

appellant's recurrences of total disability on June 8, 1998, April 10, 2000 and July 5 and April 12, 2002. The Board remanded the case for a *de novo* decision and further development because the Office failed to provide appellant's authorized representative with a copy of the April 17, 2003 decision.²

On January 29, 1998 appellant, then a 43-year-old letter carrier, filed a traumatic injury claim alleging that he sustained a back injury on that date when he tripped on a broken sidewalk. On February 19, 1998 the Office accepted his claim for a lumbosacral strain. Appellant returned to work on February 23, 1998 in a light-duty capacity.

Appellant subsequently submitted claims for recurrences of disability on June 8, 1998, April 10, 2000 and April 12³ and July 5, 2002, along with supporting medical reports.⁴

In form reports dated February 3 and 19, 1998, Dr. Baron S. Lonner a Board-certified orthopedic surgeon specializing in the spine, indicated that appellant's scoliosis was related to his January 29, 1998 employment injury.

In reports dated March 31 and April 29, 1998, Dr. Lonner stated his opinion that appellant's fall at work on January 29, 1998 aggravated his underlying scoliosis which had been causing intermittent back pain. He stated, "There is no question, that the fall exacerbated the underlying condition and gave [appellant] prolonged disability preventing him from working."

In a September 15, 1998 report, Dr. Lonner indicated that appellant could return to light-duty work on September 26, 1998 following his scoliosis fusion surgery on June 8, 1998.

In reports dated May 7 and 13, 2002, Dr. Laurence E. Mermelstein, a Board-certified orthopedic surgeon specializing in the spine, stated that appellant had a complicated back history involving scoliosis surgery and revision scoliosis surgery performed by Dr. Lonner. He stated his opinion that appellant's January 29, 1998 employment injury exacerbated his symptoms from his scoliosis, necessitating his back surgeries and causing chronic pain. Dr. Mermelstein stated, "[H]is present disability is related to his work-related injury as an exacerbating cause." He recommended surgical insertion of an intrathecal pump to administer pain medication.

In an operative report dated July 5, 2002, Dr. Mermelstein indicated that appellant underwent a surgical injection of morphine to treat postlaminectomy syndrome and degenerative lumbar disc disease. In a July 11, 2002 operative report, Dr. Gerard D. D'Ariano, a Board-

² An Office decision is not properly issued unless the Office sends copies of the decision to both a claimant and his or her authorized representative. *See Thomas H. Harris*, 39 ECAB 899 (1988).

³ On April 17, 2002 appellant filed a claim for a traumatic injury on April 12, 2002 in Office file number 022024084. This claim was denied in a June 21, 2002 Office decision. The issue regarding a new injury on April 12, 2002 is addressed in the Board's decision in appellant's appeal docketed as No. 04-1562.

⁴ Appellant claimed total disability for the period June 8 to September 26, 1998 due to surgery on June 8, 1998 to treat residual pain from previous surgery for preexisting scoliosis of the lumbar spine, April 10 to September 6, 2000 due to back surgery on April 10, 2000, April 12 to 17, 2002 due to back pain and July 5 to September 13, 2002 for further back surgery on July 5 and 11, 2002.

certified orthopedic surgeon, indicated that appellant underwent permanent implantation of an intrathecal narcotic pump to treat his chronic low back and bilateral leg pain.

In an August 6, 2002 report, amended August 26, 2002, Dr. Mermelstein stated his opinion that appellant's January 29, 1998 employment injury exacerbated his underlying scoliosis condition, necessitating his back surgery on June 8, 1998 and revision surgery on April 10, 2000. He stated, "All the remainder of his surgical procedures, work up, treatment and eventually his last procedure (insertion of a morphine pump) were causally related to his employment[-]related incident of January 29, 1998."

In a statement dated October 29, 2002, submitted to the Office on November 18, 2002, appellant reiterated his claim for recurrences of total disability on June 8, 1998, April 10, 2000, and July 5 and April 12, 2002. He also requested that the Office add the following medical conditions as causally related to the January 29, 1998 employment injury: aggravation of preexisting scoliosis, failed back syndrome, right thoracolumbar dextroscoliosis, two surgeries for thoracolumbar scoliosis and chronic pain syndrome, insertion of an intrathecal morphine pump, sUBLUXATIONS at L3-5 and disc herniation at L1-2 and L3-4. Appellant also sought compensation for partial disability beginning September 14, 2002 because the employing establishment provided only three to four hours a day of light-duty work.

By decision dated December 12, 2002, the Office accepted appellant's claims for recurrences of total disability on June 8, 1998, April 10, 2000 and July 5 and April 12, 2002.

By decision dated April 17, 2003, the Office rescinded its acceptance of appellant's recurrences of disability on June 8, 1998, April 10, 2000 and July 5 and April 12, 2002.

As noted above, by order dated August 12, 2003, the Board set aside the Office's April 17, 2003 decision and remanded the case for further development.

By letter dated October 10, 2003, the Office advised appellant that he needed to submit, in support of his recurrences on June 8, 1998, April 10, 2000 and July 5, 2002, medical evidence establishing that he was totally disabled from his light-duty job because of a worsening of his employment-related lumbar strain or factual evidence showing a change in his light-duty job requirements such that they no longer met his work restrictions.

By letter dated October 30, 2003, appellant advised the Office that the information requested in its October 10, 2003 letter had been provided on November 18, 2002.

By letter dated December 19, 2003, the Office advised appellant that it proposed to rescind its acceptance of his recurrences of total disability on June 8, 1998, April 10, 2000 and July 5, 2002. The Office stated that it would develop his claim for a recurrence of total disability on April 12, 2002 as a claim for a new injury under a separate file number.

In a letter dated January 9, 2004, appellant requested that the Office expand the accepted conditions in his case, with respect to the claimed recurrences of June 8, 1998, April 10, 2000

and July 5 and April 12, 2002, to include those conditions listed in his November 18, 2002 statement.

By decision dated January 29, 2004, the Office rescinded its acceptance of appellant's recurrences of total disability on June 8, 1998, April 10, 2000 and July 5, 2002. The Office stated that the medical evidence did not establish that appellant had a change in the nature and extent of his accepted lumbar strain or a change in the nature and extent of his light-duty job requirements. The Office stated:

“[T]he medical evidence submitted did not provide a history of the claimed recurrences nor did the medical evidence reference any of the claimed recurrences of disability. A review of the claim file indicates that [it] is devoid of any medical evidence referencing the claimed recurrences of disability of [June 8, 1998, April 10, 2000 and July 5, 2002].”

LEGAL PRECEDENT

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 Act⁵ and, where supported by the evidence, set aside or modify a prior decision and issue a new decision.⁶ 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.⁷ Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation.⁸ This holds true where the Office later decides that it has erroneously accepted a claim for compensation.⁹ In establishing that its prior acceptance was erroneous, the Office is required to provide a clear explanation of its rationale for rescission.¹⁰

ANALYSIS

The Board finds that the Office did not meet its burden of proof in rescinding its acceptance of appellant's recurrences of total disability on June 8, 1998, April 10, 2000 and July 5, 2002. The Office's January 29, 2004 rescission decision, failed to provide a detailed and clear explanation of how the evidence submitted was not adequate to meet appellant's burden of proof in establishing his claims for recurrences of total disability on June 8, 1998, April 10, 2000 and July 5, 2002. The Office has an obligation to adequately explain the basis for a decision.¹¹

⁵ 5 U.S.C. §§ 8101-8193. *See also* 20 C.F.R. § 10.610.

⁶ *John W. Graves*, 52 ECAB 160 (2000); *Eli Jacobs*, 32 ECAB 1147 (1981).

⁷ *John W. Graves*, *supra* note 6; *Doris J. Wright*, 49 ECAB 230 (1997).

⁸ *Linda L. Newbrough*, 52 ECAB 323 (2001).

⁹ *Id.*

¹⁰ *Alice M. Roberts*, 42 ECAB 747 (1991).

¹¹ *See Jacqueline Brasch*, 52 ECAB 252 (2001). *See also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.4 (March 1997).

In its January 29, 2004 decision, the Office stated that the medical evidence did not establish that appellant had a change in the nature and extent of his accepted lumbar strain or a change in the nature and extent of his light-duty job requirements and that the record was “devoid” of medical evidence addressing the recurrences of total disability on June 8, 1998, April 10, 2000 and July 5, 2002. However, a review of the case record reveals that there are several medical reports of record addressing the June 8, 1998, April 10, 2000 and July 5, 2002 recurrences of total disability, as well as other medical reports indicating that appellant’s preexisting scoliosis condition was aggravated by the January 29, 1998 accepted employment injury.

Appellant submitted medical reports from Dr. Lonner and Dr. Mermelstein in which they stated their opinion that his preexisting scoliosis, with related surgeries on June 8, 1998 April 10, 2000 and July 5 and 11, 2002, was aggravated by the accepted January 29, 1998 employment injury. Although these medical reports do not indicate a change in the nature of appellant’s accepted lumbar strain sustained on January 29, 1998 they do provide some support for his allegation that the Office should have accepted an aggravation of his preexisting scoliosis condition as causally related to his January 29, 1998 employment injury, in addition to his accepted lumbar strain. Appellant’s claims for recurrences of total disability are based on the dates of his surgeries necessitated by the aggravation of his scoliosis. While none of the medical reports are completely rationalized, they are consistent in indicating that appellant sustained an aggravation of his preexisting scoliosis due to his January 29, 1998 employment injury, with resulting periods of total disability. Therefore, while the reports are not entirely sufficient to meet his burden of proof to establish his claims for recurrences of total disability, they are sufficient to require further development of the medical evidence and the case record by the Office. The Office should have further developed the medical evidence in this case before making a determination as to whether its acceptance of appellant’s recurrences of disability should be rescinded.¹² Because the Office did not provide adequate rationale in its January 29, 2004 decision for its rescission of appellant’s accepted recurrences of total disability on June 8, 1998, April 10, 2000, and July 5, 2002, it did not meet its burden of proof.

Appellant has also asserted, in his January 9, 2004 letter, that the Office never issued a final decision regarding his claimed recurrence on April 12, 2002. However, the Office chose to develop the April 12, 2002 recurrence claim as a claim for a new injury. The record shows that appellant’s claim form for a traumatic injury on April 12, 2002 and his claim form for a recurrence of disability on April 12, 2002, causally related to his January 29, 1998 employment injury, provide the same time for the injury (3:10 p.m.), the same location (Hawthorne Avenue) and the same circumstances (while delivering mail route). Consequently, the Board finds no error in the Office’s decision to adjudicate the April 12, 2002 claim as a new injury, rather than as a recurrence of disability.

Regarding appellant’s allegation that the Office has not adjudicated his claim for total disability beginning on September 14, 2002 because the employing establishment did not provide eight hours of light-duty work, it appears that there is no final Office decision regarding

¹² See *Robert A. Redmond*, 40 ECAB 796 (1989).

this issue and, therefore, the Board has no jurisdiction to consider it.¹³ On remand the Office should develop this issue and issue an appropriate final decision.

CONCLUSION

For the reasons stated above, the Board finds that the Office failed to meet its burden of proof to rescind its prior acceptance of appellant's accepted recurrences of total disability on June 8, 1998, April 10, 2000 and July 5, 2002.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 29, 2004 is hereby reversed.

Issued: December 27, 2004
Washington, DC

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

¹³ 5 U.S.C. §§ 501.2(c), 501.3.