

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

E.G., Appellant)

and)

DEPARTMENT OF THE AIR FORCE, OGDEN)
AIR LOGISTICS CENTER, HILL AIR FORCE)
BASE, UT, Employer)

**Docket No. 06-1530
Issued: January 25, 2007**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 20, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' May 23, 2006 merit decision rescinding its payment of compensation beginning November 18, 2003. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office met its burden of proof to rescind its payment of compensation for wage loss beginning November 18, 2003.

FACTUAL HISTORY

On January 16, 2001 appellant, then a 34-year-old sandblaster, filed an occupational disease claim alleging that he sustained injury to his upper extremities due to the repetitive duties of his job. The Office accepted that he sustained bilateral ulnar nerve entrapment, de Quervain's disease of the right upper extremity and tenosynovitis of the left hand and wrist and paid him

compensation for periods of disability. In May and July 2001, appellant underwent surgical procedures, which included shortening of both ulna bones, debridement of his right wrist joint and debridement of partial scapholunate tears and triangular fibrocartilagenous cartilage complex tears in both wrists.¹

After extended periods of disability, appellant returned to work on August 26, 2002 in a limited-duty position as a spotter in the sandblast area at the employing establishment.² The position was within the work restrictions recommended by his attending physicians. Appellant received compensation from the Office for loss of wage-earning capacity.

Appellant stopped work on January 21, 2003 and later relocated to California. He claimed that his work stoppage was justified under the Family Medical Leave Act in that he was caring for his daughter's medical needs. The employing establishment indicated that appellant's limited-duty spotter position continued to be available to him. Appellant was placed on the periodic rolls effective August 10, 2003. As of October 1, 2003, he was receiving \$2,307.48 of wage-loss compensation every four weeks from the Office.³

In a report dated September 18, 2003, Dr. Rita B. Bermudez, an attending Board-certified physical medicine and rehabilitation physician, indicated that appellant's employment injury necessitated that he perform limited-duty work and she restricted him from performing repetitive pushing, pulling, or gripping with his hands.

The employing establishment terminated appellant for cause effective November 18, 2003 because he took 225 days of unauthorized leave between January 21 and November 18, 2003. At the time of his effective termination, appellant was still receiving \$2,307.48 of wage-loss compensation every four weeks from the Office and the limited-duty spotter position would have been available to him but for his termination for cause.

In May 2004, the Office requested that Dr. Anthony Fenison, a Board-certified orthopedic surgeon, provide an opinion regarding whether appellant could perform the sandblaster position he held when he filed his occupational disease claim. The Office attached a description of the position which indicated that the position required such duties as holding and carrying of up to 65 pounds (and greater weight with assistance) and holding a blasting nozzle with 40 pounds of pressure.

¹ By decision dated July 25, 2003, the Office granted appellant a schedule award for a four percent permanent impairment of his right arm and a three percent permanent impairment of his left arm. After the Board directed the Office to further develop the medical evidence on two occasions (Docket No. 03-1994, issued December 15, 2003 and Docket No. 05-987, issued September 7, 2005), the Office issued a decision on March 7, 2006 finding that appellant had an eight percent permanent impairment of his right arm and a seven percent permanent impairment of his left arm. By decision dated November 30, 2006, the Board issued a decision (Docket No. 06-1088) finding that appellant had an eleven percent permanent impairment of his right arm and a seven percent permanent impairment of his left arm. The matter of appellant's entitlement to schedule award compensation is not the subject of the present appeal.

² It appears that the position was a full-time job but paid less than his date-of-injury job.

³ Appellant was placed on the periodic rolls effective August 10, 2003.

In an October 16, 2004 report, Dr. Fenison determined that appellant could perform his usual and customary duties as a sandblaster. He stated that, when he examined appellant on March 24, 2004, his overall grip strength was approximately 110 pounds for the right side and 120 pounds for the left side and concluded that there was no reason that he could not lift or manipulate the device that is used for his sandblasting activities.

In October 11, 2004 and June 8, 2005 reports, Dr. Bermudez diagnosed chronic bilateral wrist pain with tenosynovitis and ulnar neuropathy. In a June 8, 2005 report, she indicated that appellant could only occasionally lift 20 pounds and frequently lift 10 pounds, that he could not perform forceful pushing or pulling, that he could only engage in repetitive wrist or elbow motion for four hours per day and that he could only operate a motor vehicle for four hours per day.

By decision dated August 8, 2005, the Office terminated appellant's compensation, effective September 3, 2005, on the grounds that he no longer had residuals of his employment injuries after that date.

By decision dated May 9, 2006, the Board reversed the Office's termination determination finding that there was a conflict in the medical evidence between Dr. Fenison and Dr. Bermudez regarding whether appellant continued to have residuals of his employment injury which prevented him from performing the sandblaster position he held when he filed his claim. The Board found that, since the Office relied on the opinion of Dr. Fenison to terminate appellant's compensation benefits effective September 3, 2005 without having resolved the existing conflict in the medical evidence, the Office failed to meet its burden of proof in terminating appellant's benefits.

On May 19, 2006 appellant contacted the Office and asked that his compensation be reinstated.

By decision dated May 23, 2006, the Office determined that appellant was not entitled to Office compensation for wage loss after November 18, 2003.⁴ The Office reasoned that, because appellant was terminated by the employing establishment for cause effective November 18, 2003 and not due to his employment-related injuries, he was not entitled to receive compensation for wage loss after November 18, 2003. The Office indicated that the medical evidence from around the time he stopped work in January 2003 showed that he could perform the limited-duty spotter position which remained available to him.

LEGAL PRECEDENT

The Board has upheld the Office's authority to reopen a claim at any time on its own motion under 5 U.S.C. § 8128(a) and, where supported by the evidence, set aside or modify a prior decision and issue a new decision. The Board has noted, however, that the power to annul an award is not an arbitrary one and that an award for compensation can only be set aside in the manner provided by the compensation statute.⁵ It is well established that once the Office accepts

⁴ The Office indicated that appellant would still be entitled to appropriate medical benefits.

⁵ *Andrew Wolfgang-Masters*, 56 ECAB ____ (Docket No. 05-1, issued March 22, 2005); *see also* 20 C.F.R. § 10.610.

a claim, it has the burden of justifying termination or modification of compensation.⁶ This holds true where the Office later decides that it has erroneously accepted a claim for compensation. In establishing that its prior acceptance was erroneous, the Office is required to provide a clear explanation of its rationale for rescission.⁷

Section 8102(a) of the Federal Employees' Compensation Act sets forth the basis upon which an employee is eligible for compensation benefits. That section provides, "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..."⁸ In general the term "disability" under the Act means "incapacity because of injury in employment to earn the wages which the employee was receiving at the time of such injury."⁹ This meaning, for brevity, is expressed as "disability for work."¹⁰

ANALYSIS

The Office accepted in 2001 that appellant sustained bilateral ulnar nerve entrapment, de Quervain's disease of the right upper extremity and tenosynovitis of the left hand and wrist. The Office authorized several surgical procedures. Appellant continued to receive wage-loss compensation from the Office even after he was terminated from the employing establishment for cause due to taking extended unauthorized leave. The Office terminated appellant's compensation effective September 3, 2005 based on its evaluation of the medical evidence, but the Board reversed the Office's termination in a May 9, 2006 decision. By decision dated May 23, 2006, the Office determined that appellant was not entitled to Office compensation for wage loss after November 18, 2003 because the employing establishment terminated him for cause effective November 18, 2003 and not due to his employment-related injuries.

The Board finds that, by determining retroactively that appellant was not entitled to Office compensation for wage loss after November 18, 2003, the Office effectively conducted a rescission of its prior payment of compensation for wage loss beginning November 18, 2003. The Board further finds that the Office did not provide a clear explanation of its rationale for rescission and therefore did not establish that its prior acceptance was erroneous.¹¹

In its May 23, 2006 decision, the Office reasoned that, because appellant was terminated by the employing establishment for cause effective November 18, 2003 and not due to his employment-related injuries, he was not entitled to receive compensation for wage loss after November 18, 2003. However, appellant would be entitled to compensation for wage loss on

⁶ See *Frank J. Meta, Jr.*, 41 ECAB 115, 124 (1989); *Harold S. McGough*, 36 ECAB 332, 336 (1984).

⁷ *Andrew Wolfgang-Masters*, *supra* note 5.

⁸ 5 U.S.C. § 8102(a).

⁹ *John W. Normand*, 39 ECAB 1378 (1988); *Gene Collins*, 35 ECAB 544 (1984).

¹⁰ *Clarence D. Glenn*, 29 ECAB 779 (1978).

¹¹ *Andrew Wolfgang-Masters*, *supra* note 5.

and after November 18, 2003 if he was still disabled, *i.e.*, if he were unable to earn the wages that he was receiving when he was injured.¹²

The record reveals that appellant returned to work in August 2002 for the employing establishment in a limited-duty spotter position within his work restrictions. Appellant was deemed partially disabled in that he continued to receive compensation for wage loss after his return to work. At the time of his November 18, 2003 termination from the employing establishment, he was receiving \$2,307.48 of wage-loss compensation every four weeks from the Office and the limited-duty position would have been available to him but for his termination for cause. The Office did not advance any credible theory explaining why appellant would not be entitled to receive partial disability compensation after November 18, 2003. It did not present medical evidence showing that appellant had no employment-related disability after that date and, in fact, it specifically stated that the medical evidence from the time of his return to work showed partial disability.

For these reasons, the Office did not show that it made an error when it paid appellant wage-loss compensation after November 18, 2003.

CONCLUSION

The Board finds that the Office did not meet its burden of proof to rescind its payment of compensation for wage loss beginning November 18, 2003.

¹² See *supra* notes 8 through 10 and accompanying text.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' May 23, 2006 decision is reversed.

Issued: January 25, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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