

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

L.G., Appellant)

and)

**DEPARTMENT OF AGRICULTURE, FOOD)
SAFETY INSPECTION SERVICE,)
Winesburg, OH, Employer)**

**Docket No. 10-2188
Issued: September 21, 2011**

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, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 24, 2010 appellant, through her attorney, filed a timely appeal of the March 4 and July 28, 2010 rescission decisions of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act (FECA)¹ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether OWCP properly rescinded an acceptance of a recurrence of disability.

On appeal, appellant's attorney contends that OWCP decisions are contrary to fact and law.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

OWCP accepted that on February 10, 2000 appellant, then a 49-year-old food inspector, sustained a lumbosacral sprain/strain, a left leg sprain and aggravation of lumbar degenerative disc disease and degenerative spondylolisthesis at L5-S1 and left hip osteoarthritis while in the performance of duty. Appellant stopped work on May 5, 2000 and returned to work, four hours a day, on February 12, 2001. She stopped work on February 14, 2001. On April 30, 2001 appellant underwent left hip replacement surgery. She underwent cervical spine surgery on January 17, 2002. Appellant returned to her regular work duties on March 12, 2002.

On January 22, 2003 appellant filed a claim (Form CA-2a) alleging that she sustained a recurrence of total disability on October 31 and November 15, 2002. In an undated narrative statement, she related that in June 2002, Dr. Alexander Michael, III, an attending Board-certified orthopedic surgeon, placed her on restricted duty, eight hours a day, five days a week. Appellant worked the last two weeks in October 2002, but stopped due to pain and problems with her back and leg. On November 15, 2002 Dr. Michael placed her off work through January 12, 2003. He released her to return to full-time work with the previous restrictions on January 13, 2003.

In a November 15, 2002 medical report, Dr. Michael indicated that appellant's biggest problem was low back pain. A magnetic resonance imaging (MRI) scan performed in 2000 showed two levels with herniated discs and degenerative changes of the disc margins and areas of the lumbar spine. Dr. Michael advised that appellant presented with a flare-up of lower back symptoms, but there was no significant radicular component at that time. Appellant had some paraspinal spasm through the lumbar area with some sciatic notch tenderness on the right side. In disability certificates dated November 15, 2002 through January 17, 2003, Dr. Michael advised that she was totally disabled for work on intermittent dates from November 11, 2002 to January 12, 2003. In a November 15, 2002 prescription, he ordered physical therapy to treat appellant's lumbar degenerative disc disease.

In a May 8, 2003 decision, OWCP accepted appellant's claim for a recurrence of total disability on October 31 and November 15, 2002.

On May 20, 2004 and February 28, 2006 appellant filed claims for compensation (Form CA-7) for the periods October 31, 2002 to December 31, 2003 and January 1 to March 4, 2006.²

In decisions dated July 23, 2008, OWCP denied appellant's claim for disability for the period October 31, 2002 to December 31, 2003 and January 1 to March 4, 2006 on the grounds that the medical evidence failed to establish any employment-related disability.

On July 26, 2008 appellant, through her attorney, requested an oral hearing before OWCP's hearing representative, which was held on November 17, 2008. At the hearing she

² In a May 27, 2004 decision, OWCP granted appellant a schedule award for 37 percent impairment of the left lower extremity for the period December 17, 2003 to December 31, 2005. On February 28, 2006 appellant filed claims for wage-loss compensation Form CA-7 for the period October 31, 2002 to March 4, 2006. In a March 17, 2006 letter, OWCP advised her that she could not claim wage-loss compensation for the period covered by her May 27, 2004 schedule award. It addressed the factual and medical evidence needed to establish a recurrence of disability during the revised period of October 31, 2002 to December 16, 2003 and January 1 to March 4, 2006.

testified that following her 2002 surgery, she returned to her regular work duties as a poultry inspector. Appellant attended a class on October 31, 2002 at work which required her to walk up and down stairs. She testified that this activity caused a resumption of her back symptoms. Appellant did not return to work on October 31, 2002.

In a January 27, 2009 decision, OWCP's hearing representative affirmed the July 23, 2008 decisions. She found that the October 31, 2002 incident, when appellant walked up and down the stairs to attend a class, constituted an intervening exposure which would constitute the basis for a new traumatic injury claim. OWCP's hearing representative further found that the medical evidence did not establish a worsening of appellant's accepted conditions resulting in total disability commencing October 31, 2002. She concluded that appellant was not entitled to wage-loss compensation for recurrent disability from October 31, 2002 to December 31, 2003 and January 1 to March 4, 2006 causally related to the employment injury of February 10, 2000.

On February 13, 2009 appellant, through her attorney, appealed the January 27, 2009 decision to the Board, which assigned Docket No. 09-922. In a December 23, 2009 order remanding the case, the Board found that the proper issue was whether OWCP met its burden of proof to rescind the acceptance of appellant's claim for a recurrence of disability on October 31 and November 15, 2002.³ The Board remanded the case for it to properly adjudicate this issue. The Board stated that OWCP, in the July 23, 2008 and January 27, 2009 decisions, appeared to attempt to rescind the acceptance of appellant's recurrence of disability on October 31 and November 15, 2002, *i.e.*, for the periods October 31, 2002 to December 31, 2003 and January 1 to March 4, 2006, based on its finding that she sustained an intervening injury on October 31, 2002 for which she should have filed a new traumatic injury claim. The Board noted that it did not inform appellant that it was contemplating rescission or actually rescinding acceptance of the stated recurrences of disability. OWCP also did not explain why it was rescinding acceptance of appellant's claim.

Following remand of the case by the Board, OWCP, on January 21, 2010, issued a notice of proposed rescission of the acceptance of appellant's claim for a recurrence of disability on October 31 and November 15, 2002. It found that going up and down steps to attend a class at work on October 31, 2002 constituted an intervening cause of appellant's injury for which she should have filed a traumatic injury claim. OWCP further found that the medical evidence was insufficient to establish that appellant was totally disabled commencing October 31, 2002, for the claimed periods, due to her February 10, 2000 employment-related injuries. Appellant was afforded 30 days to submit additional evidence and argument if she disagreed with the proposed action.

A February 1, 2010 report which contained the typed name of Dr. Atef Wasef, a Board-certified anesthesiologist, listed findings on physical examination and diagnosed symptoms of low back pain radiating into both lower extremities, mostly prominent at the L5-S1 distribution, due to degenerative disc disease, lumbar canal stenosis and lumbosacral facet syndrome that was less likely to be sacroiliac joint osteoarthritis.

³ *Order Remanding Case*, Docket No. 09-922 (issued December 23, 2009).

In a March 4, 2010 decision, OWCP finalized its proposed rescission of appellant's recurrence of disability claim for October 31 and November 15, 2002. It found that the medical evidence submitted by appellant was insufficient to establish that her total disability on the claimed dates was causally related to her accepted injuries.

By letter dated March 13, 2010, appellant, through her attorney, requested a telephone hearing.

In a July 28, 2010 decision, OWCP's hearing representative affirmed the March 4, 2010 rescission decision. She found that the October 31, 2002 incident constituted an intervening incident and, therefore, a recurrence of disability was not established.

LEGAL PRECEDENT

Section 8128 of FECA 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.⁴ The Board has upheld OWCP's authority to reopen a claim at any time on its own motion under section 8128 of FECA 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

Workers' compensation authorities generally recognize that compensation awards may be corrected, in the discretion of the compensation agency and in conformity with statutory provision, where there is good cause for so doing, such as mistake or fraud. It is well established that, once OWCP accepts a claim, it has the burden of justifying the termination or modification of compensation benefits. This holds true where OWCP later decides that it erroneously accepted a claim. In establishing that its prior acceptance was erroneous, OWCP is required to provide a clear explanation of the rationale for rescission.⁷

ANALYSIS

OWCP accepted that appellant sustained employment-related lumbosacral sprain/strain, left leg sprain and aggravation of lumbar degenerative disc disease, degenerative spondylolisthesis at L5-S1 and left hip osteoarthritis on February 10, 2000. Appellant claimed a recurrence of disability on October 31 and November 15, 2002. OWCP did accept that she was entitled to compensation for temporary total disability for the claimed dates and, therefore, it is their burden to rescind acceptance and must provide a clear explanation of the rationale for the rescission.

⁴ 5 U.S.C. § 8128.

⁵ *Eli Jacobs*, 32 ECAB 1147 (1981).

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

⁷ *John W. Graves*, 52 ECAB 160 (2000); *R.M.*, Docket No. 07-1066 (issued February 6, 2009).

At the November 17, 2008 hearing, appellant attributed her claimed total disability to back symptoms that resumed on October 31, 2002 after walking up and down stairs to attend a class at work. A recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition resulting from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the original illness.⁸ It does not include a condition that results from a new injury, even if it involves the same part of the body previously injured.⁹ The Board finds that appellant has alleged that her claimed disability was due to an intervening injury and new exposure to work factors that negated the causal relationship between the accepted conditions and her condition as of October 31, 2002. The Board finds, therefore, that her claim does not meet the definition of a recurrence of disability.¹⁰

The Board further finds that OWCP explained that the medical evidence is not of sufficient probative value to support a recurrence of disability on October 31 and November 15, 2002. To establish a recurrence of disability, there must be probative medical evidence.¹¹

The contemporaneous medical evidence includes Dr. Michael's disability certificates which advised that appellant was totally disabled for work from November 11, 2002 to January 12, 2003. Medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value.¹² While Dr. Michael addressed appellant's claimed period of total disability, he failed to address how her disability was caused by the accepted conditions. The Board finds, therefore, that his disability certificates are of diminished probative value and are insufficient to establish the recurrence claim.

Similarly, Dr. Michael's November 15, 2002 report and prescription are of diminished probative value. In his report, he listed findings on physical examination and reviewed the findings of a 2,000 lumbar MRI scan. Dr. Michael advised that appellant presented with a flare-up of lower back symptoms, but she had no significant radicular component at that time. He found that she had some paraspinal spasm through the lumbar area with some sciatic notch tenderness on the right side. Dr. Michael's prescription ordered physical therapy to treat

⁸ 20 C.F.R. § 10.5(x); *see S.F.*, 59 ECAB 525 (2008). *See* 20 C.F.R. § 10.5(y) (defines recurrence of a medical condition as a documented need for medical treatment after release from treatment for the accepted condition).

⁹ OWCP procedures state that a recurrence of disability includes a work stoppage caused by a spontaneous material change, demonstrated by objective findings, in the medical condition that resulted from a previous injury or occupational illness without an intervening injury or new exposure to factors causing the original illness. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3(b) (May 1997). *Kenneth R. Love*, 50 ECAB 193, 199 (1998).

¹⁰ *See Bryant F. Blackmon*, 56 ECAB 752 (2005).

¹¹ To establish a recurrence of disability, there must be substantial, reliable and probative evidence that the disability for which appellant claims compensation is causally related to the accepted injury. Probative medical evidence is evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and supports that conclusion with sound medical reasoning. *Robert H. St. Onge*, 43 ECAB 1169 (1992); *Dennis J. Lasanen*, 43 ECAB 549 (1992).

¹² *A.D.*, 58 ECAB 149 (2006); *Jaja K. Asaramo*, 55 ECAB 200 (2004); *Michael E. Smith*, 50 ECAB 313 (1999).

appellant's lumbar degenerative disc disease. He did not provide an opinion addressing how the diagnosed lumbar conditions and her claimed recurrences of disability were causally related to the accepted conditions. The Board finds, therefore, that Dr. Michael's reports are of diminished probative value.

The February 1, 2010 report which contained Dr. Wasef's typed name with no accompanying signature has no probative value, as it is not established that the author is a physician.¹³

The Board finds that OWCP properly explained that the evidence did not establish a spontaneous change in the accepted conditions¹⁴ and that there was no probative medical evidence establishing a recurrence of disability on October 31 and November 15, 2002 causally related to the accepted February 10, 2000 employment-related lumbosacral sprain/strain, left leg sprain and aggravation of lumbar degenerative disc disease, degenerative spondylolisthesis at L5-S1, and left hip osteoarthritis.¹⁵ The Board finds, therefore, that OWCP met its burden to justify rescission in this case.

On appeal, counsel contends that OWCP's decision is contrary to fact and law. The Board finds, however that, for the reasons explained above, OWCP met its burden of proof to rescind acceptance of appellant's recurrence of disability claims for October 31 and November 15, 2002.

CONCLUSION

The Board finds that OWCP properly rescinded an acceptance of a recurrence of disability.

¹³ See *D.D.*, 57 ECAB 734 (2006); *Merton J. Sills*, 39 ECAB 572, 575 (1988).

¹⁴ *Bryant F. Blackmon*, *supra* note 10.

¹⁵ See *supra* note 11.

ORDER

IT IS HEREBY ORDERED THAT the July 28 and March 4, 2010 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: September 21, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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