

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of YVONNE D. NELSON and U.S. POSTAL SERVICE,  
POST OFFICE, Memphis, TN

*Docket No. 98-2335; Submitted on the Record;  
Issued June 21, 2000*

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DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,  
A. PETER KANJORSKI

The issues are: (1) whether appellant has established that she was totally disabled on or after June 18, 1996 due to her accepted October 7, 1994 employment injury; and (2) whether the Office of Workers' Compensation Programs properly rescinded acceptance of her recurrence of disability commencing June 18, 1996.

On October 7, 1994 appellant, then a 33-year-old carrier, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging that she injured her leg when a dog bit her while delivering mail.<sup>1</sup> The Office accepted the claim for a dog bite in the right leg and anxiety reaction and paid appropriate compensation. Appellant stopped work on October 7, 1994 and returned to light-duty work on April 29, 1995.<sup>2</sup>

The record contains limited-duty assignment offers from the employing establishment for the period June 15, 1995 through July 13, 1996.

On June 18, 1996 the employing establishment notified appellant that she was "being placed on emergency suspension immediately" due to her statements that she "would 'shoot up the place' if they did [not] leave you the fuck alone."

Appellant submitted a claim for compensation (Form CA-7) requesting wage-loss compensation for the period June 18 to July 12, 1996.

On July 1, 1996 appellant filed an occupational disease claim arguing that on October 11, 1994 she first realized that her panic attacks, depression, tendinitis and post-traumatic stress

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<sup>1</sup> This was assigned claim number A06-0609065.

<sup>2</sup> The Board notes that appellant filed a traumatic injury claim on May 10, 1995 for an injury sustained on May 8, 1995. This was assigned claim number A06-0624983.

disorder were due to the dog bite she sustained while delivering mail on October 7, 1994. She noted that she had been hospitalized for the period June 18 through June 28, 1996 for inpatient psychiatric care.

On July 1, 1996 appellant filed a traumatic injury claim alleging that on June 18, 1996 she “developed an uncontrollable anxiety which turned into intense fear” when told to deliver test cards from a postal vehicle.

On July 9, 1996 appellant filed a recurrence claim alleging disability commencing June 18, 1996 which the Office denied in a decision dated October 23, 1996.

On October 26, 1996 appellant requested reconsideration which the Office denied by decision dated November 6, 1996.

On December 12, 1996 the employing establishment issued a notice of removal effective January 19, 1997 due to her threatening statements against fellow employees and a violation of the zero tolerance policy on violence or threats and unacceptable conduct.

On January 31, 1997 appellant again requested reconsideration and submitted a January 16, 1996<sup>3</sup> report by Dr. Antoine Jean-Pierre.<sup>4</sup> In his report, he indicated that appellant had returned to a limited-duty work with a specific job description as of May 25, 1995, but that the employing establishment failed to comply with the restrictions as it moved her to different locations and different assignments with no notice, that she was required to drive 25 miles from her home to her work station, that she was required to do extensive walking, that she was required to do extensive standing while casing mail and not given necessary accommodations. As to her mental status, Dr. Jean-Pierre noted that appellant indicated she had “considerable amounts of difficulties from the period extending from May 1, 1995 thr[ough] June 18, 1996,” that this coincided “with a period of recurrences of spasms, pain and depression” and that appellant became more confused. He stated that appellant had a breakdown from June 18 through October 4, 1996 at which time appellant was totally disabled and that appellant found “herself in conflict with management to the point of being denied any work assignment what so ever.” In conclusion, Dr. Jean-Pierre opined:

“Currently [appellant] is profoundly affected by those circumstances. This clinical report hopefully will shed some light regarding her situation and hope to reintegrate her in her previous position. Since [appellant’s] dog injury of October 7, 1994, there seems to be a recurrence of her symptoms. It is my opinion [t]he cause effect relationship is obvious for psychological factors affecting her physical limitations. There is no doubt that [appellant’s] previous injury contributes to most of her current dysfunction.”

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<sup>3</sup> This report contains a typographical error in that the physician mistakenly put the year “1996” instead of “1997.”

<sup>4</sup> An attending Board-certified psychiatrist.

In a nonmerit letter dated March 14, 1997, the Office denied appellant's request for reconsideration.

In a letter dated March 18, 1997, appellant again requested reconsideration of the denial of her recurrence claim.

By decision dated May 19, 1997, the Office vacated its October 23, 1996 decision denying her claim for a recurrence of disability commencing June 18, 1996. The Office relied upon the December 1, 1995 report by Dr. Melvin Goldin<sup>5</sup> and a January 16, 1997 report by Dr. Jean-Pierre as well as the fact that the record contained no valid job offer which included a list of job duties and physical requirements in the record to find that appellant had met her burden of proof to establish a recurrence of disability due to her accepted October 7, 1994 employment injury. The Office also noted that there was no evidence supporting that her disability had ceased.

By letter dated May 19, 1997, the Office informed appellant that her claim had been accepted for a recurrence of disability commencing June 18, 1996 and advised her to submit a completed Form CA-7 or CA-8 if she wished to claim compensation or repurchase leave. The Office also advised appellant that any request for compensation must include medical evidence establishing her disability for the time claimed.

In an arbitrator's decision dated May 24, 1997, the arbitrator found that the employing establishment properly terminated appellant's employment based on her threats of violence to her fellow employees.

By letter dated July 1, 1997, the employing establishment indicated that appellant had been on limited duty at the time she was put in a nonpay status unrelated to her accepted employment injury. Furthermore, the employing establishment stated that had appellant not removed herself from employment due to her threats of violence that she would have continued in the limited-duty work.

On July 22, 1997 the Office issued a loss of wage-earning capacity decision. The Office noted that appellant had been reemployed in a limited-duty assignment effective March 11, 1996. The Office determined that appellant had no loss of wages in her limited-duty position.

By decision dated July 22, 1997, the Office denied appellant's claim for compensation for lost wages from June 18, 1996 and continuing as appellant was suspended from her position on June 18, 1996 for violent threats and not because she was unable to perform her light-duty job.

Appellant requested an oral hearing in a letter dated July 26, 1997 which was held on March 4, 1998. Appellant both in her letter and at the hearing referred to the May 19, 1997 decision accepting her recurrence claim.

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<sup>5</sup> A second opinion physician Board-certified in child and adolescent psychiatry and psychiatry.

By decision dated May 8, 1998, the Office hearing representative affirmed the July 22, 1997 decision denying appellant's claim for lost wages. The Office hearing representative also found that medical evidence of record "established that the claimant was working within her restrictions and would have continued to do so even if she was asked to drive" and that appellant would have continued working in her light-duty position, but for the threats of violence to fellow employees. Thus, the Office hearing representative found that appellant had failed to meet her burden of proof to establish that she could not perform the light-duty position or that the requirements of the light-duty position changed.

The Board finds that appellant has not established that she was totally disabled due her accepted October 7, 1994 employment injury on and after June 18, 1996.

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.<sup>6</sup> To satisfy its burden, the Office cannot merely second-guess the initial set of adjudicating officials but must establish through new evidence, legal arguments or rationale, that its acceptance was erroneous.<sup>7</sup>

The Board has upheld the Office's authority under 5 U.S.C. § 8128(a) to reopen a claim at any time on its own motion and, where supported by the evidence, set aside or modify a prior decision and issue a new decision.<sup>8</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>9</sup> It is well established that once the Office accepts a claim, it has the burden of justifying termination or modification of compensation.<sup>10</sup> This holds true where, as here, the Office later decides that it has erroneously accepted a claim for compensation. 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>11</sup>

In the instant case, the Office originally accepted appellant's recurrence claim based upon December 1, 1995 report by Dr. Goldin and a January 16, 1997 report by Dr. Jean-Pierre. In a letter dated May 19, 1997, the Office advised appellant that she needed to submit medical evidence supporting a causal relationship between any disability and her accepted injury.

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<sup>6</sup> *Gareth D. Allen*, 48 ECAB 438 (1997); *Daniel E. Phillips*, 40 ECAB 1111, 1119 (1989); *petition on recon. denied*, 41 ECAB 201 (1989).

<sup>7</sup> *Id.*

<sup>8</sup> *Eli Jacobs*, 32 ECAB 1147, 1151 (1981).

<sup>9</sup> *Shelby J. Rycroft*, 44 ECAB 795 (1993). *Compare Lorna R. Strong*, 45 ECAB 470 (1994).

<sup>10</sup> *See Frank J. Meta, Jr.*, 41 ECAB 115, 124 (1989); *Harold S. McGough*, 36 ECAB 332, 336 (1984).

<sup>11</sup> *Laura H. Hoexter (Nicholas P. Hoexter)*, 44 ECAB 987 (1993); *Alphonso Walker*, 42 ECAB 129, 132-33 (1990); *petition for recon. denied*, 42 ECAB 659 (1991); *Beth A. Quimby*, 41 ECAB 683, 688 (1990); *Roseanna Brennan*, 41 ECAB 92, 95 (1989); *Daniel E. Phillips*, 40 ECAB 1111, 1118 (1989), *petition for recon. denied*, 41 ECAB 201 (1990).

However, after accepting the claim on May 19, 1997, in finding that appellant had established a recurrence of disability, the Office by decision dated July 22, 1997 and which was affirmed by a hearing representative by decision dated May 8, 1998, found that appellant was not entitled to wage-loss compensation. In the May 8, 1998 decision, the Office hearing representative found that appellant had failed to meet her burden of proof to establish that she had been disabled from performing her light-duty job due to her employment injury or that the position requirements of the light duty had changed. The Office hearing representative found that appellant was not performing her light-duty job based on her suspension and subsequent termination, by the employing establishment due to her threats of bodily violence on June 18, 1996. In addition, the hearing representative found that appellant would still be performing her light-duty job, but for her threats of violence against her fellow employees. The evidence of record establishes that the employing establishment suspended appellant on June 18, 1996 due to threats of violence, that she had received light-duty assignments during the period June 15, 1995 through July 13, 1996 and the employing establishment verified that light-duty work was still available.

In the May 8, 1998 decision, the Office hearing representative made no mention of the Office's May 19, 1997 decision vacating a prior decision rejecting appellant's recurrence claim and the acceptance of her recurrence of disability. The Board notes that the Office effectively rescinded its earlier acceptance of the claim for recurrence of disability.<sup>12</sup>

The Board finds that the Office provided sufficient new legal argument and new evidence to justify its rescission of appellant's recurrence claim by arguing that the requirements of appellant's light-duty position had not changed, that appellant would still be performing the light-duty position but for her suspension for threats of bodily harm against fellow employees and that the position was still available for appellant.<sup>13</sup> Following the May 19, 1997 decision, the employing establishment forwarded documentation establishing that appellant was removed from her light duty due to her misconduct. The Board finds that the evidence of record supports that appellant's lost wages were due to her suspension and subsequent termination, due to threats of bodily harm against fellow employees, matters that were not reflected in the Office's May 19, 1997 decision. In addition, the prior decision had been based in part upon the December 1, 1995 report by a second opinion physician, Dr. Goldin<sup>14</sup> and a January 16, 1997 report by Dr. Jean-Pierre and that there was no contrary medical evidence establishing that appellant's disability had ceased in the record. However, Dr. Goldin's opinion predated appellant's claimed recurrence of disability. Also, Dr. Jean-Pierre attributed appellant's disability to her hospitalization and conflict with management at the employing establishment, which are not due to her accepted conditions.

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<sup>12</sup> See *Ausbon Johnson*, 50 ECAB \_\_\_\_ (Docket No. 97-1567, issued March 19, 1998) (where the Board found that the Office effectively rescinded an earlier acceptance of right ear hearing loss claim).

<sup>13</sup> See *John W. Normand*, 39 ECAB 1378 (1988) (where the Board found that the claimant was not disabled within the meaning of the Act where employment within his work restrictions was terminated due to his misconduct and where there was no evidence that appellant was terminated due to a physical inability to perform assigned duties).

<sup>14</sup> A second opinion physician Board-certified in child and adolescent psychiatry and psychiatry.

The decision of the Office of Workers' Compensation Programs dated May 8, 1998 is hereby affirmed.

Dated, Washington, D.C.  
June 21, 2000

David S. Gerson  
Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member