

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES C. BURY and U.S. POSTAL SERVICE,
GENERAL MAIL FACILITY, Brooklyn, NY

*Docket No. 03-596; Submitted on the Record;
Issued April 24, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to rescind acceptance of a recurrence of disability commencing August 12, 1998.

This case was before the Board on a prior appeal. In a decision dated February 8, 2002, the Board reversed a January 19, 2001 Office decision. As the Board noted, the Office accepted a recurrence of disability on August 12, 1998 as an aggravation of cervical and lumbar sprain. The January 19, 2001 Office decision purported to deny the claim for a recurrence of disability; the Board found that, if the Office intended to rescind the acceptance, it should have properly identified the issue and made appropriate findings. The history of the case is discussed in the Board's prior decision and is incorporated herein by reference.

In a decision dated November 21, 2002, the Office rescinded acceptance of a recurrence of disability. The Office found that the weight of the medical evidence was represented by a June 1, 1999 report by Dr. J. Mervyn Lloyd, an orthopedic surgeon selected as a second opinion physician.

The Board finds that the Office did not meet its burden of proof in this case.

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.¹ 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.² It is well established that once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. This holds

¹ *Eli Jacobs*, 32 ECAB 1147 (1981).

² *Doris J. Wright*, 49 ECAB 230 (1997); *Shelby J. Rycroft*, 44 ECAB 795 (1993).

true where the Office later decides that it has erroneously accepted a claim for compensation.³ In establishing that its prior acceptance was erroneous, the Office is required to provide a clear explanation of its rationale for rescission.⁴

In this case, the Office cited the June 1, 1999 report from Dr. Lloyd as the weight of the medical evidence. Although this report is new evidence, since it was received after the Office accepted a recurrence of disability by letter dated December 4, 1998, it does not constitute probative evidence that the Office erroneously accepted a recurrence of disability on August 12, 1998. Dr. Lloyd opined that appellant had fully recovered from the August 1, 1996 employment injury at the time of his examination on June 1, 1999. While this may be relevant to a termination of compensation, it does not show error in the acceptance of a recurrence of disability. Dr. Lloyd notes in his history that appellant had stopped working as of August 12, 1998 and had a recurrence of his lower back problems. The physician does not dispute that there was a recurrence of disability or provide an opinion on causal relationship between a disabling condition as of August 12, 1998 and appellant's federal employment. It is not, therefore, sufficient to establish error in the acceptance of a recurrence of disability.

The Office failed to cite new evidence showing that the acceptance of aggravation of cervical and lumbar sprains, and a recurrence of disability on August 12, 1998, was erroneous. The Office therefore did not meet the burden of proof in this case.

The decision of the Office of Workers' Compensation Programs dated November 21, 2002 is reversed.

Dated, Washington, DC
April 24, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member

³ See 20 C.F.R. § 10.610.

⁴ *Alice M. Roberts*, 42 ECAB 747 (1991).