

Bradley vehicle. By letter dated May 29, 2009, the Office notified appellant that his claim for spinal stenosis of the lumbar region had been accepted.

In an accident form report dated January 21, 2009, Gwendolyn Wingfield, an employing establishment occupational health nurse, related that appellant sustained an injury on November 26, 2008 at approximately 4:00 p.m. while working on a temporary-duty assignment (TDY) at Fort Bragg, North Carolina. Appellant stepped out of the driver's hatch of a Bradley vehicle and fell backwards onto his buttocks. Ms. Wingfield stated that he went to the health clinic that afternoon and left for Blackstone, Virginia for the remaining 12 days of his TDY. Appellant returned to full-time, regular duty on December 15, 2008. Ms. Wingfield advised that he has not consulted a physician. She related that appellant had a history of preexisting back problems, including back surgeries in 2001 and 2005. Ms. Wingfield told him to complete a Form CA-1 for the November 26, 2008 injury and follow up on medical treatment.

In a report dated April 22, 2009, Dr. Bacharani C. Muthappa, appellant's treating physician and a specialist in family practice and general surgery, noted that appellant had sustained a back injury at work that day. Appellant had previously had two back surgeries and also injured his back in November 2008. Dr. Muthappa diagnosed a lumbar sprain and strain. In an April 28, 2009 report, he stated that he had examined appellant on April 22, 2009 for a back injury and found that he was unable to work. Dr. Muthappa recommended that appellant undergo a magnetic resonance imaging (MRI) scan and consult a neurologist before returning to work.

In a May 5, 2009 memorandum, Ann Harmon, the employing establishment workers' compensation specialist, controverted appellant's claim. She stated that the fact that appellant waited six months after the alleged November 26, 2008 injury to file a claim raised doubts as to whether it occurred, as alleged. Ms. Harmon noted that appellant had a significant history of back problems, including two surgeries, which raised further questions as to the relationship of the back condition to his employment.

The employing establishment provided medical evidence concerning appellant's preexisting back problems. In a May 14, 2001 history report, Dr. Ayaz H. Malik, Board-certified in neurosurgery, related that appellant experienced excruciating back pain radiating into his left lower extremity when he got out of bed about five weeks prior. He listed a history of prior intermittent low back pain. Dr. Malik stated that an MRI scan showed a large, left-sided L5-S1 disc herniation. On May 14, 2001 he performed a lumbar laminectomy at L5 and a microdiscectomy at L5-S1 with decompression of thecal sac and exiting S1 nerve root.

In a January 23, 2005 report, Dr. Malik related that appellant had lifted some tires while at Cooper Tire when he felt a pop in his back and experienced back pain radiating down his leg to his foot. Appellant underwent an MRI scan on January 23, 2005 which showed a small left paracentral disc protrusion at L5-S1. In reports from March to May 2005, it was noted that appellant continued to experience severe low back pain. A May 12, 2009 lumbar MRI scan noted that appellant had mild bilateral neural foraminal stenosis at L4-5 and L5-S1 due to diffuse disc bulges and degenerative changes and mild to moderate multilevel degenerative changes of the lumbar spine, most pronounced at L5-S1.

In a May 28, 2009 report, cosigned by Dr. Henry Platt, Board-certified in emergency medicine, appellant related that he had injured his back on November 26, 2008 when he slipped from a vehicle. On April 21, 2009 he stepped from a roller. Appellant stated that he had sharp low back pain, radiating into the left lumbar area. On examination, it was reported that he had normal musculature with decreased flexion and extension. Dr. Platt diagnosed thoracic/lumbosacral radiculitis.

By letter dated June 8, 2009, the Office advised appellant that the May 29, 2008 acceptance of the claim was made in error. It asked him to provide additional medical evidence, including a comprehensive medical opinion from his treating physician, to determine whether the injury he sustained on November 26, 2008 was causally related to factors of his federal employment. In addition, it asked appellant to explain why he waited until April 30, 2009 to report the injury. The Office stated that appellant had 30 days in which to submit the requested information.

In a June 2, 2009 hospital admission report, received by the Office on July 6, 2009, appellant complained of low back pain. The report was not signed by a physician.

By decision dated July 14, 2009, the Office rescinded its acceptance of appellant's claim for lumbar spinal stenosis. It reiterated that the claim was inadvertently accepted and found that the medical evidence of record failed to establish that his low back condition was causally related to the established work incident.

By letter dated July 27, 2009, appellant's attorney requested a hearing, which was held on November 10, 2009. Appellant stated that he had back surgery in 2001 and in 2005; however, neither of the surgeries were necessitated by an injury causally related to his federal employment. He sustained a back injury while working at a farm, and the other was while under the State of Texas workers' compensation systems. After appellant's 2005 back surgery, he did not experience any back problems until November 25, 2008. On November 25, 2008 he injured his back and subsequently filled out a claim form for this incident on November 25, 2008; he asserted that his supervisor had a copy of the Form CA-1. Appellant consulted a physician on November 25, 2008 and paid for this visit. He reported his November 2008 injury to Ms. Harmon and Ms. Wingfield in January 2009. Appellant acknowledged that he had originally stated that he injured his back on November 26, 2008; however, to the best of his recollection, the injury occurred on November 25, 2008.

The hearing representative instructed appellant to submit copies of the 2005 surgery report, all medical records subsequent to the 2005 surgery, a copy of the November 25, 2008 Form CA-1, a copy of the November 25, 2008 medical record, copies of all of Dr. Muthappa's notes on and after April 22, 2009 and a report from Dr. Muthappa addressing the preexisting back injuries and surgeries and explaining how appellant's back problems commencing April 22, 2009 were causally related to the November 25, 2008 incident. Appellant, however, did not submit any additional evidence.

In an undated statement, received by the Office on December 15, 2009, an employing establishment attorney, Larry Minasian, denied that Ms. Harmon told appellant to get an MRI scan for which he would be reimbursed by the Office. He denied appellant's assertion that

Ms. Harmon did nothing to help appellant find a physician. Mr. Minasian stated that the employer had no record of an April 21, 2009 injury and offered him a light-duty job on June 8, 2009.² Appellant never responded to the job offer or returned to work. Ms. Harmon submitted an undated statement, received by the Office on January 12, 2010, in support of Mr. Minasian's assertions.

By decision dated February 4, 2010, an Office hearing representative affirmed the July 14, 2009 decision. The hearing representative modified the decision to find that there were serious inconsistencies in appellant's account of injury and that he therefore failed to establish fact of injury.

LEGAL PRECEDENT

Section 8128 of the Act provides that the Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application.³ The Board has upheld the Office's authority to reopen a claim at any time on its own motion under section 8128 of the Act and, where supported by the evidence, set aside or modify a prior decision and issue a new decision.⁴ 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.⁵

Workers' compensation authorities generally recognize that compensation awards may be corrected, in the discretion of the compensation agency and in conformity with statutory provisions, where there is good cause for so doing, such as mistake or fraud. It is well established that, once the Office accepts a claim, it has the burden of justifying the termination or modification of compensation benefits. This holds true where, as here, the Office later decides that it erroneously accepted a claim. In establishing that its prior acceptance was erroneous, the Office is required to provide a clear explanation of the rationale for rescission.⁶

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether the fact of injury has been established. There are two components involved in establishing the fact of injury. First, the employee must submit sufficient evidence to establish that she actually experienced the employment incident at the time, place and in the manner alleged.⁷ Second, the employee must submit evidence, in the form

² The Board notes that appellant has not filed a claim based on an alleged April 21, 2009 back injury.

³ 5 U.S.C. § 8128.

⁴ *John W. Graves*, 52 ECAB 160, 161 (2000).

⁵ *See* 20 C.F.R. § 10.610.

⁶ *John W. Graves*, *supra* note 4.

⁷ *Julie B. Hawkins*, 38 ECAB 393, 396 (1987); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 2.803.2a (June 1995).

of medical evidence, to establish that the employment incident caused a personal injury.⁸ Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on whether there is a causal relationship between the claimant's diagnosed condition and the compensable employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.⁹ Rationalized medical opinion evidence includes a physician's opinion on the issue of whether there is a causal relationship between the employment incident and the condition for which the employee is treated based on a complete and accurate factual and medical history. The opinion must be one of reasonable medical certainty with an explanation of the relationship between the diagnosed injury and the incident sustained by the employee.

ANALYSIS

The Office accepted appellant's claim in a May 29, 2009 letter which noted code 724024, spinal stenosis, lumbar region. However, it provided no review of the evidence submitted in support of the claim, no discussion of the November 25, 2008 employment incident and no appraisal of the medical evidence of record. In a July 14, 2009 decision, the Office rescinded its acceptance of appellant's claim. It found that the November 25, 2008 incident was established, but that appellant did not submit sufficient medical evidence to establish the claimed back condition as related to the November 25, 2008 work incident.

In the February 4, 2010 decision, the Office hearing representative affirmed but modified the July 14, 2009 decision, finding that appellant failed to establish fact of injury. The hearing representative stated that the factual evidence contained serious inconsistencies regarding the alleged work incident -- which, appellant asserted at the hearing, occurred on November 25 not November 26, 2008, as he initially alleged -- as to cast serious doubt upon the validity of the claim.

The Office cannot accept fact of injury if there are such inconsistencies in the evidence as to seriously question whether the specific event or incident occurred at the time, place and in the manner alleged, or whether the alleged injury was in the performance of duty,¹⁰ nor can the Office find fact of injury if the evidence fails to establish that the employee sustained an "injury" within the meaning of the Act. An injury does not have to be confirmed by eyewitnesses in order to establish the fact that an employee sustained an injury in the performance of duty, as alleged, but the employee's statements must be consistent with surrounding facts and circumstances and her subsequent course of action.¹¹ Such circumstances as late notification of injury, lack of

⁸ *John J. Carlone*, 41 ECAB 354, 356-57 (1989); see Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 2.803.2a (June 1995).

⁹ See *Donna Faye Cardwell*, 41 ECAB 730, 741-42 (1990).

¹⁰ *Elaine Pendleton*, 40 ECAB 1143 (1989).

¹¹ See *Gene A. McCracken*, Docket No. 93-2227 (issued March 9, 1995); *Joseph H. Surgener*, 42 ECAB 541, 547 (1991).

confirmation of injury, continuing to work without apparent difficulty following the alleged injury, and failure to obtain medical treatment may cast doubt on an employee's statements in determining whether he or she has established his or her claim.¹²

The Office hearing representative found that the record contained insufficient evidence to establish that the claimed incident occurred at the time, place and in the manner alleged. He noted that appellant filed his claim on April 30, 2009, several months after the alleged November 25, 2008 work incident and did not respond to the Office query as to why he delayed in filing the claim. The hearing representative stated that appellant failed to present copies of the Form CA-1 he purportedly filed on November 25, 2008 or the report from the physician he allegedly saw on November 25, 2008, as he stated he would at the November 10, 2009 hearing. He concluded that appellant did not establish that he sustained an incident in the performance of duty on November 25, 2008.

The Board finds that the Office provided sufficient justification rescinding its prior acceptance of appellant's claim for a spinal stenosis condition. The Office properly found that appellant has not established fact of injury because of inconsistencies in the evidence that cast serious doubt as to whether the specific event or incident occurred at the time, place and in the manner alleged. Appellant stated on his April 30, 2009 CA-1 form and informed Ms. Wingfield on January 21, 2009 that he injured his back on November 26, 2008, when he stepped out of a Bradley vehicle. He indicated at the hearing, however, that he actually injured his back on November 25, 2008 and that he initially sought treatment for his back on that date. Appellant testified that he possessed a copy of the November 25, 2008 physician's report and a copy of the Form CA-1 he completed on that date, which he alleged was signed by his supervisor. However, he failed to submit copies of these documents to the Office, as the hearing representative requested, and failed to explain why he waited until April 30, 2009 to file a claim, in response to the Office's queries. Further, appellant did not submit any additional medical evidence supporting his claim that he sustained an employment injury on November 25, 2008. Appellant can be reasonably imputed to have knowledge of when he sustained an injury that caused him to be medically released from work.¹³ This contradictory evidence created an uncertainty as to the time, place and in the manner in which appellant sustained his alleged lower back injury.¹⁴

In addition, appellant failed to submit to the Office a corroborating witness statement. This casts additional doubt on appellant's assertion that he strained his lower back while exiting a Bradley vehicle on November 25, 2008. The Office requested that appellant submit additional factual and medical evidence explaining how he injured his lower back on the date in question. Appellant failed to submit such evidence.¹⁵ Therefore, given the inconsistencies in the evidence

¹² See *Constance G. Patterson*, 42 ECAB 206 (1989).

¹³ See generally *Sue A. Sedgwick*, 45 ECAB 211, 218 n.4 (1993).

¹⁴ *Id.*

¹⁵ The Board notes that none of the medical reports appellant submitted contained a probative, rationalized medical opinion indicating that appellant had a spinal stenosis condition causally related to an employment injury sustained on November 25 or November 26, 2008.

regarding how appellant sustained his injury, the Board finds that there is insufficient evidence to establish that appellant sustained an injury in the performance of duty as alleged.¹⁶

Accordingly, based on the facts presented in this case, the Board will affirm the Office's February 4, 2010 decision, which found that the Office met its burden of proof to rescind its acceptance of appellant's claim for a lumbar spinal stenosis condition.¹⁷

CONCLUSION

The Board finds that the Office met its burden of proof to rescind its acceptance of appellant's claim for a lumbar spinal stenosis condition.

ORDER

IT IS HEREBY ORDERED THAT the February 4, 2010 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: April 22, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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

¹⁶ See *Mary Joan Coppolino*, 43 ECAB 988 (1992) (where the Board found that discrepancies and inconsistencies in appellant's statements describing the injury created serious doubts that the injury was sustained in the performance of duty).

¹⁷ *D.G.*, 59 ECAB 734 (2008).