

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

S.C., Appellant)

and)

**DEPARTMENT OF THE INTERIOR, OFFICE
OF INFORMATION POLICY, Herndon, VA,
Employer**)

**Docket No. 12-553
Issued: November 9, 2012**

Appearances:
Appellant, pro se
No appearance, for the Director

Oral Argument September 18, 2012

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On January 13, 2012 appellant filed a timely appeal from the October 17, 2011 and January 10, 2012 merit decisions of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether OWCP properly rescinded acceptance of the claim; (2) whether OWCP properly found an overpayment of \$187,144.22 was created; and (3) whether OWCP properly denied waiver of the overpayment.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On January 13, 2009 appellant, then a 57-year-old supervisory information technology specialist, filed a traumatic injury claim (Form CA-1) alleging that she sustained stress, as well as hypertension, vertigo, migraines and facial tics, as a result of her federal employment. She alleged that she suffered coercion and duress from supervisors.

By letter dated February 25, 2009, an employing establishment supervisor stated that appellant had worked from November 2003 to November 2006 in Albuquerque, New Mexico as the Director, Office of Information Policy. The supervisor stated that employees at that work site had been reassigned in September 2006, but appellant chose to retire on November 26, 2006 rather than be reassigned to Virginia. According to the employing establishment supervisor, appellant had filed an action with the Merit Systems Protection Board (MSPB) and as a result of her appeal the employing establishment was required to put her back in duty status. The letter stated that appellant was scheduled to return to work in Virginia on March 15, 2009.

The record contains a November 18, 2008 decision from an administrative judge with respect to an MSPB appeal. The decision found that appellant's resignation in November 2006 was involuntary. According to the administrative judge, the employing establishment's "action in allowing the notice of proposed removal, which was without basis and could not be sustained, to remain as a coercive tool in order to force the appellant to 'follow through' with the reassignment or to retire" was sufficient to find the retirement involuntary. The administrative judge found that the employing establishment knew that the reason for the threatened removal, a failure to accept the directed reassignment, could not be sustained as appellant accepted the reassignment in a timely manner and found that the proposed removal action was coercive. Accordingly, the employing establishment was directed to cancel her involuntary retirement and restore her employment effective November 25, 2006. With respect to claims of discrimination or retaliation, the judge found the evidence was insufficient to establish the claims.

On August 13, 2009 OWCP accepted the claim for post-traumatic stress disorder (PTSD). It began paying compensation for wage loss as of October 19, 2009. Appellant was referred for a second opinion examination by psychiatrist, Dr. Robert Sullivan. In a report dated March 13, 2010, Dr. Sullivan diagnosed adjustment disorder, with mixed emotional features and depressed mood. He opined that the diagnosis of PTSD was not supported.²

In a letter dated August 25, 2011, OWCP advised appellant that it proposed to rescind acceptance of her claim. Under the heading of "incidents which occurred but are not factors of employment" OWCP stated that the record contained a "partial copy" of the November 18, 2008 MSPB decision.³ OWCP stated that the judge "ruled the appellant met her burden to show [MSPB] jurisdiction over the appeal by preponderant evidence and reversed the [employing

² Although OWCP had asked Dr. Sullivan for an opinion on causal relationship with respect to compensable work factors outlined in the statement of accepted facts (SOAF), a January 14, 2010 SOAF provided no discussion of compensable work factors.

³ It is not clear what portions of the November 18, 2008 MSPB OWCP believed to be missing. The copy of the MSPB decision in the record appears to the Board to be a complete copy of a 50-page decision.

establishment's November 25, 2006] actions affecting the appellant's retirement in lieu of involuntary action." The proposed rescission also includes a heading of incidents which OWCP finds "did not occur." Under this heading are listed numerous allegations, such as a February 2009 e-mail referring to appellant as a former supervisor, an allegation she was subject to a "dog and pony" show by the employing establishment and that supervisors asked why she was coming to Virginia as no one wanted her there.

Appellant responded on September 16, 2011 with a September 11, 2011 letter discussing her claim. She argued that the employing establishment's proposed removal had been found to be coercive and that the employing establishment continued to cause stress with miscalculation and noncompliance with the MSPB order.

By decision dated October 17, 2011, OWCP rescinded acceptance of the claim effective October 23, 2011. It stated that the contents of the proposed rescission were incorporated into the final decision. With respect to the MSPB decision, OWCP stated that "the ruling and results of that decision were not factors of your employment," as stated in the proposed rescission. In response to an allegation that appellant was restored to full-duty status, OWCP stated that she was not working in January 2009 when she filed the claim, had not been working for more than two years prior to that date and therefore her injury did not arise out of employment.

By letter dated October 20, 2011, OWCP advised appellant of a preliminary determination that an overpayment of \$187,144.22 had occurred due to the rescission of compensation. It indicated that she was found not at fault in creating the overpayment and she had a right to submit evidence with respect to the overpayment and waiver issues. On November 4, 2011 appellant submitted an overpayment recovery questionnaire (Form OWCP-20) and evidence regarding bank accounts.

In a decision dated January 10, 2012, OWCP finalized its determination that an overpayment of \$187,144.22 was created. It stated that appellant had not submitted evidence sufficient to waive recovery of the overpayment.

LEGAL PRECEDENT -- ISSUE 1

Section 8128 of FECA provides that the Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application.⁴ The Board has upheld OWCP'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. OWCP's burden of justifying termination or modification of compensation holds true where OWCP later decides that it has erroneously accepted a claim for compensation. In establishing that, its prior acceptance was erroneous, OWCP is required to provide a clear explanation of its rationale for rescission.⁵ If OWCP rescinds acceptance of compensable work factors, it should

⁴ 5 U.S.C. § 8128.

⁵ *Amelia S. Jefferson*, 57 ECAB 183 (2005).

issue a decision that discusses the specific allegations, refers to the evidence of record and Board precedent and makes a clear factual finding as to why the allegation does not constitute a substantiated compensable work factor.⁶

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. There are situations where an injury or illness has some connection with the employment but nevertheless does not come within the coverage of workers' compensation. These injuries occur in the course of the employment and have some kind of causal connection with it but nevertheless are not covered because they are found not to have arisen out of the employment. Disability is not covered where it results from an employee's frustration over not being permitted to work in a particular environment or to hold a particular position or secure a promotion. On the other hand, where disability results from an employee's emotional reaction to his or her regular or specially assigned work duties or to a requirement imposed by the employment, the disability comes within the coverage of FECA.⁷

A reaction to an administrative or personnel matter is generally not covered as it is not related to the performance of regular or specially assigned duties.⁸ Nevertheless, if the evidence demonstrates that the employing establishment erred, acted abusively or unreasonably in the administration of a personnel matter, any physical or emotional condition arising in reaction to such error or abuse may be covered.⁹

ANALYSIS -- ISSUE 1

In the present case, OWCP accepted PTSD as causally related to appellant's federal employment. It rescinded acceptance of the claim effective October 23, 2011, finding that no compensable work factors were established. To rescind acceptance of the claim, OWCP must provide a clear explanation as to why the evidence does not establish a compensable factor of employment.

The record contains an MSPB decision dated November 18, 2008. The administrative judge found that the employing establishment had issued a notice of proposed removal that was "without basis and could not be sustained" and used it as a coercive tool to force appellant to follow through with the reassignment or retire. Appellant's retirement was held to be involuntary and the employing establishment was ordered to cancel the involuntary retirement and "restore the appellant effective November 25, 2006."

In reviewing the proposed rescission memorandum and the October 17, 2011 final decision,¹⁰ the Board finds that OWCP failed to provide a clear explanation of the rationale for

⁶ See *E.A.*, Docket No. 07-429 (issued June 25, 2007); *L.C.*, 58 ECAB 493 (2007).

⁷ *Lillian Cutler*, 28 ECAB 125 (1976).

⁸ See *Brian H. Derrick*, 51 ECAB 417, 421 (2000).

⁹ *Margreate Lublin*, 44 ECAB 945, 956 (1993).

¹⁰ The October 17, 2011 decision stated that it incorporated the findings of the proposed rescission letter.

its decision. As noted above, compensable work factors may be established if the evidence shows error or abuse in an administrative matter. OWCP provided no clear explanation as to why the judge's determination that the notice of proposed removal was issued without justification and used as a coercive tool is not sufficient to establish error or abuse by the employing establishment. The August 25, 2011 proposed rescission briefly acknowledges that the decision "reversed" the employing establishment's November 25, 2006 actions and then places the decision findings under the heading of incidents "that are not factors of employment." No relevant explanation is provided that clearly explains why the evidence does not establish a factor of employment. The October 17, 2011 decision provided no additional findings, as it referred only to the findings in the proposed rescission letter. OWCP did not cite to Board precedent on error or abuse or provide clear rationale for its determination that no compensable factor was established.

In addition, the Board notes that in the proposed rescission OWCP listed numerous allegations under a general heading that the incidents "did not occur." For example, OWCP noted an allegation regarding a February 3, 2009 e-mail received by appellant. No specific explanation was provided as to the basis for concluding that identified alleged incidents did not occur. OWCP did not refer to the evidence of record, cite case law or otherwise clearly explain its findings in this regard. The October 17, 2011 decision finds that appellant had not "served in her position" since November 26, 2006 and also refers to her as "not on duty" at the time of a February 20, 2009 e-mail. Such findings do not establish that an alleged incident did not occur. If OWCP is making a finding that appellant was not in the performance of duty at the time of a specific allegation, they need make such a finding and support it with probative evidence of record and a proper explanation in accord with Board precedent.

Since OWCP is rescinding acceptance of the claim, they must provide a clear, well-supported explanation as to why none of the allegations made by appellant are compensable work factors. The Board finds that OWCP did not provide such explanation in this case and the evidence of record is not sufficient to rescind acceptance of the claim. As the overpayment was based on the rescission of the claim, the Board finds OWCP did not properly establish an overpayment of compensation. The Board will not address a waiver issue as fact of overpayment has not been established.¹¹

CONCLUSION

The Board finds that OWCP did not properly rescind acceptance of the claim as it did not provide an adequate explanation of its rationale for rescission. The Board finds that fact of overpayment is not established because the basis for the declared overpayment was rescission of acceptance of the claim.

¹¹ The Board notes that the record contains a May 7, 2012 OWCP decision with respect to rescission of the claim. It is well established that the Board and OWCP may not have concurrent jurisdiction over the same case and OWCP decisions that change the status of the decision on appeal are null and void. *Douglas E. Billings*, 41 ECAB 880, 895 (1990). The Board finds the May 7, 2012 decision is null and void.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated January 10, 2012 and October 17, 2011 are reversed.

Issued: November 9, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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