

**United States Department of Labor  
Employees' Compensation Appeals Board**

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E.C., Appellant )

and )

**DEPARTMENT OF THE TREASURY,** )  
**INTERNAL REVENUE SERVICE,** )  
**Morton Grove, IL, Employer** )

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**Docket No. 07-2005  
Issued: February 19, 2008**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

DAVID S. GERSON, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On July 26, 2007 appellant filed a timely appeal of the Office of Workers' Compensation Programs' March 1, 2007 merit decision finding that she failed to establish a recurrence of total disability; two decisions dated June 7, 2007, finding that she had received overpayments of compensation; and a nonmerit decision dated May 15, 2007. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merit and nonmerit issues of this case.

**ISSUES**

The issues are: (1) whether appellant sustained a recurrence of total disability on November 8, 2006 causally related to her accepted left ankle injuries; (2) whether the Branch of Hearings and Review properly denied appellant's request for an oral hearing on the grounds that it was not timely filed; (3) whether appellant received an overpayment in the amount of \$1,029.92 for the period January 26 through February 11, 2005; (4) whether appellant received an overpayment in the amount \$883.46 for the period July 22, 2005 to August 6, 2005; (5) whether the Office properly denied waiver of the \$1,029.92 overpayment on the grounds that appellant was at fault in the creation of this overpayment; and (6) whether the Office properly

denied waiver of the \$883.46 overpayment on the grounds that appellant was at fault in creating this overpayment.

### **FACTUAL HISTORY**

On September 21, 2004 appellant, then a 57-year-old automation clerk, filed an occupational disease claim alleging that she sustained a stress fracture to her left ankle due to standing in the performance of duty. The Office accepted her claim for left ankle stress fracture on August 31, 2004. The Office also accepted aggravation of osteoarthritis of the left ankle. The Office authorized surgical treatment.

On February 25, 2005 appellant's attending physician, Dr. Howard I. Freedberg, a Board-certified orthopedic surgeon, performed left foot triple arthrodesis with a calcaneocuboid strut allograft, adjunctive platelet gel concentrate and graft on bone grafting with strayer gastrocnemius recession. The Office entered appellant on the periodic rolls on April 11, 2005. It informed appellant that in order to avoid an overpayment of compensation, she must notify the Office immediately when she returned to work and that, if she worked for any portion of the period for which a payment was made, she must return the check to the Office to avoid an overpayment of compensation.

Dr. Freedberg released appellant to return to work on June 29, 2005. He indicated that she could sit eight hours a day, walk and stand a total of two and a half hours a day and that she could push, pull and lift up to five pounds for no more than two and a half hours a day. The employing establishment provided appellant with a light-duty job assignment on June 22, 2005. Appellant declined this position on June 20, 2005.

In a letter dated July 1, 2005, the Office informed appellant that the Department of the Treasury would issue a duplicate payment for the period January 26 to February 11, 2005 in the amount of \$1,029.92. The Office requested that appellant return the check or draft a personal check in the amount of \$1,029.92. In a telephone conversation of the same date, the claims examiner noted that appellant stated that she would return the check when she received it. Through a personal check dated July 6, 2005, appellant provided the Office with a payment of \$1,029.92.

By letter dated July 18, 2005, the Office informed appellant that it found the position offered by the employing establishment to be suitable work. The Office allowed appellant 30 days to accept the position or offer her reasons for refusal. Appellant responded that she would report to work on July 22, 2005.

Dr. Freedberg examined appellant on July 27, 2005 and noted that she was capable of walking more than 200 feet and that her pain had been reduced by 50 percent. On October 12, 2005 he found that appellant was doing well and had reached maximum medical improvement. Dr. Freedberg examined appellant on May 9, 2006 due to pain in her left foot, vertigo necessitating a walker and right foot pain. He noted that she required new orthopedic boots. On June 6, 2006 Dr. Freedberg noted that appellant's new orthopedic boots did not fit and that she could not wear them. He stated that appellant had another injury at work on May 9, 2006 when she fell on her left side bruising her left, ribs and two little fingers. Dr. Freedberg recommended

new refitted boots and no intervention for her May 9, 2006 injury. He examined appellant on September 5, 2006 and found that she had pes planovalgus with pain over the lateral plate. Dr. Freedberg stated that appellant had not yet received her new orthopedic boot.

In a note dated November 14, 2006, Dr. Freedberg stated that appellant injured her left leg and should not work for three weeks. Appellant telephoned the Office on November 17, 2006 and reported that the employing establishment had relocated her limited-duty assignment area requiring her to walk further. She alleged that this change had resulted in pain in her ankle and limited her ability to work. Appellant completed a claim for compensation on November 19, 2006 and requested compensation for leave without pay from November 14 to 24, 2006. She also completed a notice of recurrence of disability dated November 19, 2006. Appellant alleged that she sustained a recurrence of total disability on November 8, 2006. She stated: "I was walking to the fax machine when my left knee began to buckle. This caused excruciating pain in my left ankle. This injury happened because my managers moved me away from the location that I was performing my doctor's restricted light duties." Appellant noted that she had fallen on May 9, 2006 at work and bruised her torso. Karen Coleman, her supervisor, reported on the reverse of the form that appellant was not required to fax or copy any documents once she arrived at her desk. Ms. Coleman stated that appellant did not report for work on November 9, 2006 stating that she was sick. She noted that November 10, 2006 was a federal holiday and that appellant was only in the office for two hours on November 13, 2006, her next scheduled workday. Ms. Coleman stated that appellant informed her on November 14, 2006 that she twisted herself while on the way to the copy/fax machine area.

The employing establishment disputed appellant's claim on November 27, 2006, noting that she called in sick on November 9, 2006 and reported for work for a short time on November 13, 2006. On November 14, 2006 appellant informed her supervisor that she twisted her leg on November 8, 2006 while walking to the copy machine. She did not mention this injury to her supervisor on November 9 or 13, 2006.

By letters dated December 5, 2006, the Office requested additional information regarding appellant's November 19, 2006 claim for compensation and claim for recurrence of disability. The Office allowed appellant 30 days for a response.

On December 21, 2006 appellant stated that she was moved so far away from the entrance of the building that she was required to walk excessively. She alleged that her supervisors violated her work restrictions. On November 14, 2006 Dr. Freedberg diagnosed left leg radiculopathy and indicating with a checkmark "yes" that this condition was related to work. In a report dated December 5, 2006, Dr. Freedberg noted that appellant described pain in her foot and ankle and stated that this pain was related to increased walking at work. He recommended a wheelchair. On December 7, 2006 Dr. Freedberg opined that appellant required a wheelchair due to "a multiplicity of problems and surgeries." He stated that this need was related to appellant's employment based on history and the surgeries. Appellant informed Dr. Freedberg that the distance from the front door of the employing establishment to her desk was 188 feet. In a note dated December 26, 2006, Dr. Freedberg released appellant to return to work in a wheelchair on December 28, 2006. On January 9, 2007 he prescribed a motorized wheelchair due to left leg radiculopathy, bilateral pes planovalgus and prior left foot triple arthrodesis.

Dr. Freedberg in a separate note of the same date indicated that appellant should work part time beginning 10:30 a.m.

The Office again requested additional information from appellant on January 11, 2007. The Office allowed appellant 30 days for a response. In a report dated January 16, 2007, Dr. Freedberg noted that appellant was using a wheelchair and had an Arizona brace on the right leg. He diagnosed significant pes planovalgus deformity with no discreet areas of tenderness.

By decision dated March 1, 2007, the Office denied appellant's claim for recurrence of disability. It found that the medical evidence submitted was not sufficient to establish her claim.<sup>1</sup>

In a letter dated March 12, 2007, the Office informed appellant of its preliminary determination that she had received an overpayment of compensation in the amount of \$1,029.92 because she was sent duplicate payments for the period January 26 through February 11, 2005. The Office stated that the refund check she sent the Office to repay the debt was written on an account which contained insufficient funds to make the payment. The Office found that appellant was at fault in the creation of the overpayment as she received notification of the duplicate payment by letter dated July 1, 2005. The Office allowed her 30 days to respond.

On March 13, 2007 the Office made a preliminary determination that appellant received an overpayment in the amount of \$883.46 because she received compensation for total disability after she returned to work on July 22, 2005. The Office found that she was at fault in the creation of the overpayment as she knowingly accepted a compensation benefit payment dated August 6, 2005. Appellant received compensation on August 6, 2005 covering the period July 10 to August 6, 2005 in the amount of \$1,546.05. The Office stated that as she returned to work on July 22, 2005 she was entitled to compensation for the period July 10 to 22, 2005, in the amount of \$662.59. The Office concluded that appellant received an overpayment in the amount of \$883.46, the difference between the amount of compensation she actually received and the amount of compensation to which she was entitled. The Office allowed 30 days for a response.

Appellant requested a prerecoumpment hearing on April 16, 2007. She submitted documentation from her bank, that the July 6, 2005 check to the Office was returned due to insufficient funds. Appellant alleged that she was confused due to the requirement by the Office and the employing establishment that she return to work by July 22, 2005. By decision dated

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<sup>1</sup> Appellant initially alleged that she was totally disabled beginning November 8, 2006. She indicated that she sustained an additional injury to her left leg and reported this injury to her attending physician, Dr. Freedberg, a Board-certified orthopedic surgeon, who stated on November 14, 2006 that appellant injured her left leg. Appellant stated that as she walked to the fax machine her left knee began to buckle causing pain in her left ankle. Her supervisor stated that appellant informed her that she twisted her left leg on the way to the fax machine. The Office's regulations define a traumatic injury as a condition of the body caused by a specific event or incident, or series of events or incidents, within a single workday or shift. Such condition must be caused by external force, including stress or strain, which is identifiable as to time and place of occurrence and member or function of the body affected. The Board notes that this description of appellant's injury on November 8, 2006 appears to be a new traumatic injury. 20 C.F.R. § 10.5(ee). Appellant alleged a specific event identifiable as to time and place of occurrence and member of the body affected, twisting of her left leg on November 8, 2006 as she walked to the fax machine, which caused her to be totally disabled. The Office has not issued a final decision regarding this aspect of appellant's claim and the Board may not address this issue for the first time on appeal. 20 C.F.R. § 501.2(c).

May 15, 2007, the Branch of Hearings and Review denied her request for a prerecoupment hearing on the grounds that it was not timely filed.

By decision dated June 7, 2007, the Office finalized the March 12, 2007 finding that appellant was at fault in the creation of an overpayment in the amount of \$1,029.92, which occurred as she received duplicate checks and failed to maintain adequate funds in her account to cover the refund check she tendered. In a separate decision dated June 7, 2007, the Office finalized the March 13, 2007 preliminary finding that appellant was at fault in the receipt of an overpayment in the amount of \$883.46 as she returned to work on July 22, 2005 and received compensation for total disability through August 6, 2005.<sup>2</sup>

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

A recurrence of disability is the inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment which caused the illness. The term also means an inability to work that takes place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn (except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force), or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.<sup>3</sup>

When an employee who is disabled from the job she held when injured on account of employment-related residuals returns to a limited-duty position or the medical evidence of record establishes that she can perform the limited-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and to show that she cannot perform such limited-duty work. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the limited-duty job requirements.<sup>4</sup>

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

Appellant alleged that she sustained a recurrence of total disability on November 8, 2006. She attributed this recurrence of disability to a change in the nature and extent of her light-duty job requirements. Appellant contended that her supervisors required her to work outside her light-duty job requirements as her workstation was moved within the employing establishment so that she had to walk a greater distance to reach her desk. She indicated that she had to walk 188 feet from the front of the employing establishment to her desk. Dr. Freedberg, a Board-certified orthopedic surgeon and appellant's attending physician, indicated on July 27, 2005 that she was

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<sup>2</sup> Following the Office's June 7, 2007 decisions, appellant submitted additional new evidence. As the Office did not consider this evidence in reaching a final decision, the Board may not review the evidence for the first time on appeal. See 20 C.F.R. § 501.2(c).

<sup>3</sup> 20 C.F.R. § 10.5(x).

<sup>4</sup> *Joseph D. Duncan*, 54 ECAB 471, 472 (2003); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

capable of walking more than 200 feet. As this distance does not appear to exceed appellant's work restrictions, she must submit additional medical evidence in support of her claim.

Beginning on November 14, 2006 Dr. Freedberg supported appellant's disability for work. He indicated that she injured her left leg, but failed to describe how this injury occurred. This report is not sufficient to establish a change in the nature and extent of appellant's injury-related condition or a change in the nature and extent of her light-duty job requirements.

Dr. Freedberg also diagnosed left leg radiculopathy on November 14, 2006 and indicating with a checkmark "yes" that this condition was due to appellant's employment. He did not explain why and how appellant had developed left leg radiculopathy. The Board has held that an opinion on causal relationship which consists only of a physician checking "yes" to a medical form report question on whether the claimant's condition was related to employment is of little probative value. Without any explanation or rationale for the conclusion reached, such a report is insufficient to establish causal relationship.<sup>5</sup>

On December 5, 2006 Dr. Freedberg attributed the increasing pain in appellant's left ankle to increased walking at work. This statement is not sufficient to meet appellant's burden of proof in establishing a recurrence of disability as she has not submitted any evidence that her light-duty job requirements of walking increased. Her supervisor, Ms. Coleman denied that appellant was required to walk to deliver documents and stated that she was instructed to utilize e-mail instead. As appellant has not submitted the necessary factual and medical evidence to establish a change in the nature and extent of her injury-related condition or a change in her light-duty job requirements, she has failed to meet her burden of proof and the Office properly denied her claim for recurrence of disability.

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

Section 10.432 of the Office's regulations provides that, in response to a preliminary notice of an overpayment, a claimant may request a precoupment hearing within 30 days of the written notice of overpayment.<sup>6</sup> Failure to request the hearing within this 30-day time period shall constitute a waiver of that right.<sup>7</sup>

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

The Office issued a preliminary finding of overpayment and fault in the creation of the overpayment on March 13, 2007. Appellant requested a precoupment hearing on this matter on April 16, 2007. As she did not request the precoupment hearing within the required 30-day time period, she waived her right to this hearing.

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<sup>5</sup> *Lucrecia M. Nielson*, 41 ECAB 583, 594 (1991).

<sup>6</sup> 20 C.F.R. § 10.432. See *Willie C. Howard*, 55 ECAB 564 (2004).

<sup>7</sup> *M.B.*, (Docket No. 07-380, issued June 1, 2007).

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

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>8</sup> When a claimant receives a duplicative compensation payment for a period that he has already received compensation for wage loss, an overpayment of compensation is created.<sup>9</sup>

### **ANALYSIS -- ISSUE 3**

The record establishes that the Office issued appellant a duplicate payment in the amount of \$1,029.92 for the period January 26 through February 11, 2005 on July 1, 2005. As appellant was not entitled to duplicate compensation for the same period, an overpayment of compensation of \$1,029.92 was created.

### **LEGAL PRECEDENT -- ISSUE 4**

Section 8102(a) of the Act<sup>10</sup> provides that the United States "shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty. A claimant, however, is not entitled to receive temporary total disability and actual earnings for the same period."<sup>11</sup> Office procedures provide that an overpayment in compensation is created when a claimant returns to work but continues to receive wage-loss compensation.<sup>12</sup>

### **ANALYSIS -- ISSUE 4**

Appellant returned to full-time light-duty work on July 22, 2005. The Office issued her a check on August 6, 2005 covering the period July 10 to August 6, 2005, in the amount of \$1,546.05. As appellant returned to work on July 22, 2005, she was not entitled to receive compensation for temporary total disability and actual earnings for the same period. She was only entitled to receive compensation through July 21, 2005 in the amount of \$662.59. Therefore, appellant was not entitled to receive compensation from July 22 through August 6, 2005 and received an overpayment of compensation of \$883.46 the difference between the amount she received and the amount to which she was entitled.

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<sup>8</sup> 5 U.S.C. § 8116(a).

<sup>9</sup> See *Lawrence J. Dubuque*, 55 ECAB 667, 670-71 (2004).

<sup>10</sup> 5 U.S.C. §§ 8101-8193, 8102(a).

<sup>11</sup> *Supra* note 8.

<sup>12</sup> *Danney E. Haley*, 56 ECAB 393,400 (2005); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(a) (September 1994).

### **LEGAL PRECEDENT -- ISSUE 5 & 6**

Section 8129(b) of the Act<sup>13</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.”

The Office may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she received from the Office are proper. The recipient must show good faith and exercise a high degree of care in reporting events, which may affect entitlement to or the amount of benefits. 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>14</sup>

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.<sup>15</sup>

### **ANALYSIS -- ISSUE 5**

The Office determined that appellant was not without fault regarding the July 1, 2005 overpayment because she accepted a payment that she knew or should have known was incorrect. The factual history of the case establishes that the Office informed appellant of the duplicate payment for the period January 26 to February 11, 2005, before she received it and that she did not dispute her entitlement to the duplicate payment in the amount of \$1,029.92. The check issued by the Office was not returned, as requested. Rather, appellant attempted to repay this amount by personal check dated July 6, 2005, however, this repayment was not successful due to insufficient funds in her account. As she accepted a payment which she knew or should have known was incorrect, she was not without fault under the third standard outlined above and recovery of the overpayment of compensation in the amount of \$1,029.92 may not be waived.

### **ANALYSIS -- ISSUE 6**

The Office determined that appellant was not without fault regarding the August 6, 2005 overpayment on the grounds that she accepted a payment that she knew or should have known was incorrect. In order for the Office to establish that she was at fault in creating the

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<sup>13</sup> 5 U.S.C. § 8129(b).

<sup>14</sup> 20 C.F.R. § 10.433(a).

<sup>15</sup> *Id.* § 10.433(b).



overpayment of compensation, the Office must establish that, at the time appellant received the compensation checks in question, she knew or should have know that the payment was incorrect. Appellant returned to work on July 22, 2005 and received a check on August 6, 2005 for the period July 10 to August 6, 2005. The Office informed appellant at the time she was entered on the periodic rolls that she must return any check received after she returned to work to avoid an overpayment. Appellant alleged that she was confused as she was “forced” to return to work and felt that she was entitled to an additional period of total disability. The Board finds that appellant was aware or should have been aware at the time she accepted the August 6, 2005 check that it included a period of time for which she was not entitled to compensation benefits in addition to her actual earnings.<sup>16</sup>

### **CONCLUSION**

The Board finds that appellant has not met her burden of proof in establishing that she sustained a recurrence of disability on November 8, 2006. The Board further finds that appellant did not request a prerecoupment hearing within 30 days from the Office’s preliminary finding of overpayment and that she therefore waived the right to such a hearing. The Board further finds that appellant received overpayments of compensation in the amounts of \$1,029.92 and \$883.46 and that she was at fault in the creation of these overpayments such that the overpayments are not subject to waiver.

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<sup>16</sup> The Board notes that it does not have jurisdiction to consider recovery of these overpayments as the Office is not seeking recovery from continuing compensation under the Act. *Judith A. Cariddo*, 55 ECAB 348, 353 (2004).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated June 7, May 15 and March 1, 2007 are affirmed.

Issued: February 19, 2008  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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

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