

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JOSE ROMERO and DEPARTMENT OF THE NAVY,  
MARINE CORPS LOGISTICS BASE, Barstow, CA

*Docket No. 00-605; Submitted on the Record;  
Issued November 16, 2001*

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DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,  
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof to rescind acceptance of appellant's cervical injury; and (2) whether the Office properly denied appellant's request for reconsideration without merit review of the claim.

On April 2, 1998 appellant filed an occupational disease claim (Form CA-2) alleging that he sustained a cervical spine compression causally related to his federal employment as a rigger. Appellant noted on the claim form that he had a prior injury on February 11, 1994 to his back while pulling a hydraulic cylinder.<sup>1</sup> By letter dated June 2, 1998, the Office advised appellant that it had accepted the claim for cervical herniated disc.

In a letter dated July 30, 1998, the Office advised appellant that it proposed to rescind acceptance of the herniated cervical disc because new medical evidence showed that appellant did not have an employment-related cervical condition. By decision dated September 15, 1998, the Office rescinded acceptance of the claim. In a decision dated August 16, 1999, The Office determined that appellant's request for reconsideration was insufficient to warrant further merit review.

The Board finds that the Office did not meet its burden of proof to rescind acceptance of the claim.

The Board has upheld the Office'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.<sup>2</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

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<sup>1</sup> OWCP File No. 13-1039741. The Office accepted that appellant sustained a lumbar strain and an L4-5 herniated disc.

<sup>2</sup> *Eli Jacobs*, 32 ECAB 1147 (1981).

manner provided by the compensation statute.<sup>3</sup> It is well established that once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. This holds true where 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 or rationale.<sup>4</sup> In establishing that its prior acceptance was erroneous, the Office is required to provide a clear explanation of its rationale for rescission.<sup>5</sup>

In this case, the Office accepted a herniated cervical disc.<sup>6</sup> With respect to rescission, the Office indicated that it relied on evidence from appellant's February 11, 1994 employment injury (File No. 13-1039741). The Office found that this evidence established that appellant did not have an employment-related cervical condition. Although the Office notes several items from that file, the only medical evidence on causal relationship of the cervical condition referred to is a report dated March 23, 1998 from Dr. Thomas Dorsey, an orthopedic surgeon. Dr. Dorsey was a second opinion referral physician who was asked to provide a report on appellant's continuing lumbar condition. He noted in his summary that appellant "has presented on a nonindustrial basis for cervical spine MRI (magnetic resonance imaging), which showed some spinal cord compression at C4-5. I see no evidence of a claim related to neck pain as a result of the work injury." The Board notes that appellant had not yet filed his claim for a neck injury at the time of this report, and Dr. Dorsey was not asked to render an opinion with regard to a cervical condition. His brief statements on this issue are of limited probative value.

In addition, appellant submitted new evidence after acceptance of his claim. In a report dated August 10, 1998, Dr. Wilbur C. Sanford, a neurologist, noted findings of spinal compression at C5-6 and opined that "the neck injury is a result of [appellant's] industrial accident of February 11, 1994. I believe [appellant] injured his neck by the pulling and tugging of an eight-foot strap attached to the 1,500-pound hydraulic cylinder."<sup>7</sup> The Office found this report to be lacking in medical rationale. However, the Board notes that Dr. Dorsey's report also lacks rationale and detail with respect to an employment-related cervical condition. It is the Office that has the burden of proof to rescind acceptance of the claim. The Board finds that the evidence submitted after June 2, 1998 is not sufficient to establish that the acceptance of the claim was erroneous.

In view of the Board's finding, the denial of reconsideration is moot.

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<sup>3</sup> *Doris J. Wright*, 49 ECAB 230 (1997); *Shelby J. Rycroft*, 44 ECAB 795 (1993).

<sup>4</sup> *Curtis Hall*, 45 ECAB 316, 322 (1994).

<sup>5</sup> *Alice M. Roberts*, 42 ECAB 747 (1991).

<sup>6</sup> It is not clear on what basis the Office accepted the claim. The Office states in the September 15, 1998 decision that "there never was any probative evidence" submitted with the original claim. Once the Office accepts the claim, however, it must rely on new evidence or legal argument to show the acceptance was erroneous.

<sup>7</sup> Dr. Sanford also submitted a form report (Form CA-20) dated June 30, 1998 diagnosing herniated C4-5 disc, stenosis and cervical spondylosis; he checked a box "yes" on causal relationship.

The decisions of the Office of Workers' Compensation Programs dated August 16, 1999 and September 15, 1998 are reversed.

Dated, Washington, DC  
November 16, 2001

Michael J. Walsh  
Chairman

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member