

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GUY EDWARD LEWIS and DEPARTMENT OF THE AIR FORCE,
AIR LOGISTICS CENTER, TINKER AIR FORCE BASE, Okla.

*Docket No. 97-944; Submitted on the Record;
Issued December 15, 1998*

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs met its burden of proof in rescinding acceptance of appellant's aggravation of preexisting post-traumatic stress disorder.

On June 20, 1994 appellant, then a 35-year-old sheet metal mechanic, filed a claim for compensation, alleging that on June 18, 1994 his supervisor, Mr. Don Newton, had burned a cross in his presence at work. Following further development, on November 29, 1994 the Office accepted that appellant sustained an aggravation of preexisting post-traumatic stress disorder due to the June 18, 1994 incident. He received appropriate continuation of pay and compensation and returned to work in a different area on February 21, 1995 with no restrictions. He stopped work on July 16, 1996 and filed a Form CA-2a, recurrence claim, alleging that he continued to receive "bad treatment" at work and had received a letter from the employing establishment that upset him. He noted that his physician advised that he should not work.¹

By decision dated October 2, 1996, the Office rescinded the prior acceptance on the grounds that new evidence indicated that the June 18, 1994 incident had not occurred in the performance of duty. In the attached memorandum, the Office stated that review of a newspaper article regarding the incident and a Merit Systems Protection Board (MSPB) decision regarding Mr. Newton's dismissal, indicated that, because appellant and Mr. Newton had a "joking relationship," the incident did not arise out of appellant's daily work activities and was therefore not in the performance of duty. The Office stated:

"While the Office does not and will not make a finding of harassment, nor address the MSPB findings and conclusions, it must and will be argued that regardless of who instigated the relationship or how other parties responded to the abusive

¹ Appellant also indicated that he could no longer do production work and was performing janitorial duties at work.

language that culpability should and must be assigned to both parties including the claimant.... It is further argued that none of these discussions or attacks arose out of a supervisor to co-worker relationship, nor did the action center around any work factor or reflect the claimant's ability to perform the day-to-day operations of his job as a sheet metal mechanic."

The Board finds that the Office abused its discretion in rescinding acceptance of appellant's employment-related emotional condition.

Once the Office accepts a claim, it has the burden of justifying the termination or modification of compensation benefits. This holds true where the Office later decides that it erroneously accepted a claim. To justify rescission of a claim, the Office must establish that its prior acceptance was erroneous based on new or different evidence or through new legal argument or rationale.² Merely reviewing the evidence of record and arriving at a different conclusion is not sufficient for the Office to meet its burden of proof.³

In the present case, while the record contains "new and different evidence" in the form of an MSPB decision dated December 16, 1994 and a newspaper article, the Board finds that these do not constitute sufficient evidence for the Office to rescind acceptance of appellant's claim. Initially the Board notes that the findings of other administrative agencies are not determinative with regard to proceedings under the Act, which is administered by the Office and the Board.⁴ Nonetheless, the Board notes that the MSPB decision in question affirmed the termination of Mr. Newton, finding that Mr. Newton engaged in deliberate racial actions toward appellant, a subordinate minority employee, on June 18, 1994.⁵ Furthermore, even if appellant and Mr. Newton had a "joking relationship" at work, this does not sever the connection with the workplace as there is no indication that the relationship was imported into the workplace.⁶ The Office has therefore failed to meet its burden in rescinding acceptance of the claim.

² *Josie P. Waters*, 45 ECAB 513 (1994).

³ *George E. Reilly*, 44 ECAB 458 (1993).

⁴ *Donald E. Ewals*, 45 ECAB 111 (1993).

⁵ The MSPB decision further noted that Mr. Newton acted without malice or discriminatory intent when he lit the cross and that appellant engaged in unilateral racial remarks directed at Mr. Newton but concluded that Mr. Newton "was taking the joking to an extreme by lighting the cross" in front of appellant.

⁶ See generally *Josie P. Waters*, *supra* note 2.

The decision of the Office of Workers' Compensation Programs dated October 2, 1996 is hereby reversed.

Dated, Washington, D.C.
December 15, 1998

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member