



## **FACTUAL HISTORY**

On May 29, 2001 appellant, then a 54-year-old central mark-up clerk, filed a claim for occupational disease, Form CA-2, alleging that keying and lifting heavy bundles of mail in the performance of duty caused her to develop severe pain in her left wrist and shoulder. Appellant stopped work on May 25, 2001.

On November 30, 2001 the Office accepted appellant's claim for tendinitis of the "left shoulder/arm" and tendinitis of the left wrist. The Office commenced payment of appropriate medical expenses and wage-loss compensation related to the accepted aggravation.

On December 19, 2001 Dr. James S. Zarr, appellant's treating Board-certified physiatrist, released appellant for light-duty work with restrictions on performing repetitive activities with her left hand. On February 6, 2002 Dr. Zarr released appellant to return to full duty, without restrictions. His only provision was that appellant should work only four hours a day for the first week, six hours a day for the second week and then begin working eight hours a day.<sup>1</sup>

On February 6, 2002 the employing establishment offered appellant a full-time position in her previous unit, in accordance with the schedule set forth by Dr. Zarr. Appellant accepted the position and returned to duty on February 7, 2002. On April 11, 2002 appellant filed a claim for a recurrence of disability beginning February 7, 2002. Appellant indicated that she stopped work on March 1, 2002 and returned to work on March 2, 2002, but experienced increased pain since her initial return on February 7, 2002. In support of her claim, appellant submitted an April 3, 2002 report from Dr. Richard R. Dailey, a treating Board-certified osteopath, who stated that appellant needed to be totally released from keying due to an aggravation of her permanent left upper extremity injuries. Appellant submitted a November 16, 2001 report from Dr. Dailey and as a February 13, 2002 x-ray report.

In a decision dated July 15, 2002, the Office denied appellant's claim for a recurrence of disability beginning February 7, 2002 on the grounds that the medical evidence was insufficient to support her claim of total disability.

On August 9, 2002 appellant began seeing Dr. Richard A. Ruiz, Jr., a Board-certified family practitioner, for treatment of left elbow epicondylitis. He restricted appellant from lifting more than 15 pounds. By letter dated September 3, 2002, the Office denied appellant's request for authorization for physical therapy as recommended by Dr. Ruiz, on the grounds that left elbow tendinitis had not been accepted as employment related. The Office explained that, if appellant believed her left elbow condition was causally related to her March 2, 2001 accepted work injuries, she should submit a medical report from her physician addressing the causal relationship.

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<sup>1</sup> In a follow-up report dated February 19, 2002, Dr. Zarr reiterated that appellant could perform full-duty work, with no restrictions. He stated that there were no objective findings of any disabling conditions and that no further treatment was needed.

In a report dated October 1, 2002, Dr. Ruiz summarized his treatment of appellant, noting that he had last seen her on September 13, 2002 when he released her to full duty without restrictions. With respect to the cause of appellant's condition, Dr. Ruiz stated:

“The patient's diagnosis of left elbow lateral epicondylitis could have been caused by numerous etiologies. These include repetitive wrist turning or hand gripping, tool use, or twisting movements that may exceed tissue capacity. I am unsure whether or not this was a work-related injury, but it could have been if she were required to repetitively lift weights with her left upper extremity or asked to perform any activities where there has been excessive hand gripping or twisting of the elbow. As stated above, the patient was seen in my office and treated for the condition from August 8, 2002 to September 13, 2002 when she was released to full duty. I am in no position to comment whether her injury of March 2, 2002 was related as I did not care for her during this injury.”

On January 23, 2002 appellant submitted CA-7 forms claiming wage-loss compensation for intermittent periods from September 17 to November 12 and from November 25 to 26, 2002. Appellant stated that, on each of the dates claimed, management had sent her home rather than scheduling her to work.<sup>2</sup>

By letter dated December 16, 2002, the Office explained to appellant that, with respect to the periods from September 17 to November 12 and from November 25 to 26, 2002, she would be entitled to wage-loss compensation if she was disabled due to her accepted condition, and that such a determination could only be established through medical evidence. The Office allowed appellant 30 days to submit medical evidence in support of her claimed periods of disability.

Appellant submitted a note from Dr. Ruiz dated January 6, 2003, stating that appellant was restricted from lifting more than 15 pounds with her left upper extremity, or performing repetitive activities with her left elbow. In a second note also dated January 6, 2003, Dr. Ruiz prescribed physical and occupational therapy for appellant's lateral epicondylitis.

In a decision dated January 17, 2003, the Office denied appellant's claims for compensation for intermittent periods from September 17 to November 12, 2002 and from November 25 to 26, 2002, causally related to her accepted left wrist tendinitis and left arm and shoulder tendinitis. The Office found the medical evidence insufficient to establish disability for the relevant periods.

By letter dated January 21, 2003, appellant requested examination of the written record by the Branch of Hearings and Review and submitted medical reports from Dr. C. Erik Nye, a treating Board-certified orthopedic surgeon, to whom she had been referred by Dr. Ruiz.

In a report dated January 13, 2002, Dr. Nye noted that appellant had sought treatment for her left elbow, but was now also complaining of left shoulder and wrist pain, which she reported

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<sup>2</sup> In a letter of response dated April 28, 2003, the employing establishment acknowledged that, during the claimed period, whenever there were 23 or more clerks reporting who did not have limited-duty restrictions, appellant was not scheduled to work.

had started with a 2001 employment injury. He noted that appellant had previously been restricted from keying and performing repetitive work, received therapy for her wrist and was now receiving therapy for her elbow. Dr. Nye noted that, while appellant's left shoulder hurt and she had some mild bursitis in this joint, her left elbow bothered her the most. He diagnosed overuse syndrome, left upper extremity, medial epicondylitis with ulnar neuritis left elbow, chronic bursitis/overuse left shoulder and chronic overuse of the left wrist. Dr. Nye gave appellant exercises to perform and restricted her from performing repetitive work, if possible, and from keying.

On February 28, 2003 Dr. Nye noted that recent x-rays of appellant's left shoulder and wrist were normal, and that her diagnoses were essentially unchanged. He prescribed therapy for appellant's left shoulder, elbow, wrist and entire arm, and advised her to continue light-duty work as before. Dr. Nye concluded that, upon her return in six weeks, if appellant was not improved he would consider further testing to rule out carpal tunnel or ulnar nerve root entrapment.

In a decision dated June 20, 2003, an Office hearing representative affirmed the Office's January 17, 2003 decision, finding that appellant had submitted insufficient medical evidence to establish that she was disabled for work for the claimed periods from September 17 to November 12 and November 25 to 26, 2002.

On July 14, 2003 appellant submitted CA-7 forms claiming wage-loss compensation for intermittent periods March 10 to June 21, 2003. Appellant stated that, on each of the dates claimed, management had sent her home rather than schedule her to work.

By letter dated July 29, 2003, the Office allowed appellant 30 days to submit medical evidence in support of the claimed periods of disability. In response, appellant submitted copies of previously submitted medical reports and therapy notes.

In an August 5, 2003 letter, the employing establishment explained that, with respect to the claimed periods of intermittent disability, appellant was on limited duty and not scheduled to work whenever there were sufficient able-bodied clerks reporting for work. The employing establishment asserted that, because appellant's work restrictions had not been established as employment related, she was not entitled to compensation for the times she was not scheduled to work.

On August 11, 2003 appellant filed a claim for a recurrence of disability beginning February 2002. She indicated that she had been disabled for intermittent days beginning February 7, 2002, when she returned to full duty.

On September 12, 2003 the Office advised appellant that her August 11, 2003 claim for a recurrence of disability beginning February 7, 2002 was considered a duplicate of her April 11, 2002 claim, which had been denied by the Office in its July 15, 2002 decision. The Office stated that, if she wished to pursue this claim, she needed to exercise one of the appeal rights provided with the July 15, 2002 decision.

In a separate decision also dated September 12, 2003, the Office denied appellant's claims for compensation for intermittent periods March 10 to June 21, 2003, causally related to her accepted left wrist tendinitis and left arm/shoulder tendinitis.

On September 18, 2003 the Office issued a preliminary determination that an overpayment in the amount of \$1,128.60 had occurred because it inadvertently issued appellant a compensation check for the period February 3 to March 13, 2003, to which she was not entitled. The Office found that appellant was not without fault in the creation of the overpayment, as she knew or should have known that she had received compensation to which she was not entitled.

By letter dated September 23, 2003, appellant requested reconsideration of the Office's decisions denying her claims for wage-loss compensation.<sup>3</sup> She submitted a September 17, 2003 report from Dr. Karen M. Arkin, a treating Board-certified neurologist.

With respect to the Office's preliminary overpayment determination, on September 25, 2003, appellant requested a telephone conference. Appellant submitted a September 17, 2003 narrative report from Dr. Arkin, received by the Office on October 7, 2003, who noted that routine nerve conduction studies of both upper extremities were only mildly abnormal and were consistent with incipient median mononeuropathies of both wrists, carpal tunnel syndrome. Dr. Arkin advised appellant to remain on limited duty, as she felt that most of appellant's pain was related to tendinitis and repetitive use injuries.

In a decision dated October 2, 2003, the Office denied reconsideration on the grounds that appellant's request neither raised substantial legal questions nor included new and relevant evidence and, thus, it was insufficient to warrant merit review of its prior decision.

In a decision dated November 14, 2003, the Office finalized the preliminary overpayment determination. The Office found that appellant was not without fault in the creation of the overpayment in the amount of \$1,128.60 that occurred from February 3 to March 13, 2003 because she received compensation which she knew or should have known she was not entitled to receive. The Office noted that, while a conference call with appellant was initiated on November 10, 2003, during the call appellant simply stated that she did not feel she was at fault in the creation of the overpayment, and did not wish to discuss the issue further. The Office ordered appellant to repay the overpayment in full.

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

A claimant, for each period of disability claimed, has the burden of proving by the preponderance of the reliable, probative and substantial evidence that he or she is disabled for work as a result of the employment injury. Whether a particular injury causes an employee to be

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<sup>3</sup> The Board notes that appellant's letter does not identify the Office decision from which she is requesting reconsideration. Appellant's request was received by the Office on September 29, 2003, and, therefore, could be considered a timely request for reconsideration of either the Office's June 20 or September 12, 2003 decision. 20 C.F.R. § 10.607(a) (1999).

disabled for employment, and the duration of that disability, are medical issues which must be established, probative and substantial evidence.<sup>4</sup>

In this case, appellant has the burden of establishing by the weight of the substantial, reliable and probative evidence, a causal relationship between her claimed total disability for intermittent periods September 17 to November 12, November 25 to 26, 2002 and March 10 to June 21, 2003, and her accepted left shoulder/arm and left wrist tendinitis.<sup>5</sup> The Board has held that the mere belief that a condition was caused or aggravated by employment factors or incidents is insufficient to establish a causal relationship between the two.<sup>6</sup> The Board will not require the Office to pay compensation for disability in the absence of medical evidence directly addressing the particular period of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.<sup>7</sup>

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

With respect to the claimed periods of intermittent disability from September 17 to November 12, November 25 to 26, 2002, the Board notes that, while the record does contain evidence from appellant's treating physicians, there is no medical evidence of record which supports a finding of total disability for the periods claimed. Appellant was released to full, unrestricted duty by Dr. Zarr on February 4, 2002 and returned to work on February 7, 2002. While she claimed disability beginning February 7, 2002, her claim denied by the Office July 15, 2002, which is outside the jurisdiction of the Board on this appeal.<sup>8</sup> The Board notes that, on February 19, 2002, Dr. Zarr that appellant had no objective findings of disability on physical examination, required no further treatment, and could remain at full-duty work without restrictions. Appellant was subsequently treated by Dr. Dailey, who placed her on limited duty. However, Dr. Dailey's final report of record is dated April 3, 2002, and does not discuss appellant's condition or disability status from September 17 to November 12 and November 25 to 26, 2002. Appellant saw Dr. Ruiz for left elbow tendinitis, and was again placed on physical restrictions. However, on October 1, 2002, Dr. Ruiz stated that he had released appellant to full duty with no restrictions effective September 13, 2002. This does not support disability for periods after that date. Moreover, Dr. Ruiz stated that he could not say whether appellant's left elbow tendinitis was employment related. While Dr. Ruiz placed appellant on physical restrictions effective January 6, 2003, he did not discuss appellant's ability to work or disability for the claimed periods. Similarly, Dr. Nye, who treated appellant from January 13 to February 28, 2003, did not offer any opinion regarding appellant's condition or disability status

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<sup>4</sup> *Fereidoon Kharabi*, 52 ECAB 291 (2001).

<sup>5</sup> *Alfredo Rodriguez*, 47 ECAB 437 (1996).

<sup>6</sup> *Id.*

<sup>7</sup> *Fereidoon Kharabi*, *supra* note 4.

<sup>8</sup> 20 C.F.R. § 501.3(d)(2) requires that an application for review by the Board be filed within one year of the date of the Office's final decision being appealed. As appellant's application for review was postmarked December 1, 2003, and received by the Board December 15, 2003, the Board cannot consider the Office's July 15, 2002 decision.

during the relevant periods of 2002. The only remaining medical evidence<sup>9</sup> of record consists of the September 17, 2003 reports from Dr. Arkin, received subsequent to the Office's June 20, 2003 decision regarding the periods of disability from September 17 to November 12 and November 25 to 26, 2002.<sup>10</sup>

With respect to the claimed periods of intermittent disability from March 10 and June 21, 2003, the Board notes that the only relevant medical evidence of record consists of the January 13 and February 28, 2003, reports of Dr. Nye. On January 13, 2002 he noted that appellant sought treatment for her left elbow, but was also complaining of left shoulder and wrist pain, which she reported had started with a 2001 employment injury. Dr. Nye noted that appellant had previously been restricted from keying and performing repetitive work, received therapy for her wrist and was now receiving therapy for her elbow. He diagnosed an overuse syndrome of the left upper extremity, medial epicondylitis with ulnar neuritis of the left elbow, chronic bursitis and overuse of the left shoulder and chronic overuse of the left wrist. Dr. Nye gave appellant exercises to perform and restricted her from performing repetitive work, keying. On February 28, 2003 he noted that recent x-rays of appellant's left shoulder and wrist were normal and that the diagnoses were essentially unchanged. The physician prescribed therapy for appellant's left shoulder, elbow, wrist and entire arm. The Board finds that Dr. Nye did not explain whether appellant's restrictions were due to her accepted conditions or to the additional diagnosed condition of epicondylitis. This is especially important in light of the fact that Dr. Nye emphasized that it was appellant's left elbow condition that bothered her the most.<sup>11</sup> The Board notes that, as he last saw appellant on February 28, 2003, his reports do not address the relevant periods of disability claimed by appellant from March 10 to June 21, 2003.

The issue of whether appellant's disability was related to the accepted conditions is a medical question which must be established by a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disability is causally related to employment factors and supports that conclusion with sound medical reasoning.<sup>12</sup> In letters dated December 16, 2002 and July 29, 2003, the Office advised appellant of the evidence required; however, appellant failed to submit medical evidence sufficient to establish that she was totally disabled for the intermittent dates claimed. Consequently, appellant has not met her burden of proof to establish that she was totally disabled for intermittent periods September 17 to November 12, November 25 to 26, 2002 and March 10 to June 21, 2003.

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<sup>9</sup> While the record also contains numerous physical therapy and occupational therapy notes, these are not considered medical evidence as physical and occupational therapists are not defined as physician under the Act. 5 U.S.C. § 8101(2); *Vickey C. Randall*, 51 ECAB 357 (2000).

<sup>10</sup> The Board cannot review this additional medical evidence however, as the Board's jurisdiction is limited to reviewing the evidence that was before the Office at the time it issued its final decision. *Charles P. Mulholland, Jr.*, 48 ECAB 604 (1997); *Robert D. Clark*, 48 ECAB 422 (1997).

<sup>11</sup> *James Mack*, 43 ECAB 321 (1991).

<sup>12</sup> *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000); *Alfredo Rodriguez*, *supra* note 5.

## LEGAL PRECEDENT -- ISSUE 2

Section 10.606 of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent new evidence not previously considered by the Office.<sup>13</sup> Section 10.608 provides that when an application for review of the merits of a claim does not meet at least one of these requirements, the Office will deny the application for review without reviewing the merits of the claim.

## ANALYSIS -- ISSUE 2

By letter dated September 23, 2003, appellant requested reconsideration of the Office's decisions denying her request for wage-loss compensation and submitted additional evidence. On reconsideration, appellant stated that she had recently undergone electromyography (EMG) and was submitting new evidence from her treating physician. However, appellant did not allege or demonstrate that the Office erroneously applied or interpreted a specific point of law, or advance a relevant legal argument not previously considered by the Office. Consequently, appellant is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(2).

With respect to the third above-noted requirement, the Board notes that appellant submitted a September 17, 2003 report from Dr. Karen M. Arkin, who stated only that appellant could return to work at limited duty for 12 weeks due to bilateral carpal tunnel syndrome and tendinitis, and restricted her from lifting more than 5 to 10 pounds. In an undated report, Dr. Arkin stated that appellant could not perform overhead lifting, keying or prolonged carrying, pushing or pulling. However, neither of these reports contain any opinion by the physician as to relevant issue in this case, which is appellant's total disability claim for intermittent dates from September 17 to November 12, November 25 to 26, 2002, and March 10 to June 21, 2003. Evidence which does not address the particular issue involved does not constitute a basis for reopening the claim.<sup>14</sup> Although appellant submitted numerous leave slips documenting that she had been sent home at the request of the employing establishment, the Board has held that the question of whether a claimed period of disability is causally related to an accepted employment injury is medical in nature and must be resolved by probative medical evidence.<sup>15</sup> The leave slips do not constitute a basis for reopening appellant's claim. As appellant failed to raise substantive legal questions or to submit new relevant and pertinent evidence not previously

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<sup>13</sup> 20 C.F.R. § 10.606(b) (1999).

<sup>14</sup> *Alan G. Williams*, 52 ECAB 180 (2000).

<sup>15</sup> *Roger Williams*, 52 ECAB 468 (2001); *Manuel Gill*, 52 ECAB 282 (2001); *Jacqueline M. Nixon-Steward*, *supra* note 12.

reviewed by the Office, the Office properly refused to reopen appellant's claim for review of the merits of her claim based on the third above-noted requirement under section 10.606(b)(2).<sup>16</sup>

### **LEGAL PRECEDENT -- ISSUE 3**

When an employee returns to work and ceases to have any loss of wages, compensation for wage loss is no longer payable.<sup>17</sup> Where there are no further payments due and an overpayment has been made to an individual by reason of an error of fact or law, such individual, as soon as the mistake is discovered or his attention is called to same, shall refund to the Office any amount so paid or, upon failure to make such refund, the Office may proceed to recover the same.<sup>18</sup>

Section 8129 of the Federal Employees' Compensation Act provides that an overpayment of compensation shall be recovered by the Office 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>19</sup> Thus, the Office may not waive the overpayment of compensation unless appellant was without fault.<sup>20</sup> In determining whether an individual is with fault, section 10.433(a) of the Office's regulations provides in relevant part:

"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;
- (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.)"<sup>21</sup>

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<sup>16</sup> The Board notes that, while appellant additionally submitted a September 17, 2003 narrative report from Dr. Arkin summarizing the results of a recent EMG, as this report was received by the Office on October 7, 2003, subsequent to Office's October 2, 2003 decision, the Board cannot review this additional medical evidence. *Charles P. Mulholland, Jr.*, *supra* note 10; *Robert D. Clark*, *supra* note 10.

<sup>17</sup> *Steven A. Berndt*, 51 ECAB 402 (2000); *Kenneth E. Rush*, 51 ECAB 116 (1999).

<sup>18</sup> *Albert Pineiro*, 51 ECAB 310 (2000).

<sup>19</sup> 5 U.S.C. § 8129.

<sup>20</sup> *See Diana L. Booth*, 52 ECAB 370 (2001) (no waiver is possible if the claimant is not without fault in helping to create the overpayment).

<sup>21</sup> 20 C.F.R. § 10.433(a) (1999).

### ANALYSIS -- ISSUE 3

The Office found that an overpayment in the amount of \$1,128.60 occurred from February 3 to March 13, 2003 and that appellant was at fault in the creation of this overpayment because she accepted a payment that she knew or should have known was incorrect. The record establishes that appellant returned to full-time duty effective February 7, 2002. She filed a claim alleging that she sustained a recurrence beginning February 7, 2002, but the Office denied this claim July 15, 2002. She filed claims alleging wage loss for intermittent periods from September 17 to November 12 and from November 25 to 26, 2002, but the Office denied these claims on January 17, 2003. She then asked for a review of the written record. This was the state of affairs when she received a compensation check dated May 30, 2003 for \$1,128.60. The Office had approved none of her claims for compensation since she returned to work on February 7, 2002. Review of the written record was pending, but those claims involved intermittent periods from September 17 to November 12 and from November 25 to 26, 2002. Appellant had claimed no compensation for wage loss from February 3 to March 13, 2003, the period covered by the May 30, 2003 check.<sup>22</sup> Although she asserted that she did not know what period the check covered and assumed it was money that was owed to her, the check indicated the period for which it was issued. As there was no discernible basis for the payment of this compensation from appellant's perspective, the Board finds that she knew or should have known that the payment was incorrect. Her acceptance of the payment establishes fault in the creation of the overpayment under the third criterion noted above.

The Board notes that, even though the overpayment resulted from negligence by the Office, this does not excuse appellant's acceptance of a payment to which she knew or should have known she was not entitled.<sup>23</sup> As appellant is not in receipt of compensation for continuing wage loss, the Board has no jurisdiction to review the recovery of the overpayment.<sup>24</sup>

### CONCLUSION

The Board finds that appellant failed to meet her burden of proof to establish that she was disabled for intermittent periods September 17 and November 12, November 25 to 26, 2002, and March 10 to June 21, 2003, causally related to her accepted left shoulder and left wrist tendinitis. The Board further finds that the Office properly declined to reopen appellant's claim for further review of the merits on October 2, 2003. Finally, the Board finds that the Office properly found that appellant was at fault in the creation of an overpayment in the amount of \$1,128.60.

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<sup>22</sup> She would later claim compensation for periods beginning March 10, 2003.

<sup>23</sup> *Diana L. Booth*, *supra* note 20.

<sup>24</sup> *See Albert Pineiro*, *supra* note 18; *Lorenzo Rodriguez*, 51 ECAB 295 (2000).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office dated November 14, October 2, September 12, June 20 and January 17, 2003 are affirmed.

Issued: July 23, 2004  
Washington, DC

Colleen Duffy Kiko  
Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member