



Appellant underwent right shoulder surgery on April 17, 2003 and stopped working. In a claim for compensation (Form CA-7) signed on April 29, 2003, he claimed compensation for leave without pay commencing April 18, 2003. Appellant also indicated that he had intermittent wage loss from February 10 to April 17, 2003.

A leave analysis provided by the employing establishment advised that appellant used sick leave from April 19 to May 15, 2003, then for the week of May 19 to 23, 2003, he used leave without pay and from May 24 to August 2, 2003 appellant used sick or annual leave. In a July 3, 2003 letter, an employing establishment human resources specialist stated that prior to receiving compensation benefits appellant had requested his time be converted to sick leave. The specialist noted that appellant had been paid by the employing establishment through June 13, 2003.

In a letter dated September 21, 2003, appellant stated that following the April 17, 2003 surgery he had requested sick leave while he was waiting for compensation to be paid. When he received his first compensation payment, he submitted a written request to the employing establishment to stop using sick and annual leave. Appellant stated that he later received two more compensation payments, but did not initially receive any additional payments from the employing establishment. He stated that he cashed the compensation payments to pay family expenses.

The record indicates that the Office issued a compensation payment dated June 13, 2003 for \$813.84. A payment dated June 27, 2003, covering the period May 24 to June 20, 2003, was issued for \$2,178.94. By payment dated July 18, 2003, a payment in the amount of \$2,193.53 was issued for the period June 21 to July 17, 2003.

By letter dated December 16, 2008, the Office advised appellant of a preliminary determination that an overpayment of compensation of \$4,372.47 had been found for the period May 24 to July 17, 2003. It found that appellant had received two payments of compensation covering this period, while he had also been paid by the employing establishment for sick and annual leave. The Office found appellant at fault in creating the overpayment because he knew or should have known that he could not receive compensation for the same period he used sick and annual leave.

Appellant requested a hearing, which was held on April 27, 2009.

By decision dated July 21, 2009, the hearing representative finalized the determination as to a \$4,372.47 overpayment and that appellant was at fault in creating the overpayment.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8116 of the Federal Employees' Compensation Act 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.<sup>1</sup> Title 20 of the Code of Federal Regulations

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<sup>1</sup> 5 U.S.C. § 8116(a).

section 10.500 provides that “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.” According to 5 U.S.C. § 8118(c), an employee may use annual or sick leave at the time disability begins, but his compensation for disability does not begin until the use of annual or sick leave ends.

### **ANALYSIS -- ISSUE 1**

The record indicates that appellant received two compensation payments totaling \$4,372.47, covering the period May 24 to July 17, 2003. As evidence by the employing establishment payroll records, appellant used sick or annual leave during this entire period. Appellant did not provide any contrary evidence. As noted, compensation for wage loss is not appropriate for periods when a claimant has used sick or annual leave.<sup>2</sup> Since appellant received \$4,372.47 in compensation for a period when sick or annual leave was used, an overpayment of compensation was created.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8129(b) of the Act<sup>3</sup> provides: “Adjustment or recovery by the United States may not be made when 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.”<sup>4</sup> No waiver of an overpayment is possible if the claimant is at fault in creating the overpayment.<sup>5</sup>

On the issue of fault, 20 C.F.R. § 10.433 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.”

### **ANALYSIS -- ISSUE 2**

The Office found that appellant was at fault in the creation of the overpayment because he accepted payments he knew or should have known were incorrect. On appeal, appellant’s representative argues that appellant was not at fault in the creation of the overpayment because he was compelled to use sick and annual leave to cover his absence after continuation of pay ended because the employing establishment had run out of CA-7 forms. Appellant acknowledged that he received the two compensation payments from the Office after he had received payments from the employing establishment for sick or annual leave. Although appellant stated he requested the employing establishment stop payments for sick and annual

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<sup>2</sup> See also *L.C.*, 59 ECAB 569 (2008).

<sup>3</sup> 5 U.S.C. §§ 8101-8193.

<sup>4</sup> *Id.* at § 8129(b).

<sup>5</sup> *Gregg B. Manston*, 45 ECAB 344 (1994).

leave, there is no evidence of any confirmation from the employing establishment at the time he accepted the June 27 and July 18, 2003 compensation payments. He should have known the payments were incorrect. Appellant acknowledged that he held the payments for some time, but was forced to cash the payments to pay family expenses. When appellant accepted the compensation payments in this case he knew or should have known that such payments were incorrect.

Pursuant to 20 C.F.R. § 10.433(3), appellant is at fault with respect to the overpayment. Waiver of the overpayment is not possible when a claimant is at fault in creating the overpayment. The Board accordingly finds that the Office properly determined that appellant was not entitled to waiver of the overpayment in this case.

**CONCLUSION**

The Board finds that a \$4,372.47 overpayment of compensation was created for the period May 24 to July 17, 2003. The Board further finds that the Office properly found appellant at fault in creating the overpayment.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated July 21, 2009 is affirmed.

Issued: November 9, 2010  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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