

FACTUAL HISTORY

On January 17, 1990 appellant, then a 47-year-old medical technologist, filed a traumatic injury claim alleging that on that date a large heavy metal container fell from a cart onto her left arm and shoulder. She stopped working immediately after the injury and has not returned. The Office accepted appellant's claim for left trapezius myositis.

By letter dated January 10, 1991, the Office informed appellant that she had been placed on the periodic rolls. The weekly rate of pay utilized to compute appellant's gross compensation was \$613.75. This amount was determined based on an annual salary of \$28,825.00 which yielded a weekly pay rate of \$554.33. To this amount, was added a weekly cost-of-living adjustment of \$55.43 and Sunday premium pay of \$3.99. The yearly figure for Sunday premium pay equaled \$207.36.

By letter dated August 27, 1998, the Office informed appellant that 10 compensation checks, covering the period October 16, 1997 through August 15, 1998, had been returned. It asked her to complete a direct deposit sign-up form. The Office informed appellant that, if it did not hear from her within 30 days, her compensation benefits would be suspended unless it could verify why the checks were being returned. Appellant did not submit a response. Subsequently, two additional compensation checks were returned by the bank. The Office suspended appellant's benefits effective November 8, 1998.

By letter dated June 3, 2003, appellant, through her attorney, requested formal reactivation and past due payments. Appropriate documents were submitted. On December 10, 2004 the Office issued a check for the period October 16, 1997 through November 7, 1998 based on a pay rate of \$613.75. By letter dated December 15, 2004, the Office notified appellant, through her attorney, that further documentation was needed to issue further checks. This material was submitted and compensation checks were issued for the period November 8, 1998 through June 11, 2005 based on a weekly pay rate of \$613.75. However, for the pay periods beginning June 12, 2005 through the pay period ending August 4, 2007, appellant received compensation benefits based on an average weekly pay rate of \$876.54.

The Office submitted appellant's payment history report. For the period August 16 through October 11, 1998 checks were issued in the amount of \$2,008.34, with the last check being issued on November 27, 1998. This was followed by a period of suspended payments. Multiple checks were issued on September 23, 2005 in the following amounts: \$30,445.91; \$27,132.15; \$28,113.10; \$28,584.00, \$28,242.63, \$29,514.75 and \$13,270.59. These checks covered the period November 8, 1998 through June 12, 2005. On July 9, 2005 regular compensation checks were issued in the amount of \$3,382.12 each, covering the period June 12, 2005 through January 21, 2006. Two checks were issued covering the period January 22 through March 18, 2006 in the amount of \$3,374.42 each. Appellant received a compensation check for the period March 19 through April 15, 2006 in the amount of \$3,574.85. For the period April 16, 2006 through January 20, 2007, she received checks in the amount of \$3,496.42. For the period April 15 through July 7, 2007, appellant received checks in the amount of \$3,579.40. For the period July 8 to August 4, 2007, she received a check in the amount of \$3,571.71. After this date, appellant's compensation payments were reduced to \$2,463.72.

On February 13, 2008 the Office made a preliminary determination that appellant had been overpaid in the amount of \$29,489.00. It found that she was paid compensation based on an incorrect pay rate from June 12, 2005 through August 4, 2007. Appellant received compensation based on a weekly pay rate of \$876.54 instead of the correct amount of \$613.75. This error occurred because appellant's annual Sunday premium pay of \$207.36 was computed as a weekly amount. The Office determined that, had appellant been paid based on the proper pay rate of \$613.75, she should have received compensation in the amount of \$67,202.72 for the period from June 12, 2005 through August 4, 2007. However, appellant received compensation in the amount of \$96,691.72. This resulted in an overpayment of \$29,489.00. The Office found that appellant was at fault in the creation of the overpayment because she knew or should have known that she was receiving compensation at an incorrect amount. It noted that appellant should have realized the increase in her monthly payments from \$2,009.34 to \$3,382.12. The Office notified appellant of her rights and informed her that, if she wished to challenge the overpayment finding, she must file a response within 30 days of the date of the letter. It forwarded appellant financial documentation to be completed. By letter of the same date, it informed appellant's attorney of the overpayment.

By decision dated March 17, 2008, the Office finalized the overpayment, finding that appellant had not submitted any financial documentation or response to the preliminary determination.¹ It directed recovery of the overpayment by withholding the sum of \$371.15 from her continuing compensation payments.

LEGAL PRECEDENT -- ISSUE 1

The Act² 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 duty.³ Section 8129(a) of the 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.⁴

ANALYSIS -- ISSUE 1

The Office accepted that appellant that she sustained left trapezius myositis as a result of the January 17, 1990 work-related injury. It paid compensation benefits based on a weekly rate of pay of \$613.75. However, appellant's compensation payments were suspended after 12 compensation checks were returned by appellant's bank. Compensation payments were reinstated in a series of checks issued on September 23, 2005 ranging in amounts between \$13,270.59 and \$30,445.91. These payments were also based on a weekly rate of pay of

¹ Subsequent to the March 17, 2008 decision, appellant, through counsel, submitted additional evidence. 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. §§ 8101-8193.

³ *Id.* at § 8102(a).

⁴ *Id.* at § 8129.

\$613.75. However, payments covering the period June 12, 2005 through the pay period ending August 4, 2007, were erroneously issued based on a weekly rate of pay of \$876.54. The Board notes that instead of adding appellant's weekly Sunday premium pay differential, the Office added appellant's yearly premium pay differential, which caused the discrepancy. The Office noted that had appellant had been paid based on the correct weekly pay rate of \$613.75 for this period, she should have received \$67,202.72. However, due to the incorrect pay rate, appellant was erroneously paid \$96,691.72. This resulted in an overpayment of \$29,489.00. The Board finds that the Office correctly calculated the fact and amount of overpayment.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Act provides as follows: "Adjustment or recovery by the United States may not be made when an incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience."⁵ No waiver of an overpayment is possible if the claimant is at fault in creating the overpayment.⁶

On the issue of fault, 20 C.F.R. § 10.433(a) provides in pertinent part:

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

- (1) made an incorrect statement as to material fact which the individual knew or should have known to be incorrect;
- (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."⁷

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

"(b) 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."⁸

⁵ *Id.* at § 8129(b).

⁶ *Gregg B. Manston*, 45 ECAB 344 (1994).

⁷ *Kenneth E. Rush*, 51 ECAB 116 (1999).

⁸ 20 C.F.R. § 10.433(b).

ANALYSIS -- ISSUE 2

The Office applied the third standard in determining that appellant was at fault in creating the overpayment. For it to establish that appellant was with fault in creating the overpayment of compensation, the Office must establish that, at the time appellant accepted the compensation checks in question, she knew or should have known that the payments were incorrect.⁹

The Board notes that the Office erroneously issued compensation checks in an improper amount as it entered the wrong weekly pay rate for payments issued June 12, 2005 through August 4, 2007. However, the Board finds that the Office improperly found that appellant at fault in creating the overpayment. The Office notes that in 1998 appellant's compensation checks were in the amount of \$2,009.34. However, there was an extensive period of time during which appellant did not receive any compensation checks as appellant's compensation had been suspended due to the fact that the checks were returned to the Office by the bank. When appellant began receiving the series of checks for the suspended period on September 23, 2005, they were in amounts from \$13,270.59 to \$30,445.91. Then, when appellant's regular compensation checks were resumed on July 9, 2005, the Office did not issue any explanation or letter describing how it calculated his compensation payments. Therefore, appellant could not have known why the checks were in the amount issued. Furthermore, due to the approximately seven years between appellant's last regular compensation check in 1998 and her new compensation checks in 2005, she could not reasonably be expected to know that the amount was erroneous. Therefore, the Board finds that the Office erred when it found that appellant was with fault in the creation of the overpayment. As waiver is only properly considered when appellant is without fault in the creation of the overpayment,¹⁰ this case is remanded for the Office to determine if appellant was entitled to waiver of recovery of the overpayment.

CONCLUSION

The Board finds that the Office properly found that appellant received an overpayment in the amount of \$29,489.00 during the period June 12, 2005 through August 4, 2007. However, the Board reverses the Office's finding that appellant was at fault in the creation of the overpayment.¹¹

⁹ See *Claude T. Green*, 42 ECAB 274, 278 (1990).

¹⁰ See *Ricky Greenwood*, 57 ECAB 463 (2006).

¹¹ In light of the Board's finding that the Office improperly found that appellant as not without fault in the creation of the overpayment, the issue of whether the Office properly set the recovery rate is moot.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 17, 2008 is affirmed in part and reversed in part, and the case is remanded for further action consistent with this opinion.

Issued: February 23, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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