

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

S.D., Appellant)

and)

DEPARTMENT OF HOMELAND SECURITY,)
U.S. SECRET SERVICE UNIFORMED)
DIVISION, OFFICE OF THE CHIEF,)
Washington, DC, Employer)

**Docket No. 07-414
Issued: August 6, 2007**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 5, 2006 appellant filed an appeal from a September 7, 2006 decision of the Office of Workers' Compensation Programs which rescinded acceptance of her claim. 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 to rescind acceptance of appellant's April 16, 2001 injury on the grounds that it did not fall under the purview of 5 U.S.C. § 8191.

FACTUAL HISTORY

On April 18, 2002 appellant, then a 38-year-old officer, filed a law enforcement officer's claim alleging that on April 16, 2001 she injured her feet while working at the annual White House Easter Egg Roll. She stopped work on September 7, 2001. In support of her claim,

appellant submitted a magnetic resonance imaging (MRI) scan of her feet dated February 6, 2002 and numerous medical reports from R. Fayomi, a physician's assistant at the Police and Fire Clinic and Dr. Brian P. Bach, a podiatrist, who diagnosed plantar fasciitis and advised that she could not work. The employing establishment controverted the claim and submitted leave analysis and employing establishment clinic notes dated July 5, 1995 to April 18, 1997. In a September 28, 2001 report, Lieutenant Ron Parthemore noted that on April 16, 2001 appellant began her White House tour at about 7:30 a.m. and that at 8:00 a.m. she reported that her feet hurt and she was going home. By letter dated October 11, 2001, Captain Eugene Szestak advised appellant that her claimed April 16, 2001 injury had not occurred in the performance of duty. In a report dated March 5, 2002, Dr. Michael J. Magee, Board-certified in orthopedic surgery, noted appellant's symptoms, reviewed the MRI scan and advised that her bilateral foot pain and plantar fasciitis "can be related to [the] fact that she had been standing for long periods of time."

On August 13, 2002 the Office accepted that appellant sustained employment-related bilateral plantar fasciitis. Appellant came under the care of Dr. A. Lee Dellon, a Board-certified plastic surgeon, who noted a history of standing and walking patrol for long periods, made examination findings and diagnosed bilateral tibial and peroneal nerve compressions, worse on the left. He recommended surgery. On September 9, 2002 the Office rescinded acceptance of appellant's claim, advising that she was not covered under section 8101 of the Federal Employees' Compensation Act¹ because she was covered under the District of Columbia Policemen and Firemen Retirement and Disability Act and, therefore, her entitlement should have been based on section 8191 of the Federal Employees' Compensation Act, rather than section 8101. On October 8, 2002 the Office accepted the claim under section 8191 of the Federal Employees' Compensation Act. Dr. Dellon performed nerve surgery on appellant's left knee, ankle and foot on October 17, 2002. He advised that she could not work as a police officer and that she needed to have surgery on her right foot.

An Equal Employment Opportunity (EEO) Commission settlement agreement dated July 8, 2003, provided that appellant could return to full-time work on July 14, 2003 and her prior absent-without-leave status would be changed to leave without pay. The employing establishment reported that for the period July 14 to 25, 2003, appellant worked no more than three days. In an October 16, 2003 report, Dr. Dellon advised that appellant had been totally disabled from August 8, 2002 forward. On October 27, 2003 she filed a Form CA-7, claim for compensation, for the period December 11, 2001 to July 23, 2003. Appellant was removed from her federal job effective January 10, 2004. The notice of personnel action indicated that her service computation date was May 4, 1981 and that she was covered under the District of Columbia Retirement Act.

Appellant submitted a claim for compensation beginning January 1, 2004 and by letter dated February 23, 2004, the Office advised her of the evidence that she needed to submit. In a June 8, 2004 report, Dr. Dellon advised that appellant's left foot had improved following surgery, that she needed surgery on the right and that it was appropriate for her to retire on disability due to the problems with her feet. The employing establishment approved disability

¹ 5 U.S.C. §§ 8101-8193.

retirement effective October 15, 2004. By decision dated January 4, 2005, the Office denied appellant's claim for compensation beginning September 10, 2001 and continuing. On February 1, 2005 appellant, through counsel, requested a hearing and submitted reports dated September 30, 2004 and July 15, 2005 in which Dr. Dellon advised that her conditions of compression of the common peroneal nerve, deep peroneal nerve, tarsal tunnel syndrome and plantar fasciitis were work related due to prolonged standing and walking for long periods of time and that she needed surgery on the right.

At the hearing, held on December 6, 2005, appellant testified that she went to the Police and Firemen's Clinic on April 16, 2001 and was placed on sick leave. She stated that, although she had had leg pain prior to April 16, 2001, on that day it was excruciating. Appellant returned to work the next day but continued to have painful feet. On September 7, 2001 she could not put on her uniform shoes because her feet were swollen. Appellant stopped work that day, used all her leave by December 20, 2001 and worked intermittently until August 8, 2002 when, while on light duty, she injured her left wrist. She stated that she was paid compensation by the employing establishment for that injury from August 2002 until January 2003 when she again stopped work and was found to be incapacitated due to her bilateral foot condition.

By decision dated February 15, 2006, an Office hearing representative found that appellant was entitled to wage-loss compensation for some periods between September 10, 2001 and July 23, 2003 as supported by the medical evidence. She also found that appellant was entitled to wage-loss compensation beginning January 3, 2004 and ongoing because her light-duty job had been withdrawn. In a June 6, 2006 decision, an Office hearing representative set aside the Office decisions dated January 4, 2005 and February 15, 2006 finding the case not in posture for decision. She noted that the Office did not provide appellant with proper notice of the requirements needed to perfect her claim. On remand, the Office was to explain to appellant that she needed to submit rationalized medical evidence to support her claimed disability. The hearing representative further noted that the issue of whether appellant's left lower extremity surgery was causally related to the accepted bilateral plantar fasciitis was unresolved and that, as this was a section 8191 case, her usual work duties would not be covered. The Office was to determine if there were any other periods of employment activity that would fall under section 8191.

In a June 13, 2006 letter to appellant, the Office explained the provisions of section 8191 and asked that she provide information regarding specific activities which would be covered. In a July 6, 2006 letter, appellant described her employment history. She also submitted duplicates of medical evidence previously of record. By letter dated July 28, 2004, the employing establishment argued that the Office did not properly interpret section 8191, because on April 16, 2001 appellant was not actively engaged in the act of preventing or attempting to prevent the commission of a federal crime or that a federal crime was imminent.

By decision dated September 7, 2006, the Office rescinded acceptance of appellant's claim because new evidence and argument submitted established that the circumstances of her injury were not covered by section 8191 of the Federal Employees' Compensation Act. The Office noted that on the day of the claimed injury there was no evidence that appellant was engaged in the apprehension of a person sought for the commission of a crime against the United States, no evidence that she was guarding or protecting a person held for the commission of a

crime against the United States or as a material witness in connection with such a crime and no evidence to establish that she was actively engaged in the prevention of an imminent actual and specific crime.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits. This holds true where the Office later decides that it has erroneously accepted a claim for compensation.² The Board has upheld the Office's authority to reopen a claim at any time on its own motion under 5 U.S.C. § 8128 and, where supported by the evidence, set aside or modify a prior decision and issue a new decision. The power to annul an award, however, is not an arbitrary one and an award for compensation can only be set aside in the manner provided by the compensation statute.³ The Office's burden of justifying termination or modification of compensation holds true where the Office later decides that it has erroneously accepted a claim for compensation. In establishing that its prior acceptance was erroneous, the Office is required to provide a clear explanation of its rationale for rescission. The Office may rescind a claim if it determines that an accepted injury did not occur in the performance of duty.⁴

Office regulations on rescission state that, if the Director determines that a review of an 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 evidence) may modify, rescind, decrease or increase compensation previously awarded or award compensation previously denied.⁵

Members of the Uniformed Division of the U.S. Secret Service are considered civil employees under 5 U.S.C. § 8101 unless they are covered under the District of Columbia Retirement Act. Coverage under the District of Columbia Retirement Act is mandatory for all members of the Uniformed Division who were hired prior to January 1, 1984. For a secret service member covered by the District of Columbia Retirement Act, the only entitlement to benefits under the Federal Employees' Compensation Act is as a law enforcement office under 5 U.S.C. § 8191.⁶

In pertinent part, 5 U.S.C. § 8191 provides that an eligible officer is any person who is determined by the Secretary of Labor in his or her discretion to have been on any given occasion --

“(1) A law enforcement officer and to have been engaged on that occasion in the apprehension or attempted apprehension of any person --

² 20 C.F.R. § 10.610.

³ *George A. Rodriguez*, 57 ECAB ____ (Docket No. 05-490, issued November 18, 2005).

⁴ *Id.*

⁵ *Deborah S. Stein*, 56 ECAB ____ (Docket No. 04-750, issued April 26, 2005).

⁶ Office Program Memorandum No. 275 (revised, January 30, 1987); *see Mark A. Cognetti*, 35 ECAB 734 (1984).

(A) for the commission of a crime against the United States; or
(B) who at that time was sought by a law enforcement authority of the United States for the commission of a crime against the United States; or

(C) who at that time was sought as a material witness in a criminal proceeding instituted by the United States; or

“(2) A law enforcement officer and to have been engaged on that occasion in protecting or guarding a person held for the commission of a crime against the United States or as a material witness in connection with such a crime; or

“(3) A law enforcement officer and to have been engaged on that occasion in the lawful prevention of, or lawful attempt to prevent, the commission of a crime against the United States....”⁷

Office regulation provide that benefits are available to law enforcement officers who are not “employees” under 5 U.S.C. § 8101, who are determined in the discretion of the Office to have been engaged in the activities listed in section 8191 of the Federal Employees’ Compensation Act.⁸ Benefits are payable when an officer is injured while apprehending or attempting to apprehend an individual for the commission of a federal crime. The fact that an injury is related in some way to the commission of a federal crime does not necessarily bring the injury within the coverage of the Federal Employees’ Compensation Act.⁹ For benefits to be payable when an officer is injured preventing or attempting to prevent a federal crime, there must be objective evidence that a federal crime is about to be committed.¹⁰ Based on the facts available at the time of the event, the officer must have an awareness of sufficient information which would lead a reasonable officer, under the circumstances, to conclude that a federal crime was in progress or about to occur and there must be sufficient evidence that the officer was in fact engaged in actual or attempted apprehension of a federal criminal or prevention of a federal crime.¹¹

The Board has recognized that the issue of whether a law enforcement officer was attempting to apprehend someone for or prevent the commission of a federal crime turns initially on the question of whether, at the time the injury was sustained, the local law enforcement officer knew that a federal crime or potential federal crime was being committed, and, therefore, formed the intent to apprehend someone for or to prevent the commission of a federal crime. Knowledge of a potential federal crime at the time of injury or death does not, alone establish eligibility to receive benefits under the Federal Employees’ Compensation Act. The claimant

⁷ 5 U.S.C. § 8191.

⁸ 20 C.F.R. § 10.735(b).

⁹ 20 C.F.R. § 10.738(a).

¹⁰ 20 C.F.R. § 10.738(b).

¹¹ 20 C.F.R. § 10.739.

must establish that the activities in which he or she was engaged at the time of injury constituted the apprehension or attempted apprehension of a federal offender or the lawful prevention of or lawful attempt to prevent the commission of a federal crime.¹²

ANALYSIS

Following acceptance of the claim under section 8191 of the Federal Employees' Compensation Act, the employing establishment argued that the injury on April 16, 2001 did not fall under the purview of section 8191 and by decision dated September 6, 2006, the Office rescinded its acceptance of appellant's claim.

The record supports District of Columbia Retirement Act and, therefore, the provisions of section 8191 apply.¹³ In interpreting section 8191, the Board has recognized that the issue of whether a law enforcement officer was attempting to prevent the commission of a federal crime turns initially on the question of whether, at the time the injury was sustained, the officer had knowledge that a federal crime was being or about to be committed and, therefore, formed the intent to prevent the commission of a federal crime.¹⁴ The Board has further held that section 8191 requires that the threat must be actual and imminent.¹⁵

In this case, there is no evidence of record to show that when appellant's claimed injury occurred on April 16, 2001, a federal crime was being or about to be committed or that she was engaged in the apprehension or attempted apprehension of a person for the commission of a crime against the United States or protecting or guarding a person being held for or a material witness to a threat against the United States. Appellant would thus, not be entitled to coverage under parts (1) or (2) of section 8191. She would also not be entitled to coverage under part (3) because the record does not reflect that there was an actual imminent threat, that appellant had the intent to prevent the commission of a federal crime or that she knew a federal crime was being committed at the time of the claimed injury on April 16, 2001 when she worked for several hours at the annual White House Easter Egg Roll.¹⁶ Appellant, therefore, is not eligible to receive compensation benefits under section 8191 of the Federal Employees' Compensation Act and the Office, therefore, properly rescinded acceptance of her claim.¹⁷

¹² *Michael Kosowski*, 57 ECAB ____ (Docket No. 04-2263, issued November 22, 2005).

¹³ *Supra* note 7.

¹⁴ *See Morris W. Farlow*, 48 ECAB 659 (1997).

¹⁵ *See Alfred A. Danna*, 47 ECAB 789 (1996).

¹⁶ *See J.P.*, 58 ECAB ____ (Docket No. 06-1274, issued January 29, 2007).

¹⁷ *See George A. Rodriguez*, *supra* note 3.

CONCLUSION

The Board finds that the Office properly rescinded acceptance of appellant's claim because her April 16, 2001 employment injury does not fall within the purview of 5 U.S.C. § 8191.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 7, 2006 be affirmed.

Issued: August 6, 2007
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board