

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RITA M. PLATA and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, Dallas, TX

*Docket No. 99-535; Submitted on the Record;
Issued June 27, 2000*

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs met its burden of proof in rescinding acceptance of appellant's claim.

On April 27, 1998 appellant, then a 34-year-old staff nurse, filed a notice of occupational disease and claim for compensation, Form CA-2, alleging that, on April 14, 1998, she realized that her abdominal hernia was causally related to her employment. By letter dated May 4, 1998, the employing establishment controverted the claim.

In response to the Office's request for more information, appellant submitted an April 14, 1998 treatment note and a May 18, 1998 report from Dr. Lawrence S. Barzune, a Board-certified internist, who was also appellant's treating physician. Dr. Barzune noted that appellant presented to him on April 14, 1998 with severe abdominal pain and based on examination, diagnosed a ventral hernia. He indicated that, "prior to the development of the symptoms and findings, she had been moving a morbidly obese patient at work ... [s]ince she was initially [seen] on April 14, 1998, she has continued to have more pain with some enlargement of the hernia." Dr. Barzune recommended surgery for hernia repair noting that "the demands of her job are such that unless this repair is done, she will be at risk for all the problems related to abdominal wall hernias."

In a May 24, 1998 statement, appellant described the employment duties, which allegedly caused her hernia. She explained that, as a registered nurse on the intermediate and rehabilitation care unit, lifting, pushing and pulling comprised most of her daily duties. Appellant further stated that she recently started treating morbidly obese patients who required total assistance for toileting and mobility. She indicated that nurses were trained to use lifting devices but that "after we position the patient on the devices pulling and pushing is required." The employing establishment continued to dispute the claim and argued that the ventral hernia was caused by appellant's prior nonwork-related gastric bypass surgery. In letters dated June 1 and 5, 1998 and received by the Office on June 10, 1998, the employing establishment contested

appellant's assertion that she was required to lift patients without assistance from others or without the use of mechanical devices for lifting.

By letter dated June 12, 1998, the Office accepted appellant's claim for ventral hernia and authorized medical benefits.

On July 9, 1998 the Office referred appellant's case record along with a statement of accepted facts to the Office medical adviser to determine whether hernia surgery should be authorized. In a report dated July 10, 1998, the Office medical adviser indicated that his answers were based on a review of the statement of accepted facts and appellant's record. The Office medical adviser set forth his findings as follows:

"The proposed surgery is for an incisional hernia that developed nine months after gastric bypass surgery. In my opinion, the incisional hernia has developed as a complication of the gastric bypass surgery. After review of the chart, it is my opinion that there has been no more aggravation from the job than there would be from the regular activities of daily living."

The Office medical adviser also indicated that the working conditions noted by the employing establishment did not denote excessive lifting.

By decision dated June 12, 1998, the Office rescinded acceptance of appellant's claim based on the Office medical adviser's report. The Office noted that Dr. Barzune did not provide any direct causal relationship between appellant's hernia and the factors of employment.

The Board finds that the Office improperly rescinded its acceptance of appellant's claim.

Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits. Under such circumstances, the Office must establish either that its original determination was erroneous or that the employment-related disability has ceased. In order to rescind prior acceptance of a claim, the Office must establish that its prior acceptance was erroneous through new or different evidence.¹

In *Daniel E. Phillips*,² the Board held that, in order to rescind its prior acceptance of a claim, the Office "must establish that its prior acceptance was erroneous through new or different evidence and that it is not merely second guessing the initial set of adjudicating officials."³ In *Roseanna Brennan*,⁴ the Board indicated that the Office was obliged to introduce "new evidence, legal arguments and rationale which justify its rescission" of the prior acceptance of a claim.⁵ More recently, in *Beth A. Quimby*,⁶ the Board stated that, in order "to justify a

¹ *Laura J. Womack*, 42 ECAB 528 (1991); *see also Major W. Jefferson, III*, 47 ECAB 295 (1996).

² 40 ECAB 1111, 1118 (1989); *petition for recon. denied*, 41 ECAB 201 (1989).

³ *Id.* at 1117-18 (1989).

⁴ 41 ECAB 92 (1989); *petition for recon. denied*, 41 ECAB 371 (1990).

⁵ *Id.* at 92, 96 (1989).

rescission of acceptance of a claim, the Office must show that it based its decision on new evidence, legal argument and/or rationale.”

In the present case, the Board finds that there is a conflict between Dr. Barzune, appellant’s attending physician and the Office medical adviser.⁷ Dr. Barzune found that appellant’s abdominal hernia was caused by her lifting and moving patients at work. The Office medical adviser opined that appellant’s hernia developed as a complication of gastric bypass surgery. The Board finds that the reports of Dr. Barzune and the Office medical adviser are of virtual equal weight and rationale and provide conflicting medical opinions regarding the cause of appellant’s ventral hernia. Based on the unresolved conflict in the instant case, the Office failed to meet its burden of proof to rescind the acceptance of appellant’s claim.

The decision of the Office of Workers’ Compensation Programs dated June 12, 1998 is hereby reversed.

Dated, Washington, D.C.
June 27, 2000

David S. Gerson
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

⁶ 41 ECAB 683, 688 (1990).

⁷ 5 U.S.C. § 8123.