

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

S.R., Appellant

and

**U.S. POSTAL SERVICE, LENOX HILL
STATION, New York, NY, Employer**

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**Docket No. 14-1313
Issued: January 22, 2015**

Appearances:
Paul Kalker, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 19, 2014 appellant, through her attorney, filed a timely appeal from an April 21, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP) rescinding acceptance of a recurrence of disability. 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.

ISSUE

The issue is whether OWCP properly rescinded acceptance of its finding that appellant sustained a recurrence of disability on June 12, 1998 causally related to her May 11, 1994 employment injury.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board. OWCP accepted that on May 11, 1994 appellant, then a 32-year-old mail handler, sustained a head contusion when she was struck by a metal bar. She worked limited duty beginning July 1994.

On June 15, 1998 appellant filed a recurrence of disability beginning that date causally related to her May 11, 1994 employment injury. She stopped work on June 12, 1998 and did not return.

On June 16, 1998 Dr. Frantz Jasmin, a Board-certified internist, found that appellant was disabled from employment beginning June 12, 1998 pending an evaluation by an orthopedist.

In a July 21, 1998 narrative report, Dr. Richard Memoli, an orthopedic surgeon, discussed appellant's history of an injury when a metal bar fell and hit the top of her head and neck. He noted that she complained of neck pain radiating into her right arm, headaches, and radiating low back pain. Dr. Memoli diagnosed head trauma by history, cervical sprain with radiculopathy, and to rule out a herniated nucleus pulposus. He asserted that appellant was disabled due to her May 11, 1994 work injury.

In a letter dated July 21, 1998, Dr. Memoli related that he initially evaluated appellant on that date for neck pain radiating into her right arm, headaches, and dizziness.² On examination he found a loss of cervical spine range of motion with swelling and tenderness of the right paravertebral muscles. Dr. Memoli noted that appellant stopped work beginning June 12, 1998 because of her worsening symptoms. He determined that she could not return to work and recommended a magnetic resonance imaging (MRI) scan study of the cervical spine.

On September 25, 1998 Dr. Memoli diagnosed cervical radiculopathy and sprain and found that appellant was totally disabled. On December 14, 1998 he diagnosed cervical sprain with radiculopathy and opined that she was incapacitated. In a report dated March 22, 1999, Dr. Memoli found neck pain radiating into the right arm with weakness, headaches, and dizziness. He advised that appellant was unable to work and requested authorization for diagnostic studies.³ Dr. Memoli submitted similar reports on January 19 and September 11, 2001 and January 2, May 13 and September 16, 2003.

On March 26, 1999 appellant resigned from the employing establishment. She cited as the reason for her resignation her daughter's health condition.

By letter dated May 3, 2000, OWCP referred appellant to Dr. Harvey A. Levine, a Board-certified orthopedic surgeon, for a second opinion examination. In a report dated May 19, 2000, Dr. Levine diagnosed status postconcussion, resolved cervical sprain, and resolved lumbosacral sprain, all of which he attributed to the work injury. He found that she had no disability.

² Dr. Memoli continued to submit progress reports finding appellant disabled from work.

³ On May 16, 2003 OWCP authorized a cervical MRI scan study.

On July 23, 2001 OWCP notified appellant that it had accepted her “recurrence of June 12, 1998” and informed her that she could submit medical bills for payment. It requested that she submit a Form CA-7 if she “lost time from work due to the recurrence....”

By letter dated January 3, 2003, OWCP informed appellant’s attorney that it had accepted her recurrence of June 12, 1998 and was “currently processing a supplemental payment” from August 4, 1998 to December 28, 2002 subject to “certification by several individuals.” It also advised counsel that it was scheduling an impartial medical examination to resolve a conflict between Dr. Memoli and Dr. Levine.⁴

By letter dated April 23, 2003, OWCP advised appellant’s congressional representative that it had accepted that she sustained a recurrence of disability on June 12, 1998. It indicated, however, that it was scheduling a referral examination prior to “processing compensation payments.”

On July 21, 2003 OWCP referred appellant back to Dr. Levine for a second opinion examination. By letter dated July 21, 2003, appellant’s attorney questioned why it was scheduling another medical examination given that it had accepted a recurrence of disability. He argued that she was entitled to benefits until OWCP terminated her compensation.

In a report dated August 14, 2003, Dr. Levine diagnosed status post cerebral concussion, resolved cervical sprain, and resolved lumbosacral sprain due to appellant’s work injury. He concluded that she could perform her usual employment.⁵

On January 6, 2012 appellant requested compensation from June 12, 1998 to December 21, 2011. She noted that she had worked outside the employing establishment during that period.

In a letter dated February 14, 2012, OWCP indicated that appellant resigned from the employing establishment on March 26, 1999 for personal reasons. It requested that she explain why she was requesting compensation given that the record contained no medical report for almost nine years and as she had earnings from private employment.

In a February 23, 2012 response, counsel again noted that OWCP had accepted a recurrence of disability and that appellant’s employment “represents at most a minor statutory adjustment for temporary wage[-]earning capacity.”

By decision dated May 16, 2012, OWCP found that appellant had not established a recurrence of disability due to her accepted work injury.

⁴ In an internal e-mail dated January 8, 2003, OWCP determined that it was unable to refer appellant for an impartial medical examination without obtaining current medical evidence regarding her condition.

⁵ In a report dated January 2, 2003, Dr. Memoli discussed appellant’s complaints of radiating neck pain and found that she should remain off work. In a September 16, 2003 progress report, he discussed her physical complaints and found that she was unable to work.

In a decision dated December 11, 2012, the Board reversed a May 16, 2012 OWCP decision finding that appellant had not established an employment-related recurrence of disability on June 15, 1998.⁶ The Board noted that on June 23, 2001 OWCP had accepted that she sustained a recurrence of disability commencing June 12, 1998. The Board thus found that OWCP improperly adjudicated the issue presented as it had the burden to rescind acceptance of its finding that appellant sustained a recurrence of disability. The Board further determined that OWCP failed to advise her that it was attempting to rescind its acceptance of her recurrence of disability and thus failed to issue an appropriate decision. The Board additionally noted that the May 19, 2000 report of Dr. Levine did not address the issue of whether she sustained a June 1998 employment-related recurrence of disability.

On remand, in a decision dated March 6, 2013, OWCP again found that appellant did not establish a recurrence of disability. In an order dated January 2, 2014, the Board reversed a March 6, 2013 decision finding that appellant had not established a recurrence of disability.⁷ The Board found that OWCP had not properly issued a decision rescinding acceptance of its determination that she sustained a recurrence of disability.

On February 4, 2013 OWCP referred appellant to Dr. Jonathan Black, a Board-certified orthopedic surgeon, for a second opinion examination. In a report dated February 20, 2013, Dr. Black discussed her history of injury and current complaints of arm pain radiating to her hand, neck pain, and headaches. On examination he found no loss of motion or tenderness of the cervical spine, no radiculopathy, and full strength. Dr. Black related that he had reviewed the statement of accepted facts and reports from Dr. Jasmin, Dr. Neil S. Rosenthal, a Board-certified internist and neurologist,⁸ Dr. Memoli, and Dr. Levine. He asserted, "Through review of the records I do not find any evidence that appellant suffered a recurrence of disability on June 15, 1998 causally related to her May 11, 1994 work injury." Dr. Black further determined that appellant had no residuals of her employment injury.

On February 25, 2014 OWCP advised appellant of its proposed rescission of its finding that she sustained a recurrence of disability on June 12, 1998 due to her May 11, 1994 employment injury. It found that there was no medical evidence showing a causal relationship between the accepted work injury and her June 12, 1998 work stoppage.

In a response dated March 11, 2014, appellant's attorney generally asserted that OWCP should consider the medical evidence and arguments submitted contemporaneous with appellant's claimed recurrence of disability.

By decision dated April 21, 2014, OWCP rescinded acceptance of its July 23, 2001 finding that appellant had established an employment-related recurrence of disability on June 12, 1998.

⁶ Docket No. 12-1404 (issued December 11, 2012).

⁷ *Order Reversing Case*, Docket No. 13-1566 (issued January 2, 2014).

⁸ In a report dated December 9, 1996, Dr. Rosenthal, an OWCP referral physician, found that appellant had no objective findings supporting her complaints and could resume her usual employment.

On appeal, appellant's attorney notes that OWCP had accepted the recurrence of disability based on the medical evidence from Dr. Memoli and then shifted the burden to appellant to show a recurrence of disability. Counsel maintains that it is not possible "for a current examination to determine whether or not a claim was accepted in error in 1998." He asserts that OWCP failed to meet its burden of proof to rescind acceptance and notes that appellant has not received disability compensation for any period.

LEGAL PRECEDENT

Section 8128 of FECA provides that the Secretary of Labor may review an award for or against payment of compensation at any time on his or her own motion or application.⁹ The Board has upheld OWCP's authority to set aside or modify a prior decision and issue a new decision under section 8128 of FECA.¹⁰ 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.¹¹

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.¹² It is well established that, once OWCP accepts the claim, it has the burden of justifying the termination or modification of compensation benefits.¹³ OWCP's burden of justifying termination or modification of compensation holds true where it later decides that it has erroneously accepted a claim of compensation. In establishing that its prior acceptance was erroneous, OWCP is required to provide a clear explanation of its rationale for rescission.¹⁴

A "recurrence of disability" means an inability to work after an employee has returned to work caused by a spontaneous change in a medical condition, which resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.¹⁵

ANALYSIS

OWCP accepted that on May 11, 1994 appellant sustained a head contusion in the performance of duty. Appellant returned to limited-duty employment on July 13, 1994. She stopped work on June 12, 1998 and filed a notice of recurrence of disability on June 15, 1998.

⁹ 5 U.S.C. § 8128; *see also M.E.*, 58 ECAB 694 (2007).

¹⁰ *John W. Graves*, 52 ECAB 160 (2000).

¹¹ *See* 20 C.F.R. § 10.610; *Cary S. Brenner*, 55 ECAB 739 (2004); *Stephen N. Elliott*, 53 ECAB 659 (2002).

¹² *See L.C.*, 58 ECAB 493 (2007).

¹³ *See Andrew Wolfgang-Masters*, 56 ECAB 411 (2005).

¹⁴ *See Amelia S. Jefferson*, 57 ECAB 183 (2005); *Delphia Y. Jackson*, 55 ECAB 373 (2004).

¹⁵ 20 C.F.R. § 10.5(x).

On July 23, 2001 OWCP accepted that she sustained a recurrence of disability beginning June 12, 1998 causally related to her accepted work injury.

Once OWCP accepts the claim, it has the burden of justifying the termination or modification of compensation benefits.¹⁶ Its burden of justifying termination or modification of compensation holds true where it later decides that it has erroneously accepted a claim of compensation. In establishing that its prior acceptance was erroneous, OWCP is required to provide a clear explanation of its rationale for rescission.¹⁷

OWCP determined that Dr. Black's opinion constituted the weight of the medical evidence and established that appellant did not sustain a recurrence of disability on June 12, 1998. The Board finds, however, that Dr. Black did not provide sufficient rationale supporting his finding that she did not experience a recurrence of disability. As noted, OWCP has the burden to rescind acceptance and must provide a clear explanation of the rationale for the rescission.¹⁸

On February 20, 2013 Dr. Black discussed appellant's history of injury and her complaints of continued radiating arm pain, neck pain, and headaches. He further reviewed the medical reports of record and provided findings on examination. Dr. Black opined that the appellant had not sustained a recurrence of disability on June 15, 1998 due to her May 11, 1994 employment injury. He did not, however, offer medical reasoning in support of his conclusions.¹⁹ The certainty with which Dr. Black expressed his opinion cannot overcome the lack of medical rationale as the Board has held that medical conclusions unsupported by rationale are of little probative value.²⁰ Additionally, medical rationale is particularly necessary in the instant case given the length of time between the acceptance of appellant's recurrence of disability and OWCP's rescission. Moreover, Dr. Black indicated that he had reviewed the evidence from Dr. Jasmin and Dr. Memoli but did not explain why he disagreed with these physicians' finding that she had established a recurrence of disability. Consequently, the Board finds that OWCP did not meet its burden of proof to rescind acceptance of the recurrence of disability beginning June 12, 1998.

CONCLUSION

The Board finds that OWCP improperly rescinded acceptance of its finding that appellant sustained a recurrence of disability on June 12, 1998 causally related to her May 11, 1994 employment injury.

¹⁶ See *Andrew Wolfgang-Masters*, 56 ECAB 411 (2005).

¹⁷ See *Amelia S. Jefferson*, 57 ECAB 183 (2005); *Delphia Y. Jackson*, 55 ECAB 373 (2004).

¹⁸ See *V.C.*, 59 ECAB 137 (2007); *John W. Graves*, 52 ECAB 160 (2000).

¹⁹ See *Elaine Sneed*, 56 ECAB 373 (2005).

²⁰ See *Willa M. Frazier*, 55 ECAB 379 (2004); *Jimmy H. Duckett*, 52 ECAB 332 (2001).

ORDER

IT IS HEREBY ORDERED THAT the April 21, 2014 decision of the Office of Workers' Compensation Programs is reversed.

Issued: January 22, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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