United States Department of Labor
Employees' Compensation Appeals Board

CARY S. BRENNER, Appellant	)	
	)	**Docket No. 04-1117**
and	)	**Issued: September 30, 2004**
NEW YORK CITY POLICE DEPARTMENT, New York, NY, Employer	)	

Appearances:
Thomas S. Harkins, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On March 22, 2004 appellant filed a timely appeal of a decision dated January 30, 2004, in which the Office of Workers' Compensation Programs denied modification of a November 14, 2002 decision, affirming the rescission of appellant's compensation benefits on the grounds that he was not a civil employee under the Federal Employees' Compensation Act. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[1]

ISSUE

The issue is whether the Office met its burden of proof to rescind appellant's compensation benefits on the grounds that he was not a civil employee under the Act.

[1] The record further contains a February 26, 2004 decision in which the Office approved attorney's fees. An appeal has not been filed with the Board regarding this decision.

FACTUAL HISTORY

On August 3, 1998 appellant, then a 51-year-old detective with the New York City Police Department (NYPD), filed a Form CA-1 traumatic injury claim, alleging that on January 26, 1998 he was injured while operating a motor vehicle belonging to the Federal Bureau of Investigation (FBI).[2] He sustained a low back injury when the car was struck from the rear. Appellant related that he had emergency room treatment that day. A witness, Gerald LaRocco, also an NYPD detective, confirmed the incident and stated that they were going to a meeting with Assistant U.S. Attorney Bridgette Rohde pursuant to an FBI case.

Appellant submitted a Certificate of Deputation, indicating that he was a Special Deputy U.S. Marshal for the period March 24, 1998 through March 31, 1999 and a sworn affidavit titled Oath of Office and Credential -- Special Deputation dated March 24, 1998 attesting that he would "faithfully execute all lawful precepts directed by the United States Marshal for the Eastern District of New York or to the appropriate Federal official so designated...." The affidavit further stated that the appointment was valid only while performing duties as assigned by the U.S. Attorney, Eastern District of New York and was signed by appellant, as appointee, and Lawrence C. Parker, acting chief deputy, for the U.S. Marshals Service.

By letter dated July 29, 1998, the National Office requested that appellant furnish additional information regarding the accident to determine if he was a civil "employee" as defined by section 8101 of the Act and the Intergovernmental Personnel Act (IPA).[3]

By decision dated September 14, 1998, the Office found that appellant was not an "eligible officer" as defined by section 8191 of the Act.[4]

Appellant's records were combined and the claim was adjudicated by the National Office to determine coverage under section 8101.

Additional evidence submitted included a NYPD line-of-duty injury report stating that appellant was performing his designated tour, conducting an investigative assignment in the vehicle belonging to the FBI when it was struck from the rear, after which he was taken to the hospital and cervical tissue damage was diagnosed. An NYPD statement entitled "Injury to a Member of the Department" was provided by Mr. LaRocco, who advised that appellant was driving and he, FBI agent Janet Engel and Assistant District Attorney Gregory Pavilides, were riding in the vehicle when the accident occurred. An accident report dated January 26, 1998, which provided details regarding the accident was also submitted. A February 11, 1998 NYPD memorandum, signed by Lieutenant Kenneth W. Rosello, advised that at the time of the January 26, 1998 accident appellant was assigned to the Queens District Attorney's Office

[2] The record reflects that appellant submitted claim forms to the district and national Offices to protect his rights under both section 8191 and section 8101.

[3] 5 U.S.C. § 3371, *et seq.*

[4] The Office found that appellant was not engaged in the apprehension or attempted apprehension of any person for the commission of a crime against the United States. Appellant did not seek further review of this determination.

Squad. Lieutenant Rosello requested an amendment to appellant's line-of-duty injury and advised that the Federal Employees' Compensation Act should be applicable to the injury.

Appellant submitted medical evidence dating from February 4 to October 8, 1998. He came under the care of Dr. Francis J. Lanzone, an orthopedic surgeon.

A telephone conference was held on November 19, 1998 between an Office claims examiner and appellant to determine if his assignment came under the provisions of the IPA in accordance with the Act. Appellant was assigned to the federal agency since December 1997, the NYPD paid his salary and he received New York state workers' compensation benefits and his medical bills had been paid. Regarding the amount of time he spent working with the federal agency, appellant responded that he attended regularly scheduled meetings on Monday and performed other tasks discussed at the meetings such as surveillance and debriefing of informants. He indicated that he spent a "considerable" amount of time working with the federal agency. In response to a question of whether the federal government would reimburse the NYPD, appellant responded that "they could but we never request it." He stated that his immediate supervisor was Lieutenant Rosello with NYPD and that Bob Hart was the federal supervisor of the task force.

On November 20, 1998 a telephone conference was held between the Office's claims examiner and Mr. Hart with the FBI. Mr. Hart disagreed that there was a formal agreement between the FBI and the NYPD, advising that appellant was not assigned to the FBI. He explained that when it was in the best interest of more than one agency, such as the FBI and the Queens District Attorney, to pursue an investigation, an informal relationship was created. There was no written agreement and there were no transfers between agencies, but they worked together, perhaps on a daily basis. Regarding the case appellant was working on, Mr. Hart stated that it had been decided that the federal government would prosecute. He concluded that five NYPD officers were assigned to work with him and were deputized.

A second telephone conference between the claims examiner and appellant was held on November 23, 1998, at which time appellant stated that he had been deputized by the U.S. Marshals Service. The claims examiner stated that she had telephoned Ms. Rohde of the U.S. Attorney's Office, who confirmed that appellant was deputized by the U.S. Marshals Service. Appellant stated that the investigation began with his partner in 1995 and later merged with an FBI investigation in December 1997. He stated that Ms. Rohde informed them that they would have to be deputized to enforce the U.S. Code. When asked why appellant was not deputized until March 24, 1998, he replied there was a delay in processing the paperwork.

On November 25, 1998 the Office determined that appellant had been assigned to a federal agency and accepted that on January 26, 1998 he sustained herniated discs while in the performance of federal duties. The Office explained that appellant would have to elect coverage between state benefits and the Federal Employees' Compensation Act. On December 1, 1998 he elected the coverage under the Federal Employees' Compensation Act.

On February 25, 2000 appellant's disability retirement from the City of New York was approved and on May 11, 2000 he filed a claim for a schedule award. By letter dated May 30, 2000, the Office again informed appellant that he had to elect between state and federal benefits

and requested that he furnish information regarding his disability retirement benefits from the NYPD. In a letter dated June 6, 2000, appellant furnished information regarding his retirement benefits. An Office memorandum dated January 17, 2001 indicated that it continued to pay appellant's medical bills. By letter dated March 22, 2001, the Office advised appellant that he could not receive retirement benefits from a local agency and benefits under the Act and informed him that he would be entitled to compensation of $3,626.20 each 28 days under the Act. By letter dated April 2, 2001, appellant requested clarification. On April 6, 2001 the FBI requested a copy of the case record. On May 9, 2001 the FBI called the Office inquiring about the case.

In a September 4, 2001 letter, the Office informed appellant that it proposed to rescind the acceptance of his claim for compensation benefits. The Office stated that as a result of an inquiry by the FBI, a complete review of his file was undertaken with further research into the IPA, Department of Justice (DOJ) policies and those of the Office of Personnel Management (OPM). The Office referenced the November 20, 1998 telephone conference with Mr. Hart and sections 3372 and 3374 of the IPA which codifies the requirements regarding assignment of employees between federal agencies and local governments. The Office stated that the evidence of record did not support that the NYPD and the FBI had entered into an agreement in his case, rather that the NYPD was working in conjunction with the FBI to their mutual benefit and the record did not reflect that there was an agreed period for assignment as prescribed in section 3372. The Office further referenced the February 11, 1998 NYPD memorandum in which Lieutenant Rosello advised that appellant was assigned to the Queens District Attorney's Office Squad at the time of the January 26, 1998 motor vehicle accident and concluded that appellant was not a civil employee under the Act on January 26, 1998 as he was working in his capacity as a detective with the NYPD conducting a joint investigation with the FBI. He was thus, not entitled to coverage under the Federal Employees' Compensation Act.

By letter dated September 11, 2001, appellant contested the proposed rescission, stating that at the time of the January 26, 1998 accident he was on a joint task force with the FBI and as he had been deputized by the U.S. Marshals Service, a formal agreement existed. He forwarded copies of his special deputation identification cards issued by the U.S. Marshals Service.

In a decision dated March 20, 2002, the Office finalized rescission of the acceptance of appellant's claim, effective that day.

On May 10, 2002 appellant requested a review of the written record. By decision dated November 14, 2002, an Office hearing representative affirmed the March 20, 2002 decision, finding that as no formal agreement existed between the NYPD and the FBI, appellant was not a civil employee under section 8101 of the Act.

On September 30, 2003 appellant requested reconsideration and his attorney contended that appellant was a civil employee as defined by the IPA. He noted that appellant had been assigned to the FBI in December 1997, devoted 40 hours a week to the joint investigation and had been deputized, that at the time of the January 26, 1998 accident, he was driving a vehicle owned by the FBI and was going to a regularly scheduled meeting at the U.S. Attorney's Office. The attorney contended that sections 3372 and 3374 of the IPA did not preclude appellant's

coverage under the Act, as he was "clearly" assigned to the FBI. He also submitted evidence previously of record.

By decision dated January 30, 2004, the Office denied modification of the November 14, 2002 decision, again finding that appellant was merely working in conjunction with the FBI on one investigation.

LEGAL PRECEDENT

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.[5] 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.[6] 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.[7] To support rescission of acceptance of a claim, the Office must show that it based its decision on new evidence, legal argument and/or rationale.[8]

For purposes of determining entitlement to compensation benefits under the Act, an "employee" is defined, in relevant part, as a "civil officer or employee in any branch of the Government of the United States, including an officer or an employee of an instrumentality wholly owned by the United States."[9]

The Intergovernmental Personnel Act permits temporary assignments between eligible governments and institutions in the federal government.[10] Section 3374 of the IPA delineates the procedures to be followed when employees from state or local governments are assigned to the federal government. It provides that an "appointment" be made[11] and that an employee so appointed and who suffers disability as a result of a personal injury sustained while in the performance of his duty during the assignment "shall be treated ... as though he were an employee as defined by section 8101."[12] The implementing regulations of the IPA provide that before an assignment is made, "the assigned employee shall enter into a written agreement which

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[5] *Eli Jacobs*, 32 ECAB 1147 (1981).

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

[7] *See* 20 C.F.R. § 10.610.

[8] *Stephen N. Elliot*, 53 ECAB __ (Docket No. 01-363, issued July 12, 2002); *Roberto Rodriguez*, 50 ECAB 124 (1998).

[9] 5 U.S.C. § 8101(1)(a).

[10] 5 U.S.C. § 3371 *et seq.*

[11] 5 U.S.C. § 3374(a)(1).

[12] 5 U.S.C. § 3374(d).

records the obligations and responsibilities of the parties as specified in 5 U.S.C. §§ 3373-3375."[13]

Office procedures provide that to determine if a nonfederal law enforcement officer is considered a civil employee of the United States, a copy of the written agreement between the local government and federal agency should be obtained.[14] Relevant questions used to determine whether a claimant is a civil employee under the Federal Employees' Compensation Act include how long has the claimant been assigned to the federal agency; how much of the claimant's time is spent working with the federal agency, as opposed to the local agency; who pays the claimant's salary and, if paid by the local agency, is it reimbursed by the federal agency; was the claimant issued a federal agency identification card; who is the claimant's immediate superior and is this individual a federal employee?[15]

ANALYSIS

On November 25, 1998 the Office determined that appellant was a civil employee as defined by section 8101 of the Federal Employees' Compensation Act and accepted that he sustained herniated discs at L1-2 and L5-S1, bulging discs at L3-4 and L4-5 and aggravation of degenerative disc disease of the cervical spine. In a decision dated March 20, 2002 the Office rescinded acceptance of appellant's claim.

The Board finds that the Office properly considered a new rationale to support the rescission of acceptance in appellant's claim in that, as a result of an inquiry by the FBI, a complete review of appellant's file was undertaken. The Office then conducted further research into the IPA, DOJ policies and those of the OPM in determining that appellant's claim had been accepted in error.

As noted above, section 3374 of the IPA explains that for coverage under the IPA, an appointment must be made[16] and the implementing regulations provides that the assigned employee shall enter into a written agreement.[17] Office procedures contemplate that a written agreement is made and provides further guidance for determination of coverage under the IPA.[18] At the time of the January 26, 1998 motor vehicle accident, appellant was an NYPD detective assigned to the Queens County District Attorney's office who was performing his usual tour of duty. When the accident occurred, appellant was driving an FBI vehicle on his way to a meeting with an Assistant United States Attorney, and was a member of a joint task force composed of the NYPD and FBI investigating automobile crimes. The record establishes that appellant was

[13] 5 C.F.R. § 334.106(a).

[14] Federal (FECA) Procedure Manual, Part 4 -- Compensation Benefits, *Nonfederal Law Enforcement Officers*, Chapter 4.200.10(a) (September 1994).

[15] *Id.* at 4.200.10(a)(1)-(5).

[16] *Supra* note 11.

[17] *Supra* note 13.

[18] *Supra* note 14.

not formally assigned to any federal agency and his salary was paid by the NYPD. Although appellant was deputized by the U.S. Marshals Service, this was not done until March 24, 1998, following the January 26, 1998 accident. There is no documentation of any written agreement made assigning appellant to any federal agency. Mr. Hart of the FBI advised that, appellant was not assigned to the FBI and there was no formal agreement between the NYPD and the FBI. Rather, an informal relationship existed with no written agreement in order that the two agencies could pursue a common investigation to their mutual benefit.[19]

The Board finds that the Office properly reopened appellant's claim for further review and determined that he was not a civil employee under the Act and not entitled to federal workers' compensation coverage.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 30, 2004 is affirmed.

Issued: September 30, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

[19] The Board further notes that DOJ procedures require that all IPA assignments be in writing.