Notice: This decision may be formally revised before it is published in the *District of Columbia Register*. Parties should promptly notify the Office Manager of any formal errors so that this Office can correct them before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
VELERIE JONES-COE,	)	OEA Matter No. 1601-0088-99C09R11
Employee	)	
	)	Date of Issuance: July 24, 2014
	)	
D.C. DEPARTMENT OF HUMAN SERVICES,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
REMAND

The merits of this case were previously decided in an Initial Decision issued on June 17, 2002. The Office of Employee Appeals' ("OEA") Administrative Judge ("AJ") reversed Agency's termination action and ordered it to reinstate Employee with back-pay and benefits.[1] Since then, the parties have been in litigation to address compliance with the Initial Decision. As a result, a number of subsequent compliance decisions have been issued by this Office.[2] In an

[1] Velerie Jones-Coe ("Employee") worked as a Staff Assistant with the Department of Human Services ("Agency"). Employee was terminated from her position for inexcusable absence without leave. She filed a Petition for Appeal with the OEA on April 13, 1999. *Petition for Appeal* (April 13, 1999). In the Initial Decision, the AJ determined that Agency failed to commence the adverse action process within the time frame required by law. As a result, Agency was ordered to return Employee to her position and restore any lost pay and benefits. Agency did not appeal that decision; thereby, allowing the Initial Decision to become final. *Initial Decision*, p. 2-7 (June 17, 2002).

[2] On August 22, 2002, Employee filed a motion contending that Agency did not comply with the Initial Decision. *Employee's Letter to Administrative Judge Daryl J. Hollis, Esq.* (August 22, 2002). The AJ issued an Addendum Decision on Compliance on October 10, 2002. He determined that Employee's motion was premature because she was receiving disability payments, and the law prohibited an employee from receiving a salary while simultaneously receiving disability compensation. Furthermore, Employee provided that she was not physically capable of returning to her duties. As a result, the AJ concluded that Agency could not reinstate Employee because she was

effort to continue to enforce compliance with the Initial Decision and the Second Addendum Decision, Employee also filed a Petition for Entry of Lien and Enforcement against Agency in the Superior Court for the District of Columbia. The court issued its decision on the matter on December 16, 2009; wherein, it ordered that Employee be reimbursed back pay consistent with the Second Addendum Decision.[3] However, the matter was later appealed to the District of Columbia Court of Appeals, which vacated the Superior Court's decision and remanded the matter to OEA for "a declaration of the amount owed by [Agency] by the highest administrative legal body."[4]

This matter was remanded to the AJ. On April 17, 2012, the AJ ordered the parties to submit briefs regarding whether Agency had complied with the Court's order and his Second Addendum Decision. Agency explained in its brief that it complied with the General Counsel's

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disabled from performing any type of work and because she had not submitted medical documentation from her treating physician attesting that she was cleared to return to work. Therefore, Employee's motion was dismissed without prejudice. The AJ noted that if and when Employee was medically cleared to return to work and submitted the necessary documentation, then Agency would be bound by his June 17, 2002 Initial Decision. *Addendum Decision on Compliance,* p. 5-6 (October 10, 2002).

Years later on September 3, 2008, Employee filed a second motion for compliance. She provided that she stopped receiving disability payments on January 6, 2003. She also asserted that she was returned to work on October 14, 2007; however, when she attempted to obtain back pay and benefits for the period of January 7, 2003 to October 13, 2007, Agency informed her that it needed an order to comply. *Motion for Compliance* (September 3, 2008).

The AJ in this matter retired; therefore, the matter was reassigned to another AJ, who issued a Second Addendum Decision on Compliance on March 10, 2009. The AJ found that on January 21, 2003, Employee returned to work and was ". . . ready, willing, and medically cleared to return to duty." Accordingly, the AJ ruled that Agency was obligated to reimburse Employee with back pay and benefits from January 6, 2003 to October 14, 2007. He then certified the matter to the OEA General Counsel for enforcement. *Second Addendum Decision on Compliance,* p. 6-7 (March 10, 2009).

Thereafter, on July 23, 2009, the OEA General Counsel issued an Order on Compliance which directed Agency to submit documents verifying that it restored all of Employee's back pay and benefits from May 26, 2005 to October 14, 2007. Thus, the General Counsel's Order modified the back pay dates. *General Counsel's Order on Compliance,* p. 3 (July 23, 2009).

[3] The Court held that the General Counsel's modification of the dates of Employee's back pay was outside of her authority. *Velerie Jones-Coe v. District of Columbia Department of Mental Health,* Case No. 2009 CA 004990 (D.C. Super. Ct. December 16, 2009).

[4] *Agency's Petition for the Office of Employee Appeals to Comply with the Remand Order from the District of Columbia Court of Appeals,* Attachment # 1 (*District of Columbia Department of Mental Health v. Velerie Jones-Coe,* No. 10-CV-101, Mem. Op. & J (D.C. February 23, 2011)).

Order and issued a check to Employee for back pay and benefits for the period of May 25, 2005 through October 13, 2007.[5] In response, Employee argued that this partial payment did not comply with the Second Addendum Decision and requested that Agency be ordered to pay the entire amount owed to her.[6]

The Initial Decision on Remand was issued on January 22, 2013.[7] The AJ agreed with the D.C. Superior Court's holding that the General Counsel's modification of the dates of Employee's back pay was outside of her authority. With regard to Agency's additional arguments, he found that they were unpersuasive and "fail[ed] to properly take into account the [Second Addendum Decision] and the findings contained therein."[8] Lastly, as it relates to Agency's payment for the period of May 25, 2005 through October 13, 2007, the AJ ruled that said payment did not comply with the Second Addendum Decision which required Agency to reimburse Employee for the period of January 6, 2003 through October 14, 2007. Thus, he concluded that Agency did not comply with OEA's final decision, and it was ordered to make an additional payment to Employee for the period of January 6, 2003 through May 24, 2005.[9]

On February 28, 2013, Agency filed a document titled "Agency's Petition for the Office of Employee Appeals to Comply with the Remand Order from the District of Columbia Court of Appeals." It provides that pursuant to the District of Columbia Court of Appeals' decision, the matter should not have been remanded to the AJ because the court stated that the full OEA ". . .

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[5] *Agency's Verification of Compliance with Final Decision* (April 13, 2012).
[6] *Employee's Brief Regarding Compliance,* p. 14 (May 2, 2012). In reply to Employee's assertion, Agency explained that Employee was not entitled back pay and benefits for the period of January 21, 2003 to May 25, 2005, because she did not submit medical documentation proving that she had a medical release to return to work prior to May 26, 2005. Therefore, Agency requested that the AJ find that it fully complied with the final decision of the Office. *Agency's Reply Brief to Employee's Brief Regarding Compliance and Objection to the Issuance of a Third Addendum Decision on Compliance,* p. 10-18 (May 22, 2012).
[7] This decision was previously captioned "Third Addendum Decision on Compliance." An errata to the decision was issued on March 25, 2013, which, *inter alia,* changed the caption to Initial Decision on Remand. *Errata to the Third Addendum Decision on Remand* (March 25, 2013).
[8] *Initial Decision on Remand,* p. 5 (January 22, 2013).
[9] *Id.* at 6.

must consider the issue that [the court] ordered it to consider – the amount owed to Employee. . . ."[10] Agency reiterates that prior to May 26, 2005, Employee did not comply with the first Addendum Decision on Compliance and submit medical documentation from her doctor stating that she was cleared to return to work.[11] Furthermore, Agency contends that the reassigned AJ did not have jurisdiction to retroactively change the requirement set by the previous AJ in the first Addendum Decision on Compliance. Based on these circumstances, Agency believes that Employee is not entitled to any additional money and that "OEA should declare that the amount owed to Employee by [it] is the amount equivalent to back-pay and benefits for the period between May 26, 2005 and October 13, 2007."[12]

In response to Agency's submission, Employee submitted a Motion to Strike, arguing that Agency's filing was untimely. She provided that pursuant to OEA's rules, Agency had thirty-five (35) days to file an appeal of the Initial Decision on Remand, but it did not do so.[13] With regard to the AJ's authority to retroactively change the requirement set by the first AJ in his Addendum Decision on Compliance, Employee notes that Agency did not raise this issue before the second AJ, and therefore, it is estopped from raising the issue now. Accordingly, Employee argues that the petition should be stricken, or in the alternative, it should be dismissed.[14]

Thereafter, Employee submitted an Opposition to Agency's Petition for OEA to Comply with the Remand Order from the Court of Appeals. She reiterates the same arguments provided

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[10] *Agency's Petition for the Office of Employee Appeals to Comply with the Remand Order from the District of Columbia Court of Appeals*, Attachment # 1 (February 28, 2013).

[11] Agency provided that it was not until May 26, 2005, that Employee submitted her physician's release. Agency notes that it fully restored Employee's back pay and benefits for the period of May 25, 2005 through October 13, 2007. *Id.*, 6 and 15-17.

[12] *Id.* at 17.

[13] Employee also addressed Agency's argument that the full OEA should consider the court's order. She provides that the court did not specifically remand the matter to the Board, and per OEA's normal procedure, the matter was remanded to the AJ who was assigned the matter. *Memorandum of Points and Authorities in Support of Employee's Motion to Strike, or in the Alternative for Summary Disposition*, p. 5-7 (March 29, 2013).

[14] *Id.*, 6-10. Employee also submitted a Motion for Attorney's Fees in the amount of $77,634.30 and states that the amount requested is reasonable. *Memorandum of Points and Authorities in Support of Employee's Motion for Attorney's Fees* (March 28, 2013).

in her motion to strike; however, she also argues that pursuant to D.C. Official Code § 1-606.03, the second AJ had full authority to issue his Second Addendum Decision.[15] With regard to Agency's need for a release from her treating physician in order to reinstate her, Employee stated that the first Addendum Decision on Compliance only refers to the need for necessary documentation, not documentation from her treating physician. Finally, Employee argued that the General Counsel exceeded her authority in issuing her decision on compliance. [16]

Untimely Filing

Because Employee raised Agency's alleged late filing as an issue, this Board must address it. D.C. Official Code § 1-606.03(c) provides that "the initial decision of the Hearing Examiner *shall* become final 35 days after issuance, unless a party files a petition for review of the initial decision with the Office within the 35-day filing period (emphasis added)." Moreover, OEA Rule 633.1 provides that "any party to the proceeding may serve and file a petition for review of an initial decision with the Board within thirty-five (35) calendar days of issuance of the initial decision."

The Third Addendum Decision on Compliance, which was subsequently renamed Initial Decision on Remand, was issued on January 22, 2013. Agency filed its Petition for Compliance February 28, 2013, two days past the thirty-five day deadline to file a Petition for Review. Accordingly, had Agency's petition been a Petition for Review, it would have been deemed untimely and under normal circumstances, it would have been denied. However, Agency did not

[15] She explains that the first Addendum Decision on Compliance did not specify the time period for back pay and benefits, and as a result, the reassigned AJ determined the period of back pay in his subsequent compliance decision.
[16] *Employee's Opposition to Agency's Petition for the Office of Employee Appeals to Comply with the Remand Order from the District of Columbia Court of Appeals,* p. 9-15 (April 4, 2013). Subsequently, Agency filed a Petition for Review of Initial Decision on Remand on April 12, 2013. It offered the same arguments provided in its Petition to Comply with Remand Order. *Agency's Petition for Review of Initial Decision on Remand* (April 12, 2013). Employee later submitted an opposition to Agency's Petition for Review. Similarly, it reiterated the arguments provided in her opposition to Agency's Petition to Comply. *Employee's Opposition to Agency Petition for Review of Decision on Remand* (May 21, 2013).

file a Petition for Review in this matter. It filed a Petition for OEA to comply with the D.C. Court of Appeals order.

As previously provided, the D.C. Court of Appeals' February 23, 2011 decision ordered that a determination on the amount owed by Agency be issued "by the highest administrative legal body."[17] As Employee contends, it is OEA's practice to assign cases to the AJ when matters are remanded from the courts. However, because the D.C. Court of Appeals specifically stated that the amount be determined by the highest administrative legal body, it is plausible that it could have been referring to the OEA Board because the Board is the highest appellate level within the Office. Therefore, the matter should not have been remanded to the AJ; it should have been immediately considered by the OEA Board. Under these circumstances, Agency's petition filing date is of no consequence, and the Board is required to issue a decision on the amount owed, as requested by the D.C. Court of Appeals.

Substantial Evidence

Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.[18] The Court in *Baumgartner v. Police and Firemen's Retirement and Relief Board*, 527 A.2d 313 (D.C. 1987) found that if administrative findings are supported by substantial evidence, then it must be accepted even if there is substantial evidence in the record to support a contrary finding. After reviewing the record, this Board does not believe that the AJ's Second Decision on Compliance was based on substantial evidence.

It is without question that in accordance with D.C. Official Code § 1-623.16(a)(1)-(4),

[17] *Agency's Petition for the Office of Employee Appeals to Comply with the Remand Order from the District of Columbia Court of Appeals,* Attachment # 1(February 28, 2013). Attachment # 1 is the D.C. Court of Appeals decision *District of Columbia Department of Mental Health v. Velerie Jones-Coe,* No. 10-CV-101, Mem. Op. & J (D.C. February 23, 2011).

[18] *Mills v. District of Columbia Department of Employment Services*, 838 A.2d 325 (D.C. 2003) and *Black v. District of Columbia Department of Employment Services*, 801 A.2d 983 (D.C. 2002).

Employee is not entitled to back pay during the time that she was receiving disability benefits.[19] Therefore, the original AJ required Employee to "submit[ ] any medical documentation . . . stating that she has been cleared by her doctors to return to work."[20] Both parties agree that Employee's disability benefits ceased on January 6, 2003. Accordingly, the second AJ ordered Agency to reimburse Employee for back pay from January 6, 2003 until October 14, 2007, the date she was reinstated to her position.[21] Thus, the real issue to be decided by this Board is whether there is substantial evidence in the record to support the AJ's decision that Employee provided medical documentation that she was cleared to return to work on January 21, 2003.

Medical Documentation for Release to Return to Work

The Addendum Decision clearly provided that Agency could not reinstate Employee until she submitted any medical documentation that she was cleared by her doctors to return to work. Employee argues that she provided medical documentation that she was released to return to work on January 21, 2003, when she reported to work. She contends that medical documentation was provided to Agency on that date, when she provided a copy of a Reconsideration Final Order from the D.C. Disability Compensation Program, along with a Notice of Intent to

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[19] D.C. Official Code § 1-623.16(a)(1)-(4) provides the following:

> (a) While an employee is receiving compensation under this subchapter or if he or she has been paid a lump sum in commutation of installment payments until the expiration of the period during which the installment payments would have continued, he or she may not receive salary, pay, or remuneration of any type from the District of Columbia, except:
>
> (1) In return for service actually performed;
> (2) Pension for service in the Army, Navy, or Air Force;
> (3) Other benefits administered by the Veterans Administration unless such benefits are payable for the same injury or the same death; and
> (4) Retired pay, retirement pay, retainer pay, or equivalent pay for service in the armed forces or other uniformed services, subject to the reduction of such pay in accordance with § 5532 of Title 5 of the United States Code. Eligibility for or receipt of benefits under subchapter III of Chapter 83 of Title 5 of the United States Code or another retirement or disability system for employees of the government does not impair the right of the employee to compensation for scheduled disabilities specified by subsection (c) of § 1-623.07.

[20] *Addendum Decision on Compliance*, p. 5 (October 10, 2002).

[21] *Second Addendum Decision on Compliance*, p. 6-7 (March 10, 2009).

Controvert Disability Compensation Payments.[22] However, Agency asserts that Employee did not provide medical documentation until May 25, 2005.[23] Ultimately, in his Second Addendum Decision, the AJ found that the Notice of Intent and Reconsideration Final Order both provided that Employee was fit to return to work. He held that, *inter alia*, because Employee was medically cleared by Independent Medical Examiners, the requirements of the Addendum Decision by the original AJ had been met. It is clear that the AJ relied on the decision by Disability Compensation Claims office that Employee was able to return to work; a decision that he held "was made in consultation with medical professionals."[24]

However, a review of the Reconsideration Final Order and Notice of Intent offer no documentation which could be reasonably considered an actual medical clearance for Employee to return to work. The relevant section of the Reconsideration Final Order provides that Employee's orthopedic diagnostic tests were essentially normal, and as a result, she was found to be "capable of returning to work in an administrative capacity from an orthopedic standpoint."[25] Similarly, the Notice of Intent provides that it was the conclusion of a group of Independent Medical Examiners that Employee is "able to return to the labor market . . . ."[26]

The Reconsideration Final Order is written and signed by a D.C. Disability Compensation Claims Supervisor and the Claims Bureau Manager. The Notice of Intent is drafted and signed by a Disability Compensation Claims Examiner and Manager. Thus, both documents were drafted by D.C. Disability Compensation Claims personnel, not physicians.

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[22] *Employee Submission to Agency of D.C. Disability Compensation Program Reconsideration Final Order,* p. 2-7 (February 5, 2009).
[23] *Agency's Petition for the Office of Employee Appeals to Comply with the Remand Order from the District of Columbia Court of Appeals,* p. 6 and 15-16 (February 28, 2013).
[24] *Second Addendum Decision on Compliance*, p. 5-6 (March 10, 2009).
[25] *Employee Filing Regarding Disability Compensation Program Reconsideration Final Order*, p. 3-4 (February 5, 2009).
[26] *Employee Filing Regarding Disability Compensation Program Notice of Intent to Controvert Disability Compensation Payments*, p. 5-7 (February 5, 2009).

Because neither document is written or signed by a physician, it is unclear to this Board why the AJ considered them sufficient to constitute medical documentation.[27]

Moreover, there is no evidence in the record to support the disability claim examiners' allegations that the Independent Medical Examiners provided that the Employee was able to return to work. As Agency provided, the Disability Compensation's Final Decision on Reconsideration, did not contain any medical documentation.[28] Thus, the AJ's Second Addendum Decision relied solely on a curt summary of the alleged opinions of Independent Medical Examiners made during the course of another agency's administrative proceedings.

This Board is offered guidance on this issue from our federal counterpart, the Merit Systems Protection Board ("MSPB"). The United States Court of Appeals has held that a decision of Office of Worker's Compensation Program ("OWCP") or the Employees' Compensation Appeals Board does not bind the MSPB from acting within its own separate statutory sphere of deciding the merits of a case.[29] Moreover, the federal courts have held that proceedings following OWCP determinations are bound only by the decisions to allow or deny compensation awards and are not bound by the OWCP's factual conclusions. The Court of Appeals was clear to make a distinction between compensation proceedings and all other adjudicatory proceedings.[30] Accordingly, we do not believe that it is reasonable for the AJ to have solely relied on the Disability Compensation decisions as adequate evidence of a medical release from an independent examiner or Employee's treating physician.

After a thorough review, this Board has located only one medical release in the record. It

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[27] Although, Employee argues that the medical documentation did not need to be from her treating physician, the record does not reflect that she offered any medical documentation to Agency at all when she reported to work in January of 2003. Employee's presentation of the Reconsideration Final Order and Notice of Intent does not rise to the level of medical documentation.

[28] *Agency's Petition for the Office of Employee Appeals to Comply with the Remand Order from the District of Columbia Court of Appeals*, p. 13 (February 28, 2013).

[29] *Minor v. Merit Systems Protection Bd*., 819 F.2d 280 (1987)

[30] *National Association of Letter Carriers, AFL-CIO v. U.S.P.S.*, 272 F.3d 182 (2001).

is accompanied by a letter submitted by Employee to the Agency Director on May 26, 2005. The medical release is signed by Dr. Jacqueline C. Shepard-Lewis, Employee's treating physician and is dated May 25, 2005. It clearly provides the release for Employee to return to work on May 26, 2005.[31]

Because there is no other medical release form within the record, this Board must grant Agency's Petition for OEA to Comply with the Remand Order from the D.C. Court of Appeals. Employee is entitled to back pay from May 26, 2005 until October 14, 2007. Agency has proven that it has adequately complied with the back pay award for that time period. Employee is not entitled to any additional back pay awards. This is the final decision of the Office of Employee Appeals.[32]

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[31] *Employee's Release to Return to Work,* p. 2-3 (February 5, 2009). It should be noted that Agency informed Employee on January 29, 2003, of the need for her to provide a medical release, as provided in the Addendum Decision on Compliance. *Id.*, 1-2. However, Employee did not submit the requested documentation to Agency until over two years later on May 26, 2005. This Board is puzzled by Employee's unwillingness to provide such documentation sooner. Had she done so, there would be no question that Agency would have been required to provide her with back pay from January 2003 until she was reinstated on October 14, 2007, as the second AJ ordered. Unfortunately, such documentation was not provided until May 26, 2005.

[32] As for Employee's argument regarding the General Counsel exceeding her authority, this Board agrees with this contention. As reasoned by the Superior Court of the District of Columbia, in accordance with D.C. Official Code § 1-606.03, the General Counsel is tasked with providing legal advice to the Office and assisting with the enforcement of orders. *Velerie Jones-Coe v. District of Columbia Department of Mental Health,* Case No. 2009 CA 004990 (D.C. Super. Ct. December 16, 2009). Therefore, the General Counsel's authority is narrowly prescribed. Accordingly, she lacked the authority to modify the dates ordered by the AJ.

In accordance with OEA Rule 633.10, the OEA Board is the only body within OEA that can modify a decision of an AJ. That rule provides that "the Board may affirm, reverse, remand, modify, or vacate the initial decision, in whole or in part." Although this Board agrees with the Superior Court's decision regarding the General Counsel exceeding her authority, it is worth noting that the Superior Court order did not address the merits of the AJ's Second Addendum Decision and his ruling regarding the time frame Employee was owed back pay. A determination of the actual back pay dates was never considered. The court strictly focused on the General Counsel's lack of authority to change the terms of an AJ's order when issuing a decision on compliance.

ORDER

Accordingly, it is hereby ORDERED that Agency's Petition for the Office of Employee Appeals to Comply with the Remand Order from the District of Columbia Court of Appeals is **GRANTED**, and the Second Addendum Decision is **REVERSED**. This is the final decision of the Office of Employee Appeals.

FOR THE BOARD:

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William Persina, Chair

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Sheree L. Price, Vice Chair

_____
Vera M. Abbott

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A. Gilbert Douglass

_____
Patricia Hobson Wilson

The Initial Decision in this matter shall become a final decision of the Office of Employee Appeals 5 days after the issuance date of this order. An appeal from a final decision of the Office of Employee Appeals may be taken to the Superior Court of the District of Columbia within 30 days after formal notice of the decision or order sought to be reviewed.

Dissenting Opinion of William E. Persina, OEA Board Chair

I dissent because I conclude that Employee presented adequate medical documentation to Agency on January 21, 2003 to warrant her being returned to active employment on that date.[33] This documentation consisted of a Notice of Intent to Controvert Disability Compensation Payments (Notice), and a Reconsideration Final Order (Order). Both documents were issued by the D.C. Disability Compensation Program (Program). The Notice listed the names of a number of medical doctors serving as independent medical examiners (IMEs) for the Program. These IMEs concluded that she was physically able to return to work. The Order stated Employee "has been found to be capable of returning to work in an administrative capacity from an orthopedic standpoint."[34] Based on the foregoing documents, the Program terminated Employee's disability benefits effective in January 2003.[35]

The OEA Board's majority holds today that the Notice and Order were not adequate documentation to warrant her being returned to work in January 2003 because they were not medical reports signed by a physician. The majority suggests that the May 2005 letter of Employee's personal physician, which stated that Employee was then physically able to return to work, is the kind of documentation that Employee should have provided to Agency in January 2003 if she wanted to return to work at that time. However, I find no legal foundation on which to base such a conclusion. The Order and Notice were both explicitly based on the medical opinions of several IMEs, all of whom found Employee able to perform her job duties at Agency. Employee therefore provided Agency with sufficient documentation to inform Agency that medical doctors had determined that she was physically able to perform her job duties. There is

[33] I concur with the majority's holding that there is no basis for finding Agency's Petition for Compliance to have been filed untimely.
[34] Employee's own personal physician at this time had found Employee to be disabled for work.
[35] This determination to terminate benefits was later affirmed by the Court of Appeals.

no claim that the Program had falsely portrayed the findings of its own IMEs who had examined Employee. I therefore do not agree that only a medical report bearing a physician's signature was required to provide Agency with the information it needed to determine that Employee was found by medical doctors to be physically able to go back to work.[36]

The majority's holding unnecessarily creates a "Catch-22" situation for individuals like Employee in this case: she was determined by the Program's IMEs to be physically able to perform work, and thus not entitled to receive disability benefits; at the same time she was effectively determined by Agency to be disabled and therefore not able to return to work to receive her salary. To place the burden on Employee, as the majority does, to contact the Program's IMEs herself and obtain the medical reports the Program relied on in denying benefits seems unreasonable and unnecessary. As a result of the majority's holding, Employee did not receive either disability benefits or a salary for more than two years. To me, this result is untenable. In my view, Agency was required to put Employee back to work in January 2003 based on the medical documentation Employee presented to Agency, and I would direct that Agency pay back pay with interest to Employee for the period January 2003 to May 2005.

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William E. Persina, OEA Board Chair

[36] Agency said that it refused to put Employee back to work in January 2003 because of an Addendum Decision on Compliance (ADC), issued in October 2002, by OEA Senior Administrative Judge Hollis. AJ Hollis said that it was premature to determine compliance, due to the fact that Employee was receiving disability payments at the time of his ADC. He went on to say that "until Employee is released to return to work by her treating physician, Agency is not able to reinstate her." At the time of this ADC, Employee's treating physician was of the opinion that Employee was disabled for work, and the Program had not yet issued its Order and Notice. In short, circumstances had changed considerably by the time Employee reported for work in January 2003. Accordingly, I do not read AJ Hollis's ADC to authorize Agency to disregard the Program's Order and Notice, as the AJ could not have known with any certainty in October 2002 that such documents would issue. Even if he could be said to have had such knowledge, as I have indicated above, I find no basis for establishing such a requirement. Further in this regard, the Court of Appeals remand to the OEA places the responsibility for determining Agency's back pay liability on this Board, and I therefore do not view the Board as being bound by AJ Hollis's statement.