

temporary-duty assignment in Springfield, Virginia, during the period September 12 to 23, 2011. She attended daily meetings at a Hilton Hotel conference room from September 16 to 22, 2011 and was exposed to Legionella pneumophila bacteria by way of the air conditioning system. Appellant became symptomatic on October 2, 2011, stopped work on October 3, 2011, and sought medical treatment. She was subsequently informed by the Ohio Department of Health on October 10, 2011 that she sustained Legionnaires' disease. Appellant returned to work on October 17, 2011.

An October 10, 2011 urinary antigen test obtained by Dr. Robert J. Zsoldos, a Board-certified internist, was positive for Legionella pneumophila serogroup 1 antigen, suggesting current or past infection.

In an October 26, 2011 report, Dr. Joseph G. Lutz, Jr., a Board-certified family practitioner, remarked that appellant attended work-related meetings at Hilton Springfield from September 16 to 23, 2011. He examined her on October 4, 2011 and initially diagnosed viral illness. An October 6, 2011 electrocardiogram later showed a ventricular strain pattern. Following the positive October 10, 2011 urinary antigen test, Dr. Lutz concluded:

“With the sudden onset of the illness and the quick response to appropriate treatment, it is my opinion that [appellant] certainly did have acute onset of Legionnaires' disease and the diagnosis of Legionnaires' disease originated while in [temporary-duty] status for the [employing establishment] on September 12 through 23, 2011.”

By decision dated November 30, 2011, OWCP accepted appellant's claim for Legionnaires' disease.

The employing establishment challenged OWCP's ruling in a December 12, 2011 letter on the grounds that appellant did not contract Legionnaires' disease while in the performance of duty. Dr. Faye T. Bresler, its occupational health program manager and Board-certified occupational physician, was advised by the Virginia Department of Health that the source of transmission could be best pinpointed in outbreak situations rather than individual cases. She then contacted the Centers for Disease Control and Prevention (CDC) as well as Hilton Springfield on October 18 and December 9, 2011, respectively, and was notified that there were no Legionnaires' disease outbreak investigations in Virginia or any reported incidents from hotel guests before, during or after appellant's visit. Therefore, exposure to Legionella pneumophila during appellant's temporary-duty assignment could not be verified. In addition, the employing establishment noted that the CDC's website indicated that Legionnaires' disease symptoms usually commenced 2 to 14 days after bacterial exposure. Since appellant was diagnosed approximately two weeks after her temporary-duty assignment, she “reasonably could have been exposed to Legionella bacteria at some point after her return home from Virginia,” for instance by produce misting and spraying equipment in grocery stores, decorative fountains in restaurants and air conditioning systems in residential buildings.

In a December 13, 2011 decision, OWCP informed appellant that the acceptance of her claim was rescinded on the basis of the employing establishment's December 12, 2011 letter and afforded her 20 days to submit additional evidence supporting her claim.

In a December 13, 2011 letter, Martin Flaherty, Hilton Springfield's corporate director of maintenance, asserted that no visitor had ever alleged exposure to Legionella pneumophila dating back to the hotel's opening in 1978. A December 13, 2011 letter from Hilton Springfield's insurance broker likewise stated that it did not receive any such claims since the April 8, 2007 underwriting.

In a January 18, 2012 statement, appellant contended that the employing establishment did not present probative and substantial evidence that she contracted Legionnaires' disease while she was off duty.

By decision dated January 27, 2012, OWCP denied appellant's claim, finding the factual evidence insufficient to establish that she was exposed to Legionella pneumophila while she was on temporary-duty assignment.

Appellant requested a telephonic hearing, which was held on May 29, 2012. She testified that she initially experienced symptoms within the 14-day incubation period described by the employing establishment. Appellant detailed that she was susceptible to bacterial infection because she was taking Humira to treat psoriatic arthritis and recalcitrant psoriasis. She later contacted the Virginia Department of Health, which informed her that Hilton Springfield would not be tested for contamination unless more than one person reported Legionella pneumophila exposure.

Dr. Linda S. Rupert, a Board-certified dermatologist, confirmed in a May 21, 2012 letter that appellant had recalcitrant psoriasis and was prescribed Humira, which weakened her immune system. She opined that appellant contracted Legionnaires' disease during a business trip.

Appellant's representative argued in a June 14, 2012 statement that OWCP did not meet its burden of proof to rescind acceptance.

On August 14, 2012 OWCP's hearing representative affirmed the January 27, 2012 decision.

LEGAL PRECEDENT

Pursuant to section 8128 of FECA, the Secretary of Labor may review an award for or against payment of compensation at any time on his or her own motion or on application. The Board has upheld OWCP's authority under this section to reopen a claim at any time on its own motion and, where supported by the evidence, set aside or modify a prior decision and issue a new decision. The Board has noted, however, that the power to annul an award is not arbitrary and that an award for compensation can only be set aside in the manner provided by the compensation statute.²

Workers' compensation authorities generally recognize that compensation awards may be corrected, in the discretion of the compensation agency and in conformity with statutory

² V.C., 59 ECAB 137 (2007).

provision, where there is good cause for so doing, such as mistake or fraud. Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits. This also holds true where OWCP later decides that it erroneously accepted a claim.³

OWCP bears the burden of justifying rescission of acceptance on the basis of new evidence, legal argument and/or rationale.⁴ It does not discharge its burden of proof by reviewing the evidence of record at the time of acceptance and arriving at a different conclusion from that of the initial adjudicator.⁵ Probative and substantial positive evidence⁶ or sufficient legal argument⁷ must establish that the original determination was erroneous. OWCP must also provide a clear explanation of the rationale for rescission.⁸

ANALYSIS

The Board finds that OWCP improperly rescinded acceptance of appellant's claim. According to OWCP's procedure manual, a pretermination notice is required when a rescission is issued.⁹ In this case, by decision dated November 30, 2011, OWCP accepted that appellant contracted Legionnaires' disease due to bacterial exposure during a temporary-duty assignment. Thereafter, on the basis of the employing establishment's December 12, 2011 letter, it rescinded acceptance on December 13, 2011.¹⁰ The case record does not establish that appellant received a pretermination notice between November 30 and December 13, 2011. In view of this procedural error, OWCP's original determination of rescission is *void ab initio*.

CONCLUSION

The Board finds that OWCP improperly rescinded acceptance of appellant's claim.

³ *Id.*

⁴ *John W. Graves*, 52 ECAB 160, 161-62 (2000); *Alice M. Roberts*, 42 ECAB 747, 753 (1991).

⁵ *Roseanna Brennan*, 41 ECAB 92, 96 (1989).

⁶ *Michael W. Hicks*, 50 ECAB 325, 329 (1999).

⁷ *See, e.g., Beth A. Quimby*, 41 ECAB 683, 688-89 (1990).

⁸ *V.C.*, *supra* note 2.

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.4(b)(10) (February 2013). *See also id.* Chapter 2.1400.19 (where the original decision may have been issued in error, OWCP must perform any necessary case development to fully resolve the matter before rendering proposed and final decisions rescinding the original finding).

¹⁰ The Board notes that OWCP's December 13, 2011 letter was issued without findings of fact or appeal rights. *See* 20 C.F.R. § 10.126 (provides that an OWCP decision shall contain findings of fact and a statement of reasons and also states that the decision will be accompanied by information about appeal rights).

ORDER

IT IS HEREBY ORDERED THAT the August 14, 2012 merit decision of the Office of Workers' Compensation Programs is reversed.

Issued: June 7, 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