

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

T.D., Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL
CENTER, Temple, TX, Employer**

)
)
)
)
)
)
)
)
)
)

**Docket No. 15-1577
Issued: January 20, 2016**

Appearances:
Tim Egbuchunam, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 16, 2015 appellant, through her representative, filed a timely appeal from a June 2, 2015 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.

ISSUE

The issue is whether OWCP properly rescinded acceptance of appellant's claim.

FACTUAL HISTORY

On December 29, 2014 appellant, then a 39-year-old licensed vocational nurse, filed a traumatic injury claim (Form CA-1) alleging that she sustained an injury in the performance of duty on December 8, 2014. She described the incident as "assisting resident on the bedpan."

¹ 5 U.S.C. § 8101 *et seq.*

The nature of the injury was reported as to the back, hip, and buttocks. Appellant stopped working on December 16, 2014, received continuation of pay (COP) and filed a CA-7 claim for compensation commencing January 25, 2015.

On January 5, 2015 appellant submitted a December 16, 2014 report from a physician assistant at the employing establishment health unit. The history provided in the report was that she was helping a patient onto a bedpan when she felt a pulling and burning sensation in her lower back.

By report dated December 29, 2014, Dr. Les Benson, a Board-certified neurologist, provided a history that when appellant “was assisting the patient on a bedpan, the patient moved” and appellant felt immediate pain in her lower back radiating into the right leg. He reported that she had constant pain since the injury. Dr. Benson provided results on examination and indicated a lumbar magnetic resonance imaging (MRI) scan would be scheduled.² He diagnosed intervertebral disc (IVD) displacement, lumbar spine. Dr. Benson opined, with reasonable medical certainty, that appellant’s injuries were caused “[w]hen [appellant] lifted and assisted the patient on a bedpan while the patient exerted pressure on her back that aggravated or caused injuries to her lumbar spine.” In a note also dated December 29, 2014, Dr. Benson reported that appellant had been diagnosed with a back, right hip, and buttock injury and was disabled for work through January 29, 2015.

On February 8, 2015 OWCP received an employing establishment incident report dated December 24, 2014 with respect to the alleged December 8, 2014 employment incident. The report states, “Staff reports she was placing a resident on the bedpan. [S]he reports that she did not physical[ly] touch her. As she positioned the bedpan up under the resident and stepped back that is when she stated she started to hurt in her lower right back and buttocks.”

OWCP accepted the claim on February 9, 2015 for displacement of lumbar intervertebral disc. On February 9, 2015 it received a report from Dr. Benson dated January 28, 2015 opining that appellant remained disabled through February 26, 2015.

By letter dated April 30, 2015, OWCP advised appellant that it proposed to rescind acceptance of the claim. It indicated that the claim had been accepted based on the December 29, 2014 report from Dr. Benson, but the evidence from the employing establishment incident report was inconsistent with the history provided to him. Appellant was advised to submit evidence or argument within 30 days.

On May 6, 2015 appellant submitted an April 22, 2015 report from Dr. Benson, who repeated his prior history that appellant was assisting a patient and the patient moved, with appellant feeling immediate back pain. Dr. Benson diagnosed displacement of lumbar intervertebral disc without myelopathy. He noted that appellant remained disabled. Appellant also submitted an April 30, 2015 report from Dr. Benson, which provided the same history and diagnosis.

² The record contains a January 5, 2015 lumbar MRI scan report from Dr. Paul Marsh, an osteopath. Dr. Marsh reported mild facet arthropathy L1-4 and mild disc bulges L4-S1.

Appellant also submitted a March 16, 2015 report from Dr. Francisco Batlle, a neurosurgeon. Dr. Batlle provided a history that appellant had placed a bedpan under a patient, and when appellant stepped back with her right leg, she felt an acute onset of low back pain. He provided results on examination and diagnosed lumbar radiculitis, herniated nucleus pulposus at L4-S1, and lumbago.

In a statement dated May 22, 2015, appellant discussed the December 8, 2014 incident. She reported that the patient was unable to lift her hips to be able to slide the bedpan underneath them; therefore, the patient had to be rolled to the side. According to appellant, she had to “manually handle the patient’s body components” to be able to align the patient’s buttocks with the bedpan. Appellant reported that she used her left hand to guide the patient’s buttocks steady and her right hand to push and align the bedpan, and then waited several minutes for the patient to roll back onto the bedpan. The patient requested several readjustments complaining of discomfort, and each time appellant readjusted she had to wait several minutes for the patient to roll back onto the bedpan. According to appellant, “While assisting the patient to the bedpan, the patient moved towards me and I felt a pulling and burning in my lower back and my right hip. I removed my hands from the patient and the bedpan and tried to stand up. As I tried to stand up and step away from the bed, I immediately felt pulling and burning in my lower back into my right buttock and on my posterior right thigh.”

By decision dated June 2, 2015, OWCP rescinded acceptance of the claim. It found that the factual evidence regarding the alleged employment incident was inconsistent as she “provided two different statement[s] of how the injury occurred.” Thus, it concluded that “the factual component of the alleged work-related injury” was not established.

LEGAL PRECEDENT

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.³ 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.⁴ 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.⁵ In establishing that its prior acceptance was erroneous, OWCP is required to provide a clear explanation of its rationale for rescission.⁶

ANALYSIS

In the present case, OWCP accepted displacement of lumbar intervertebral disc on February 9, 2015. The acceptance of the claim was based on appellant’s statement that on

³ *Eli Jacobs*, 32 ECAB 1147 (1981).

⁴ *Doris J. Wright*, 49 ECAB 230 (1997); *Shelby J. Rycroft*, 44 ECAB 795 (1993).

⁵ *See* 20 C.F.R. § 10.610.

⁶ *Belinda R. Darville*, 54 ECAB 656 (2003).

December 8, 2014 she was injured while assisting a patient with a bedpan. In a report dated December 29, 2014, Dr. Benson reported that appellant had assisted the patient, which exerted pressure on her back. He diagnosed a lumbar intervertebral disc.

OWCP has rescinded acceptance of the claim, finding that the factual history regarding the December 8, 2014 statement is inconsistent, noting the December 24, 2014 employing establishment incident report. It is well established that a claimant cannot establish fact of injury if there are inconsistencies in the evidence that cast serious doubt as to whether the specific event or incident occurred at the time, place, and in the manner alleged.⁷ In this case, the Board finds that there are not such inconsistencies that rise to the level of casting serious doubt as to the occurrence of the employment incident.

Appellant had initially reported on her CA-1 claim form that she was injured while assisting a patient with a bedpan. In the December 16, 2014 report from the physician assistant, the history provided was that appellant was helping a patient onto a bedpan when she felt a pulling and burning sensation in her lower back. Appellant again reported a history of assisting a patient on a bedpan in Dr. Benson's December 29, 2014 report. In Dr. Battle's March 16, 2015 report, he noted a history of placing a bedpan under a patient and experiencing pain. The May 22, 2015 statement from appellant also reports assisting a patient with a bedpan and experiencing pain.

The history that appellant provided of the December 8, 2014 employment incident was consistent in indicating that she sustained an injury while assisting a patient with a bedpan. The Board notes that an employee's statement alleging that an injury occurred at a given time and in a given manner is of great probative value and will stand unless refuted by strong or persuasive evidence.⁸ The Board has found in very limited applicable circumstances that the minimal variance of factual statements of a nurse, doctor, and appellant do not cast serious doubt that the incident occurred.⁹ The Board finds that such circumstances exist in this case. There are no such inconsistencies in this case that cast serious doubt as to whether the incident occurred as alleged.¹⁰

It is, as noted above, OWCP's burden of proof to rescind acceptance of the claim. For the reasons discussed, the Board finds that OWCP did not meet its burden in this case.

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to rescind acceptance of the claim.

⁷ *Gene A. McCracken*, 46 ECAB 593 (1995); *Mary Joan Coppolino*, 43 ECAB 988 (1992).

⁸ *Id.*

⁹ *See also Dale K. Mayo*, 34 ECAB 970 (1985).

¹⁰ *See Michael W. Hicks*, 50 ECAB 325 (1999) (OWCP finding of conflicting evidence was not supported by record and not sufficient to rescind acceptance).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 2, 2015 is reversed.

Issued: January 20, 2016
Washington, DC

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

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

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