

claim for benefits, which was accepted for cervical strain, right ankle strain, contusion of the right arm and left arm pyarthrosis. By decisions dated August 4, 1999 and June 15, 2000, the Office denied appellant's claim for a schedule award. In a decision issued October 22, 2001,¹ the Board set aside the August 4, 1999 Office decision, finding that the reports of the physicians of record were of diminished probative value because they relied on a statement of accepted facts which was not accurate or complete. The Board found that the statement of accepted facts failed to indicate that appellant's left elbow pyarthrosis condition was accepted by the Office as a consequential injury; this was relevant to a determination of whether he had any permanent impairment because both physicians of record noted a left elbow impairment but found that his left arm condition was not work related. The Board, therefore, remanded for the Office to further develop the record to resolve the remaining issues pertaining to whether appellant is entitled a schedule award.

The Office referred the case to Dr. Paul C. Liebrecht, a Board-certified orthopedic surgeon, who indicated in a March 7, 2002 report, that appellant had a measurable impairment in his left elbow, but stated that there was no causal relationship between his left elbow problems and his work-related motor vehicle accident. By decision dated May 14, 2002, the Office found that he was not entitled to a schedule award. In a January 17, 2003 decision,² the Board set aside the Office's May 14, 2002 decision. The Board found that the Office erred in relying on the opinion of Dr. Liebrecht, who disregarded an element of the statement of accepted facts; *i.e.*, that appellant had accepted left elbow condition, left elbow pyarthrosis in determining whether he was entitled to a schedule award based on the 1995 work injury. The Board remanded the case to the district Office and instructed the Office to refer him to a new medical specialist to determine whether appellant sustained a permanent impairment causally related to his February 1995 employment injury. The complete facts of this case are set forth in the Board's January 17, 2003 decision and are herein incorporated by reference.

In its March 4, 2003 letter to the new medical specialist, the Office posed the question, "As noted on the statement of accepted facts the Office accepted the claimant's left pyarthrosis. *However, the medical evidence indicates otherwise.* Upon your review of attached medical evidence and statement of accepted facts, please provide an explanation as to if the February 1995 motor vehicle accident caused this condition." [Emphasis added]. The Office referred appellant to Dr. Anbu Nadar, a Board-certified orthopedic surgeon, who submitted a May 6, 2003 report which indicated that appellant no longer had residuals from any of his accepted conditions. He answered the query posed by the Office in its referral letter, above, by stating:

"From the records provided, I cannot unequivocally say [that] the left pyarthrosis is related to the February 1995 accident. As, the first time, any mention of left elbow complaints was mentioned by Dr. McKain on June 27, 1995. [Appellant] did develop septic arthritis of his left elbow but the etiology of which has not been fully determined from the records provided, it could possibly be bacterial seeding

¹ Docket No. 00-2206 (issued October 22, 2001).

² Docket No. 02-2189 (issued January 17, 2003).

from the pneumonia. So, in my opinion, the left elbow pathology is less likely related to the motor vehicle accident.”

By decision dated June 2, 2003, the Office denied appellant’s request for a schedule award.

By decision dated November 17, 2003, the Office terminated appellant’s compensation benefits.

On November 25, 2003 appellant requested an oral hearing.

By decision dated January 20, 2004, an Office hearing representative, based on review of the written record, affirmed the June 2, 2003 Office decision.

By letter dated March 8, 2004, appellant requested reconsideration.

By decision dated June 2, 2004, the Office denied appellant’s application for review on the ground that it neither raised substantive legal questions nor included new and relevant evidence sufficient to require the Office to review its prior decision.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees’ Compensation Act³ sets forth the number of weeks of compensation to be paid for permanent loss or loss, of use of the members of the body listed in the schedule. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage loss of use.⁴ However, the Act does not specify the manner in which the percentage of loss of use, of a member is to be determined. For consistent results and to insure equal justice under the law to all claimants, the Office has adopted the A.M.A., *Guides* (5th ed.) as the standard to be used for evaluating schedule losses.⁵

ANALYSIS -- ISSUE 1

In the present case, the Office committed reversible error in its March 4, 2003 referral letter to Dr. Nadar. In both its October 22, 2001 and January 17, 2003 decisions, the Board had specifically instructed the Office to refer appellant to a new medical specialist and include a condition of left pyarthrosis of the elbow in the statement of accepted facts so that the new specialist could determine whether he sustained a permanent impairment causally related to his February 1995 employment injury. In its March 4, 2003 letter, however, the Office again disregarded the Board’s instructions by stating that, although the left elbow condition was part of the statement of accepted facts, the medical evidence indicated otherwise. The Office, therefore, contravened the Board’s direct order -- stated in three consecutive Board decisions -- to include

³ 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C. § 8107(c).

⁴ 5 U.S.C. § 8107(c)(19).

⁵ 20 C.F.R. §10.404.

the accepted condition of left elbow pyarthrosis in the statement of accepted facts and have a medical specialist, on remand, consider the degree to which this condition affected appellant and determine whether it caused impairment sufficient to warrant a schedule award. The Office further erred by asking Dr. Nadar to provide his own explanation regarding whether his February 1995 motor vehicle accident could have caused this condition. He concurred that the left elbow condition was not related to the February 1995 work injury. This was a misstatement of the issue in this case, which was termination, not rescission of acceptance.⁶ Thus, Dr. Nadar's referral report is of diminished probative value and fatally flawed, as his opinion, like that of Dr. Liebrecht, disregarded a critical element of the statement of accepted facts and effected a rescission of the accepted condition, left elbow pyarthrosis.

Therefore, based on the repeated failure of the Office to abide by the statement of facts which stipulated that appellant's left elbow condition is causally related, the Board must once again set aside the Office's determination, the initial June 2, 2003 Office decision denying a schedule award which followed the Board's January 17, 2003 decision. On remand the Office will refer appellant to a new medical specialist, who will be instructed to provide a well-rationalized opinion -- relying on the statement of accepted facts -- to specifically determine the outstanding issue in the case, *i.e.*, whether he met his burden to establish that he sustained a permanent impairment causally related to his February 1995 employment injury, sufficient to establish that appellant is entitled to a schedule award and to clearly indicate the specific background upon which he based his opinion. After such development as it deems necessary, the Office shall issue a *de novo* decision.⁷

LEGAL PRECEDENT -- ISSUE 2

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.⁸ After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.⁹

⁶ The Board has upheld the Office's authority to reopen a claim at any time on its own motion under section 8128(a) of the Act and, where supported by the evidence, set aside or modify a prior decision and issue a new decision. *Eli Jacobs*, 32 ECAB 1147 (1981). 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 proved by the compensation statute. *Shelby J. Rycroft*, 44 ECAB 795 (1993). It is well established that once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. *See Frank J. Mela, Jr.*, 41 ECAB 115 (1989). 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. *See Laura H. Hoexter (Nicholas P. Hoexter)*, 44 ECAB 987 (1993). *See Sheila A. Johnson*, 46 ECAB 323 (1994).

⁷ As the Board has set aside the Office's merit decisions the nonmerit review decision need not be considered.

⁸ *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

⁹ *Id.*

ANALYSIS -- ISSUE 2

On June 2, 2003 the same date the Office denied appellant's claim for a schedule award based on his right elbow, the Office issued a proposed notice of termination. By decision dated November 17, 2003, the Office terminated benefits based on Dr. Nadar's May 6, 2003 report. The Office stated in this decision that, "your claim is only accepted for contusion of right elbow and forearm, right ankle sprain and neck sprain." For the reasons stated above in regard to appellant's claim for a schedule award, this finding constitutes reversible error. The Board has indicated herein that the Office, in its March 4, 2003 letter to Dr. Nadar, disregarded the Board's instructions by stating that, although the left elbow pyarthrosis condition was part of the statement of accepted facts, the medical evidence indicated otherwise. As previously noted, this constitutes rescission of acceptance, not termination of compensation. Since the Office based its November 17, 2003 termination decision on Dr. Nadar's flawed report which concurred that the left elbow condition was not related to the February 1995 work injury, the Office's termination decision must be reversed.

CONCLUSION

The Board finds that the case is not in posture for decision with regard to appellant's claim for a schedule award. The Board reverses the Office's November 17, 2003 termination decision.¹⁰

¹⁰ As the Board has remanded for the Office to reconsider the issue of whether appellant is entitled to a schedule award based on his accepted left elbow condition and in light of its reversal of the November 17, 2003 Office termination decision, it need not consider the issue of whether the Office properly refused to reopen his case for further review on the merits of his claim under 5 U.S.C. § 8128.

ORDER

IT IS HEREBY ORDERED THAT the January 20, 2004 decision of the Office of Workers' Compensation Programs be set aside and the case remanded to the Office for further action consistent with this decision of the Board. The November 17, 2003 Office termination decision is reversed.

Issued: November 28, 2005
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board