

**United States Department of Labor
Employees' Compensation Appeals Board**

TROY L. BROOME, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Lafayette, GA, Employer**

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**Docket No. 04-154
Issued June 18, 2004**

Appearances:
Troy L. Broome, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On October 28, 2003 appellant, through his attorney, filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated September 25, 2003. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office met its burden of proof in rescinding acceptance of appellant's claim.

FACTUAL HISTORY

On June 26, 1998 appellant, then a 52-year-old clerk, filed a notice of traumatic injury alleging that on February 9, 1998 he received a spider bite on this right leg while in the performance of duty. The employing establishment disputed appellant's claim noting that he initially asserted that he injured his leg at home.

The Office requested additional factual and medical information by letter dated September 9, 1998. By decision dated October 15, 1998, the Office accepted appellant's claim for insect bite with infection.

In a letter dated April 23, 2003, the employing establishment stated that it appeared that the medical evidence had been altered to remove a reference to appellant's injury occurring at home.

In a letter dated July 15, 2003, the Office proposed to rescind acceptance of appellant's claim on the grounds that new evidence suggested that his injury did not occur at the time, place and in the manner alleged. Appellant's physician explained that appellant had requested the correction in the operative report and that he had happily complied. Appellant further requested that additional medical evidence be altered to reflect that he first noticed the injury on February 13, 1998 rather than March 13, 1998.

By decision dated August 25, 2003, the Office rescinded the acceptance of appellant's claim on the grounds that subsequent medical evidence did not support that the spider bite occurred on the date alleged.

LEGAL PRECEDENT

Section 8128 of the Federal Employees' Compensation Act provides that "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application."¹ The Board has upheld the Office's authority to reopen a claim at any time on its own motion under section 8128 of Act and, where supported by the evidence, set aside or modify a prior decision and issue a new decision.² 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.³

The Office's applicable regulation provides:

"Such review may be made without regard to whether there is new evidence or information. If the Director determines that a review of the award is warranted (including, but not limited to circumstances indicating a mistake of fact or law or changed conditions), the Director (at any time and on the basis of existing

¹ 5 U.S.C. §§ 8101-8193, 8128.

² *John W. Graves*, 52 ECAB 160, 161 (2000).

³ *Id.*

evidence) may modify, rescind, decrease or increase compensation previously awarded, or award compensation previously denied.”⁴

Workers’ compensation authorities generally recognize that compensation awards may be corrected, in the discretion of the compensation agency and in conformity with statutory provision, where there is good cause for so doing, such as mistake or fraud. It is well established that, once the Office accepts a claim, it has the burden of justifying the termination or modification of compensation benefits. This holds true where, as here the Office later decides that it erroneously accepted a claim. 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 legal rationale. In establishing that its prior acceptance was erroneous, the Office is required to provide a clear explanation of the rationale for rescission.⁵

ANALYSIS

The Office accepted appellant’s claim based on evidence supporting that he sustained a brown recluse spider bite on February 9, 1998.⁶ The Office found that subsequent medical records contradicted appellant’s claimed date of injury of February 9, 1998. The Office specifically noted that a March 19, 1998 note from Dr. Richard Smith, a Board-certified family practitioner, reported that appellant had noticed that his right leg had been swollen for six days. The Office also based its rescission on the fact that the original May 13, 1998 operative report from Dr. Geoffrey W. Hilliard, a Board-certified plastic surgeon, stated that appellant believed that his right leg wound was caused by a brown recluse spider bite sustained in appellant’s basement. The Office that concluded due to these newly discovered discrepancies, that the date and place that appellant sustained his right leg injury were purely speculative and that there was no longer any credible medical evidence that appellant sustained a spider bite as previously alleged. The Office found that appellant had not established that the injury was sustained at the time, place and in the manner previously alleged.

The March 19, 1998 note from Dr. Smith is not included in the record. The record contains a summation of the medical evidence by Dr. McKinley S. Lundy, an osteopath, which includes mention of this note. Dr. Lundy stated, “On March 19, 1998 [appellant] returned to see

⁴ 20 C.F.R. § 10.610.

⁵ *John W. Graves, supra* note 2.

⁶ An employee who claims benefits under the Act has the burden of establishing the occurrence of an injury at the time, place and in the manner alleged, by a preponderance of the reliable, probative and substantial evidence. An injury does not have to be confirmed by eyewitnesses in order to establish the fact that an employee sustained an injury in the performance of duty, but the employee’s statements must be consistent with the surrounding facts and circumstances and his or her subsequent course of action. An employee has not met his burden of proof in establishing the occurrence of an injury when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim. Such circumstances as late notification of injury, lack of confirmation of injury, continuing to work without apparent difficulty following the alleged injury and failure to obtain medical treatment may, if otherwise unexplained, cast sufficient doubt on an employee’s statements in determining whether a *prima facie* case has been established. However, an employee’s statement alleging that an injury occurred at a given time and in a given manner is of great probative value and will stand unless refuted by strong or persuasive evidence. *Edward W. Malaniak*, 51 ECAB 279, 280-81 (2000).

Dr. Smith with some soreness of his left upper gum and a complaint that his right leg was swollen for the last six days.” Dr. Smith diagnosed cellulitis. As neither the Office nor the Board reviewed the original note from Dr. Smith, the summation of this note by Dr. Lundy, prepared for his own purposes during a schedule award evaluation, is not sufficiently complete to cast doubt on the date of injury of February 9, 1998 and to meet the Office’s burden of proof to rescind acceptance of appellant’s claim.⁷

In support of his initial claim, appellant had submitted an operative report dated May 13, 1998 from Dr. Hilliard. In this report, Dr. Hilliard stated that for the last six weeks appellant had a progressively enlarging chronic nonhealing area on his anterior leg. There is a smear on the document followed by Dr. Hilliard’s initials. Contemporary notes from Dr. Hilliard diagnosed possible brown recluse spider bite. Following the acceptance of appellant’s claim, the employing establishment submitted a different version of Dr. Hilliard’s May 13, 1998 report. This report contained the sentence, “He believes that this is due to some injury sustained while in his basement, perhaps a brown recluse spider bite.”

On July 23, 2003 Dr. Hilliard explained the changes in his report. He stated:

“Beginning in May 1998, I treated [appellant] for an open wound in his right lower extremity. From a diagnostic standpoint, this wound was entirely consistent with that of a [r]ecluse [s]pider bite, but it is often difficult to determine the actual source of such an injury. In my operative report dated 13 May 1998, I stated that [appellant] may have been bitten in his basement. He later pointed out to me that this statement was in error and asked that I amend the operative report to reflect this. As this statement was made from my recollection of his verbal history and not based on my direct medical observations, I was happy to comply with his request. In the spirit of honesty, I must state that, at the time I dictated the operative report, I did not have any firsthand knowledge as to the source of this injury and any statements that I made to that effect must be treated as speculation or the result of poor recollection. If the location where this spider bite occurred, if indeed it was a [b]rown [r]ecluse [s]pider bite, is now in dispute, then I must ask that any statements in the operative report that are in divergence with [appellant’s] be disregarded.”

The operative report and subsequent explanation by Dr. Hilliard contain inconsistencies regarding the cause and history of appellant’s injury. Dr. Hilliard’s operative report casts doubt on whether appellant’s alleged spider bite occurred at work as previously reported. These discrepancies cast doubt on the validity of appellant’s claim. This new evidence, particularly when viewed with previous evidence,⁸ shows that appellant did not establish fact of injury on

⁷ *Linda M. Nawracaj*, 54 ECAB ____ (Docket No. 02-810, issued August 18, 2003).

⁸ The record contains treatment notes dated February 10, 1998 which do not mention any right leg condition such as a sting, pain or swelling. *Compare Doyle W. Ricketts*, 48 ECAB 167, 170 (1996) (where the Board found that appellant had established an employment-related insect bite based on his consistent history of a stinging sensation, soreness and lump in the injured area later in the same day).

February 9, 1998 and the Office presented sufficient new evidence and argument to justify the rescission of its acceptance of appellant's claim for an insect bite.

CONCLUSION

The Board finds that the Office submitted sufficient new evidence to meet its burden of proof to rescind acceptance of appellant's claim on the grounds that he failed to establish that the injury occurred at the time, place and in the manner alleged.

ORDER

IT IS HEREBY ORDERED THAT the August 25, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 18, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member