employee who uses sick or annual leave may not receive compensation for any period covered by such leave.⁷

ANALYSIS -- ISSUE 1

The record establishes that an overpayment was created because appellant was employed from March 13, 2007, while he remained on the periodic rolls and received compensation for total disability. The Office determined that for the aforementioned time frame appellant received \$748.22 in compensation for total disability. As he returned to work and had no entitlement to compensation for this period, the receipt of compensation for this time frame, caused an overpayment of compensation to appellant. The Board will affirm the Office's July 31, 2007 decision on the issue of fact of overpayment.

The Office's overpayment worksheet shows that appellant received compensation for total disability for the period March 10 to 17, 2007. In calculating the overpayment, the Office determined that appellant had received an overpayment of compensation in the amount of \$811.30 for this period. The Office credited appellant for health and life insurance premiums deducted during this period and concluded that the total amount of the overpayment was \$748.22. The Board also notes that appellant was scheduled to return to work on March 10, 2007; however, he requested annual leave. His decision to utilize annual leave on his return-to-work date of March 10, 2007 does not entitle him to compensation since this would constitute a dual payment of both annual leave and compensation for the dates that he utilized leave.⁸ The Board finds that the Office properly calculated that appellant received a \$748.22 overpayment of compensation from March 10 to 17, 2007.

LEGAL PRECEDENT -- ISSUE 2

The Office may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. 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. The recipient must show good faith and exercise a high degree of care in reporting events which may affect entitlement to, or the amount of, benefits. A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment: (1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or (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 to be incorrect (this provision applies only to the overpaid individual).⁹

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

⁷ *Vincent E. Washington*, 42 ECAB 636 (1991); 5 U.S.C. § 8118(c).

⁸ *See supra* note 7.

⁹ 20 C.F.R. § 10.433(a).

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.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 a payment which he knew or should have known to be incorrect.¹¹ 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 appellant was at fault in creating the overpayment, the Office must show that, at the time he received and accepted the compensation checks in question, he knew or should have known that the payment was incorrect.¹²

The Board finds that, at the time appellant received the compensation checks in question, the record is unclear as to whether he knew or should have known that the payments were incorrect. The record shows that appellant received a letter dated February 16, 2007, which informed him that he must return any compensation checks after he returned to work. He was also advised that his first compensation check would cover the period January 14 to February 17, 2007. Appellant did not receive his first check until March 8, 2007. The Office had to reissue this payment because he did not receive the check which was issued on February 23, 2007. Although appellant subsequently received a check for the period February 18 to March 17, 2007, after he returned to work, the record is unclear as to when he received or accepted the check. The Board notes that this is an important factor in determining whether appellant was aware that the payment he accepted was incorrect.¹³ Furthermore, appellant was entitled to a majority of the period from February 18 to March 10, 2007.¹⁴ The record does not contain a copy of the specific compensation check that he received for this period from February 18 to March 17, 2007. The Board finds that it is impossible to ascertain whether appellant knew, or should have known that the payment was incorrect at the time he received the check in question. There is also no evidence in the record that any letter or other information accompanied the check which would have reasonably put appellant on notice that he had received an incorrect payment. As noted above, in determining whether an individual is without

¹⁰ 20 C.F.R. § 10.433(b).

¹¹ The Board notes that the Office also found that appellant failed to provide information which she knew or should have known to be material under the second criterion. However, as the Office met its burden of proof to establish that appellant was at fault under the third standard, the second standard does not need to be addressed.

¹² *Robin O. Porter*, 40 ECAB 421 (1989).

¹³ See *Claude T. Green*, 42 ECAB 274 (1990) (where the Board found that the lapse of time between the return to work and the continued receipt of compensation is to be considered in determining whether a claimant is at fault in creating an overpayment).

¹⁴ See *Robin O. Porter*, *supra* note 12; see also *Michael R. Nixon*, 40 ECAB 398 (1988); *Marlene R. Pavlo*, 38 ECAB 716 (1987) (where the Board found that appellant was without fault where the record contained no evidence indicating that she was apprised by the Office, as of the time she received the compensation check, of the specific period the check covered so as to put her on notice that she was being paid incorrectly for a period of time during which she worked).

fault, the Office must consider an individual's understanding of the obligation to return payments which were not due. There is insufficient evidence to establish that appellant knew or should have known that the payment was not due. There is no other evidence of record which put appellant on notice that the compensation check was for a period of time to which he was not entitled to compensation. For this reason, the Office has not met its burden of proof in establishing that he was at fault.

CONCLUSION

The Board finds that the Office properly determined that appellant received an overpayment. However, the July 31, 2007 decision is set aside as to the finding of fault for the overpayment of compensation paid for the period February 18 to March 17, 2007. The case is remanded to the Office for a determination on the issue of whether appellant is entitled to waiver of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the July 31, 2007 decision of the Office of Workers' Compensation Programs is affirmed, in part and set aside in part.

Issued: March 14, 2008
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board