

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

D.H., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
White Plains, NY, Employer**

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**Docket No. 13-1885
Issued: May 12, 2014**

Appearances:
Paul Kalker, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On August 13, 2013 appellant, through her attorney, filed a timely appeal from a July 25, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP) which rescinded her claim. 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 for Ehlers-Danlos syndrome, postural orthostatic tachycardia syndrome (POTS) and tethered cord syndrome.

On appeal, counsel contends that the evidence of record is sufficient to establish that appellant aggravated her preexisting congenital conditions and that OWCP should accept her Ehlers-Danlos syndrome, POTS and tethered cord syndrome.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On June 25, 2009 appellant, then a 36-year-old mail handler, filed an occupational disease claim (Form CA-2) alleging that she sustained multiple injuries due to factors of her federal employment. OWCP accepted the claim for aggravation of the following preexisting conditions: (1) Chiari I malformation with low-lying cerebellar tonsils and borderline small posterior fossa with craniocervical instability; (2) cervical and lumbar spondylosis and degenerative disc disease; (3) obstructive sleep apnea/hypopnea secondary to No. 1; (4) carpal tunnel syndrome; (5) syringomyelia at C7 secondary to No. 1, resolved; (6) right shoulder, labral tear and mild distal supraspinatus tendinopathy; and (7) depression, adjustment disorder.

OWCP referred appellant to Dr. Edward Kirby, a Board-certified orthopedic surgeon, for a second opinion to determine the nature and extent of her employment-related conditions. In a May 26, 2010 report, Dr. Kirby advised that appellant had Ehlers-Danlos syndrome which was known to cause joint instability and opined that the labral tear and her need for surgery for stabilization of the right shoulder was due to her underlying syndrome. There was no evidence for any aggravation or causation by employment-related factors. Dr. Kirby explained that Ehlers-Danlos syndrome was a genetic abnormality resulting in altered collagen tissues and various problems with joint laxity and other connective tissue components and was not related to any work conditions. On September 3, 2010 Dr. Kirby opined that appellant was not totally disabled with respect to the diagnoses of cervical and lumbar spondylosis, carpal tunnel syndrome or right shoulder labral tear.

OWCP also referred appellant to Dr. Patrick Hughes, a Board-certified neurologist, for a second opinion evaluation to determine the nature and extent of her employment-related conditions. In a July 13, 2010 report, Dr. Hughes opined that the conditions of tethered cord syndrome, Ehlers-Danlos syndrome and POTS were related to appellant's federal employment, but not by direct cause. He opined that appellant sustained a permanent aggravation of the conditions and stated that, in spite of the appropriate surgical and medical treatments, her pain continued to persist. On September 3, 2010 Dr. Hughes indicated that he was "unable to comment about the right shoulder labral tear and mild distal supraspinatus tendinopathy in light of the fact that this [was] outside of [his] area of expertise."

By decision dated April 7, 2011, OWCP accepted appellant's claim for Ehlers-Danlos syndrome and POTS, noting that, upon receipt of accurate coding, the case would also be accepted for tethered cord syndrome. It placed her on the periodic rolls.

On May 16, 2011 Dr. Henry J. Magliato, a Board-certified orthopedic surgeon and OWCP medical adviser, noted that the neck was mainly a neurosurgical problem and Ehlers-Danlos syndrome was a hyperelasticity of all of the joint ligaments. He did not believe that it was influenced in any way by appellant's federal employment. Dr. Magliato stated that appellant had filed an occupational disease claim for tethered cord syndrome and Ehlers-Danlos syndrome and wanted the additional diagnoses accepted under her claim." He opined that "[s]ince she only worked for one year for the [employing establishment], it [was] unlikely her occupational duties could have caused enough aggravation to permanently affect her numerous diseases and malformations." Dr. Magliato noted that he did not review the second opinion report from Dr. Kirby.

By decision dated June 15, 2011, OWCP reopened the case upon receipt of additional evidence. It vacated the April 7, 2011 decision, rescinding appellant's claim on the basis that the medical evidence of record failed to establish that her congenital conditions were aggravated by factors of her federal employment.

OWCP referred appellant to Dr. Joseph Laico, a Board-certified orthopedic surgeon, for a second opinion evaluation. In reports dated August 2 and September 6, 2011, Dr. Laico opined that appellant did not sustain an aggravation of her preexisting conditions. Appellant's Ehlers-Danlos syndrome required surgical intervention, but was not aggravated by her federal employment.

OWCP also referred appellant to Dr. Jack Goodman, a Board-certified neurosurgeon, for a second opinion examination. In his August 7, 2011 report, Dr. Goodman diagnosed Munchausen's syndrome and opined that appellant "orchestrated an incredible scenario from which she has created a very elaborate and expensive production." He indicated that appellant was in need of continuous psychiatric care considering her age and medical track record. Dr. Goodman indicated that the issues of Ehlers-Danlos syndrome was also of questionable significance since appellant never had any dislocations or joint instability issues while at work.

On September 16, 2011 appellant, through her attorney, requested reconsideration. She submitted reports dated June 18, 2009 and August 14, 2011 from Dr. Clair Francomano, a Board-certified internist, who opined that appellant's duties of loading and unloading bulk mail, unloading mail from trucks, dumping mail from sacks, carrying mail and picking up sacks significantly aggravated her symptoms resulting from Ehlers-Danlos syndrome, POTS and tethered cord syndrome. Dr. Francomano stated that, while many patients with Ehlers-Danlos syndrome never experience disabling symptoms, the physical demanding tasks required by appellant's employment were precisely the kind of activities that often provoked the onset of disability symptoms. She explained that, because the joints are unusually lax in patients with Ehlers-Danlos syndrome, the muscles are working overtime to try to stabilize the joints and placing a person in a physically demanding situation where the muscles are constantly called up to contract and relax in the process of lifting and loading heavy sacks and pouches can cause chronic muscle spasm and the development of myofascial trigger points. Dr. Francomano stated that the over-activity of the sympathetic nervous system may exacerbate the symptoms of POTS and repetitive bending and lifting would exacerbate the symptoms of tethered cord syndrome, which is what she believed happened to appellant.

In a July 9, 2009 report, Dr. Roger Kula, a Board-certified neurologist and appellant's attending physician, diagnosed Ehlers-Danlos syndrome and POTS. Dr. Kula advised that appellant's tethered cord syndrome and Ehlers-Danlos syndrome were minimally or materially asymptomatic prior to her work experiences.

On October 17, 2011 OWCP found a conflict in medical opinion between Dr. Kula and Dr. Goodman. It referred appellant to Dr. Daniel Spitzer, a Board-certified neurosurgeon, for an impartial medical examination on November 7, 2011. Dr. Spitzer, however, reviewed the medical records and found that appellant was treating with a doctor that he knew and deferred the appointment.

By decision dated August 3, 2012, OWCP denied modification of the June 15, 2011 decision.

On April 22, 2013 appellant, through her attorney, requested reconsideration. In an October 8, 2012 report, Dr. Francomano reiterated her medical opinion. In a December 7, 2012 report, Dr. Kula also reiterated his diagnoses and opined that appellant's conditions were causally related to factors of her employment, including loading and unloading mail, lifting and dumping heavy sacks of mail and carrying mail.

On November 1, 2012 Dr. Louis Weimer, a Board-certified neurologist, diagnosed Chiari I malformation, Ehlers-Danlos syndrome, cervical syringomyelia, tethered cord, Mitral valve prolapse and prior craniocervical fusion surgery with craniotomy in September 2008. He further diagnosed POTS and indicated that it was more common in patients with hereditary Chiari I malformations. Dr. Weimer stated that some activities were known to exacerbate the symptoms and possibly the neurological injury in patients with Chiari malformations, including heavy lifting of boxes or other similar objects such as bins of mail. He indicated that appellant's autonomic disorder was likely because of injury to the brainstem area that was affected by the Chiari malformations where critical heart rate and blood pressure control centers resided and she had additional lesser risk factors for the condition, including Ehlers-Danlos syndrome. Dr. Weimer also noted that recurrent position changes, especially squatting to standing, exacerbated certain symptoms of this condition.

OWCP referred appellant to Dr. Solomon Miskin, a Board-certified psychiatrist, for a second opinion examination. In his April 16, 2013 report, Dr. Miskin diagnosed post-traumatic stress disorder and major depressive disorder without psychotic features. He stated that appellant's preexisting conditions were concurrent with her psychiatric symptoms and had a direct relationship to them, in that her symptoms were reactive and consequent to her multiple medical disorders.

OWCP also referred appellant to Dr. Kamran Tabaddor, a Board-certified neurosurgeon, for a second opinion evaluation. In his April 25, 2013 report, Dr. Tabaddor opined that appellant's work could possibly have accelerated her preexisting condition or could have been totally incidental and unrelated since congenital conditions are known to progress and produce symptoms without any injuries or traumas. He indicated that appellant's Ehlers-Danlos syndrome could have had a significant impact on her autonomic functions which could produce multiple clinical symptoms which she complained of, such as dizziness, tinnitus, difficulty with rapid movement and change of blood pressure. Dr. Tabaddor advised that appellant was unable to return to work and opined that her preexisting congenital diseases "only might have been accelerated by her work."

By decision dated July 25, 2013, OWCP denied modification of its August 3, 2012 decision on the basis that the medical evidence submitted was not sufficient to establish causal relationship.

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.² 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.³ 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.⁴

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. 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.⁵

OWCP bears the burden of justifying rescission of acceptance on the basis of new evidence, legal argument and/or rationale.⁶ Probative and substantial positive evidence⁷ or sufficient legal argument⁸ must establish that the original determination was erroneous. OWCP must also provide a clear explanation of the rationale for rescission.⁹

ANALYSIS

On April 7, 2011 OWCP expanded appellant's claim to include Ehlers-Danlos syndrome and POTS, noting that upon receipt of accurate coding, the case would be accepted for tethered cord syndrome as well. It later reopened the case after receiving additional evidence, including a May 16, 2011 report from the medical adviser, Dr. Magliato. In its June 15, 2011 decision, OWCP rescinded the expansion of appellant's claim on the basis that the medical evidence of record failed to establish that her congenital conditions were aggravated by factors of her federal employment. By decision dated July 25, 2013, it denied the claim on the basis that the medical evidence submitted was not sufficient to establish causal relationship.

² 5 U.S.C. § 8128.

³ See *John W. Graves*, 52 ECAB 160, 161 (2000).

⁴ 20 C.F.R. § 10.610.

⁵ See *V.C.*, 59 ECAB 137 (2007).

⁶ See *John W. Graves*, *supra* note 3; *Alice M. Roberts*, 42 ECAB 747, 753 (1991).

⁷ See *Michael W. Hicks*, 50 ECAB 325, 329 (1999).

⁸ See, e.g., *Beth A. Quimby*, 41 ECAB 683, 688-89 (1990).

⁹ See *V.C.*, *supra* note 5.

OWCP did not identify its decision denying appellant's claim as a rescission. However, as it had accepted her claim, it bears the burden of proof to rescind acceptance.¹⁰ OWCP impermissibly shifted the burden of proof to appellant to establish an employment-related emotional condition.¹¹ In establishing that its prior acceptance was erroneous, it is required to provide a clear explanation of the rationale for rescission.¹²

In his May 16, 2011 report, Dr. Magliato indicated that the neck was mainly a neurosurgical problem and Ehlers-Danlos syndrome was a hyperelasticity of all of the joint ligaments and he did not believe that it was influenced in any way by appellant's federal employment. He stated that appellant had filed an occupational disease claim for tethered cord syndrome and Ehlers-Danlos syndrome and "now want[ed] these additional diagnoses added to her accepted conditions." Dr. Magliato opined that "[s]ince she only worked for one year for the [employing establishment], it [was] unlikely her occupational duties could have caused enough aggravation to permanently affect her numerous diseases and malformations." He noted that he did not see the second opinion reports from Dr. Kirby.

The Board finds that the opinion of OWCP's medical adviser is insufficient to meet OWCP's burden of proof to rescind as he provided no rationalized opinion in support of its decision to rescind.¹³ While the medical adviser asserted that appellant wanted additional diagnoses to be added to her accepted conditions, the record establishes that OWCP had previously accepted the conditions in its April 7, 2011 decision. Dr. Magliato failed to provide an opinion based on a complete and accurate medical history, as he noted that he did not review the second opinion reports from Dr. Kirby. He opined that appellant's Ehlers-Danlos syndrome was not influenced in any way by her federal employment and explained that it was unlikely that her duties could have caused enough aggravation to permanently affect her conditions as she was only employed by the employing establishment for one year. The Board finds that OWCP's medical adviser's conclusory opinion is speculative and not sufficiently rationalized. The Board has held that speculative and equivocal medical opinions regarding causal relationship are of diminished probative value.¹⁴ Thus, the report of Dr. Magliato is insufficient to meet OWCP's burden of proof to rescind acceptance.

The Board finds that OWCP did not offer a clear explanation of its rationale for rescission. Therefore, OWCP has failed to meet its burden of proof to rescind the acceptance of the claim.

¹⁰ See *George A. Rodriguez*, 57 ECAB 224 (2005).

¹¹ See *T.Y.*, Docket No. 10-231 (issued September 2, 2010).

¹² See *Amelia S. Jefferson*, 57 ECAB 183 (2005); *Delphia Y. Jackson*, 55 ECAB 373 (2004).

¹³ See *D.C.*, Docket No. 10-2052 (issued August 16, 2011); see also *George Randolph Taylor*, 6 ECAB 986, 988 (1954) (where the Board found that a medical opinion not fortified by medical rationale is of little probative value).

¹⁴ See *Ricky S. Storms*, 52 ECAB 349 (2001) (while the opinion of a physician supporting causal relationship need not be one of absolute medical certainty, the opinion must not be speculative or equivocal. The opinion should be expressed in terms of a reasonable degree of medical certainty).

CONCLUSION

The Board finds that OWCP has not met its burden of proof to rescind its acceptance of appellant's claim for Ehlers-Danlos syndrome, postural orthostatic tachycardia syndrome and tethered cord syndrome.

ORDER

IT IS HEREBY ORDERED THAT the July 25, 2013 decision of the Office of Workers' Compensation Programs is reversed.

Issued: May 12, 2014
Washington, DC

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

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

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