

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

AUDREY M. TREMBLY, Appellant

and

**U.S. POSTAL SERVICE, REMOTE ENCODING
CENTER, Allentown, PA, Employer**

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**Docket No. 05-532
Issued: June 16, 2005**

Appearances:
Audrey M. Trembly, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member

JURISDICTION

On January 3, 2005 appellant filed a timely appeal from the October 4 and December 14, 2004 merit decisions of the Office of Workers' Compensation Programs, which found that she was not entitled to compensation from August 14, 1999 to December 31, 2002 and that she received an overpayment of \$76,343.27 as a result. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review both Office decisions.

ISSUES

The issues are: (1) whether the Office met its burden of proof to establish that it erroneously accepted temporary total disability from August 14, 1999 to December 31, 2002; and (2) if so, whether appellant received an overpayment of \$76,343.27 for that period.

FACTUAL HISTORY

On the prior appeal of this case,¹ the Board found that the Office improperly applied 5 U.S.C. § 8106(c)(2), which provides that a partially disabled employee who refuses suitable

¹ Docket No. 03-163 (issued May 27, 2003).

work is not entitled to compensation. The Board found that a conflict in medical opinion existed between appellant's attending physician and the Office referral physician and, therefore, the weight of the medical evidence failed to establish the suitability of the offered position.

The facts of this case as set forth in the Board's prior decision are hereby incorporated by reference. Briefly, the Office accepted that appellant developed a mild bilateral carpal tunnel syndrome in 1998 from performing keying activities in her federal employment. In 1999 appellant was working a limited-duty miscellaneous clerk assignment in East Stroudsburg, PA, when the employing establishment offered her a permanent rehabilitation position as a part-time flexible (modified) clerk in Lehigh Valley, PA. In a letter dated July 8, 1999, the employing establishment directed her to report to work on July 10, 1999 to begin her new assignment. When she failed to report, the Office issued its decision on August 16, 1999 finding that she refused an offer of suitable work. The Board reversed, citing the unresolved conflict in medical opinion.

On August 19, 2003 the Office advised appellant to file a Form CA-7 because she was entitled to additional compensation effective the date of the termination/modification: "Once the Philadelphia District Office receives your claim form, they will take action to provide all compensation due you retroactive to the date of the decision that has been reversed." Appellant filed a Form CA-7 on May 21, 2004, claiming compensation for leave without pay beginning July 10, 1999. She explained that her last day of work was July 9, 1999, that her rehabilitation job began July 10, 1999 and that she used leave to cover her absence from work through August 13, 1999. On August 6, 2004 the Office issued an initial compensation check to appellant in the amount of \$76,343.27 for temporary total disability from August 14, 1999 to December 31, 2002.

On September 17, 2004, however, the Office informed appellant that it appeared she was paid in error, as there was no medical evidence to support that she was unable to perform the position offered her on July 10, 1999. The Office gave her 20 days, or until October 7, 2004, to provide medical evidence supporting such disability.

In a decision dated October 4, 2004, the Office found that appellant was not entitled to compensation for temporary total disability from August 14, 1999 to December 31, 2002. The Office found that the December 5, 2003 opinion of Dr. Thomas DiBenedetto, a Board-certified orthopedic surgeon and impartial medical specialist, resolved the conflict earlier noted by the Board and established that appellant was capable of performing the modified job offered to her effective July 10, 1999.

On October 4, 2004 the Office made a preliminary determination that appellant was without fault in receiving an overpayment of \$76,343.27:

"This office erred in authorizing compensation for temporary total disability for the period paid. Although the ECAB decision reversed our previous decision, the weight of the medical evidence does not support disability for the period claimed. Compensation was paid in error. See the attached decision for details."

In a decision dated December 14, 2004, the Office finalized its preliminary determination, finding that compensation was paid in error from August 14, 1999 to December 31, 2002 because the weight of the medical evidence did not support disability for the period. Having received no response from appellant, the Office denied waiver and requested that she submit a check in the amount of \$76,343.27 within 30 days.

LEGAL PRECEDENT

The Board has upheld the Office's authority to reopen a claim at any time on its own motion under section 8128(a) of the Federal Employees' Compensation Act and, where supported by the evidence, to set aside or modify a prior decision and issue a new decision.² The Board has noted, however, that the power to annul an award is not an arbitrary one and that an award for compensation can be set aside only in the manner provided by the compensation statute.³ It is well established that once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. This holds true where the Office later decides that it has erroneously accepted a claim for compensation.⁴

ANALYSIS

The issue raised by the Office's October 4, 2004 decision on appellant's entitlement to compensation from August 14, 1999 to December 31, 2002 is one of rescission. Following the Board's prior decision, and at the Office's request, appellant filed a Form CA-7 claiming compensation for leave without pay beginning July 10, 1999. The Office accepted temporary total disability beginning August 14, 1999 and made an initial payment of \$76,343.27 in compensation. The Office then determined that it paid this compensation in error because the weight of the medical evidence established that she was capable of performing the modified job offered to her effective July 10, 1999. The Office therefore bears the burden of proof to establish an erroneous acceptance of temporary total disability from August 14, 1999 to December 31, 2002.⁵

The Office based its October 4, 2004 decision on the December 5, 2003 report of Dr. DiBenedetto, a Board-certified orthopedic surgeon. The Office selected Dr. DiBenedetto as an impartial medical specialist to resolve the conflict in medical opinion identified in the Board's prior decision.⁶ Dr. DiBenedetto related appellant's history and complaints and described his

² *Eli Jacobs*, 32 ECAB 1147 (1981); *see* 5 U.S.C. § 8128(a).

³ *Doris J. Wright*, 49 ECAB 230 (1997); *Shelby J. Rycroft*, 44 ECAB 795 (1993).

⁴ *See* 20 C.F.R. § 10.610 (1999).

⁵ The Office did not invoke section 8106(c)(2) of the Act. Rather, the Office found that the weight of the medical evidence established that she had no injury-related disability for work beginning July 10, 1999.

⁶ 5 U.S.C. § 8123(a) (if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination).

findings on physical examination. After summarizing her medical records, Dr. DiBenedetto offered his opinion:

“After my history and physical examination, and review of the medical records, I believe that [appellant] can perform the duties of the position offered to her on March 13, 1999, and modified on July 9, 1999, that she accepted.

“I believe that she is capable of driving 26 miles to the Lehigh Valley office where the July 1999 job was located.

“I believe that she should be limited to four hours of keying on a daily basis.

“I did not find any preexisting conditions which limit her.

“There are minimal objective findings to support that her work-related condition of April 18, 1998 is active.

“Her subjective complaints are not consistent with carpal tunnel syndrome which is compression of the median nerve at the wrist. This causes pain in the hand and numbness and tingling in the thumb, index finger, long and half of the ring finger. It does not affect the little finger and ulnar border of the ring finger, and it does not cause sensory disturbance in the forearm and arm. She had a full range of motion of her fingers, wrists, elbows and shoulders. She had no evidence of ulnar nerve compression at Guyon’s canal or at the elbow, and she had no clinical evidence of brachial plexus compression.

“I have given these opinions within a reasonable degree of medical certainty.”

The most significant aspect of this opinion is that Dr. DiBenedetto expressed it in the present tense. He examined appellant on December 5, 2003 and, based on those findings, reported that she “can perform the duties of the position offered to her” and “is capable of driving 26 miles to the Lehigh Valley office.” He expressed no opinion on whether residuals of the accepted employment injury prevented her from performing the duties of her permanent rehabilitation position or driving the 26 miles to the job location beginning on or about July 10, 1999.⁷ So while this medical evidence might establish that appellant was capable, at the end of 2003, of holding a position that was no longer available,⁸ it has no bearing on whether the Office erroneously accepted temporary total disability from August 14, 1999 to December 31, 2002. The Board will reverse the Office’s October 4, 2004 decision. The Office did not meet its burden of proof.

Because the Office has not met its burden of proof to establish that it erroneously accepted temporary total disability from August 14, 1999 to December 31, 2002, no basis exists

⁷ “Disability” means the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury. 20 C.F.R. § 10.5(f) (1999).

⁸ The employing establishment advised that appellant was removed from the active rolls and was no longer an employee.

for the Office's finding that appellant received an overpayment of compensation during this period. The Board will therefore set aside the Office's December 14, 2004 decision finding an overpayment of \$76,343.27.

Further, the Board notes that on March 12, 2004 appellant filed a claim alleging that she sustained a recurrence of disability beginning July 10, 1999 because the employing establishment withdrew the temporary limited-duty assignment she was working in East Stroudsburg. Following this appeal and upon return of the case file, the Office should adjudicate this claim.

CONCLUSION

The Board finds that the Office did not meet its burden of proof to establish that it erroneously accepted temporary total disability from August 14, 1999 to December 31, 2002. As a result, there is no basis for the Office's finding that appellant received an overpayment of \$76,343.27 during that period.

ORDER

IT IS HEREBY ORDERED THAT the October 4, 2004 decision of the Office of Workers' Compensation Programs is reversed. The Office's December 14, 2004 decision is set aside and the case remanded for further action consistent with this opinion.

Issued: June 16, 2005
Washington, DC

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member