United States Department of Labor
Employees' Compensation Appeals Board

D.M., Appellant	)	
	)	**Docket No. 13-165**
and	)	**Issued: March 19, 2013**
DEPARTMENT OF HEALTH & HUMAN SERVICES, INDIAN HEALTH SERVICE, Billings, MT, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 31, 2012 appellant, through his attorney, filed a timely appeal from the September 28, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (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 for an August 11, 2011 work injury.

FACTUAL HISTORY

On November 4, 2011 appellant, then a 46-year-old administrative officer, filed a traumatic injury claim alleging a back injury at about 10:15 p.m. on Thursday, August 11, 2011, when he slipped and fell on a wet surface while retrieving laundry from a dryer at the "federal"

[1] 5 U.S.C. §§ 8101-8193.

apartment complex where he lived. On the claim form, Yvonne Misiaszek, appellant's immediate supervisor, indicated on November 8, 2011 that appellant's regular work hours were 8:00 a.m. to 5:00 p.m., Monday through Friday. She stated that the accident did not occur in the performance of duty because appellant was off duty at the time.

In a December 23, 2011 decision, OWCP accepted that appellant sustained displacement of lumbar intervertebral disc without myelopathy.

In a January 17, 2012 statement, Kevin Stiffarm, an acting chief executive officer for the employing establishment, stated that appellant held the position of administrative officer which did not include a regular and routine requirement to be available for recall on a 24/7 basis.[2] He noted that appellant maintained normal office hours of 8:00 a.m. to 5:00 p.m., Monday through Friday. Mr. Stiffarm stated that appellant was not required to reside in government quarters and indicated that his occupancy in the quarters was best described as that of a tenant paying monthly rent for the occupancy of the government quarters. He concluded that appellant was not injured in the performance of duty and enclosed a copy of a quarters assignment and acceptance agreement signed by appellant on January 20, 2011 and a housing policy document which discussed the occupant's responsibilities for maintaining the quarters and grounds.[3]

In a February 6, 2012 letter, OWCP advised appellant that it proposed to rescind its acceptance of his August 11, 2011 work injury. The proposed rescission was based on new evidence in the form of the January 17, 2012 letter of Mr. Stiffarm. It showed that appellant did not sustain an injury in the performance of duty on August 11, 2011. OWCP provided appellant with 30 days from the date of the letter to submit evidence and argument challenging the proposed action.

In a March 4, 2012 letter, appellant challenged the proposed rescission of the acceptance of his claim. He claimed that he was on call at all times for work and that he was required, or at least expected, to live in government quarters. Appellant disagreed that he was responsible for taking care of the grounds of the quarters.

In an April 9, 2012 decision, OWCP rescinded its acceptance of appellant's claim for an August 11, 2011 work injury. It noted that its rescission was based on the January 17, 2012 letter of Mr. Stiffarm which established that appellant was not in the performance of duty when he sustained an accident on August 11, 2011. OWCP provided a discussion of the "bunkhouse rule" which generally states that, when an employee who is required or expected to live in quarters or premises furnished or made available by his employer and is injured during the reasonable use or occupancy of such premises, the injury arises out of and in the course of employment. It noted, however, that the new evidence of record showed that appellant was not required or expected to live in government quarters and that he was not on call for work at the time of the August 11, 2011 accident. Moreover, appellant was not performing any work duties at the time of the accident.

[2] Mr. Stiffarm indicated that the employing establishment had not previously been provided an opportunity to formally comment on appellant's August 11, 2011 injury.

[3] The documents indicate that tenants had extensive responsibilities in maintaining living quarters and grounds, including mowing lawns and keeping walkways clear of debris.

Appellant requested a telephone hearing with an OWCP hearing representative. During the July 13, 2012 hearing, he testified that he lived in government housing and was required or at least expected, to do so. Appellant asserted that he was on call with his work at all times. He claimed that there was no other housing available within a reasonable distance. Counsel acknowledged that appellant was not explicitly required to live in government housing but argued that he was expected to live in such housing.

In an August 8, 2012 letter, P.J. Smith, a human resources assistant for the employing establishment, reiterated that appellant was not required or expected to live in government housing. The employing establishment noted that there was other housing available within a reasonable commuting distance of 13 miles of his duty station. Appellant had worked overtime before, but he was not an "on call" employee and not on call at the time of the August 11, 2011 accident. His actions at the time of the accident were not in any way connected to his work duties.

In a September 28, 2012 decision, a hearing representative affirmed OWCP's April 9, 2012 decision. She found that new evidence, including the letters from employing establishment officials, established that appellant was not in the performance of duty at the time of the August 11, 2011 accident. Therefore, the rescission of the acceptance of appellant's claim was proper.

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.[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, 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.[7]

While injuries occurring to employees at their residences are not generally compensable, if an employee is required or expected to live in quarters or premises furnished or made available

[4] 5 U.S.C. § 8128.

[5] *John W. Graves*, 52 ECAB 160, 161 (2000).

[6] *See* 20 C.F.R. § 10.610.

[7] *John W. Graves*, *supra* note 5.

by his or her employer and is injured during the reasonable use or occupancy of such premises, such injuries have been held to have occurred in the performance of duty and to be compensable. This rule has been referred to as the "bunkhouse rule."[8] The bunkhouse rule is further set forth in OWCP's procedures, which state, in pertinent part:

> "(1) An employee has the protection of [FECA] if injured during the reasonable use of premises which he or she is required or expected to occupy and which are provided by the employer. In this category of cases, the official superior should be requested to submit a statement showing:
>
> > (a) Whether the employee was required or expected to occupy the quarters where the injury occurred and, if so, this should be explained fully;
> >
> > (b) Whether the employer provided the quarters for the employee and, if so, this should be explained fully; and
> >
> > (c) In what activity the employee was engaged at the time of the injury."[9]

ANALYSIS

On August 11, 2011 appellant filed a traumatic injury claim alleging that he sustained a back injury at about 10:15 p.m. on Thursday, August 11, 2011, when he slipped and fell while retrieving laundry from a dryer at the apartment complex where he lived. On December 23, 2011 OWCP accepted that he sustained displacement of lumbar intervertebral disc without myelopathy.

OWCP rescinded its acceptance of appellant's claim based on new evidence of record, including a January 17, 2012 statement from Mr. Stiffarm, an acting chief executive officer for the employing establishment. Mr. Stiffarm asserted that appellant was not injured in the performance of duty on August 11, 2011.

The Board finds that OWCP presented sufficient evidence to meet its burden of proof to rescind its acceptance of appellant's claim for an August 11, 2011 work injury. This record supports that appellant did not sustain an injury in the performance of duty on August 11, 2011. Appellant's regular work hours were 8:00 a.m. to 5:00 p.m., Monday through Friday, and the accident occurred outside these hours. Despite the fact that appellant lived in a federally-run apartment complex, he was not required by the employing establishment or expected to live in government housing. Therefore, appellant's accident did not fall within the purview of the bunkhouse rule or occur in the performance of duty.[10] Appellant alleged generally that he was on call at the time of the August 11, 2011 accident which occurred outside his regular work hours. The evidence of record does not establish that he was an "on call" employee or otherwise

[8] *Jimmy T. Vest*, Docket No. 01-157 (issued October 25, 2001); *Edmond B. Wagoner*, 39 ECAB 758 (1988).

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.4(e) (August 1992).

[10] *See supra* notes 8 and 9.

on call at the time of the August 11, 2011 accident. Moreover, it is not established that appellant was performing any work duties at the time of the accident; rather, he was doing his laundry. The January 17, 2012 letter of Mr. Stiffarm was supported by the August 8, 2012 letter of P.J. Smith, a human resources assistant for the employing establishment.

OWCP presented sufficient evidence to show that appellant did not sustain an injury in the performance of duty on August 11, 2011. It met its burden of proof to rescind its acceptance of appellant's claim for an August 11, 2011 injury in the form of displacement of lumbar intervertebral disc without myelopathy.

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 for an August 11, 2011 work injury.

ORDER

IT IS HEREBY ORDERED THAT the September 28, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 19, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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