

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CHERYL Y. DELONEY and DEPARTMENT OF VETERANS AFFAIRS,
WEST LOS ANGELES MEDICAL CENTER, Los Angeles, Calif.

*Docket No. 96-1687; Submitted on the Record;
Issued May 26, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to rescind its acceptance of appellant's claim.

The Board finds that the Office met its burden of proof to rescind its acceptance of appellant's claim.

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, set aside or modify a prior decision and issue a new decision.¹ 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.² It is well established that once the Office accepts a claim, it has the "burden of justifying termination or modification of compensation."³ This holds true where, as here, the Office later decides that it has erroneously accepted a claim for compensation. To justify rescission of acceptance, the Office must establish that its prior acceptance was erroneous based on new or different evidence or through new legal argument and/or rationale.⁴

In the present case, the Office accepted that on June 16, 1993 appellant sustained an employment-related facial stab wound, blunt facial trauma, cervical strain/sprain, multiple

¹ *Eli Jacobs*, 32 ECAB 1147, 1151 (1981).

² *Shelby J. Rycroft*, 44 ECAB 795, 802-03 (1993). *Compare Lorna R. Strong*, 45 ECAB 470, 479-80 (1994).

³ *See Frank J. Meta, Jr.*, 41 ECAB 115, 124 (1989); *Harold S. McGough*, 36 ECAB 332, 336 (1984).

⁴ *Laura H. Hoexter*, 44 ECAB 987, 994 (1993); *Alphonso Walker*, 42 ECAB 129, 132-33 (1990); *petition for recon. denied*, 42 ECAB 659 (1991); *Beth A. Quimby*, 41 ECAB 683, 688 (1990); *Roseanna Brennan*, 41 ECAB 92, 95 (1989); *Daniel E. Phillips*, 40 ECAB 1111, 1118 (1989), *petition for recon. denied*, 41 ECAB 201 (1990).

cervical spine subluxations, cervical myofascitis, left shoulder sprain/strain and a right ankle fracture. Shortly after arriving at the employing establishment on the morning of June 16, 1993, appellant was assaulted at her vehicle in the parking lot by Columbus Grisby, an employee with the dietetic service of the employing establishment.

By decision dated March 7, 1994, the Office rescinded its acceptance of appellant's claim. In support of its rescission, the Office raised the legal argument that the injury occurred due to appellant's relationship with the assailant rather than factors of her federal employment. The Office indicated that Professor Larson in his treatise on workers' compensation law, noted, "When the animosity or dispute that culminates in an assault is imported into the employment from claimant's domestic or private life and is not exacerbated by the employment, the assault does not arise out of the employment under any test."⁵ The Office noted that in *George A. Fenske, Jr.*⁶ the Board had determined that an assailant had gone to the claimant's place of employment "for the sole purpose of inflicting injury upon him and not for reasons connected with his work; the aspect pertaining to the employment was merely coincidental."⁷ The Office detailed the factual circumstances of appellant's relationship with Mr. Grisby and concluded that the assault was imported into the employment from her private life.

On March 16, 1995 appellant requested reconsideration and submitted a report of contact with Joe Paez, a recreation therapist; a September 10, 1993 report of contact with a Ms. Harrison; and a September 29, 1991 memorandum from the employing establishment concerning management of assault like behavior. The record also contains a March 24, 1995 addendum to appellant's request for reconsideration from Mr. Brown addressing the knife used to assault appellant and the place where the assault occurred. By decision dated May 11, 1995, the Office denied modification of its decisions of September 6 and March 7, 1994.

The Board finds that the Office provided sufficient new legal argument to justify its rescission of appellant's claim by arguing that appellant's injury did not occur in the performance of duty. The Act provides for payment of compensation which occur in the "performance of duty" and this phrase has been interpreted as being the equivalent of the commonly found prerequisite in workers' compensation law of "arising out of and in the course of employment."⁸ The Board has held that when animosity or dispute which culminates in an assault is imported into the employment from a claimant's domestic or private life, the assault

⁵ See A. Larson, *The Law of Workers' Compensation* § 11.21 (1993).

⁶ 11 ECAB 471 (1960).

⁷ The Office indicated that the Board in *Fenske* further noted, "The injury was inflicted only because of a personal relationship outside of and wholly apart from his employment. The only part the employment played in the assault was to place appellant at a location in a point of time where the assailant knew she could find her intended victim. In the facts and circumstances the conclusion is inescapable that the assault was motivated by reasons purely personal between appellant and his assailant and the employment was not a factor in the assault; hence, the injury did not 'arise out of the employment.' Any factor of employment is so remote from the assault as to be no more than coincidental."

⁸ See 5 U.S.C. § 8102(a); *Mary Keszler*, 38 ECAB 735 (1987); *Carmen B. Gutierrez*, 7 ECAB 58 (1954).

does not arise out of employment.⁹ The Office properly explained why the animosity which culminated in the June 16, 1993 assault was imported from appellant's private life and, therefore, showed how the factual circumstances conformed to its new legal argument.

The Office explained that the evidence shows that appellant was a cousin of Mr. Grisby and developed a friendship with him, but that Mr. Grisby developed a personal animosity towards appellant which led to the June 16, 1993 assault. Appellant noted that she introduced Mr. Grisby to other family members and took him to church-related functions; she noted that she helped Mr. Grisby to overcome his substance abuse and emotional problems because she felt a responsibility to help family members.¹⁰ Although appellant apparently met Mr. Grisby when he was a patient in the employing establishment hospital, there is no indication that appellant's performance of her work duties during this period contributed to the occurrence of the assault on June 16, 1993. Moreover, while Mr. Grisby was also employed at the employing establishment at the time of the June 16, 1993 assault, the record does not contain any evidence that employment factors, such as a dispute over the performance of employment duties, contributed to the assault.¹¹ Appellant worked in Building 300 of the recreational therapy division and Mr. Grisby worked in Building 215 of the dietetic service division and it does not appear that the respective positions of appellant and Mr. Grisby required them to be in contact with each other at the employing establishment.

The Office properly noted that the record contains extensive evidence which supports the finding that, despite appellant's commendable efforts to help him, Mr. Grisby developed a personal animosity towards appellant which culminated in the June 16, 1993 assault. In a report of contact dated April 28, 1993, appellant indicated that in March 1993 "unfortunate incidents occurred" outside of the employing establishment premises with respect to Mr. Grisby. She indicated that she considered the matter to be a "personal family matter." In a statement completed in June 1993, an employing establishment employee indicated that Mr. Grisby reported to him on June 3, 1993 that he was angry with appellant for a perceived "estrangement" in their friendship and that he hoped he would not "get physical" with her. Appellant reported that in early June 1993 Mr. Grisby assaulted her at her home by pinning her to the floor and threatening her with a knife while stating "I [a]m going out and you [a]re going out with me." Appellant noted that she did not press charges against Mr. Grisby and that she did not report the incident to the employing establishment because she felt it was not work related. In addition to showing that the June 16, 1993 attack occurred due to Mr. Grisby's personal animosity towards appellant, these incidents also show that Mr. Grisby was able to confront or attack appellant outside the work place and highlight the fact that the occurrence of the June 16, 1993 attack at the employing establishment premises was merely coincidental.

⁹ *Agnes V. Blackwell*, 44 ECAB 200 (1992); *John H. Woods, Jr.*, 39 ECAB 971 (1988).

¹⁰ The record also contains evidence which indicates that appellant gave financial support to Mr. Grisby and provided meals to him at her home.

¹¹ Appellant was discharged from the hospital on September 30, 1992 and later became employed in the dietetic service division of the employing establishment.

The decision of the Office of Workers' Compensation Programs dated May 11, 1995 is affirmed.

Dated, Washington, D.C.
May 26, 1999

George E. Rivers
Member

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member