



the claim for left shoulder sprain with arthroscopy, left shoulder impingement, rotator cuff tear and bursitis of the left hip, the Office placed her on the periodic rolls in receipt of compensation for total disability.

On May 27, 2005 the Office terminated appellant's compensation benefits, effective June 12, 2005, on the grounds that she no longer had a disability or residuals from her accepted conditions.

The record contains a payment report printout bearing an October 31, 2006 run date, for the period June 12, 2005 through October 28, 2006. The report reflects that appellant received wage-loss compensation for the above-referenced period in the total amount of \$62,084.88.

By letter dated November 7, 2006, the Office advised appellant of its preliminary determination that she had received an overpayment of compensation in the amount of \$62,084.88, because she had accepted compensation for wage loss for the period June 12, 2005 through October 28, 2006 following termination of her compensation benefits. It found that she was at fault in the creation of the overpayment because she knowingly accepted payments to which she was not entitled.<sup>1</sup> Appellant was given 30 days in which to request a telephone conference or a prerecolement hearing before the Branch of Hearings and Review to object to the overpayment determination or to present evidence on the issues of fault and the possibility of waiver.

By letter dated December 4, 2006, appellant contested the preliminary finding of an overpayment, stating that she continued to experience residuals from her accepted injury and had been treated by multiple doctors. She indicated that she had responded in a timely fashion to the Office's April 6, 2005 notice of proposed termination and that the Office did not mention the issue of termination or overpayment in letters to her dated June 2 and 21, 2006. Appellant asserted that she was not at fault in the creation of the overpayment and requested waiver of recovery of the overpayment.

Appellant submitted medical reports, dated April 17 to November 16, 2006, from Dr. Daniel Ignacio, Board-certified in physical medicine and rehabilitation; a September 1, 2006 report of an x-ray of the left shoulder; a June 2, 2006 letter from the Office requesting information as to appellant's earnings for the previous 15-month period; information dated June 29, 2006 regarding her earnings for said period; and a June 21, 2006 letter from the Office acknowledging appellant's change of address.

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<sup>1</sup> Office regulations provide that, in addition to providing narrative descriptions to recipients of benefits paid or payable, the Office includes on each periodic check a clear indication of the period for which payment is being made. A form is sent to the recipient with each supplemental check which states the date and amount of the payment and the period for which payment is being made. For payments sent by electronic funds transfer, a notification of the date and amount of payment appears on the statement from the recipient's financial institution. Absent affirmative evidence to the contrary, the beneficiary will be presumed to have received the notice of payment, whether mailed or transmitted electronically. 20 C.F.R. § 10.430.

By decision dated December 15, 2006, the Office finalized its preliminary determination that appellant had received an overpayment of compensation in the amount of \$62,084.88, for the period June 12, 2005 through October 28, 2006. It found that she was at fault in the creation of the overpayment because she failed to return the payments after she was notified of the termination of her entitlement to compensation and was thus, precluded from obtaining a waiver. The Office instructed appellant to send a check in the full amount of the overpayment within 30 days.<sup>2</sup>

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

The Federal Employees' Compensation Act<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup>

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

The Office terminated appellant's entitlement to compensation benefits effective June 12, 2005. However, the evidence reflects and appellant does not dispute, that she received wage-loss compensation from the Office in the amount of \$62,084.88, for the period June 12, 2005 to October 28, 2006. As she was not entitled to receive any disability compensation as of June 12, 2005, the Board finds that the Office correctly determined that appellant received an overpayment of compensation in the amount \$62,084.88, for the period in question.

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

Under section 8129 of the Act and its 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.<sup>6</sup> Section 10.433 of the implementing regulations provides that the Office may consider waiving an overpayment if the individual to whom it was made was not at fault in accepting or creating the overpayment.<sup>7</sup> The regulation further provides that each recipient of

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<sup>2</sup> Appellant submitted additional evidence subsequent to the Office's December 15, 2006 decision. 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). Therefore, the Board may not consider this evidence for the first time on appeal.

<sup>3</sup> 5 U.S.C. §§ 8101-8193.

<sup>4</sup> 5 U.S.C. § 8102(a).

<sup>5</sup> 5 U.S.C. § 8129.

<sup>6</sup> 5 U.S.C. § 8129(b); 20 C.F.R. §§ 10.433, 10.434, 10.436, 10.437.

<sup>7</sup> 20 C.F.R. § 10.433(a).

compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from the Office are proper.<sup>8</sup> Under the regulations, a recipient will be found to be at fault with respect to creating an overpayment if he or she accepted a payment which he or she knew or should have known to be incorrect.<sup>9</sup> Whether the Office determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment.<sup>10</sup>

### ANALYSIS -- ISSUE 2

By accepting payments after her entitlement to benefits was terminated, effective June 12, 2005, appellant accepted payments that she knew or should have known were incorrect. Therefore, she was at fault in the creation of the overpayment.<sup>11</sup>

On May 27, 2005 the Office terminated appellant's compensation benefits effective June 12, 2005. The record reflects that a copy of the Office's decision was properly mailed to appellant at her address of record in the ordinary course of business. Accordingly, appellant was on notice that her benefits had been terminated and that she was not entitled to receive any compensation payments subsequent to June 12, 2005. However, as noted, she accepted compensation payments for the period June 12, 2005 through October 28, 2006, in the amount of \$62,084.88. As appellant was aware that her entitlement to benefits had been terminated, she accepted payments that she knew or should have known to be incorrect. Accordingly, the Board finds that she was at fault in the creation of the overpayment. The fact that the Office may have been negligent in issuing the payments does not mitigate this finding.<sup>12</sup>

As appellant was at fault in the creation of the overpayment, she is not eligible for waiver of recovery of the overpayment. The Office is required by law to recover this overpayment.<sup>13</sup>

### CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$62,084.88, for the period June 12, 2005 to October 28, 2006. It further finds that she was at fault in the creation of the overpayment and is, therefore, not entitled to waiver of recovery of the overpayment.

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<sup>8</sup> *Id.*

<sup>9</sup> 20 C.F.R. § 10.433(a)(3).

<sup>10</sup> 20 C.F.R. § 10.433(b).

<sup>11</sup> See *Otha J. Brown*, 56 ECAB \_\_\_ (Docket No. 03-1916, issued December 23, 2004); *Karen K. Dixon*, 56 ECAB \_\_\_ (Docket No. 03-2265, issued November 9, 2004).

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

<sup>13</sup> Recovery of the overpayment is not an issue in this case, as appellant is not in receipt of continuing total disability payments. With respect to the recovery of the overpayment, the Board's jurisdiction is limited to those cases where the Office seeks recovery from continuing compensation benefits under the Act. 20 C.F.R. § 10.441(a); see also *Bob R. Gilley*, 51 ECAB 377 (2000).

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 15, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 1, 2007  
Washington, DC

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

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

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