

FACTUAL HISTORY

On June 8, 2010 appellant, then a 46-year-old customs and border protection officer, filed a traumatic injury (Form CA-1) claiming that on June 6, 2010, she injured her right foot while climbing into a bus to conduct an inspection.

In an August 18, 2011 letter, OWCP advised appellant of the type of factual and medical evidence needed to establish her claim, including a detailed description of the June 6, 2010 incident, and medical evidence from her attending physician explaining how and why that incident would cause the claimed injury. It afforded her 30 days to submit such evidence.

In response, appellant submitted an August 27, 2011 report from Dr. Thomas E. Brooks, III, an attending podiatrist. Dr. Brooks diagnosed bilateral posterior tibial tendon dysfunction and prescribed bilateral orthotics. He noted work restrictions against frequent kneeling and bending, with standing limited to four hours continuously. Dr. Brooks renewed these restrictions through September 20, 2011. He provided information from the internet about posterior tibialis tendon dysfunction.

In an August 25, 2011 statement, appellant stated that she sprained her right ankle on June 6, 2010 while inspecting a bus. She sought medical treatment from her family doctor, who did not accept compensation patients. Appellant therefore consulted a second physician, who obtained an x-ray showing no abnormality of the right ankle. She then developed back spasms, which a third doctor opined could be related to the ankle injury. Appellant consulted a rheumatologist and a fourth physician who thought she might have gout. An orthopedic surgeon diagnosed bilateral posterior tendinitis “from continual stress and strain.”

By decision dated September 19, 2011, OWCP denied appellant’s claim, finding that causal relationship had not been established. It accepted that the June 6, 2010 incident occurred as alleged. OWCP found, however, that appellant did not submit medical evidence supporting a causal relationship between climbing onto a bus on June 6, 2010 and the claimed right foot or ankle injury.

In an October 12, 2011 letter, appellant requested reconsideration. She provided an October 20, 2011 statement reiterating that she sprained her right ankle on June 6, 2010, but asserting that her bilateral tendinitis was due to repetitive stress and strain. Appellant asserted that she aggravated her left ankle due to an antalgic gait after spraining her right ankle.

Appellant provided September 26 and October 10, 2011 reports from Dr. Raul O. Maldonado, an attending podiatrist, relating her account of spraining her right ankle while climbing onto a bus on June 6, 2010. On examination, Dr. Maldonado found pain on palpation of the bilateral tibial tendons. He obtained x-rays and ultrasound scans of both ankles showing a torn right posterior tibial tendon, bilateral tendinitis of the anterior and posterior tibialis, and tenosynovitis. Dr. Maldonado noted possible bilateral posterior tibial tendon tears.

In a September 29, 2011 report, Dr. Emilia Dulgheru, an attending Board-certified rheumatologist, noted treating appellant since 2010 for systemic lupus erythematosus. She diagnosed bilateral posterior tibial tendon dysfunction. Dr. Dulgheru recommended that

appellant lose weight, avoid prolonged walking or running, and adjust her “work hours and assignments to prevent further injury or deterioration.” She opined that “the posterior tibial tendon dysfunction [wa]s not related in any way to her underlying diagnosis of systemic lupus erythematosus.”

In an October 8, 2011 report, Dr. Brooks resubmitted literature about posterior tibial tendon dysfunction. He renewed prior work restrictions through October 20, 2011

By decision dated January 4, 2012, OWCP denied modification of the prior decision, finding that the additional evidence submitted was insufficient to establish causal relationship.

In a June 6, 2012 letter, appellant requested reconsideration. She submitted a May 21, 2012 report from Dr. Maldonado diagnosing bilateral posterior tibial tendon dysfunction.² Dr. Maldonado explained that the condition was “caused by over stressed tendon or trauma like a sprain or tear to the tendon.” Overuse of a weakened tendon could cause permanent damage. Dr. Maldonado related appellant’s account of a June 2011 occupational right ankle sprain, aggravated by regular and overtime work. He noted that her obesity could also contribute to bilateral ankle tendinitis.

Appellant also submitted a May 9, 2012 report from Dr. Diana Lozano, an attending Board-certified internist, who noted treating appellant for back pain on September 7, 2010. During her visit, she mentioned “she had experienced some pain to her ankle that was work related.” Dr. Lozano explained that as she did not accept workers’ compensation patients, she did not note the ankle complaint in the chart, but recalled the conversation. Appellant presented on March 1, 2011 with left ankle pain. “No mention was made as to work-related injury.” X-rays showed a two centimeter cystic lesion of the posterior cortex of the distal tibia. Appellant mentioned right ankle pain on March 8, 2011.

By decision dated June 8, 2012, OWCP vacated its September 19, 2011 and January 4, 2012 decisions and accepted appellant’s claim for a right ankle sprain, right tibialis tendinitis, and tenosynovitis of the right foot and ankle.

On May 18, 2012 appellant accepted a light-duty position at a lower pay grade, reducing her salary from \$71,102.00 to \$50,431.00 a year. The employing establishment offered the position in response to her request for reasonable accommodations due to physical disability. Appellant claimed compensation for the reduction in grade for the period June 3 to 16, 2012 and continuing.

In a June 25, 2012 report, Dr. Maldonado diagnosed a ruptured ankle tendon (traumatic), bilateral anterior/posterior tibialis tendinitis, and tenosynovitis. He opined that appellant’s condition was chronic and required her to “always wear her ankle braces, restricted walking, and standing.”

² January 24, 2012 magnetic resonance imaging scans of both ankles showed bilateral percutaneous edema, a mild amount of fluid in the distal posterior tibial tendon sheath bilaterally, and a mild effusion in the right navicular-talar joint.

In a July 13, 2012 letter, OWCP requested that appellant submit a report from Dr. Maldonado explaining why the accepted condition “caused [appellant] to need a new job” at a lower pay grade. It afforded her 30 days to submit such evidence.

By decision dated January 17, 2013, OWCP denied appellant’s claim for wage loss as the medical evidence did not establish disability from work for the claimed period due to the accepted right ankle conditions. It found that Dr. Maldonado and Dr. Brooks diagnosed a bilateral ankle condition and not a traumatic injury.

In a January 28, 2013 letter, counsel requested a telephonic hearing. He submitted appellant’s January 22, 2013 statement asserting that she did not request reasonable accommodations due to lupus, but only due to the accepted right ankle injury.

By decision dated and finalized April 8, 2013, an OWCP hearing representative found that the issue of whether appellant was disabled from June 3, 2012 onward was moot, as OWCP should not have accepted the traumatic injury claim. The hearing representative found that there was no medical evidence of record establishing that she sustained a traumatic right ankle injury on June 6, 2010. Instead, appellant’s physicians repeated appellant’s account of events and diagnosed bilateral ankle conditions caused by repetitive stress. The hearing representative directed that the case be returned to OWCP to commence rescission of the claim.

By notice dated April 26, 2013, OWCP advised appellant of its proposal to rescind the acceptance of her claim, on the grounds that the medical evidence did not establish that she sustained a traumatic right ankle injury. It afforded her 30 days to submit additional evidence and argument.

In response, appellant submitted her May 30, 2013 statement, reiterating that she sprained her ankle on June 6, 2010, then consulted a series of physicians.

In September 26 and October 10, 2011 reports, Dr. Maldonado related appellant’s account of spraining her right ankle while climbing onto a bus on June 6, 2010. On examination, he found pain on palpation of the bilateral tibial tendons. Dr. Maldonado obtained x-rays and ultrasound scans of both ankles showing a torn right posterior tibial tendon, bilateral tendinitis of the anterior and posterior tibialis, possible bilateral posterior tibial tendon tears, and tenosynovitis.

Appellant submitted an April 3, 2013 report from Dr. Marilyn Asistores-Quilon, an attending Board-certified family practitioner, diagnosing chronic posterior tendinitis of both ankles.

By decision dated January 6, 2014, OWCP rescinded its acceptance of appellant’s claim on the grounds that the medical evidence did not establish a causal relationship between her climbing into a bus on June 6, 2010 and her right ankle injury.

In a June 14, 2014 letter, counsel requested a telephonic hearing, held July 15, 2014. At the hearing, appellant reiterated that she sprained her right ankle while climbing onto a bus on June 6, 2010. She asserted that she saw her doctor shortly after the injury, but that the doctor did not accept compensation cases. Appellant newly contended that climbing onto the bus caused a

tendon rupture and not an ankle sprain. The hearing representative advised her of the type of medical evidence needed to establish her claim. He left the record open for 30 days to allow appellant to submit additional evidence.

By decision dated and finalized September 9, 2014, an OWCP hearing representative affirmed OWCP's January 6, 2014 decision, finding that the claim was accepted in error as the medical evidence did not support a traumatic right ankle injury. The hearing representative found that there was "no medical opinion supporting a traumatic injury secondary to boarding a bus on June 6, 2010." The record reflected that appellant did not seek treatment for the injury until 2011. OWCP noted that, under File No. xxxxxx983, it had accepted her occupational disease claim for a bilateral ankle condition.

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.³ 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.⁴ 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.⁵

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.⁶

OWCP bears the burden of justifying rescission of acceptance on the basis of new evidence, legal argument, and/or rationale.⁷ Probative and substantial positive evidence⁸ or sufficient legal argument⁹ must establish that the original determination was erroneous. OWCP must also provide a clear explanation of the rationale for rescission.¹⁰

³ 5 U.S.C. § 8128(a).

⁴ See *John W. Graves*, 52 ECAB 160, 161 (2000). See 20 C.F.R. § 10.610.

⁵ *Delphia Y. Jackson*, 55 ECAB 373 (2004).

⁶ See *V.C.*, 59 ECAB 137 (2007).

⁷ See *John W. Graves*, *supra* note 4; *Alice M. Roberts*, 42 ECAB 747, 753 (1991).

⁸ See *Michael W. Hicks*, 50 ECAB 325, 329 (1999).

⁹ See, e.g., *Beth A. Quimby*, 41 ECAB 683, 688-89 (1990).

¹⁰ See *supra* note 6.

ANALYSIS

Appellant claimed that she sustained a right foot injury on June 6, 2010 while boarding a bus during an inspection, but could not obtain medical verification as her physicians did not accept compensation cases. OWCP initially denied the claim due to a lack of medical evidence. On June 8, 2012 it accepted the claim for a right ankle sprain, right tibialis tendinitis, and tenosynovitis of the right foot and ankle.

OWCP reviewed the record pursuant to appellant's claim for wage loss. It determined that the medical evidence did not support that she sustained the claimed traumatic right foot injury. By notice dated April 26, 2013 and finalized January 6, 2014, OWCP rescinded its acceptance of the claim based on a lack of medical evidence. It affirmed the rescission on September 9, 2014.

Appellant submitted reports from two attending podiatrists. Dr. Brooks submitted reports from August 27 to October 20, 2011 diagnosing bilateral posterior tendon dysfunction with impairment of the right foot. He did not opine that appellant sustained a traumatic right foot injury on June 6, 2010. Dr. Maldonado provided reports from September 26, 2011 through June 25, 2012 diagnosing bilateral posterior tendinitis with bilateral tendon tears. Although he repeated appellant's account of injuring her right foot on June 6, 2010, he did not provide his independent opinion regarding the alleged incident.

Appellant also provided reports from three attending physicians. Dr. Lozano, an attending Board-certified internist, asserted on May 9, 2012 that she recalled appellant mentioning an occupational right ankle injury on September 7, 2010 when she presented with back pain. Dr. Asistores-Quilon, an attending Board-certified family practitioner, diagnosed chronic posterior tendinitis of both ankles on April 3, 2013. Dr. Dulgheru, an attending Board-certified rheumatologist, diagnosed bilateral posterior tibial tendon dysfunction unrelated to underlying systemic lupus erythematosus. None of the physicians diagnosed a traumatic right foot or ankle injury.

The Board finds that OWCP provided detailed rationale explaining its rescission of the claimed traumatic injury.¹¹ In its April 8, 2013 decision denying wage-loss compensation, an OWCP hearing representative found that there were no medical reports of record diagnosing a traumatic right foot injury as claimed. Although several doctors repeated appellant's account of an injury while boarding a bus on June 6, 2010 none offered an independent opinion linking that incident to the claimed injury. OWCP reiterated this argument in the April 26, 2013 notice and the January 6, 2014 decision rescinding the claim. In its September 9, 2014 decision, it explained that there was "no medical opinion supporting a traumatic injury secondary to boarding a bus on June 6, 2010." OWCP noted that it had accepted an occupational bilateral ankle condition under File No. xxxxxx983 as the medical evidence supported causal relationship to appellant's employment factors. However, none of appellant's physicians diagnosed a right foot or ankle injury related to the accepted work factor of climbing onto a bus on June 6, 2010.

¹¹ *K.H.*, Docket No. 13-1723 (issued June 17, 2014).

OWCP thus provided a clear explanation in establishing that its prior authorization was erroneous and properly rescinded acceptance of the June 6, 2010 traumatic injury. The Board notes that OWCP advised appellant in an August 18, 2011 letter and at the July 15, 2014 hearing of the type of evidence needed to establish her claim, including medical evidence explaining how and why boarding a bus on June 6, 2010 would cause the claimed traumatic right foot injury. However, appellant did not submit such evidence. The Board therefore finds that, based on these considerations, OWCP properly determined that the traumatic injury claim should not have been accepted based on a lack of medical evidence.

On appeal, counsel asserts that OWCP's September 9, 2014 decision is "contrary to law and fact." As stated above, appellant did not submit probative medical evidence diagnosing a traumatic right foot or ankle injury causally related to climbing onto a bus on June 6, 2010.

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 in rescinding appellant's claim on the grounds that the medical evidence did not establish causal relationship between the accepted incident and the claimed injury.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 9, 2014 is affirmed.

Issued: September 3, 2015
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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

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