

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

S.N., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Citrus Heights, CA, Employer**

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**Docket No. 12-1222
Issued: August 23, 2013**

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, Alternate Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 15, 2012 appellant, through his attorney, filed a timely appeal from the April 12, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) 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 met its burden of proof to rescind its acceptance of appellant's claim and terminate his wage-loss compensation and medical benefits effective September 12, 2011.

FACTUAL HISTORY

On March 23, 2010 appellant, then a 40-year-old mail carrier, filed a traumatic injury claim alleging that at 3:00 p.m. on March 22, 2010 he was struck in the head by a branch that

¹ 5 U.S.C. §§ 8101-8193.

blew off a tree while delivering mail. He indicated that the branch fractured the top of his head. Appellant stopped work on March 22, 2010 and did not return. On the form, Sheng Yen, appellant's supervisor, checked a "yes" box indicating that appellant was injured in the performance of duty.

On March 22, 2010 Dr. John Champlin, a Board-certified family practitioner, treated appellant at a medical clinic emergency room. He noted that appellant reported that a large branch hit him on the head while he was delivering mail that day and that he thought he lost consciousness. Appellant noted that his vision was blurry and that he had arm paresthesias. Dr. Champlin observed on physical examination that appellant had a scalp abrasion and diagnosed an acute closed head injury.

Due to the nature of his condition, appellant was transferred by ambulance to a hospital for further treatment. In a March 22, 2010 report, Dr. Mark P. Owens, a Board-certified surgeon, stated that appellant reported that a tree limb rolled off a tree and struck him in the head that day. He indicated that there was "apparently some loss of consciousness" and that appellant got up and walked around. Dr. Owens noted that appellant's chief complaints were head pain and paresthesias in his hands and fingers and that examination revealed a 0.5 centimeter abrasion over his left frontal area.²

In a March 23, 2010 treatment note describing a March 22, 2010 visit, Dr. Jeff Hardin, an attending Board-certified internist, stated that appellant reported that he was at work when a log fell on his head and knocked him down. Appellant stated that he passed out and that he woke up with a headache and pain extending from his neck down into his back. Upon physical examination, he had some contusions on the top of his head without bleeding or lacerations.³ Dr. Hardin noted that appellant had tingling in his hands without other neurological deficit and diagnosed spinal cord contusion, concussion, head trauma, dehydration and intractable pain.

In a March 23, 2010 note describing the March 22, 2010 visit, Dr. Hardin stated that appellant reported that he was delivering mail when he was struck by a very thick branch that fell 30 to 40 feet. Appellant reported a brief loss of consciousness and, upon waking, headache, neck pain radiating down his back and numbness of his hands. Dr. Hardin noted that appellant initially visited a medical clinic where he was noted to have difficulty with ambulation and bladder dysfunction. Examination of appellant's head revealed a scalp abrasion and closed lacerations in three areas. Dr. Hardin noted that appellant's neurological examination was stable

² In a March 23, 2010 note, Dr. Owens diagnosed "axial loading injury -- tree limb to head" with concussion, cervical cord contusion, mild compression fractures at T7-8, history of depression and history of chronic stomach ailment.

³ Dr. Hardin stated that magnetic resonance imaging (MRI) scan of the cervical spine showed bulging discs at C5-6 and C6-7 that were compressing the cord. The record also contains computerized tomography (CT) testing of the thoracic spine from March 22, 2010 showing mild anterior wedging of the T7 vertebral body. Some of the diagnostic testing reports from this period contain a history of "blunt trauma to head."

and diagnosed herniated nucleus pulposus at C4-5 with spinal cord compression and contusion “resulting in his current symptoms of both weakness and bladder dysfunction.”⁴

On March 25, 2010 Dr. Kee D. Kim, an attending Board-certified neurosurgeon, performed cervical surgery at C4-5 including microdiscectomy, foraminotomy and arthrodesis with instrumentation.⁵

On March 27, 2010 Dr. Owens provided a discharge diagnosis of “blunt trauma to head -- axial loading tree limb versus head” with acute C4-5 herniated nucleus pulposus and spinal cord compression anteriorly, concussion and mild compression fractures at T7-8.⁶

In April 2010, OWCP accepted the claim for a herniated disc at C4-5, concussion with brief loss of consciousness and mild compression fracture bodies at T7-8.

In an evaluation report covering April 15 to May 14, 2010, a field nurse stated that appellant reported that on March 22, 2010 he was delivering mail when he felt a whack on his head and that he fell down and had a temporary loss of consciousness.

Dr. Champlin referred appellant to Dr. Rosalind Hsia, an attending neurologist. On June 14, 2010 Dr. Hsia stated that appellant reported that on March 22, 2010 a tree limb, about three feet long and three-fourths inches in diameter, fell from above and hit him on the head. Appellant thought that the limb hit his head as he leaned over his mail tub and was saying something to a maintenance man at the apartment complex where he was delivering mail. He related that he lost consciousness when he was hit by the limb, but that he did not know how long he was unconscious. Appellant remembered rolling over and trying to sit up and then dialing a number on his cell phone using the automatic dialing feature. He believed that the first person he called was his supervisor at the post office and that he then called his wife. After 45 minutes appellant’s supervisor came and he “somehow stood up” with his supervisor’s assistance. The supervisor took appellant to a medical clinic in his own car, but it was determined that he needed a higher level of care and he was then transferred by ambulance to a hospital. Appellant reported having memory problems when he was being treated at the medical clinic. Dr. Hsia described appellant’s neck surgery and his reported post-surgery symptoms, including headaches, blurred vision and voiding problems and an incident when he passed out and fell in his bedroom. She reported findings on examination and diagnosed a number of conditions, including cervical contusion with central cord syndrome (dysesthesias of the hands,

⁴ MRI scan testing was described as showing a herniated disc at C4-5 with compression of the thecal sac and spinal cord compression as well as mild degenerative changes with disc bulge at C5-6 without fracture or significant spinal cord compression.

⁵ Dr. Kim stated that appellant reported that he was struck on the top of his head with a large falling branch while delivering mail. Appellant thought that the branch had fallen from 30 to 40 feet and that he had a loss of consciousness.

⁶ The report contains a history of injury that is similar to the history detailed in Dr. Owens’ March 22, 2010 report.

bladder dysfunction and lower limb weakness). Dr. Hsia recommended additional testing to further evaluate the nature and extent of appellant's various medical problems.⁷

In a January 5, 2011 report from the employing establishment Serious Accident Review Board, it was noted that on March 30, 2010 the members of the Serious Accident Review Board visited the apartment complex where appellant claimed that he was injured. The members noted speaking to staff at the apartment complex who indicated that they kept the branch that struck appellant and that it weighed 5.9 ounces.⁸ At about 3:00 p.m. on March 22, 2010 Lillian Watkins, a supervisor, received a phone call from appellant who stated that he had been involved in an accident. During the telephone conversation, appellant told Ms. Watkins that something had hit him in the head. When Ms. Watkins asked him if he was all right, he again stated that his head was hit. The members indicated that Ms. Watkins then told appellant to sit down and to stop delivering the mail and advised him that a supervisor would come to the scene of the accident. After speaking to appellant, Ms. Watkins called Mr. Yen, a supervisor, to direct him to go the scene and also arranged for Diane Keethe, a coworker, to finish appellant's delivery route. The members stated that Ms. Keethe was the first person to arrive at the scene. Ms. Keethe reported that appellant was seated on the ground holding his head. She noticed two dried blood spots on the top of his head. Ms. Keethe thought that they could have happened when he had a haircut. She indicated that the stick that appellant stated hit him was located across the sidewalk from the cluster mailboxes and that all the doors on the mailboxes were open. The members stated that Mr. Yen arrived at the scene at 3:30 p.m. and he noticed appellant sitting on the ground. When asked what happened, appellant told Mr. Yen that he got hit on the top of his head by a "long, wide branch that blew off from a big tree" next to the cluster mailboxes he was working on. Mr. Yen indicated that appellant was dizzy and that he took appellant in his vehicle to a medical clinic.⁹

Additional documents concerning the March 22, 2010 incident were submitted to the record. A photocopy of a photograph appears to show two branches or twigs on the ground, one of which is longer and thicker than the other.¹⁰

⁷ In a September 4, 2010 report, Dr. Hsia diagnosed status post-traumatic head injury, post-traumatic migraine headaches (rule out increased intracranial pressure) and status postcervical decompression. She prescribed medications for appellant's headaches. Diagnostic testing from September 20, 2010 showed that appellant had a mild sensory motor neuropathy in his legs without significant radiculopathy or plexopathy.

⁸ The members noted that the staff indicated that they were retaining the branch and conducting their own investigation.

⁹ The members also provided appellant's account of the events of March 22, 2010, which they indicated was based on "his statement at the time of the accident." They noted that they could not reach him to conduct an interview and stated, "[A]ppellant alleged that he was hit on the head by a falling branch from a tree at the apartment complex where he was delivering mail to rows of cluster boxes. [He] told his supervisor, as well as Dr. Champlin that he lost consciousness briefly then called his post office to report the injury."

¹⁰ The record contains a memorandum of a January 5, 2011 telephone call to OWCP by the employing establishment. OWCP's employee indicated that a person from the employing establishment believed that appellant identified the larger of the branches/twigs in the photograph as being the one that hit him and that it weighed 5.9 ounces.

In a March 22, 2010 e-mail to the employing establishment officials, Mr. Yen stated that appellant was struck on the top of his head by a three foot long, two inch wide branch which blew off a big tree next to the cluster mailboxes he was working on in an apartment complex. He stated, "Branch penetrated head skin. [Appellant] was shaking and feeling dizzy." In a March 22, 2010 e-mail, Zubie Zubia, an official of the employing establishment, stated that there were no branches on the ground of the accident scene, only a few twigs. The official noted that the cluster mailboxes would have been protected by an overhang and stated, "I am not aware of any strong gust of wind yesterday that would have sent a branch flying under the overhang."

By letter dated January 25, 2011, OWCP claims examiner advised appellant that his physicians were requesting reimbursement for treatment of conditions that had not been accepted as work related and stated, "I reviewed your file and note that there are inconsistencies about what happened when you were injured." Appellant was asked to provide a more detailed description of his March 22, 2010 injury and to respond to the evidence submitted by the employing establishment.

OWCP received a copy of a January 21, 2011 deposition from a witness to the March 22, 2010 incident who was a resident of the apartment complex where the injury occurred. The deposition was given in conjunction with appellant's third-party law suit against the apartment complex owners.¹¹ The witness stated that on March 22, 2010 he saw appellant get struck on his right shoulder by a twig (measuring an estimated eight inches long and a half inch in diameter), jerk his head quickly to the right "as far as anyone could turn their head to the right" and then exclaim, "Oh my God my neck." Appellant immediately put his mail sack down from his left shoulder and walked quickly to sit down on the walkway about four feet from her.¹² The witness stated that, upon sitting down, he exclaimed, "The post office does not take good care of its employees" or "The post office does not take care of its employees like it should."¹³ She noted that, after hitting appellant's shoulder, the twig bounced upwards in an arch a few inches higher than his head and landed on the ground about three inches from the base of some bushes which were 12 to 15 feet away. The witness indicated that he telephoned the employing establishment and asked for a supervisor to come and for another employee to finish his route. After appellant sat on the walkway for five minutes, two office workers' from the apartment complex came out and picked up the twig that the witness pointed out as hitting appellant. The workers took the twig away with them and did not say anything to appellant. Appellant's supervisor arrived about 15 to 20 minutes after appellant made his cell phone call.¹⁴ Appellant did not stand up until the

¹¹ The record contains documents showing that appellant received monies in connection with a third-party settlement.

¹² The witness indicated that appellant walked more quickly to sit down after he was hit by the twig than he did prior to being hit. She stated that she was six to eight feet from him when the incident occurred and that she was sitting down on the seat portion of her walker. The witness testified that she had 20/20 vision and that she only needed glasses for close reading.

¹³ The witness noted that she observed the twig hitting appellant's shoulder, but that she did not see the path the twig took prior to hitting him.

¹⁴ The witness indicated that a coworker of appellant arrived a few minutes before the supervisor in order to finish the mail delivery route.

supervisor came and that they both walked to the supervisor's vehicle with appellant moving very slowly and gingerly. The witness indicated that appellant and the supervisor had a conversation near the vehicle that she could not hear and that they both got into the vehicle and left the scene. She stated that she tended to look at things in a negative, questioning manner and that she thought that appellant was trying to scam an insurance agency given the fact that he walked quickly immediately after the twig hit him but then walked slowly after the supervisor arrived. The witness did not see any pictures being taken of the twig that hit him and she did not see any other witnesses who saw the twig hit him.¹⁵

No statement was received from appellant. On March 16, 2011 OWCP wrote appellant's treating physician advising that it had accepted facts in the case which were mostly based on the testimony of the witness in the third-party action.¹⁶ The physician was asked to provide appellant's current medical conditions causally related to the accepted injury event.

In an April 4, 2011 report, Dr. Hsia stated that there was some controversy as to how large the branch was that hit appellant and whether this should have caused many of his problems. She noted that he told her that he was hit by a branch that was about 18 inches long and about 1.5 inches in diameter. Appellant used his cane to demonstrate the size of the branch. Dr. Hsia included traumatic brain injury in her list of diagnoses.

On May 20, 2011 counsel advised OWCP that too much attention was focused on the weight and size of the branch and that it should focus on the fact that appellant "jerked his head suddenly and violently to the right." He posited that this motion should have been sufficient to produce the diagnosed neck condition.

In a June 7, 2011 report, Dr. Hsia stated that appellant was involved in a work-related accident in which he was hit on the top of his head by a "large tree branch." It caused downward forces sufficient to produce an altered mental status and herniation of cervical discs that in turn caused spinal cord compression necessitating cervical surgery. Dr. Hsia stated that appellant's continuing headaches and bladder/bowel problems were related to the cervical injury.

¹⁵ OWCP received a February 1, 2011 CT scan report of appellant's head which indicated that there was a "history of assault" against appellant on an unspecified date. The report diagnosed "no evidence of acute cervical spine trauma," minor degenerative joint disease with postsurgical change at C4-5 and sinusitis. The findings of an April 13, 2011 MRI scan of appellant's cervical spine showed status post C4-5 anterior fusion without spondylolisthesis and no spinal stenosis or neural foraminal narrowing.

¹⁶ OWCP detailed the accepted facts, stating, "On March 22, 2010 [appellant] was observed delivering mail at a slow pace at the Renaissance Apartments ... wearing a satchel on his left shoulder. At approximately 3:00 p.m. a twig weighing 5.9 ounces, approximately eight inches in length and a half inch in diameter struck him on the right shoulder. It bounced off, went into an arc upwards three or four inches and landed about 12 feet away at the base of some bushes. [Appellant] jerked his head to the right, said 'Oh my God, my neck hurts. The post office does not take good care of its employees.' [Appellant] took the satchel off his left shoulder and walked over at what was observed to be a fast pace to sit down on the walkway. He called the post office and asked for somebody to finish his route. Approximately six minutes later another postal worker arrived. A few minutes later the apartment building managers appeared. A witness pointed out the twig to them and they took it. A few minutes later a postal supervisor came. [Appellant] got up and walked very slowly to the supervisor's vehicle, got in and they drove away."

On June 17, 2011 OWCP advised counsel that it was still awaiting appellant's statement regarding the injury event as requested in the January 25, 2011 letter. It provided him 21 days to submit such a statement.

In an August 11, 2011 letter, OWCP advised appellant of its proposal to rescind its acceptance of his claim and to terminate his compensation benefits. It noted that new evidence, including the witness statement regarding the March 22, 2010 incident, highlighted inconsistencies in his claim that cast doubt upon its validity. It stated:

“Due to severity of your injury we accepted your case without developing what actually happened. As more information came into the file, there were many conflicting versions of what happened, including the size of the tree branch that hit you, where it hit you, whether you fell down, whether you lost consciousness and whether there were witnesses. You have been asked more than once to submit a factual statement. The only statement you submitted, through your attorney, is the account of a witness who doubted the veracity of your injury and indicated that it was more of a twig than a branch that hit you. We have given you ample opportunity to clarify and you have not.”

Counsel provided copies of photographs that were purported to be of “branches” that hit appellant, as well as a photograph of his head showing where he was struck. A ruler next to a depicted branch measured it as at least 20 inches long. No indication was given of when the photographs were taken and no clarifying statement was received from appellant.

By decision dated September 12, 2011, OWCP rescinded its acceptance of appellant's claim and terminated his wage-loss compensation and medical benefits effective September 12, 2011. It noted that he had not provided clarification of the discrepancies regarding the May 22, 2010 incident.¹⁷

On December 19, 2011 OWCP received a copy of a photograph showing branches and twigs on the ground near some bushes. It is unclear where and when the photograph was taken or what it was intended to depict.

Appellant requested a hearing that was held on January 12, 2012. Counsel argued that merely alleging inconsistencies in the record was not in fact new evidence. He noted that appellant was at work delivering mail when the injury occurred and called his supervisor to tell him that something hit his head. Counsel noted that appellant was then taken to various medical facilities, including a hospital where he ultimately had cervical surgery. He noted that the medical history reported that appellant lost consciousness. Appellant testified that he was talking to a maintenance man “that was right in front” of him when he was hit on the head. He never saw what hit him or remember much after that, except that he looked up and saw that the maintenance man “picked up the stick [and] threw it into the bushes.” Appellant did not remember calling his supervisor. He testified that he was struck on the head and that the pictures showing abrasions on his head were from the injury, as he had no abrasions from a haircut or

¹⁷ OWCP stated that counsel “further clouds the issue of what happened” by claiming for the first time that appellant was hit by more than one branch on May 22, 2010.

other source. Appellant could not remember going to a different medical facility first. He could not remember much about what happened at the hospital. Appellant stated that he told the medical personnel the truth to the best of his ability while in the emergency room. He testified that some time after the claimed work injury, he was the victim of an assault while he was at a corner liquor store and that he was hit in the face by someone who apparently was drunk. Counsel advised that he had no testimony from the maintenance man that appellant stated had witnessed the incident on March 22, 2010.

OWCP subsequently received a January 17, 2012 deposition from Dr. Kim who provided testimony about his treatment of appellant's cervical problems, including the surgery of March 25, 2010.¹⁸ Dr. Kim responded in the affirmative to a question regarding whether there was "enough force in a direct blow to the top of the head from something that may weigh less than half a pound to cause an individual to sustain a herniated disc like [appellant] did." He stated that something clearly struck appellant's head and transmitted an "axial load" into his spine and posited "that can lead to a herniated disc." Dr. Kim indicated that appellant had a weakness at the C4-5 area posterior annulus and posterior longitudinal ligament and suffered a herniated disc as a result of the load from the force of the object that hit his head.¹⁹ He stated, "Yes, it can happen," in response to a question regarding whether, in appellant's case, there could be a pathophysiological process of injury "if something struck him on the head and the immediate shock of that caused him to flinch quickly." Dr. Kim noted that any kind of quick movement can displace the disc from its normal position to an abnormal position pushing on the spinal cord. He stated that it was more likely than not that the object that struck appellant's head on March 22, 2010 caused him to sustain a herniated disc at C4-5.

In an April 12, 2012 decision, OWCP's hearing representative affirmed OWCP's September 12, 2011 decision. She indicated that due to the multiple inconsistencies in the case record, the rescission of the acceptance of appellant's claim was justified.

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 his own motion or on application.²⁰ 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.²¹ 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.²²

¹⁸ The deposition was taken by appellant's counsel in the present case.

¹⁹ Dr. Kim responded in the affirmative when asked whether forces hit the top of appellant's head, traveled from the skull to the spine which absorbed the shock and transmitted energy to a weak disc.

²⁰ 5 U.S.C. § 8128.

²¹ *John W. Graves*, 52 ECAB 160, 161 (2000).

²² *See* 20 C.F.R. § 10.610.

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, as here, 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.²³

An employee who claims benefits under FECA has the burden of establishing the occurrence of an injury at the time, place and in the manner alleged, by a preponderance of the reliable, probative and substantial evidence.²⁴ 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, but the employee's statements must be consistent with the surrounding facts and circumstances and his or her subsequent course of action.²⁵ An employee has not met his or her burden of proof of establishing the occurrence of an injury when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim.²⁶ Such circumstances as late notification of injury, lack of confirmation of injury, continuing to work without apparent difficulty following the alleged injury, and failure to obtain medical treatment may, if otherwise unexplained, cast sufficient doubt on an employee's statements in determining whether a *prima facie* case has been established.²⁷ However, an employee's statement alleging that an injury occurred at a given time and in a given manner is of great probative value and will stand unless refuted by strong or persuasive evidence.²⁸

ANALYSIS

OWCP accepted appellant's case on the basis that, on March 22, 2010, he was hit on the head by a tree branch while delivering mail and lost consciousness. Appellant's claim was accepted for a herniated disc at C4-5, concussion with brief loss of consciousness and mild compression fracture bodies at T7-8. On March 25, 2010 Dr. Kim performed cervical surgery at C4-5 including microdiscectomy, foraminotomy and arthrodesis with instrumentation. Subsequent to the acceptance of the claim, OWCP received new evidence, including a March 30, 2010 report of the Serious Accident Review Board of the employing establishment and a January 21, 2011 sworn deposition from a person who directly witnessed the events of March 22, 2010. Based on this evidence, OWCP rescinded its acceptance of appellant's claim and terminated his wage-loss compensation and medical benefits effective September 12, 2011.

²³ *Supra* note 21.

²⁴ *William Sircovitch*, 38 ECAB 756, 761 (1987); *John G. Schaberg*, 30 ECAB 389, 393 (1979).

²⁵ *Charles B. Ward*, 38 ECAB 667, 670-71 (1987); *Joseph Albert Fournier, Jr.*, 35 ECAB 1175, 1179 (1984).

²⁶ *Tia L. Love*, 40 ECAB 586, 590 (1989); *Merton J. Sills*, 39 ECAB 572, 575 (1988).

²⁷ *Samuel J. Chiarella*, 38 ECAB 363, 366 (1987); *Henry W.B. Stanford*, 36 ECAB 160, 165 (1984).

²⁸ *Robert A. Gregory*, 40 ECAB 478, 483 (1989); *Thelma S. Buffington*, 34 ECAB 104, 109 (1982).

The Board finds that OWCP properly rescinded its acceptance of appellant's claim and terminated his wage loss and medical benefits effective September 12, 2011. OWCP presented new evidence which showed that there were such inconsistencies in the evidence as to cast serious doubt upon the validity of appellant's claim. Appellant's account of the events of March 22, 2010 was refuted by strong and persuasive evidence.

The new evidence, particularly the sworn witness statement in the third-party matter, contradicted appellant's version of events. The witness specifically noted that she did not see a large branch strike appellant, but rather only saw a twig (measuring an estimated eight inches long and a half inch in diameter) hit him on his right shoulder. She did not see him fall to the ground and lose consciousness as he had alleged in statements to physicians, but rather she saw him walk quickly to sit down on a walkway and call his supervisor. The witness stated that she saw where the twig went and pointed it out to apartment complex managers. She saw no pictures taken at the time of injury and she remained in the area until appellant's supervisor came to see appellant and they both walked to the supervisor's vehicle. The witness stated that there were no other witnesses. The Board notes that appellant has been inconsistent in reporting the size of the object that allegedly hit him. Appellant has variously indicated that the branch which hit him was 18 inches long and 1½ inches in diameter or 36 inches long and ¾ inches in diameter. This conflicts with the sworn witness statement from the third-party matter who indicated that the twig that hit him was an estimated eight inches long and a half inch in diameter.²⁹ Appellant did not submit evidence or argument which adequately explained this discrepancy.

OWCP contacted appellant and asked for additional evidence that would support his version of events. No additional statements were received from him or any other witness to confirm his version of events. Appellant submitted several copies of photographs of the branch or branches that allegedly hit him, but no explanation was provided to indicate where or when these photographs were taken.³⁰

At a January 12, 2012 hearing before an OWCP hearing representative, appellant testified that he was talking to a maintenance man who was in front of him when he was hit on the head by a branch on March 22, 2010. He indicated that he never saw what hit him, but then contradicted himself by saying that he saw the maintenance man throw the stick that hit him into the bushes. Appellant did not explain the basis upon which he could state which object hit him on the head. If the maintenance man threw the object in question into the bushes, it is unclear what was depicted by the photographs submitted by counsel. Appellant did not provide any statement from a witness supporting his account of the events of March 22, 2010, such as testimony from the maintenance man alleged to have been present on that date. The witness in the third-party matter explicitly indicated that there were no other witnesses to the object which hit him. She made no mention of the presence of the maintenance man, whereas appellant asserted that the maintenance man was right in front of him when he was hit by a branch.

²⁹ The report of the Serious Accident Review Board indicated that staff at the apartment complex retained the branch that struck appellant and that they weighed it as being 5.9 ounces.

³⁰ Counsel initially indicated that one branch struck appellant on March 22, 2010, but he later suggested that more than one branch struck him.

On appeal, counsel argued that the medical evidence of record, including the January 17, 2012 deposition of Dr. Kim, established appellant's claim, as this deposition contained an opinion that even an object that weighed as little as half a pound and hit appellant on the head could cause the conditions initially accepted by OWCP. However, the Board notes that appellant's claim was rescinded due to multiple unexplained discrepancies in the factual aspects of the case and not on a medical basis.³¹ Counsel claimed that the employing establishment and OWCP did not adequately resolve various questions, including what the maintenance man might have witnessed and what tree was the source of the object that struck appellant, but the above-noted discrepancies regarding the events of March 22, 2010 were created by appellant and he failed to adequately explain them. Appellant was repeatedly provided opportunities to clarify the factual aspects of his case, but he failed to do so. His statements regarding the nature of the March 22, 2010 injury have been refuted by strong and persuasive evidence and OWCP has provided a clear explanation of the rationale for rescission of its acceptance of appellant's claim.

For these reasons, OWCP met its burden of proof to rescind its acceptance of appellant's claim and justified its termination of his wage-loss compensation and medical benefits effective September 12, 2011.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that OWCP met its burden of proof to rescind its acceptance of appellant's claim and terminate his wage-loss compensation and medical benefits effective September 12, 2011.

³¹ Moreover, the Board notes that the factual assumptions described by Dr. Kim, including appellant being hit on his head, were not established by appellant in this case.

ORDER

IT IS HEREBY ORDERED THAT the April 12, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 23, 2013
Washington, DC

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

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

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