

window and when she was scheduled on the window, she became anxious and physically ill. The Office prepared a statement of accepted facts (SOAF), noting as a compensable work factor that appellant “experiences anxiety because of working at the window and she believes she is unable to work at the window.” Appellant was referred to Dr. Streamson Chua, a psychiatrist. Based on his December 2, 2000 report, the Office accepted adjustment disorder with anxiety.

Appellant returned to work on July 14, 2001. The Office prepared an amended SOAF on March 23, 2002, stating that “no incidents occurred in the performance of duty.” The amended SOAF stated that appellant claimed “she did not know what she was doing” and this caused a reaction. According to the Office, appellant claimed she had physical symptoms while working the window “because of a lack of training” and these incidents were not in the performance of duty. Appellant was referred to Dr. Jeffrey Newton, a psychiatrist. In a report dated October 11, 2002, Dr. Newton opined that there was no psychiatric disorder at that time. In response to the question of whether the “emotional condition is the result of the administrative action of having to work the window while at the [employing establishment] even though she claims she was not properly trained,” he believed her condition was the result of that action.

By letter dated August 10, 2004, the Office notified appellant that it proposed to rescind acceptance of her claim. It referred to a July 3, 2000 statement from her indicating that every few months she was asked to work at the window and she experienced symptoms that included sweaty palms, nausea and pounding in her head and chest. The Office stated that frustration at not being able to work in a particular environment was not compensable. According to the Office, appellant also complained that she was not properly trained and training was an administrative matter. The Office concluded that the evidence did not establish an injury arising out of and in the course of employment. Appellant was provided 30 days to submit evidence or argument.

In a letter dated September 30, 2005, the Office again advised appellant that it proposed to rescind acceptance of the claim. In the “discussion of the evidence,” it noted the October 11, 2002 report from Dr. Newton regarding the cause of the emotional condition. The “basis for the decision” essentially repeated the analysis in the August 10, 2004 letter. Appellant responded in a letter dated October 27, 2005, stating that her claim was based on working her regular duties, regardless of being properly or improperly trained.

By decision dated January 18, 2006, the Office rescinded acceptance of the claim. It found her emotional condition did not arise out of and in the course of employment.

In a letter dated February 5, 2008, the Office advised appellant of a preliminary determination that an overpayment of \$21,083.52 was created. In an accompanying memorandum, it noted that the acceptance of her claim had been rescinded and that compensation paid to her from April 4, 2000 to July 14, 2002 was an overpayment of compensation. Appellant was found not to be at fault in creating the overpayment.

On February 26, 2008 appellant requested a preresoupment hearing with the Branch of Hearings and Review.¹ A hearing was held on June 24, 2008.² By decision dated August 5, 2008, the Office hearing representative finalized the finding of a \$21,083.52 overpayment and denied waiver of the overpayment.

LEGAL PRECEDENT -- ISSUE 1

If the Office properly rescinds acceptance of a claim, the compensation for wage loss paid does represent an overpayment of compensation.³ With respect to a rescission of acceptance, 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 and, where supported by the evidence, set aside or modify a prior decision and issue a new decision.⁴ 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 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.⁶ In establishing that its prior acceptance was erroneous, the Office is required to provide a clear explanation of its rationale for rescission.⁷

ANALYSIS -- ISSUE 1

The underlying overpayment in this case was based on the Office's January 18, 2006 rescission of the acceptance of appellant's emotional condition claim. The Board must review the underlying decision to determine if an overpayment has been established.⁸

As noted a rescission must provide a "clear explanation" of the rationale for rescission. The Board finds that the Office did not provide a clear explanation in this case. The acceptance of the claim was based on appellant's allegation that working at the window caused an emotional

¹ On the overpayment action request form appellant checked only the issue of waiver, she did not check a box that she disagreed with fact of or amount of the overpayment.

² At the hearing, appellant's representative raised the issue of the rescission decision, but was told to exercise appeal rights.

³ See, e.g., *Major W. Jefferson, III*, 47 ECAB 295 (1996).

⁴ *Eli Jacobs*, 32 ECAB 1147 (1981).

⁵ *Doris J. Wright*, 49 ECAB 230 (1997); *Shelby J. Rycroft*, 44 ECAB 795 (1993).

⁶ See 20 C.F.R. § 10.610.

⁷ *Belinda R. Darville*, 54 ECAB 656 (2003).

⁸ See *Russell E. Wageneck*, 46 ECAB 653 (1995). In this regard the Board notes that the hearing representative appeared to indicate that a claimant must pursue the appeal rights to the rescission decision. As a general principle this is incorrect, since the overpayment is based on the rescission and a claimant can present evidence on the issue of fact of overpayment. In this case, since appellant did not specifically request a hearing on the issue of fact of overpayment, the Board will address the issue.

reaction. Appellant was referred to Dr. Chua and the claim was accepted for adjustment disorder with anxiety.

The September 30, 2005 preliminary notice of rescission refers to both the lack of compensable work factors and to the October 11, 2002 report from the second opinion psychiatrist, Dr. Newton. If the basis for the rescission is that no compensable work factors were established, then the medical evidence is not relevant to the issue.⁹ It appeared the Office made a finding that appellant's allegations were now considered to be either a desire to work in another position or a reaction to an administrative matter regarding the lack of training. Neither finding is adequately explained based on the evidence of record. Appellant alleged that she had a reaction to working at the window, and it is well established that a reaction to performing regular or specially assigned duties is compensable.¹⁰ Even if her claim was characterized as being uncertain as to "what she was doing" this would still be a reaction to the performance of her assigned duties.¹¹ The Office did not provide evidence that appellant alleged only that her claim was based on a lack of training by the employing establishment. Appellant's statements of record do not allege a reaction to the lack of training. The Board finds that the Office did not properly rescind acceptance on the grounds that no compensable work factors were established.

Moreover, the extent that the Office based the rescission on the weight of the medical evidence, as represented by Dr. Newton, the evidence did not support such a finding. The medical evidence is reviewed if there is a compensable work factor, and the Office would have to properly explain the issue in an SOAF. The SOAF provided to Dr. Newton did not accept any compensable work factors. Dr. Newton's report is of diminished probative value and is not sufficient to constitute the weight of the medical evidence.¹²

The Board finds the Office did not meet its burden of proof to rescind acceptance of the claim. In turn, the overpayment is based on appellant not being entitled to compensation from April 4, 2000 to July 14, 2001 because acceptance of her claim was rescinded. The Board finds fact of overpayment has not been established. In view of the Board's finding, the denial of waiver is moot.

CONCLUSION

The Office did not properly rescind acceptance of the claim and therefore fact of overpayment has not been established in this case.

⁹ If no compensable work factor is established, then the medical evidence is not reviewed. *See Ronald K. Jablanski*, 56 ECAB 616 (2005).

¹⁰ *Tina D. Francis*, 56 ECAB 180 (2004).

¹¹ *See Beverly R. Jones*, 55 ECAB 411 (2004) (feeling rushed, difficulty concentrating and feeling nervous while working the window were reactions to assigned duties and were compensable work factors).

¹² The opinion of a physician must be based on a complete factual and medical background. *Donney T. Drennon-Gala*, 56 ECAB 469 (2005).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 5, 2008 is reversed.

Issued: March 19, 2009
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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