

**United States Department of Labor
Employees' Compensation Appeals Board**

T.S., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Richmond Heights, OH, Employer**

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**Docket No. 07-763
Issued: July 17, 2007**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 25, 2007 appellant filed a timely appeal of a February 4, 2007 decision of the Office of Workers' Compensation Programs, rescinding acceptance of his claim for a recurrence of disability on January 13, 2006. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether the Office met its burden of proof to rescind acceptance of appellant's recurrence of disability claim.

FACTUAL HISTORY

On April 11, 2002 appellant, then a 21-year-old mail carrier, filed a traumatic injury claim alleging that he injured his right elbow, right shoulder and right side. As he exited his delivery vehicle he struck his elbow on the door lock hinge. The Office accepted appellant's claim for a right elbow strain, sprain and contusion and a right shoulder strain and sprain. Appellant returned to full duty in August 2002.

On January 11, 2006 Dr. Curtis W. Smith, an attending orthopedic surgeon, provided findings on physical examination. He stated that appellant experienced an acute exacerbation of his right elbow pain but no new trauma. Dr. Smith released appellant to return to work the following day. However, on January 18, 2006 he stated that appellant was disabled from January 14 to February 15, 2006.

On January 18, 2006 appellant filed a claim for a recurrence of disability commencing January 13, 2006.

On February 8, 2006 Dr. Smith provided findings on physical examination and indicated that appellant's right elbow contusion "could" have produced an osteochondral defect and effusion as shown on a January 30, 2006 magnetic resonance imaging (MRI) scan. He indicated that appellant needed arthroscopic surgery.

On April 21, 2006 the Office accepted appellant's claim for a recurrence of disability on January 13, 2006.

In a report dated April 19, 2006, received by the Office on May 1, 2006, Dr. Karl V. Metz, a Board-certified orthopedic surgeon and an Office referral physician, provided findings on physical examination and a history of appellant's condition. He stated:

"Examination right shoulder: Range of motion -- flexion 95 degrees, extension 25 degrees, abduction 90 degrees, adduction 0 degrees, external rotation 45 degrees, internal rotation 50 degrees. There was no discoloration, swelling, scarring or increased warmth of the right shoulder. [Appellant] complained of moderate tenderness with palpation over the right superior trapezius, as well as anterior, lateral and posterior subacromial bursa. He also complained of moderate tenderness over the biceps tendon and the anterior capsule. There was no crepitation with active range of motion, however, [appellant's] motion was guarded and limited.

"The right arm was 0.5 [centimeters] smaller than the left on circumferential measurement.... Reflex testing of the right upper extremity was considered invalid because of guarding of the shoulder and elbow. Impingement maneuvers were attempted, but were invalid because of marked guarding of the shoulder. Motor testing and instability could not be adequately assessed because of guarding....

"Examination right elbow: Range of motion -- flexion 95 degrees, extension -50 degrees.... There was no discoloration, swelling, scarring, increased warmth or crepitation of the right elbow. [Appellant] would not permit adequate palpation of the elbow stating that it was 'too tender to touch.' Medial and lateral epicondyle by visualization, appeared comparable to the left, however, [appellant] would not permit palpation. On sensory assessment of the right upper extremity, [appellant] complained of altered sensation from the shoulder to the proximal forearm, but sensation was intact from that level to his hand. The right forearm

was one [centimeter] larger than the left on circumferential measurements. Motor testing and instability were not able to be assessed because of guarding.”

* * *

“The current definitive diagnos[e]s of [appellant’s] conditions include the allowed [accepted] conditions -- right elbow strain, right shoulder strain and right elbow contusion. In addition, it is my opinion that additional conditions exist concerning [appellant’s] right elbow which are based upon an MRI [scan] done on [January 30, 2006] and include joint space narrowing (degenerative arthritis), and osteochondral defect of the capitulum along with subchondral cyst formation of the capitulum and effusion of the right elbow.

“Radiographic studies revealed extensive degenerative arthritis of [appellant’s] right AC [acromioclavicular] joint, along with cuff tend[i]nitis. [His] current right shoulder debility, in my opinion, is related to those chronic conditions.”

* * *

“The medical record indicates that [appellant] returned to work in a full[-]duty capacity around [August 1, 2002], although [he] stated that he did not return to work for a year and a half after his injury. Based upon that information, it is my opinion, within reasonable certainty, that the [accepted] conditions -- right elbow strain, right shoulder strain and right elbow contusion had healed and were at MMI [maximum medical improvement] at the time of his return to work. This opinion is supported by radiographic studies which revealed no abnormalities of the right elbow other than a small olecranon spur and a small joint effusion of the elbow.”

* * *

“[Appellant’s] inability to return to full[-]duty status, in my opinion, is due to conditions unrelated to the [accepted] conditions of this claim.”

* * *

“In view of the fact that [appellant] returned to full duty following his original injury and radiographic studies failed to reveal any significant bony abnormality until almost four years following his injury of record, it is my opinion that other nonallowed [nonaccepted] conditions have evolved which are responsible [for appellant’s] current and ongoing complaints, as were identified in the MRI [scan] of [January 30, 2006]. Based upon this data, it is my opinion that the claim should not be expanded to include an effusion of the [right] elbow with osteochondral defect involving the capitulum.”

On May 23, 2006 the Office asked Dr. Smith for a report explaining how appellant’s current problems were causally related to his April 11, 2002 employment injury. On May 31,

2006 Dr. Smith diagnosed a contusion and strain of the right elbow and shoulder and stated that appellant's conditions were "the direct result of his industrial accident."

By decision dated June 23, 2006, the Office denied appellant's claim for a recurrence of disability on March 4, 2006.

On July 5, 2006 appellant requested a hearing that was held on November 6, 2006.

On February 4, 2007 the Office hearing representative modified the June 23, 2006 decision to find that the Office rescinded acceptance of appellant's claim for a recurrence of disability on January 13, 2006. The report of Dr. Metz established that appellant's right upper extremity conditions on January 13, 2006 were not causally related to his April 11, 2002 employment-related right elbow strain, sprain and contusion and right shoulder strain and sprain. The hearing representative affirmed the June 23, 2006 decision and modified it to reflect that the proper issue was rescission of acceptance of the January 13, 2006 recurrence of disability.¹

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.² 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.³ It is well established that once the Office accepts a claim, it has the burden of justifying termination or modification of compensation.⁴ This holds true where the Office later decides that it has erroneously accepted a claim for compensation.⁵ In establishing that its prior acceptance was erroneous, the Office is required to provide a clear explanation of its rationale for rescission.⁶

ANALYSIS

The Board finds that the Office properly rescinded acceptance of appellant's claim for a recurrence of disability on January 13, 2006 on the grounds that the evidence of record did not establish that the recurrence of disability was causally related to his accepted right upper extremity conditions sustained on April 11, 2002. In rescinding acceptance of the claim, the

¹ Subsequent to the February 4, 2007 Office decision, appellant submitted additional evidence. The Board's jurisdiction is limited to the evidence that was before the Office at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c). The Board may not consider this evidence for the first time on appeal.

² *See Andrew Wolfgang-Masters*, 56 ECAB ____ (issued March 22, 2005); *Linda L. Newbrough*, 52 ECAB 323 (2001); *see also* 20 C.F.R. § 10.610.

³ *Doris J. Wright*, 49 ECAB 230 (1997).

⁴ *Linda L. Newbrough*, *supra* note 2.

⁵ *Id.*; *Gareth D. Allen*, 48 ECAB 438 (1997).

⁶ *Delphia Y. Jackson*, 55 ECAB 373 (2004); *Belinda R. Darville*, 54 ECAB 656 (2003).

Office provided a clear explanation of its rationale for the rescission. It explained in detail how the comprehensive and well-rationalized April 19, 2006 report of Dr. Metz established that appellant's claimed recurrence of disability on January 13, 2006 was not causally related to the April 11, 2002 employment injury. The report of Dr. Metz was based upon a complete and accurate factual and medical background and detailed findings on physical examination. His report contained substantial medical rationale for his opinion. Dr. Metz stated that the accepted conditions, right elbow strain, right shoulder strain and right elbow contusion had healed as of appellant's return to full duty in August 2002. He explained that his opinion was supported by the radiographic studies in 2006 which revealed no abnormalities of the right elbow, other than a small olecranon spur and a small joint effusion of the elbow. Dr. Metz stated that the right elbow and shoulder conditions revealed in the January 30, 2006 MRI scan and in x-rays, joint space narrowing (degenerative arthritis) and osteochondral defect of the capitulum along with subchondral cyst formation of the capitulum and effusion of the right elbow and extensive degenerative arthritis of the right shoulder AC joint and cuff tendinitis were unrelated to appellant's 2002 injury. He stated that in view of the fact that appellant returned to full duty following his original injury and radiographic studies failed to reveal any significant bony abnormality until almost four years following his April 11, 2002 employment injury, it was his opinion that the conditions diagnosed in 2006 were not caused or aggravated by the April 11, 2002 right upper extremity conditions.

In contrast to Dr. Metz's report, Dr. Smith provided little rationale for his stated opinion. He stated that appellant's right elbow contusion "could" have produced an osteochondral defect and effusion as shown on a January 30, 2006 MRI scan. Dr. Smith stated that appellant's continuing problems with his right upper extremity were "the direct result of his industrial accident" but did not support his opinion with medical rationale explaining the basis for causal relationship.

The Board finds that the Office met its burden of proof to rescind its acceptance of appellant's recurrence of disability on January 13, 2006 based on the thorough and well-rationalized April 19, 2006 report of Dr. Metz which established that appellant's claimed recurrence of disability on January 13, 2006 was not causally related to his April 11, 2002 employment injury.

CONCLUSION

The Board finds that the Office met its burden of proof in rescinding its acceptance of appellant's January 13, 2006 recurrence of disability.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 4, 2007 is affirmed. The June 23, 2006 decision is affirmed, as modified, in the February 4, 2007 Office decision.

Issued: July 17, 2007
Washington, DC

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

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board