

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of EZELL WILLS and DEPARTMENT OF THE NAVY,  
NORTH ISLAND NAVAL AIR REWORK FACILITY,  
San Diego, Calif.

*Docket No. 96-549; Submitted on the Record;  
Issued March 4, 1998*

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DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,  
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly rescinded its acceptance of appellant's claim for a November 1, 1989 recurrence of disability.

On July 16, 1979, appellant filed a claim for a June 21, 1979 low back injury sustained in the performance of duty when he lifted a heavy machine part and experienced a snap in his low back. The Office accepted that appellant sustained a low back strain. He was off work from July 2 to approximately August 26, 1979, returned to light-duty work for three weeks and then to full-duty work. Appellant accepted early retirement effective October 30, 1987. He was employed with private sector aircraft production companies from May 7 to October 30, 1989 and again in 1990. In 1990 to 1992, appellant performed temporary, seasonal work as a stadium usher.

On September 1, 1990, appellant filed a notice of recurrence of disability and claim for compensation. He claimed that on November 1, 1989, the day after he stopped work at the private sector company, he sustained a recurrence of disability which he attributed to his June 21, 1979 employment injury. The Office accepted the claim for a recurrence of disability on May 27, 1992.<sup>1</sup>

In a March 10, 1993 report, Dr. Edwin Reiner, an attending orthopedic surgeon, stated that in 1989 appellant had been in an automobile accident in which he was struck from behind, causing a flare-up of quiescent lumbar symptoms for several months afterward. In subsequent progress notes, Dr. Reiner diagnosed an L3-4 disc herniation with atrophy and weakness of the

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<sup>1</sup> The record indicates that appellant's claim for a November 1, 1989 recurrence of disability was initially denied by October 23, 1990 and May 31, 1991 decisions.

left quadriceps. He stated that appellant was not a candidate for surgery due to the location of the herniation and its impingement on the thecal sac and nerve roots.<sup>2</sup>

The Office noted that Dr. Reiner's March 10, 1993 report was the first mention of record of a 1989 automobile accident, and because this new evidence created doubt that the claimed November 1, 1989 recurrence of disability was related to the June 21, 1979 low back strain, a second opinion referral was required. The Office therefore referred appellant, the medical record and a statement of accepted facts, to Dr. Bruce A. Thompson, a Board-certified orthopedic surgeon.

Dr. Thompson submitted an April 13, 1994 report, in which he reviewed the medical record, performed a detailed physical examination, and diagnosed degenerative disc disease aggravated by a November 1, 1989 motor vehicle accident. He concluded that appellant's symptoms were not related to the accepted June 21, 1979 employment injury.

In a June 8, 1994 supplemental report, Dr. Thompson stated that appellant's June 21, 1979 low back strain would not continue to be disabling for more than six weeks following the injury. He explained that appellant's current medical condition was due to "naturally progressive effects sustained from the [November 1, 1989] motor vehicle accident and resultant herniated disc. ... There is no reason to suspect that the herniation ... existed prior to the motor vehicle accident" based on the medical record. Dr. Thompson noted that the June 21, 1979 employment injury was not permanently disabling as appellant was able to return to full duty and continue working through 1987, and that the November 1, 1989 motor vehicle accident aggravated degenerative disc disease unrelated to appellant's federal employment.

By decision dated August 4, 1994, the Office rescinded its May 27, 1992 acceptance of the November 1, 1989 recurrence of disability. The Office found that Dr. Reiner's March 10, 1993 report constituted "new evidence not previously considered and [wa]s the basis for reopening the May 27, 1992 decision." The Office further found that Dr. Thompson's reports were well rationalized and based upon a complete and accurate factual and medical history, and therefore represented the weight of the medical evidence.

Appellant disagreed with this decision and, through his attorney, requested reconsideration by a July 14, 1995 letter and submitted additional medical evidence.

In a January 26, 1995 report, Dr. Anthony Markarian, a Board-certified orthopedic surgeon, provided a history of injury and treatment and reviewed various medical reports. Dr. Markarian opined that the November 1, 1989 automobile accident was not sufficiently severe to have caused a herniated L3-4 disc as his low back would have been supported by the seat back in a rear-end collision. He noted that appellant's private sector job duties were not sufficiently strenuous to have caused a herniated lumbar disc. Dr. Markarian opined that the "specific injury of June 21, 1979 and the cumulative trauma" of appellant's employment caused a lumbosacral strain, and an L3-4 disc herniation with "moderate-to-severe narrowing resulting in neurogenic

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<sup>2</sup> Dr. Reiner submitted periodic reports through January 11, 1994 stating that appellant was totally and permanently disabled due to progressive discogenic disease with left lower extremity atrophy.

claudication.” He concluded that appellant was disabled due to restricted lumbar motion, low back pain and left lower extremity atrophy attributable to the June 21, 1979 employment injury and to lifting in the course of his federal employment through 1987.

By decision dated October 10, 1995, the Office denied modification on the grounds that the evidence submitted was insufficient to warrant modification, characterizing Dr. Markarian’s report as speculative and inaccurate. The Office concluded that Dr. Thompson’s opinion continued to represent the weight of the medical evidence.

The Board finds that the Office improperly rescinded acceptance of appellant’s claim for a November 1, 1989 recurrence of disability. The record contains a conflict of medical opinion evidence between Dr. Markarian, for appellant, and Dr. Thompson, for the government.

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<sup>3</sup> and, where supported by the evidence, set aside or modify a prior decision and issue a new decision.<sup>4</sup> 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.<sup>5</sup> It is well established that once the Office accepts a claim, it has the burden of justifying termination or modification of compensation.<sup>6</sup> 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.<sup>7</sup>

In the present case, the Office accepted that appellant sustained an acute low back strain due to an incident at work on June 21, 1979. The Office’s May 27, 1992 acceptance of a November 1, 1989 recurrence of disability was predicated on appellant’s statement in his September 1, 1990 claim from that he had no intervening injuries to his back from August 26, 1979 through September 1, 1990. Therefore, Dr. Reiner’s March 10, 1993 report discussing a 1989 automobile accident constituted new evidence. However, the Office did not meet its burden of proof in rescinding acceptance of the November 1, 1989 recurrence of disability, due to a conflict of medical opinion between Dr. Markarian, for appellant, and Dr. Thompson, for the government, who attributed appellant’s condition on and after November 1, 1989 to opposing causes.

Dr. Thompson, a Board-certified orthopedic surgeon and second opinion physician, attributed appellant’s lumbar condition on and after November 1, 1989, including a herniated lumbar disc, to a nonoccupational motor vehicle accident which occurred that day. Dr. Thompson reasoned that the accepted June 21, 1979 low back strain should have resolved

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<sup>3</sup> 5 U.S.C. § 8128(a).

<sup>4</sup> *Eli Jacobs*, 32 ECAB 1147 (1981).

<sup>5</sup> *Shelby J. Rycroft*, 44 ECAB 795, 803 n.5 (1993).

<sup>6</sup> *See Frank J. Mela, Jr.*, 41 ECAB 115 (1989).

<sup>7</sup> *See Laura H. Hoexter (Nicholas P. Hoexter)*, 44 ECAB 987 (1993).

within six weeks, noting that appellant returned to full duty in September 1979 and did not retire until 1987. Thus, Dr. Thompson attributed appellant's claimed disability on and after November 1, 1989 to the nonoccupational automobile accident.

Dr. Markarian, an attending Board-certified orthopedic surgeon, provided a January 26, 1995 report explaining how and why the November 1, 1989 automobile accident could not have caused appellant's herniated L3-4 disc and the claimed recurrence of disability. Dr. Markarian opined that the June 21, 1979 incident caused a herniated L3-4 disc with stenosis leading to neurogenic claudication, in addition to the accepted lumbar strain. Thus, Dr. Markarian attributed appellant's condition on and after November 1, 1989 to the accepted June 21, 1979 employment injury.

As there is a significant, outstanding conflict of medical opinion on the critical issue of causal relationship between Dr. Markarian and Dr. Thompson, the Office failed to meet its burden of proof in rescinding appellant's claim for recurrence of disability on and after November 1, 1989.

The decision of the Office of Workers' Compensation Programs dated October 10, 1995 is hereby reversed.

Dated, Washington, D.C.  
March 4, 1998

Michael J. Walsh  
Chairman

Willie T.C. Thomas  
Alternate Member

Bradley T. Knott  
Alternate Member