

A February 24, 2005 disability certificate from Dr. Peter A. Cagnetti indicated that appellant was disabled from January 13 to February 28, 2005. He received sick leave pay for January 13 to 26, 2005, annual leave pay for January 27 to February 25, 2005 and administrative leave pay for February 28, 2005. The record shows that appellant received \$4,094.07 in wage-loss compensation from the Office for the same time period.

On January 29, 2007 the Office advised appellant of its preliminary determination that there was an overpayment of compensation in the amount of \$4,094.07 because he used leave for January 13 to February 28, 2005 and also received wage-loss compensation benefits from the Office for the same period. It made a preliminary determination that he was at fault in the creation of the overpayment because he accepted a payment which he knew or should have known to be incorrect. The Office stated that appellant was not entitled to receive leave pay concurrently with disability compensation for lost wages. Appellant was advised to submit evidence or argument if he disagreed with the fact or amount of the overpayment or if he wished to contest the preliminary finding of fault and request a waiver of recovery of the overpayment.

Appellant requested a precoupment hearing on the issues of fact and amount of the overpayment and fault. A telephonic hearing was held on October 10, 2007. He testified that in September 2006 he took the Office compensation check to a personnel specialist at the employing establishment. Appellant asked that the check be applied towards leave buyback and asked what he should do with the check. The personnel specialist that he consulted had not received instructions concerning the compensation check and told him to hold onto it until she contacted him. Appellant testified that no one from the employing establishment ever contacted him about what to do with the compensation check and he cashed it. He stated that it was always his intent to buyback the leave used from January 13 to February 28, 2005.

On November 2, 2007 appellant submitted a copy of a January 27, 2005 application for leave buyback for January 13 to February 15, 2005 and a November 2, 2007 claim for leave buyback for January 13 to February 28, 2005. He asserted that he was not at fault in the creation of the overpayment because he had initiated the process for leave buyback in 2005 before he received wage-loss compensation from the Office.

By decision dated December 31, 2007, the Office hearing representative finalized the determination that appellant received an overpayment of \$4,094.07 between January 13 and February 28, 2005 because he received wage-loss compensation from the Office at the same time that he received sick and annual leave pay from the employing establishment. The Office determined that appellant was at fault in the creation of the overpayment, thus precluding waiver of the overpayment.

LEGAL PRECEDENT -- ISSUE 1

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

ANALYSIS -- ISSUE 1

The Board finds that the Office correctly determined that appellant received a \$4,094.07 overpayment from January 13 to February 28, 2005. The record shows that appellant received wage-loss compensation from the Office during that period and also received leave pay from the employing establishment. An employee is not entitled to receive wage-loss compensation and leave pay for the same period of time. Section 8116(a) of the Act states that while an employee is receiving workers' compensation benefits, he or she "may not receive salary, pay or remuneration of any type from the United States, except ... in return for service actually performed" or for certain payments related to service in the Armed Forces unless such benefits are payable for the same injury or the same death being compensated for under the Act.² 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 Federal Employees' Compensation Act, the employee may wish to buyback 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 compensation is subsequently approved, such employee may arrange with his or her employing establishment to buyback 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 buyback leave shall be made with the employing establishment.³ While appellant may claim compensation for periods of restorable leave, appellant is not entitled to receive both compensation and leave pay. Thus, appellant received a \$4,094.07 overpayment of compensation from January 13 to February 28, 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.⁴ 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

¹ 20 C.F.R. § 10.425.

² 5 U.S.C. § 8116(a).

³ *James R. Rowell*, 39 ECAB 869 (1988); see also *Louis H. Campbell*, Docket No. 01-587 (issued December 26, 2001).

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

fault in accepting or creating the overpayment.⁵ 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.⁶ 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.”⁷ 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.⁸

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, it must show that, at the time he received the compensation checks in question, he knew or should have known that the payment was incorrect.⁹ With respect to whether an individual is with fault, section 10.433(b) of the Office’s regulations 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.¹⁰

The Board finds that appellant was at fault in creating the \$4,094.07 overpayment from January 13 to February 28, 2005. Appellant acknowledged, and the record establishes, that he received compensation checks for the period January 13 to February 28, 2005 for the same period that he received leave pay from the employing establishment. He testified that in September 2006 he took the compensation check for the period January 13 to February 28, 2005 to a personnel specialist at the employing establishment and asked what he should do with the check. Appellant was told to hold onto the check until the employing establishment contacted him. No one from the employing establishment contacted him about the compensation check and he cashed it. On November 2, 2007 appellant submitted a copy of a January 27, 2005 application for leave buyback for January 13 to February 15, 2005 and a November 2, 2007 claim for leave buyback for January 13 to February 28, 2005. However, until the employing establishment converts sick and annual leave to leave without pay, the employee remains in leave status, even if leave buyback has been requested.¹¹ Although appellant filed a claim for leave buyback on January 27, 2005 and November 2, 2007, the employing establishment did not

⁵ 20 C.F.R. § 10.433(a).

⁶ *Id.*

⁷ 20 C.F.R. § 10.433(a)(3).

⁸ 20 C.F.R. § 10.433(b).

⁹ See *Otha J. Brown*, 56 ECAB 228 (2004); *Karen K. Dixon*, 56 ECAB 145 (2004).

¹⁰ 20 C.F.R. § 10.433(b).

¹¹ See *James R. Rowell*, 39 ECAB 869, 874 (1988).

process his claim and did not convert his sick and annual leave to leave without pay. Therefore, he remained in leave status and was not entitled to accept compensation from the Office. Appellant was aware or reasonably should have been aware that he was not entitled to receive both wage-loss compensation and leave pay for the same period of time, *i.e.*, that he was not entitled to be paid twice for the same period of time. The Board finds that appellant is at fault in the creation of the overpayment from January 13 to February 28, 2005 because he accepted payments that he knew or should have known to be incorrect. That the Office may have been negligent in issuing the compensation check to appellant does not mitigate this finding.¹² Even if an overpayment resulted from negligence by the Office, this does not excuse the employee from accepting payment which the employee knew or should have been expected to know he was not entitled to receive.¹³ The Office's finding that appellant was at fault in the creation of the overpayment is proper under the facts and the circumstances of this case, as he knew or should have known that he was not entitled to accept a wage-loss compensation check for the period January 13 to February 28, 2005 for the same period that he received leave pay from the employing establishment and had not filed a claim for leave buyback. As appellant is at fault in the creation of the overpayment from January 13 to February 28, 2005, he is not eligible for waiver.¹⁴

CONCLUSION

The Board finds that the Office properly determined that appellant received a \$4,094.07 overpayment from January 13 to February 28, 2005. The Board further finds that the Office properly found that appellant was at fault in the creation of the overpayment and was therefore not eligible for waiver of recovery of the overpayment.

¹² See 20 C.F.R. § 10.435(a); *William E. McCarty*, 54 ECAB 525 (2003).

¹³ See *Diana L. Booth*, 52 ECAB 370 (2001).

¹⁴ 20 C.F.R. § 10.441(b).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 31, 2007 is affirmed.

Issued: January 6, 2009
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