

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

C.P., Appellant)

and)

DEPARTMENT OF AGRICULTURE,)
NATURAL RESOURCES CONSERVATION)
SERVICE, Decatur, TX, Employer)

**Docket No. 14-1316
Issued: November 6, 2014**

Appearances:

*S. Brock Benson, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 19, 2014 appellant, through counsel, filed a timely appeal of a November 27, 2013 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.

ISSUES

The issues are: (1) whether OWCP properly found that an overpayment of compensation in the amount of \$17,563.12 was created from November 25, 2012 to June 1, 2013; and (2) whether OWCP properly denied waiver of recovery of the overpayment.

On appeal counsel contends that recovery of the overpayment would be against equity and good conscience.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On October 14, 2012 appellant, then a 60-year-old soil conservationist, filed a traumatic injury claim alleging that on October 10, 2012 he sustained a swollen and bruised ankle and spinal stress fractures as the result of a *grand mal* seizure.² He stopped work on the date of the injury and has not returned to work.

On October 22, 2012 OWCP received an October 12, 2012 Authorization for Examination and/or treatment (Form CA-16) and an attending physician's report³ dated October 12, 2012. Appellant was diagnosed with lumbar spine fracture, seizure and ankle injury as the result of the incident. The physician checked "yes" to the question of whether the diagnosed conditions were employment related. In support of this conclusion, the physician noted that appellant was at work at the time the illness occurred.

On October 29, 2012 OWCP accepted appellant's claim for aggravation of generalized convulsive epilepsy, closed lumbar vertebra fracture with no spinal cord injury and left ankle and foot arthropathy.

By letter dated March 26, 2013, OWCP placed appellant on the periodic rolls for temporary total disability.

By decision dated April 18, 2013, OWCP rescinded acceptance of appellant's claim. It found that the medical evidence submitted at the time it accepted his claim was insufficient to establish his claim.

On May 28, 2013 appellant requested reconsideration and submitted evidence in support of his request.

By decision dated August 23, 2013, OWCP denied modification.

On October 15, 2013 OWCP advised appellant of a preliminary determination that an overpayment of compensation in the amount of \$17,653.12 was created. In an accompanying memorandum, it noted that the acceptance of his claim had been rescinded and that compensation paid to him from November 25, 2012 to June 1, 2013 was an overpayment of compensation. Appellant was found not to be at fault in creating the overpayment. OWCP provided various appeal rights to appellant to contest its preliminary determination.

On November 15, 2013 appellant requested a telephone conference with the district director, which was held on November 26, 2013. By decision dated November 27, 2013, OWCP finalized the finding of a \$17,563.12 overpayment of compensation and also denied waiver of recovery of the overpayment.

² On the back of the form, the employing establishment noted the date of injury, first medical treatment and the date appellant stopped work as October 9, 2012 and the date of notice of the injury as October 10, 2012.

³ The signature on the form is illegible.

LEGAL PRECEDENT -- ISSUE 1

If OWCP properly rescinds acceptance of a claim, the compensation for wage loss paid does represent an overpayment of compensation.⁴ With respect to a rescission of acceptance, the Board has upheld OWCP's authority to reopen a claim at any time on its own motion under 5 U.S.C. § 8128 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

It is well established that, once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation. This holds true where OWCP later decides that it has erroneously accepted a claim for compensation.⁷ OWCP 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.⁸ Probative and substantial positive evidence⁹ or sufficient legal argument¹⁰ must establish that the original determination was erroneous. OWCP must also provide a clear explanation of the rationale for rescission.¹¹

OWCP's procedure manual requires a pretermination notice where OWCP has accepted a claim and paid benefits and it is later determined that those benefits were accepted in error.¹²

ANALYSIS -- ISSUE 1

The underlying overpayment in this case was based on OWCP's April 18, 2013 rescission of the acceptance of appellant's traumatic injury claim. The Board must review the underlying decision to determine if an overpayment has been established.¹³

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

⁴ *J.F.*, Docket No. 08-2396 (issued March 19, 2009); *see, e.g., Major W. Jefferson, III*, 47 ECAB 295 (1996).

⁵ *V.C.*, 59 ECAB 137 (2007); *Eli Jacobs*, 32 ECAB 1147 (1981).

⁶ *Doris J. Wright*, 49 ECAB 230 (1997); *Shelby J. Rycroft*, 44 ECAB 795 (1993).

⁷ 20 C.F.R. § 10.610; *see V.C.*, *supra* note 5.

⁸ *Roseanna Brennan*, 41 ECAB 92, 96 (1989).

⁹ *See, e.g., Beth A. Quimby*, 41 ECAB 683 (1990).

¹⁰ *See V.C.*, *supra* note 5.

¹¹ *Belinda R. Darville*, 54 ECAB 656 (2003).

¹² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.4(b)(10) (February 2013).

¹³ *See Russell E. Wageneck*, 46 ECAB 653 (1995).

is issued.¹⁴ In this case, by decision dated October 29, 2012, OWCP accepted appellant's claim for aggravation of generalized convulsive epilepsy, closed lumbar vertebra fracture with no spinal cord injury and left ankle and foot arthropathy. In correspondence dated March 26, 2013, OWCP placed appellant on the periodic rolls for temporary total disability. By decision dated April 18, 2013, it rescinded acceptance of appellant's traumatic injury claim.¹⁵ The case record does not establish that appellant received a pretermination notice between October 29, 2012 and April 18, 2013. In view of this procedural error, OWCP's original determination of rescission is void *ab initio*.

The Board finds OWCP did not meet its burden of proof to rescind acceptance of the claim. OWCP based the fact of overpayment on the rescission of acceptance of his claim. The Board finds that as OWCP did not properly rescind acceptance of appellant's claim, the fact of overpayment has not been established. In view of the Board's finding, OWCP's denial of waiver of recovery of the overpayment is moot.

CONCLUSION

Fact of overpayment has not been established in this case as OWCP did not properly rescind acceptance of appellant's claim.

¹⁴ *Supra* note 12. *See also supra* note 12 at 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), and *P. V.*, Docket No. 12-1822 (issued June 7, 2013).

¹⁵ OWCP based the rescission of appellant's claim on the grounds that the evidence at the time of its acceptance was insufficient.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 27, 2013 is reversed.

Issued: November 6, 2014
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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