

degenerative disc disease. Appellant returned to modified duty on November 23, 1992. On May 6, 1994 the Office found that her actual earnings in that position fairly and reasonably represented her wage-earning capacity.¹

Appellant stopped work on November 8, 1994 and claimed a recurrence of total disability. She attributed her disability to her accepted injury because of increasing pain radiating down the right side of her leg with a burning sensation to her ankle. Appellant noted a significant increase in back pain.

On November 8, 1994 Dr. Day P. McNeel, Jr., the treating neurosurgeon, found appellant disabled for work:

“[Appellant] says that she just cannot work at the [employing establishment] any more. She has to bend over, pick up packages off the ground, there is a lot of bending, lifting. [Appellant] is having the same pain in the back, all down the right leg. It is worse than ever. The more [appellant] does, the more it hurts and it gets worse at work, even with [four] hours. It is simply impossible for her to go on and I do think that she is permanent[ly] disabled from bending, lifting and straining the back in any way, whether she has surgery or not and the way she describes her work in the face of a known herniated disc and lumbar radiculopathy, I think that she is disabled from the [employing establishment] work as she describes it.”

The Office denied appellant’s recurrence claim because the medical evidence offered no rationale to support that her employment injury had worsened to cause total disability.

On January 24, 2002 Dr. Frank M. Yatsu, a professor of neurology, responded to an Office request for his medical opinion and reasons regarding appellant’s disability and causation. He stated:

“I have been following [appellant] for approximately eight years since 1995, three years following her first injury for an on-the-job injury working for the [employing establishment]. At that time in 1992, as a result of employment requiring lifting and other physical activity such as bending, she developed low back pain which was originally treated by Dr. McNe[e]l who subsequently retired. However, [appellant] again reinjured her back on November 7, 1994, which is the target date of concern because since that time she had persistent and daily back pain, which has required narcotics and muscle relaxants and other medication to help alleviate symptoms but which has not been completely successful. As a result of continuing pain and muscle spasm she retired in November 1994 because of the severity of the pain and at that time you will note that she was required to work four hours per day and was to have answered [tele]phones only but was in fact required to do lifting and bending and the ergonomics of her desk required adjustment which her husband helped with but which caused excessive strain on her back.

¹ OWCP File No. xxxxxx460.

“These include having to reach, lift and bend etc., and because of continued aggravation of the pain [appellant] could not tolerate the discomfort and therefore quit at that point.... As a result of her severe low back pain with spasm and limited movement plus weakness of the right leg, I had previously indicated that [appellant] was totally disabled since the induced pain prevents her from carrying out her activities of daily living and would prevent her from any kind of meaningful work. In addition to total disability for work, her impairment rating was placed at 32 percent.”

Dr. Yatsu related his findings and diagnosed low back syndrome, pain and muscle spasm “induced from a regional injury on[-]the[-]job working at the [employing establishment] on February 7, 1992 and reaggravated by on[-]the[-]job injury at the [employing establishment] on November 7, 1994.” He added:

“As documented by her inability to work at what was to be a sedentary job for four hours per day answering the [tele]phone but in fact required lifting, bending and carrying packages etc., it is clear to me that [appellant] with her striking neurological findings of low back syndrome is unable to work in a meaningful way because of the fact that it aggravates the pain syndrome, which at best is not well controlled with standard muscle relaxants and analgesics as noted above. On the basis of [appellant’s] now [10]-year history of work-related injury and persistent symptoms which are dramatically clear, I still believe that [she] is totally disabled from meaningful work, particularly since she is unable to conduct her activities of daily living and her impairment rating by the [American Medical Association, *Guides to the Evaluation of Permanent Impairment*] standard for impairment is 32 percent. It is my belief [that appellant] should be compensated for the injury on the job and I would be willing to testify in this regard.”

On December 13, 2002 appellant filed an occupational disease claim alleging that her herniated disc was a result of her federal employment. She first became aware of the condition on November 7, 1994. Appellant noted that she previously filed a recurrence claim but should have filed an occupational disease claim.

On March 12, 2003 the Office accepted appellant’s claim for displacement of lumbar intervertebral disc.² It consolidated her two case records. Appellant claimed compensation for wage loss beginning November 8, 1994 to the present.

In a decision dated March 15, 2004, the Office rescinded its acceptance of appellant’s December 13, 2002 lumber disc claim. It stated the basis for its decision: “Your claim was accepted without the knowledge that you were not working at the time you filed your claim.” The Office concluded: “The decision of March 13, [sic] 2003 is being rescinded due to the fact you have not worked since 1994. Therefore, your condition could not have worsened due to employment factors. This decision hereby denies your occupational disease claim and your CA[-]7 [form] requesting compensation for the period of November 8, 1994 to present.”

² OWCP File No. xxxxxx255.

The Office subsequently reviewed the merits of appellant's claim on December 9, 2004, February 27, 2006, February 6, 2007 and June 20, 2008. Each time it denied modification of its prior decision.

In its February 6, 2007 decision, the Office stated that it had rescinded appellant's occupational disease claim because new evidence did not support that she sustained a new occupational disease in November 1994: "You basically stopped work and reported to your physician that you could no longer do your limited[-]duty work. There was no reasoned medical opinion evidence or objective medical evidence to support an occupational disease claim or total disability for work."

In its June 20, 2008 decision, the Office found that Dr. Yatsu gave an inconsistent history of appellant's work duties when he stated on January 15, 2008: "As I have stated before, I believe that her on[-]the[-]job injury has left [her] totally disabled so that she is unable to return to her [employing establishment] work, which involves carrying mail, etc." It noted that, in her December 10, 2006 description of her duties, appellant did not list carrying mail.

LEGAL PRECEDENT -- ISSUE 1

The United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.³ The Office may review an award for or against payment of compensation at any time on its own motion or on application.⁴

The Board has upheld the Office's authority to reopen a claim at any time on its own motion and, where supported by the evidence, to set aside or modify a prior decision and issue a new decision.⁵ The Board has noted, however, that the power to annul an award is not an arbitrary one and that an award for compensation can be set aside only in the manner provided by the compensation statute.⁶

Workers' compensation authorities generally recognize that compensation awards may be corrected, in the discretion of the compensation agency and in conformity with statutory provisions, 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. In establishing that, its prior acceptance was erroneous, the Office is required to provide a clear explanation of the rationale for rescission.⁷

³ 5 U.S.C. § 8102(a).

⁴ *Id.* at § 8128(a).

⁵ *Eli Jacobs*, 32 ECAB 1147 (1981).

⁶ *Doris J. Wright*, 49 ECAB 230 (1997); *Shelby J. Rycroft*, 44 ECAB 795 (1993).

⁷ *Walter L. Jordan*, 57 ECAB 218 (2005).

ANALYSIS -- ISSUE 1

In its March 15, 2004 decision rescinding its acceptance of appellant's December 13, 2002 occupational disease claim, the Office clearly stated the basis of its decision: "Your claim was accepted without the knowledge that you were not working at the time you filed your claim." Because appellant had not worked since 1994, the Office concluded that her low back condition could not have worsened due to employment factors.

This misrepresents the nature of appellant's December 13, 2002 claim. Appellant did not claim that her low back condition worsened after she stopped work on November 8, 1994. She claimed a new injury on or about November 7, 1994 caused by exposure to employment factors in her modified assignment. Appellant claimed that this new employment injury, diagnosed as a herniated lumbar disc with radiculopathy, caused total disability for work beginning November 8, 1994. So the fact that she did not return to work after 1994 is wholly irrelevant to whether she reinjured her low back in the performance of duty prior to November 8, 1994. An employment injury occurring prior to November 8, 1994 is not inconsistent with total disability for work beginning that date.

Because the Office's March 15, 2004 decision is not well rationalized, the Board finds that the Office did not meet its burden of proof to justify rescinding its acceptance of appellant's December 13, 2002 occupational disease claim.

In its February 6, 2007 merit review of the case, the Office stated that it had rescinded its acceptance of appellant's occupational disease claim because new evidence did not support that she sustained a new occupational disease in November 1994, because there was no reasoned medical opinion evidence or objective medical evidence to support an occupational injury or total disability for work. It appears the Office recognized the weakness of its decision after the fact and attempted to rehabilitate the rescission by supplying more rationale.

The medical evidence of record does support appellant's December 13, 2002 occupational disease claim. On November 8, 1994 Dr. McNeel, the treating neurosurgeon, cited specific employment factors, such as bending over, picking up packages off the ground and lifting, factors that caused appellant's pain to become worse than ever. In the face of a known herniated disc and lumbar radiculopathy, he took her off work. On January 24, 2002 Dr. Yatsu, the neurology professor who took over appellant's care after Dr. McNeel retired, noted that she sustained an employment-related low back injury in 1992 but reinjured her back on or about November 7, 1994 when she was required to lift, bend, reach and carry packages. He also implicated the ergonomics of her desk, which he stated caused excessive strain on her back. Dr. Yatsu reported that the continued aggravation of appellant's poorly controlled pain syndrome caused her to become totally disabled from any kind of meaningful work. The Office thereafter accepted appellant's claim.

The Office incorrectly stated in its February 6, 2007 decision, that there was no evidence to support appellant's new occupational disease claim. Different adjudicators may not agree on whether the medical evidence was sufficient at the time of acceptance to carry appellant's burden of proof to establish a herniated disc injury on or about November 7, 1994. The Office's February 6, 2007 decision offered no substantive review of the medical evidence of record. With

respect to rescission of acceptance the Office should not attempt to second guess the prior adjudicating official's assessment of the medical evidence.⁸

Because the Office did not meet its burden of proof to justify rescinding acceptance of appellant's December 13, 2002 occupational disease claim, the Board will reverse the Office's June 20, 2008 merit decision. The Board's disposition of the first issue on appeal renders the second issue moot.

CONCLUSION

The Board finds that the Office did not meet its burden of proof to rescind acceptance of appellant's December 13, 2002 occupational disease claim.

ORDER

IT IS HEREBY ORDERED THAT the June 20, 2008 decision of the Office of Workers' Compensation Programs is reversed.

Issued: October 23, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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

⁸ *Delphia Y. Jackson*, 55 ECAB 373, 377 (2004).