

FACTUAL HISTORY

On May 12, 1994 appellant, then a 32-year-old mail handler, filed a traumatic injury claim alleging that on May 11, 1994 she sustained an injury to the right side of her head when she was struck by a metal bar. OWCP accepted the claim for a head contusion. Appellant worked limited duty beginning July 1994.

On June 15, 1998 appellant filed a notice of recurrence of disability beginning that date causally related to her May 10, 1994 employment injury. She stopped work on June 12, 1998 and did not return.

In a report dated June 16, 1998, Dr. Frantz Jasmin, a Board-certified internist, found that appellant was disabled from employment beginning June 12, 1998 pending an evaluation by an orthopedist. On July 21, 1998 Dr. Richard Memoli, an orthopedic surgeon, diagnosed head trauma, a sprain of the cervical spine with radiculopathy and noted the need to rule out a herniated nucleus pulposus. He found that appellant was disabled from work due to her employment injury.²

On March 26, 1999 appellant resigned from the employing establishment. She cited as the reason for her resignation her daughter's health condition.

By letter dated May 3, 2000, OWCP referred appellant to Dr. Harvey A. Levine, a Board-certified orthopedic surgeon, for a second opinion examination. In a report dated May 19, 2000, Dr. Levine diagnosed status postconcussion, resolved cervical sprain and resolved lumbosacral sprain, all of which he attributed to the work injury. He found that appellant had no disability.

On July 23, 2001 OWCP advised appellant that it had accepted her "recurrence June 12, 1998" and informed her that she could submit medical bills for payment. It requested that she submit a Form CA-7 if she "lost time from work due to the recurrence...."

By letter dated January 3, 2003, OWCP informed appellant's attorney that it had accepted her recurrence of June 12, 1998 and was "currently processing a supplemental payment" from August 4, 1998 to December 28, 2002 subject to "certification by several individuals." It also advised counsel that it was scheduling an impartial medical examination to resolve a conflict between Dr. Memoli and Dr. Levine.³

By letter dated April 23, 2003, OWCP advised appellant's congressional representative that it had accepted that appellant sustained a recurrence of disability on June 12, 1998. It indicated, however, that it was scheduling a referral examination prior to "processing compensation payments."

² Dr. Memoli continued to submit progress reports finding appellant disabled from work.

³ In an internal e-mail dated January 8, 2003, OWCP determined that it was unable to refer appellant for an impartial medical examination without obtaining current medical evidence regarding her condition.

On July 21, 2003 OWCP referred appellant back to Dr. Levine for a second opinion examination. By letter dated July 21, 2003, appellant, through counsel, questioned why it was scheduling another medical examination given that it had accepted a recurrence of disability, arguing that she was entitled to benefits until OWCP terminated her compensation.

In a report dated August 14, 2003, Dr. Levine diagnosed status post cerebral concussion, resolved cervical sprain and resolved lumbosacral sprain due to appellant's work injury. He concluded that she could perform her usual employment.⁴

On January 6, 2012 appellant requested compensation from June 12, 1998 to December 21, 2011. She noted that she had worked outside of the employing establishment during that period.

By letter dated January 16, 2012, counsel argued that OWCP had accepted that she sustained a recurrence of disability on June 12, 1998 but developed the medical evidence rather than paying her any compensation.

In a letter dated February 14, 2012, OWCP noted that appellant resigned from the employing establishment on March 26, 1999 for personal reasons. It requested that she explain why she was requesting compensation given that the record contained no medical report for almost nine years and that she had earnings from private employment.

In a February 23, 2012 response, counsel again noted that OWCP had accepted a recurrence of disability and that appellant's employment "represents at most a minor statutory adjustment for temporary wage[-]earning capacity."

By decision dated May 16, 2012, OWCP found that appellant had not established a recurrence of disability due to her accepted work injury.

On appeal, counsel argues that OWCP accepted a recurrence of disability on June 12, 1998 and thus should have paid compensation until it found that she had no further disability. He further maintained that a conflict existed between her attending physician and Dr. Levine.

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 application.⁵ The Board has upheld OWCP's authority to set aside or modify a prior decision and issue a new decision under section 8128 of FECA.⁶ The power to annul an award, however, is not an arbitrary one and an

⁴ In a report dated January 2, 2003, Dr. Memoli discussed appellant's complaints of radiating neck pain and found that she should remain off work. In a September 16, 2003 progress report, he discussed her physical complaints and found that she was unable to work.

⁵ 5 U.S.C. § 8128; *see also M.E.*, 58 ECAB 694 (2007).

⁶ *John W. Graves*, 52 ECAB 160 (2000).

award for compensation can only be set aside in the manner provided by the compensation statute.⁷

It is well established that, once OWCP accepts a claim, it has the burden of justifying the termination or modification of compensation benefits.⁸ This holds true where OWCP later decides that it erroneously accepted a claim.⁹ Having determined that an employee has a disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing that the disability has ceased or that it is no longer related to employment. It is required to provide a clear explanation of the rationale for rescission.¹⁰

ANALYSIS

OWCP accepted that appellant sustained a head contusion due to a May 11, 1994 employment injury. Appellant returned to limited-duty employment on July 1994. On June 15, 1998 she filed a notice of recurrence of disability beginning that date due to her May 1994 work injury. Appellant resigned from work on March 26, 1999 for personal reasons. On July 23, 2001 OWCP accepted that she sustained a recurrence of disability on June 12, 1998. It instructed appellant to file a claim for time lost from work. In a decision dated May 16, 2012, OWCP found that she did not establish a recurrence of disability.

The Board finds that OWCP did not properly adjudicate the issue presented. As OWCP accepted that appellant sustained a recurrence of disability, it has the burden of proof to rescind acceptance.¹¹ The issue is thus whether it met its burden of proof to rescind acceptance of its finding that she sustained a recurrence of disability on June 12, 1998.

The medical evidence is insufficient to show that appellant did not establish a June 12, 1998 recurrence of disability. In a report dated June 16, 1998, Dr. Jamin advised that appellant was totally disabled as of June 12, 1998. On July 21, 1998 Dr. Memoli diagnosed head trauma, cervical sprain with radiculopathy and a possible herniated disc. He asserted that she was disabled due to her May 11, 1994 work injury. OWCP referred appellant for a second opinion examination with Dr. Levine. On May 19, 2000 Dr. Levine found that she was status postconcussion and diagnosed resolved cervical and lumbosacral sprain. He determined that appellant had no further employment-related disability. In a report dated August 14, 2003, Dr. Levine again diagnosed status post cerebral concussion and resolved cervical and lumbosacral strain and found that she was not disabled from employment. In his reports, however, he did not address the pertinent issue of whether appellant sustained a recurrence of disability on June 15, 1998 causally related to her May 11, 1994 work injury. Consequently, Dr. Levine's opinion is of diminished probative value.

⁷ See 20 C.F.R. § 10.610; *Cary S. Brenner*, 55 ECAB 739 (2004); *Stephen N. Elliott*, 53 ECAB 659 (2002).

⁸ See *Linda L. Newbrough*, 52 ECAB 323 (2001).

⁹ *Id.*

¹⁰ See *Andrew Wolfgang-Masters*, 56 ECAB 411 (2006); see also 20 C.F.R. § 10.610.

¹¹ See *supra* note 8.

Additionally, as noted, OWCP was attempting to rescind acceptance of its finding that appellant established an employment-related recurrence of disability. OWCP, however, must inform a claimant correctly and accurately of the grounds on which a rejection rests so as to afford the claimant an opportunity to meet, if possible, any defect appearing therein.¹² As it failed to issue an appropriate decision rescinding its finding that appellant sustained a recurrence of disability beginning June 15, 1998, OWCP did not meet its burden of proof.

CONCLUSION

The Board finds that OWCP improperly issued a decision finding that appellant did not establish a recurrence of disability on June 15, 1998 causally related to her accepted employment injury.

ORDER

IT IS HEREBY ORDERED THAT the May 16, 2012 decision of the Office of Workers' Compensation Programs is reversed.

Issued: December 11, 2012
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

¹² See *Y.S.*, Docket No. 10-2325 (issued August 23, 2011); *John M. Pittman*, 7 ECAB 514 (1955).