

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

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W.H., Appellant)	
)	
and)	Docket No. 16-0715
)	Issued: August 11, 2016
DEPARTMENT OF THE AIR FORCE, AIR)	
NATIONAL GUARD, Schenectady, NY,)	
Employer)	
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Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On February 29, 2016 appellant filed a timely appeal from a February 9, 2016 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 met its burden of proof to rescind its acceptance of appellant's recurrence of disability claim; and (2) whether appellant met his burden of proof to establish a recurrence of disability beginning September 20, 2006 causally related to his accepted employment condition.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On January 3, 1996 appellant, then a 46-year-old aircraft mechanic foreman, sustained a back injury while moving lockers at work. He stopped work on January 8, 1996 and worked intermittently before returning to full duty on October 5, 1998.

An initial magnetic resonance imaging (MRI) scan of the lumbosacral spine revealed a large central and left paracentral disc herniation at the L4-5 level and degenerative disc disease from the L2-3 through the L5-S1 levels. OWCP accepted the claim for sprain of the lumbosacral spine and subsequently accepted displacement of a lumbar intervertebral disc without myelopathy. It authorized an August 14, 1996 left L4-5 hemilaminectomy and microdiscectomy, performed by Dr. Frank Genovese, a Board-certified neurological surgeon.

In an April 12, 2002 proposed notice of indefinite suspension, the employing establishment proposed an indefinite suspension for conduct unbecoming of a National Guard technician and abuse of government property. Effective September 12, 2002, it terminated appellant's employment. The record indicated that appellant was incarcerated from November 17, 2003 until September 5, 2006 for reasons unrelated to his compensation claim.

In a September 25, 2006 report, Dr. Peter Diamond, an osteopath Board-certified in family medicine, advised that appellant had a workers' compensation-related lumbar disc disease. Examination revealed weakness in the left leg, positive straight leg raise at 45 degrees, no muscular atrophy, normal pulses, and decreased range of motion of the lumbar spine. Dr. Diamond recommended physical therapy.

In an April 13, 2007 notice of recurrence (Form CA-2a), appellant alleged a recurrence on September 20, 2006. He stated that he never fully recovered from his work injury and that it worsened over time, which prevented him from working and limited his activity. Appellant stated that he was playing with his grandkids when he felt a sharp low back pain and a loss of strength in his low back and left leg that caused him to fall. He explained that he had numbness and pain in his toes, pain in his low back radiating down his left leg, and sharp pain in his left buttock.

In a July 10, 2007 report, Dr. Genovese advised that appellant progressively complained of low back difficulty and intermittent flare ups. He noted that appellant was out of work since 2002 when he was suspended from the employing establishment. On examination Dr. Genovese noted positive single leg raise, inability to heel walk on the left, 4/5 strength in the left dorsiflexor hallucis longus, and decreased pinprick from the ankle down on the left.

In an August 27, 2007 report, Dr. Paul Salerno, a Board-certified physiatrist, advised that appellant was injured in a January 3, 1996 work-related accident. He noted that appellant worked until 2002, but had since been unemployed due to his back condition. Dr. Salerno opined that it was clear that appellant was unable to return to his prior level of function as an aircraft mechanic.

In a September 14, 2007 report, Dr. Diamond advised that he wrote a note indicating that appellant had been unable to work for the past two years because of his lumbar disc disease. He opined that appellant was permanently unable to work.

On January 8, 2008 Dr. Diamond advised that appellant was experiencing left foot weakness, chronic low back pain, lumbar disc disease with L4-5, L5-S1 radiculopathy bilaterally, and foot drop worse on the left. He opined that appellant was permanently and totally disabled and that he placed him in an out-of-work status since April 2002. In a January 14, 2008 work capacity evaluation, Dr. Diamond advised that appellant was unable to return to his date-of-injury position. He noted that appellant had chronic low back pain and left foot weakness.

In a claim for compensation (Form CA-7) dated June 24, 2008, appellant requested compensation from April 10, 2002 to the present.

By letter dated June 26, 2008, appellant's representative at the time advised that Dr. Diamond placed appellant on total disability from work beginning April 10, 2002 and that appellant never recovered enough to return to work. He noted that appellant was incarcerated from September 7, 2003 through September 7, 2006 and that this claim fell under 20 C.F.R. § 10.18.

By letter dated May 5, 2009, the employing establishment controverted appellant's claim. It explained that he was working full duty since October 5, 1998 when he was suspended without pay in April 2002 after being indicted on felony charges. The employing establishment explained that appellant was subsequently terminated as his criminal conduct had a nexus to his federal employment. It contended that he was not entitled to compensation and that he either materially misrepresented facts to OWCP or concealed material facts.

By letter dated February 4, 2010, OWCP informed appellant of the evidence needed to establish recurrence and instructed him to submit a notice of recurrence (Form CA-2a).

In a February 18, 2010 notice of recurrence (Form CA-2a), appellant claimed that he sustained a recurrence of disability on September 20, 2006. He indicated that he was playing with his grandchildren when he felt a sharp pain in his lower back, which caused him to fall. Appellant noted that he never fully recovered after his original injury and his condition worsened which prevented him from working.

In a February 23, 2010 report, Dr. Diamond advised that appellant had a work injury in January 1996, which resulted in a back injury and a consequential chronic left foot drop which caused frequent tripping and falling. On examination he noted that appellant had difficulty straight leg raising on the left past 30 degrees, obvious left foot drop with an absent ankle jerk on the left, and diminished range of motion of the lumbosacral spine. Dr. Diamond assessed chronic left foot drop as a result of delayed treatment for a herniated nucleus pulposus at L4-5 and L5-S1. He opined that appellant was permanently disabled without any expected improvement.

In a March 1, 2010 statement, appellant detailed the history of his injury and treatment. He noted that Dr. Diamond found that he was disabled for work in March 2002. Appellant asserted that Dr. Diamond had not released him to work since that time.

By letter dated May 11, 2001, OWCP informed appellant of the deficiencies in his recurrence of disability claim.

Subsequently, several progress notes from Dr. Diamond were submitted. A progress note with a handwritten annotation dated April 10, 2002 noted that appellant had an onset of severe low back pain the day prior which radiated to the left leg and caused him to fall while walking. It indicated that he would be kept out of work, subject to change and referred him to physical therapy. Another progress note dated May 21, 2002 advised that appellant was out of work without pay. It indicated that he related that he felt betrayed by his employing establishment for placing him out of work without due process. In a September 14, 2007 note, Dr. Diamond opined that appellant was permanently disabled.

In a June 1, 2010 statement, appellant advised that he worked a part-time nonfederal position beginning in May or June 2002 for a couple of months. He contended that his physician released him to work this position because it involved sitting, answering the telephone, and some walking.

In a June 10, 2010 letter, the employing establishment controverted appellant's claim noting that his incarceration records indicated that he injured his left shoulder getting out of a bunk bed and injured his right ankle injury secondary to running. It asserted that these records showed that he ran four miles and did 400 sit-ups per day. The employing establishment also contended that medical reports noting that appellant was unemployed due to his back condition were incorrect, as appellant was in fact unemployed due to his felony conviction.

By decision dated September 9, 2010, OWCP denied appellant's recurrence claim finding that factual and medical evidence provided did not establish that his work stoppage or inability to work was caused by a spontaneous worsening of his work-related injury. It further found that injuries sustained while incarcerated were intervening causes to his current condition.

In a September 27, 2010 report, Dr. Diamond opined that the work-related injury led to appellant's condition and that it would only deteriorate over time. He also explained that the physical activity that appellant performed while incarcerated was encouraged to allow him to maintain his back health.

In a November 18, 2010 report, Dr. Diamond disputed medical records from appellant's incarceration. He noted that the nurse misinterpreted back stretches to be sit-ups and noted that the four-mile run described in the report was actually four miles of walking. Dr. Diamond reiterated that appellant's condition was causally related to the work injury.

By letter dated March 8, 2011, appellant's then representative, requested reconsideration. He reiterated that Dr. Diamond found appellant totally disabled for work as of April 10, 2002, prior to his suspension and subsequent termination.

In an April 21, 2011 report, Dr. Salerno detailed the history of the injury and treatment. He noted that appellant had a moderate partial disability and indicated that he was unable to return to his prior level of function due to the bending, twisting, and lifting requirement of that position. However, Dr. Salerno noted that appellant was capable of performing a sedentary full-time position.

By decision dated June 15, 2011, OWCP rescinded its September 9, 2010 decision and accepted appellant's September 20, 2006 recurrence claim finding that the factual evidence and argument provided by appellant's then representative was sufficient to establish that he did not suffer an intervening injury during his incarceration and that the injury sustained on September 20, 2006 could not be considered to have broken the chain of causation.

Appellant continued submitting medical evidence from Dr. Salerno noting his status.

Thereafter, appellant submitted claims for compensation requesting intermittent wage-loss compensation beginning April 10, 2002. On May 23, 2012 OWCP advised him that it could not process his claims for compensation because it had not received the back page of the form signed by the employing establishment. On July 3, 2012, the employing establishment stated that it could not sign appellant's Form CA-7 as it contained material misrepresentations. It asserted that he was not eligible for compensation because of his removal for cause. The employing establishment continued to refuse to sign its portion of the CA-7 form.

On September 24, 2012 OWCP advised appellant that it had only accepted his recurrence claim beginning September 20, 2006 and that his entitlement to benefits could begin only on that date. It asked that he resubmit a Form CA-7 and indicate receipt of any benefits from the Office of Personnel Management.

Appellant resubmitted a Form CA-7 on September 28, 2012, claiming wage-loss compensation from September 20, 2006 to September 28, 2012. On September 13 and 29, 2012 he elected FECA benefits.

On October 8, 2014 OWCP issued a notice of proposed rescission of the acceptance of appellant's recurrence beginning September 20, 2006.

In an October 27, 2014 statement, appellant's then representative, disagreed with the proposed rescission. He contended that in an April 10, 2002 report, Dr. Diamond placed appellant on sick leave until May 13, 2002 and that based on the physician's report appellant did not report to work. The representative noted several other inaccuracies in the notice of proposed rescission.

In a May 15, 2015 decision, OWCP rescinded the June 15, 2011 acceptance of appellant's September 20, 2006 claim for recurrence of disability finding that the employing establishment submitted evidence that established that he was not entitled to compensation. It explained that he was removed from his position with cause in September 2002 and because he was not employed as of September 20, 2006 there was no recurrence of disability.

In another May 15, 2015 decision, OWCP denied appellant's recurrence of disability claim finding that, as he was not employed as of September 20, 2006, there was no recurrence of disability at that time.

By letter dated July 15, 2015, appellant, through his representative, requested reconsideration arguing that the claims examiner was incorrect in finding that a claimant must be employed as a federal employee at the time of submitting a notice of recurrence.

In an October 8, 2015 letter, the employing establishment reiterated its contention that appellant was not entitled to compensation as his work stoppage was due to reasons unrelated to his accepted employment injury.

Appellant was given the opportunity to respond to the employing establishment's comment. He, through his representative at the time, contended in a December 28, 2015 letter that the employing establishment's response indicated that only portions of FECA law, regulations, and case law was used in the evaluation of his claim of recurrence. Several medical reports were submitted which provided the current status of appellant's condition.

By decision dated February 9, 2016, OWCP denied modification of its previous decisions.

LEGAL PRECEDENT ISSUE 1

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

² 5 U.S.C. § 8128.

³ See *John W. Graves*, 52 ECAB 160, 161 (2000). See 20 C.F.R. § 10.610.

⁴ *Delphia Y. Jackson*, 55 ECAB 373 (2004).

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 *supra* note 5.

ANALYSIS ISSUE 1

Appellant alleged that he sustained a recurrence of disability on September 20, 2006. On June 15, 2011 OWCP accepted his recurrence of disability claim. On October 8, 2014 it proposed rescinding the acceptance of appellant's claim and the rescission was made final in a May 15, 2015 decision.

The Board finds that OWCP did not present sufficient evidence to meet its burden of proof to rescind its acceptance of appellant's recurrence of disability claim. In its May 15, 2015 decision, OWCP explained that appellant was removed from his position with cause in September 2002 and that he could not have sustained a recurrence of disability on September 20, 2006 as he was not employed at that time. This is incorrect. In cases where employment has in fact been terminated for misconduct and disability is subsequently claimed, the Board has noted that in general the term disability under FECA means incapacity because of injury in employment to earn the wage which the employee was receiving at the time of such injury.¹⁰ Disability can be established despite termination for cause if medical evidence is submitted to establish that the claimant could not work due to the accepted work injury for a given period after the termination.¹¹ The Board has held that, even if a claimant were terminated for misconduct, disability benefits would be payable if the evidence of record established that the claimant was unable to work at some point thereafter due to a work-related disabling condition.¹²

OWCP focused on the fact that appellant was terminated for cause and that he was not employed as of September 20, 2006. Instead, it should have analyzed whether medical evidence established that he sustained a spontaneous change in a medical condition which resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.¹³ For these reasons, the Board finds that OWCP erred in rescinding its acceptance of appellant's recurrence of disability claim.

Given the Board's holding with respect to the first issue presented it is not necessary to address the second issue.

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to rescind its acceptance of appellant's recurrence of disability claim.

¹⁰ *Ralph Dennis Flanagan*, Docket No. 94-1569 (issued May 28, 1996).

¹¹ *Id.*

¹² *V.M.*, Docket No. 16-62 (issued May 18, 2016).

¹³ 20 C.F.R. § 10.5(x).

ORDER

IT IS HEREBY ORDERED THAT the February 9, 2016 decision of the Office of Workers' Compensation Programs is reversed.

Issued: August 11, 2016
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board